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**UNITED NATIONS AGAINST CORRUPTION
IN POST-CONFLICT SOCIETIES**

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ABSTRACT

This is a summary of the papers prepared by Giorgio Sirtori, Alessandro Sabbini and Alessandro Dowling for the course on “Global Corruption, Good Governance and the United Nations Convention against Corruption” (13 October 2014 – 6 March 2015) held within the framework of the Master in International Affairs at the School of Government. LUISS.

The papers deal with a very challenging problem of how to deal with corruption in the political situations of fragile government and no rule of law and with the United Nations, which despite being the custodian of the United Nations Convention against Corruption (UNCAC, 2005) often has no capacity and sometimes political commitment to lead by example in the international anti-corruption efforts.

The combination of weak if not absent institutions, chaos generated by both the previous conflict and the international intervention, and low punitive risks make post-conflict countries an ideal environment for corrupt activities. Surprisingly, the literature has widely ignored this correlation up to the last ten years, when the first surveys highlighting the role of corruption in failed peacebuilding operations appeared (UNDP, 2010). Indeed, post-conflict countries constitute an ideal environment for any level of corruption.

Currently, there are sixteen ongoing peacekeeping operations around the world; the almost totality of those operations takes place in some of the most corrupt areas around the world.

It may be believed that tackling corruption pertain to a more advanced period of a state's life, one where basic needs and rights are already guaranteed, but it is clear that, through different case studies on operations in the Democratic Republic of Congo, South Sudan and Kosovo, corruption does jeopardize peacekeeping and state-building operations per se and, consequently, how important it actually is to comprise anticorruption efforts already in the earliest stages of these kinds of operations.

Given the importance of anti-corruption measures in state-building and peacekeeping operations, one issue that should be high up in the agenda of the UN as leader in international anti-corruption is that of whistleblower protection. Addressing and bridging the accountability gap for whistleblower protection is the best claim the UN has to live up to its role as leader in international anti-corruption. This, in turn, will be a first step in supporting the international community in carrying out with hope and credibility peace-keeping and state-building operations around the world.

Keywords: *United Nations, UNCAC, Corruption, Post-Conflict, No Impunity*

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UNITED NATIONS AND CORRUPTION IN POST-CONFLICT SOCIETIES

Introductory Comments by Ugljesa Ugi Zvekic

This is a summary of the papers prepared by Giorgio Sirtori, Alessandro Sabbini and Alessandro Dowling for the course on “Global Corruption, Good Governance and the United Nations Convention against Corruption” (13 October 2014 – 6 March 2015) held within the framework of the Master in International Affairs at the School of Goverment of the Libera Universita' Internationale degli Studi Sociali, Rome, Italy.

The United Nations are the promoter and the custodian of the two most important international conventions dealing with international criminal threats such as the transnational organized crime and corruption.

First, the United Nation Convention against Transnational Organized Crime (UNTOC) known as the Palermo Convention (as it was adopted in Palermo, Sicily, Italy) came into force in 2003. It has been ratified by 179 countries and criminalizes corruption carried out by the organized crime group as one of the mandatory crimes. Corruption is among the four prescribed offences of UNTOC, the other being:

- participation in an organized criminal group.
- laundering of proceeds of crime, and
- obstruction of justice.

Second, the United Nations Convention against Corruption (UNCAC) known as the Medina Convention (as it was adopted in Medina, Mexico) came into force in 2005. It has been ratified by 189 countries. It criminalizes as mandatory offences:

- Laundering of proceeds of crime
- Bribery of National Public Officials
- Active Bribery of Foreign Public Officials
- Embezzlement, Misappropriation or Other Diversion
- Obstruction of Justice
- Participation in such offences

and as optional offences:

- Passive Bribery of Foreign Public Official
- Trading in Influence
- Abuse of Functions
- Illicit Enrichment
- Bribery in Private Sector
- Embezzlement of Property in Private Sector
- Concealment , and
- Attempt / preparation of UNCAC offences

Both UNTOC and UNCAC provide for a series of instruments promoting prevention, international cooperation and strengthening of policing, prosecutorial and adjudicative capacities at the national, regional and international levels.

United Nations, in particular the United Nations Office on Drugs and Crime (UNODC) with headquarters in Vienna, Austria is the custodian of the two conventions and serves as the secretariat to the respective Conferences of the State Parties of the Conventions.

Needless to say, there are many ways to prevent and control corruption which range from moral values, family and religious/civic upbringing, education, professional values and ideology, organizational regulations and mechanisms, social regulatory framework, financial rules and procedures, political and legal culture, legal system, criminal law and criminal justice, and international framework and cooperation.

However, the issue of IMPUNITY – exemption from responsibility and sanctions -remains the central banner in all these diverse but complimentary approaches. The NO IMPUNITY slogan prevails in many national and international proclamations and even legal instruments. UN human rights instruments as well as UN criminal justice instruments such as UNTOC and UNCAC highlight the NO IMPUNITY principle.

UN system experience with the implementation of the NO IMPUNITY principle is a good example of the complexity and complicity between different interests and actors resulting often in the serious erosion of this high value legal and moral principle.

The papers presented below deal with a very challenging problem of how to deal with corruption in the political situations of fragile government and no rule of law and with the United Nations,

which despite being the custodian of the United Nations Convention against Corruption (UNCAC, 2005) often has no capacity and sometimes political commitment to lead by example in the international anti-corruption efforts.

Giorgio Sirtori in his paper on post-conflict corruption explored on the case of the Ivory Coast points out that the combination of weak if not absent institutions, chaos generated by both the previous conflict and the international intervention, and low punitive risks make post-conflict countries an ideal environment for corrupt activities. Surprisingly, the literature has widely ignored this correlation up to the last ten years, when the first surveys highlighting the role of corruption in failed peacebuilding operations appeared (UNDP, 2010). Indeed, post-conflict countries constitute an ideal environment for any level of corruption. According to Mark Philp, corruption can be defined as the “subversion of norms and rules governing public office”. This subversion reaches its maximum extent in a post-conflict environment: the rule of law, public offices and societal institutions are nearly absent, while chaos and resilient war mentality slow down their reconstitution; international intervention is ready to tolerate corruption to privilege stability; large amounts of external funds simply increase opportunities for corruption; finally, low punitive risks favour briberies and black markets.

Alessandro Sabbini looks at the challenge of dealing with the corruption threats and risks in the context of international (UN) peacekeeping operations. Currently, there are sixteen ongoing peacekeeping operations around the world; the almost totality of those operations takes place in some of the most corrupt areas around the world.

It may be believed that tackling corruption pertain to a more advanced period of a state's life, one where basic needs and rights are already guaranteed, but it is clear that, through different case studies on operations in the Democratic Republic of Congo, South Sudan and Kosovo, corruption does jeopardize peacekeeping and state-building operations per se and, consequently, how important it actually is to comprise anticorruption efforts already in the earliest stages of these political and legal interventions..

Alessandro Dowling examines the experience with the whistleblower protection on the part of the UN in the peace-building context. The latest groundbreaking case is that of John Wasserstrom, a UN official who reported misconduct of his direct superiors and suffered retaliation in return. Mr. Wasserstrom reported his case to the UN Ethics Office, which, after investigation, denied there was retaliation involved, and so he tried to have the decision reviewed

by the UN Dispute Tribunal. The UN Secretary General then appealed to the UN Appeals Tribunal, claiming that the decision by the Ethics Office could not be received by the UN Dispute Tribunal (UNDT) in the first place, not being an administrative decision. Central to the whole case was the receivability of the case itself. The UN Appeals Tribunal decreed that Mr. Wasserstrom's claim was not receivable by the UNDT since only administrative decisions are judicially receivable, and the Ethics Office does not pass "administrative decisions". The consequences of the present state of affairs, i.e. making the UN Ethics Office decisions non-receivable by internal judiciary bodies, greatly questions anti-corruption measures, because potential whistleblowers will be unwilling to report corruptive misconduct within UN offices, thereby belittling accountability for corrupt practice. Addressing and bridging the accountability gap for whistleblower protection is the best claim the UN has to live up to its role as leader in international anti-corruption. This, in turn, will be a first step in supporting the international community in carrying out with hope and credibility peace-keeping and state-building operations around the world.

All three papers in a distinct and clear manner indicate the following concluding observations:

- The principle and rule on impunity are central to the anti-corruption approach
- Impunity is not only a legal principle – rather it is a fundamental principle of anti-corruption and responsibility political and legal culture on the national and international levels
- UN system: both the member states and the UN administration having adopted and put in force UNCAC must be more cohesive and committed to the application of the impunity principle
- There is still a notable gap between the normative acceptance of UNCAC and its implementation by the member states
- There is a clear need to invest into the strengthening of the no impunity political and legal culture at the international level: among the member states as well as within the UN and other international organizations' administrations
- It may be suggested to the donors to take into consideration commitment to capacity-building and positive results in no impunity principle in fostering international cooperation and assistance.

CORRUPTION IN A POST-CONFLICT COUNTRY. THE CASE OF COTE D'IVOIRE

by Giorgio Sirtori

1. INTRODUCTION

Like bacteria in weak organisms, corruption flourishes tremendously in post-conflict countries. The combination of weak if not absent institutions, chaos generated by both the previous conflict and the international intervention, and low punitive risks make post-conflict countries an ideal environment for corrupt activities (Bolongaita, 2005). Surprisingly, the literature has widely ignored this correlation up to the last ten years, when the first surveys highlighting the role of corruption in failed peacebuilding operations appeared (UNDP, 2010). The main aim of this short paper is to explain why post-conflict countries constitute an ideal environment for any level of corruption. Events referring to the civil war in Côte d'Ivoire and its subsequent peacebuilding process will be presented to further sustain the thesis. The paper focuses on local political elites and the international community, to which, directly or indirectly, most episodes of grand corruption are connected. After having underlined the major sources of corruption, some recommendations on how the international community can limit those cases are proposed.

2. CÔTE D'IVOIRE AFTER THE CIVIL WAR

Far from being a widespread military confrontation, the Ivorian civil conflict lasted nine years due to the efforts of the former Ivorian President Laurent Gbagbo, leader of the FPI party, to postpone a peace agreement that would have seen him losing its privileges, richness and freedom. The conflict was triggered by growing ethnic tensions in the '90s, caused in turn by a deep economic crisis started in the previous decade. It opposed the ruling Southern ethnic groups against the Northern marginalized ones, systematically banned from the political competition in

those years. As for the political elections in the ‘90s, the civil war in the XXI century put at stake public offices and the seizure of national natural resources.

The conflict ended in April 2011, when Gbagbo was arrested by French and Ivorian troops.¹ During his presidency, ethnic clientelism became a rule:² he appointed ethnic members at the head of all the ministries, military and public offices, controlling the public sphere and the main resources of the country. Corruption and limited political representation undermined the legitimacy of the government, bringing the country into the civil war spiral. In 2011, Gbagbo was finally arrested because of his refusal to accept the electoral loss. A few months before, in December 2010, his rival, Alassane Ouattara, won the presidential elections. During the electoral campaign, Ouattara was able to gather together the Western support around his party. France, the US and the United Nations actively promoted his election and condemned Gbagbo’s violent reaction. With this large international support, in the next three years and a half, Ouattara has run his party – the Rally of the Republicans (RDR) – in the difficult post-conflict reconstruction.

3. CORRUPTION IN A POST-CONFLICT COUNTRY

According to Mark Philp, corruption can be defined as the “subversion of norms and rules governing public office” (Philp, 2008). This subversion reaches its maximum extent in a post-conflict environment: rule of law, public offices and societal institutions are nearly absent, while chaos and resilient war mentality slow down their reconstitution. Meanwhile, the international intervention is ready to tolerate corruption to privilege stability and large amounts of external funds simply increase opportunities for corruption. Finally, low punitive risks favour briberies and black markets.

In this environment, economic growth, public policy reforms and institutions’ restoration are hindered, affecting government’s effectiveness and ultimately its legitimacy. This sequence strengthens whoever is acting against the government, order and peace, making the risk of renewed violence a reliable possibility. Altogether, corruption contributes to perpetuate the vicious cycle that brings a country from a war-to-peace transition to a new period of insecurity and tension, possibly leading to another conflict.

¹ Laurent Gbagbo was then extradited before the International Criminal Court in November 2011, becoming the first head of state to be taken into its custody.

² Ethnic clientelism is a political dynamic common to all the Ivorian presidents in the ‘90s, with the exception of the first president Houphouët-Boigny, who led the country from the independence to his death in 1993. Although he maintained a certain ethnic balance to guarantee stability, his successors abandoned this policy favouring their own ethnic heritages, in a winner-takes-all electoral political competition.

The war that took place in Côte d'Ivoire it opposed two factions of the same country. This is relevant to the study for two main reasons. On one side, after the end of the Cold War, civil conflicts are rising in number, making their understanding a top issue in international relations. On the other side, given their national dimension, their intertwinement with national politics makes of corruption a primary key lecture. A pervasive practice almost by definition, corruption habits are easily transferred to the post-conflict period, to the point that fighting corruption may be an effective way to guarantee peace.

4. THE DIFFERENT FACES OF CORRUPTION

After a conflict, number of actors share the stage, with different responsibilities. On one hand, local elites may take advantage of the chaotic situation, seizing

A post-conflict context is dominated by chaos and anarchy. Rule of law is nearly absent and the first objective is to obtain stability through disarmament and appeasement on one side, and the re-establishment of societal structures and government institutions on the other side. However, for the conflict winning party, stability may mean to preserve past gains and to benefit from the rebuilding effort (Rose-Ackerman, 2008). The recently obtained political power legitimates a group to dispose of the national resources and to control the peace-effort through the judicial system. If not carefully monitored by international witnesses, this process can be a continuation of the adversarial war logic. In Ivory Coast, the RDR assumed the control of the most influential public offices and accepted to form a parliament without an opposition.³ At the same time, national tribunal courts have condemned only pro-Gbagbo personalities for crimes in the war period; while a South-African-like, itinerant reconciliation court, largely publicized, was postponed different times before being launched on a minor scale. As a result, political tension is still high, many former FPI members are in exile and are actively trying to subvert the status quo.⁴ In the aftermath of the conflict, international actors may purposely tolerate certain degrees of corruption to favour stability. “When it comes to the implementation of peace agreements, international actors tend to prioritise stability over ambitious governance reforms” (Barnett and

³ The Front populaire ivoirien (FPI) refused to join the other parties in the parliament, firstly because it did not recognize the results of the 2010 elections, while in a second time, as a form of opposition to extradition before the ICC of its leader.

⁴ According to UN security experts, a growing number of incursions, planned by pro-Gbagbo forces, into the Western Ivorian territory carried out by former Ivorian soldiers and Liberian mercenaries, occurred on several occasions in 2011 and 2012. They have two main objectives: to test the FRCI's capacity to respond and compactness and, second, to hit strategic infrastructures and then the Ivorian nerve centers (International Crisis Group, 2012).

Zürcher, 2009). Even a parliament without an opposition and, consequently, with limited legitimization, as it was for the Ivorian case, can be accepted as a first step out of the chaotic swamp of the conflict. Moreover, to foster peace, “international actors would much rather co-opt potential peace spoilers than confront them and risk a return to violence” (Cheng and Zaum, 2011). If the lack of will to confront peace spoilers is combined with a lack of capacity to spread the central authority all around the country, opportunities for corruption emerge immediately. In Côte d’Ivoire, certain areas of the Western and Northern regions have remained under an ambiguous limbo, where the national authority has never taken control of the territory, while the militias that fought there during the civil war have never left it. Abidjan central government de facto is not extended to the whole Ivorian territory. In 2013, even the Western border with Liberia and Guinea was blurred, with militants, bandits and migrants occasionally crossing it.⁵ The government has most of the times negotiated with the self-proclaimed leaders the territories, sometimes officialising their authority with political or police’s roles, with different results.⁶

Another opportunity for corruption comes from international funds. An enormous amount of aid flows to the country from United Nations’ agencies, states, international organizations, NGOs and private actors. To check where exactly these money and goods go once they arrive to the country is all but easy. The collection of funds must be immediate, taking the maximum advantage from the short period in which international attention converges on that specific crisis. Similarly, deployment of goods on the territory must be completed as soon as possible, to answer quickly to the emergency and to respond to contributors’ expectations. Then, everything gets more complicated and, “given that there is more aid money than capacity to absorb it, the ‘excess’ money is more likely to be misspent, creating greater scope for corruption” (Cheng and Zaum, 2011). Coordination among different actors is always an issue, especially in a crisis context, where some agencies’ goals overlap and others are contradictions. Moreover, almost all the involved actors lack of the necessary information. Here, local elites and local organizations play a role. On one hand, they can solve the information dilemma typical of the principal-agent problems, thanks to their understanding of the local context (Jackson 2008, Nakaya 2005); on the other hand, the

⁵ Ivorian Western borders became extremely important since the first months of the 2014, after the Ebola uprising. The epidemic diffusion forced Ouattara to re-take the control of the area, helped by UN organizations, not to spread Ebola beyond Liberia, Guinea and Sierra Leone.

⁶ Most of the cases comes from the Western and Northern regions. In some cases, former soldiers went back to their area without returning the arms and started self-governing the territory. In the aftermath of the conflict, given the absence of any other authority, their role was successfully negotiated by the government. More complicated situations involved the Dozos, a semi-nomadic hunter’s ethnic group, armed by the opposition forces during the war and sent to the West. After the war, they settled in these territories treating the local population as a conquered one (International Crisis Group, 2012, 2013).

price international actors must pay is a greater tolerance in terms of corruption. No considerable scandals erupted in the Ivorian case. Probably its historical role as a main hub of the Western Françafrique has helped international organizations to acquire a certain knowledge of the territory. Nevertheless, even in this exceptionally favourable case, organizations like the World Food Programme, with more than 40 years of experience in the country, have to rely on local partners for the logistics of their plans, at least at a local level.

Meanwhile, a pervasive petty corruption spreads in a post-conflict country. Briberies to formalize the properties “acquired” during the war are common in any local or regional public office. Black markets, established during the war, are now profiting from selling the goods stolen from the international aid machine and trafficking in arms and military equipment. Forms of corruption as briberies, hard to combat in a perfectly functional state, are totally out of control in post-conflict period. In 2013, in Côte d’Ivoire, there was no idea of the dimension of these phenomena and the government was trying to respond only the most urgent issues: the former combatants’ situation and the arms’ trade.

5. CONCLUSIONS

No scholar will take Côte d’Ivoire as an example of a corrupt country, even during the post-conflict phase. Altogether, the country’s recovery was successful, although its solid historical background, the limited level of violence and destruction during the civil war, the unconditioned international support and the personal history and charisma of President Ouattara had raised higher expectations.

Anyway, precisely the fact that, even in this case, there were countless opportunities for corruption should make consider how much widespread and pervasive is this threat in post-conflict states. In civil conflicts like the one analysed, corruption is one of the primary key lectures to analyse both conflict’s causes and the reasons why insecurity outlive the conflict itself, threatening to drag the country back into war. In Côte d’Ivoire, fighting corruption is a way to break the vicious cycle that takes their population as hostages.

Corruption is a well-known issue in African countries. However, it has been rarely associated to conflicts. Once this link has been disclosed, the international community can undertake some countermeasures. In the short term, international peace-builders tend to tolerate corruption in the name of the objective of stability. However, this same strategy threatens stability itself in the long term. On one side, it is worth to pay a price in terms of corruption to sign a peace agreement, and

so, to save lives. On the other side, a more attentive attitude is necessary to mitigate such a dangerous phenomenon. A debate is currently open in the literature; however, a strategy, more respectful of long-term interests, must be adopted. Firstly, international actors can phase aids on a long period (i.e. Collier and Hoeffler 2004), conditioning them to the transparency of operations. Secondly, they can develop monetary and evaluation plans to analyse the quality of strategies and the issues encountered in the field, especially when they rely on local partners (Cheng and Zaum, 2011). Finally, they can punish “governments or local partners for acts of corruption”, by interrupting, or at least decreasing, the flow of aids (Dwan and Bailey, 2006). This combination of recommendations helps shrinking the room for corruption, building more solid bases for the post-conflict reconstruction.

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CORRUPTION IN PEACEKEEPING AND STATE BUILDING OPERATIONS AND THE UNCAC

by Alessandro Sabbini

1. INTRODUCTION

Peacekeeping operations (PO), both UN-mandated or under other forms, intervene in turmoiled, war-torn zones. Currently, there are sixteen active United Nations Peacekeeping Operations around the world.¹

Just taking a brief look at the countries involved, shows how big a problem corruption is in those areas: only three of these, Cyprus, India and Liberia are within the first 100 least corrupt countries out of 175 States comprised in the Transparency International Corruption Perception Index,² with India and Liberia located at the very bottom of the top one-hundred.

As data suggest,³ tackling corruption is usually not the main concern for authorities in zones where POs take place; on the contrary, “corruption and conflict will always be linked. Corruption is often a major cause of conflict, it is an almost inevitable consequence of it, and it can become a reason for continuation of conflict so as to continue to provide benefits for the protagonists”⁴.

Despite being such a plague, corruption is usually largely disregarded as an issue to tackle during Peacekeeping Operations and there is no general UN peacekeeping policy related to the issue and it is almost never mentioned even in specific mandates.⁵

To a certain degree, this underestimation could be understandable: tackling corruption can be easily perceived as pertaining to a more advanced governance level than the one PO are concerned with (i.e. protecting human lives, a more basic need than tackling corruption, one may say); but what if corruption endangers the Operations themselves?

¹ Source: United Nations Peacekeeping, available at <http://www.un.org/en/peacekeeping/operations/current.shtml>

² Source: Transparency International Global Corruption Perceptions Index 2014, available at <http://www.transparency.org/cpi2014/results>

³ Ibid.: there exists a clear correlation between zones highlighted as being subject to elevated levels of corruption and zones where Peacekeeping Operations take place.

⁴ P. LE BILLON (2005), *Overcoming Corruption in the wake of conflict*, Transparency International Global Corruption Report, Cambridge University Press.

⁵ See: Corruption and Peacekeeping, strengthening peacekeeping and the United Nations, *Transparency International Defence and Security Programme*, available at <http://www.ti-defence.org/docs/131009%20PK%20exec%20summary%20final.pdf>

It has been argued that, even though “many consider corruption a problem for the accountants and the lawyers”, “in conflict where nepotism or patronage networks exclude vast swathes of the population from decision-making and access to resources, then corruption lies at the heart of society's problems. Furthermore, corrupt networks themselves can reinforce the very divisions along lines of ethnicity, religion or class which feed the conflict cycle. If corruption is not addressed, the chances of that durable solution in the form of a lasting positive peace remain slim”.⁶ In other words, what needs to be clear from the start is that corruption is a factor that can, and indeed does, jeopardize POs as well as state-building efforts, excluding individuals and entire ethnic groups from taking advantage of economic development and, therefore, corruption works as an incentive to prolong the very clashes that POs are created to end.

Usually, even if not always, peacekeeping operations include some degree of state-building as well; the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, for instance, states that “along with establishing security, the core task of peace-building is to build effective public institutions that, through negotiations with civil society, can establish a consensual framework for governing within the rule of law”.⁷

The two case studies proposed in the following paragraphs are essential in understanding how peace-building operations themselves are far from being immune from risks of corruption, and the risks that lead to corruption in these two major *genera* can highlight similarities and peculiarities between the two.

2. CASE STUDIES, 1: PEACEKEEPING; THE UN MISSIONS IN THE DEMOCRATIC REPUBLIC OF CONGO AND IN SOUTH-SUDAN^{8 9}

In the past years, the UN has come under scrutiny on several allegations of corruption which would have taken place during peacekeeping operations.

⁶ C. SCHARBATKE-CHURCH, K. REILING (2009), *Lilies that fester: seeds of corruption and peacebuilding*, New Routes [online], available at https://www.pksoi.org/document_repository/Lessons_Vol_14_No_3-4_2009-LMS-731.pdf

⁷ See: A more secure world: our shared responsibility, UN Follow-up to the Millennium Summit, available at http://www.unrol.org/files/gaA.59.565_En.pdf

⁸ R. GLADSTONE (10-09-2013), *Peacekeeping by U.N. Faces new scrutiny on 2 fronts*, The New York Times [online], available at http://www.nytimes.com/2013/10/10/world/peacekeeping-by-un-faces-new-scrutiny-on-2-fronts.html?_r=0

⁹ M. PLAUT (04-28-2008), *Policing the UN*, BBC Radio World Service, available at http://www.bbc.co.uk/worldservice/documentaries/2008/04/080424_panorama_un.shtml

In 2008, an eighteen months BBC investigation on MONUSCO (an acronym which stands for the French title: Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo), for instance, claimed to have found compelling evidence that the United Nations has been involved in the cover-up of accusations that its staff was involved in serious malfeasances in the African country. In particular, peacekeepers belonging to the Pakistani contingent were accused of trading gold with the Nationalist and Integrationist Front (FNI), also providing them with weapons to guard the illegal gold mines; moreover, accusations were presented concerning the Indian contingent: they would have dealt with the Democratic Forces for the Liberation of Rwanda (the militia responsible for carrying out the mid-90s Rwanda genocide, since then stationed in DRC), involving trading in gold, purchase of drugs, and sales of ammunitions which, following this investigation, would have been paid for using poaching-derived ivory; Other serious accusations were also brought forth against the Procurement Department in Kinshasa, which handles a large portion of the \$1.4 billion annual budget:¹⁰ the BBC investigation quotes an internal UN report revealing “widespread and inherent corruption pervading the procurement department in Kinshasa.

2007 investigations by the Office of Internal Oversight Services failed to produce any result, while “UN insiders told the BBC's Panorama they had been prevented from pursuing their inquiries for political reasons.

Former UN Under-Secretary-General and then newly appointed head of the Office of Internal Oversight Services stated on this issue that “..the Investigation Division has had very serious problems [...] [we need] new policies, new people”;¹¹ these declarations, if they cannot act as sufficient evidence to declare that DRC-related scandals did in fact happen, surely point to that direction.

In addition to these serious allegations, just a few years later another peacekeeping operation, UNMIS (United Nations Mission in Sudan) was the subject of another scandal¹²: over thirty high ranking officers of Nepali Police were charged for taking part in a \$4million scam in the supply of armored personnel carriers that were part of the equipment of the Nepalese contingent, five of which -to our knowledge¹³- were later convicted.

¹⁰ Source: <http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml>

¹¹ M. PLAUT (04-28-2008), *Policing the UN*, BBC Radio World Service, available at http://www.bbc.co.uk/worldservice/documentaries/2008/04/080424_panorama_un.shtml

¹² J. JOLLY (06-08-2011), *Nepal police charged with UN embezzlement scam*, BBC News South Asia, available at <http://www.bbc.co.uk/news/world-south-asia-13701849>

¹³ See: Largest corruption scandal of Nepal, available at <http://voices-against-corruption.ning.com/profiles/blogs/largest-corruption-scandal-of-nepal>

3. CASE STUDY, 2: STATE-BUILDING; EULEX KOSOVO

On December 14, 2007, the European Council approved the European Union Rule of Law Mission in Kosovo (EULEX), a Common Security and Defence Policy mission operating under the United Nations Interim Administration Mission in Kosovo (UNMIK).

EULEX states, as its mission, “to concentrate on the fight against corruption” and to work “closely with local counterparts to achieve sustainability and EU best practices in Kosovo”. Despite such a high mission, recently EULEX was hit by allegations of corruption cover-ups.

At the end of October, 2014, a British prosecutor to the mission was suspended for “gross misconduct”. Prosecutor Maria Bamieh claimed having been dismissed because of her denounces regarding misconducts and cover-ups within the mission, and declared that this mistreatment of a whistleblower sends to Kosovo the message “that we are not serious about corruption, that the institution that is here supposedly to raise legal standards is acting in this shameful way”.¹⁴

These accusations are somewhat corroborated by following independent studies, like the one realized for a book¹⁵ by Andrea Capussela, officer in the international mission that supervised Kosovo right after its independence from Serbia; he stated that, since 2008, EULEX had issued fifteen indictments, only four of which led to a conviction. “Considering how widespread political corruption and organized crime are in Kosovo, these results are gravely inadequate; the mission has disregarded its mandate”.¹⁶

4. CONCLUSION

Tackling these kinds of corruption, that take place in an international environment and where, usually, the rule of law is far from being completely established, poses some questions:¹⁷ one is criminal liability of staff members of public international organizations; another, not less

¹⁴ J. BORGER (11-05-2014), *EU's biggest foreign mission in turmoil over corruption row*, The Guardian [online], available at <http://www.theguardian.com/world/2014/nov/05/eu-facing-questions-dismissal-prosecutor-alleged-corruption>

¹⁵ A. L. CAPUSSELA (2014) ,*Eulex's Performance of its Executive Judicial Functions* (draft), available at <http://eulexannex.wix.com/draft>

¹⁶ J. BORGER (11-06-2014), *EU accused over its Kosovo mission: 'corruption has grown exponentially'*, The Guardian [online], available at <http://www.theguardian.com/world/2014/nov/06/eu-accused-over-kosovo-mission-failings>

¹⁷ K. OZAKI, *Criminal law protection and accountability of participants in peacekeeping operations*, available at <http://www.defensesociale.org/warandpiece/Criminal.pdf> (these issues pertain general criminal law and are not necessarily limited to tackling corruption)

relevant, one is absence of prosecution because of lack or serious impairment of the local legal system.

These two issues are dealt differently for UN-sponsored missions and other kind of Operations. They are, fore instance, more easily solved in the case of the second study proposed; the European Union Rule of Law Mission in Kosovo, in fact, provides clear guidance for the legal accountability of its personnel.

Even though “EULEX has been accorded immunity against local legal and administrative process”, it is specified that “if a EULEX staff member nevertheless violates the law, his/her immunity might be waived and the person can be held criminally liable in their home country”.¹⁸ It is our opinion, furthermore, that the clause ensuring liability in the “home country” renders applicable every European convention on criminal jurisdiction, namely the European Arrest Warrant; this ensures that, even in the case that the home-state (A) of the alleged criminal individual was to not press charges against them, any other member-state (B), if its laws allowed for it, may decide to do it and state A could not refuse extradition. This kind of procedures ensure in a rather efficient way that corruption (and other kinds of crimes) in the context of European Union missions, if it cannot be eradicated completely, can at least be dealt with using effective tools.

It is different in the first case-study, related to UN missions, where the situation is much more heterogeneous.¹⁹

Even though personnel of International Organizations like the UN is usually subject to criminal jurisdiction of the state where the crime is committed, “difficulty arises where the criminal acts committed relate to certain specific functions of the Organization”. Corruption of members of the UN, for example, is a crime against the interest of the UN; who should have jurisdiction over these cases? The state of nationality of the staff member, the state where the act was committed, or the United States, as the nation where the UN is headquartered? This situation should also be analyzed in the context where peacekeeping missions operate, i.e. countries “where the legal system is seriously compromised, if not destroyed, and their criminal justice system often are inadequate to investigate and prosecute these cases. In some cases, even proper legislation is lacking, and there are serious dangers of impunity”.

¹⁸ See: EULEX Accountability, available at <http://www.eulex-kosovo.eu/docs/Accountability/EULEX-Accountability-05.01.2010.pdf>

¹⁹ For this paragraph, extensive inspiration has been drawn from: Kuniko Ozaki, Criminal law protection and accountability of participants in peacekeeping operations, available at <http://www.defensesociale.org/warandpiece/Criminal.pdf>. The paper covered a broader subject but was perfectly applicable to our case, hence the opportunity of reference.

The UN General Assembly adopted in 2005 resolution 59/300, which established a Group of Legal Experts to study these issues. The Group has come up with a Report recommending “the negotiation of a new International Convention on the criminal accountability of United Nations officials and experts on missions”.

Apart from the fact that the adoption of such a convention would need a long period of negotiation, it must also be stressed that, despite being discussed within the Group, the draft of the convention does not cover corruption. It seems like the UN, the sponsor of the only universal convention on corruption, has so far been unable to tackle the same issue when regarding itself.

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UN WHISTLEBLOWER PROTECTION: THE WASSERSTROM CASE

by Alessandro Downling

1. INTRODUCTION

This paper deals with a specific case of whistleblower protection within the United Nations, but before outlining the paper's structure it is crucial to understand exactly why whistleblower protection is a practice which is evermore in need of attention and protection within the United Nations anti-corruption culture.

The United Nations is a hierarchical-based organization and it is also the most vast and populated of international organizations. Both these traits are important to the notion of whistleblower protection. Indeed the wealth of individuals working within the many offices and departments, as well as the wealth in number of the latter, render the coordination and supervision of malpractice rather challenging. When numbers are too great, then the opportunity of bending or breaking the rules are quite often high, and corruption is easily perpetrated; it is not surprising moreover that the higher up in the hierarchy of the UN stands the greater chance for immunity he/her has, if there are no steps guaranteed to challenge and condemn his acts of corruption. It is imperative that such steps are guaranteed in order to beat and ultimately deter acts of corruption. One of these steps is whistleblower protection. Whistleblowing can be seen as a watchdog against corruption when monitoring is hard to manage through formal channels in an organization as busy and peopled as the United Nations. But it is only really useful and possible if whistleblowers themselves have a protected safeguard system on which to fall back on, and which guarantees that no negative repercussions to their personal and professional livelihood may follow from retaliation measures perpetrated by the guilty parties. Indeed, if protection to whistleblowers is given with absolutely efficient methods which leave the whistleblower to report misconduct with the knowledge he will remain secure and unvulnerable in doing so. The present paper deals with a specific case of whistleblower protection and the analysis will hopefully shed light on the internal problems in the United Nations' legal structure, so that it may be easier to identify the root causes that have put a heavy *** in the successful practice of protecting whistleblowers, thus targeting, not only the issue of whistleblower protection itself, but by extension the lack of accountability for corrupt practice within the United Nations.

Firstly, I will give a brief overview of the background events prior to the Dispute Tribunal hearing to provide a helpful context for the reader. Secondly, I will try to find the root causes of the case's outcome, with in mind the accountability issue as the main concern. I will do so in two points; in the first I will track the core issue at the foundation of the Wasserstrom case, namely the question of non-receivability of Ethics Office decisions as stipulated by UNAT. In the second point, I turn my focus to the UNAT justification of non-receivability and will show that UNAT's conclusion is flawed because the Ethics Office is by nature an administrative body, and so its decisions can and should be reviewed by UNDT if necessary. In the conclusion, I draw to the surface the consequences of such a state of affairs, and argue that making Ethics Office decisions non-receivable by internal judiciary bodies unimpedes anti-corruption measures, because potential whistleblowers will be unwilling to report corruptive misconduct within UN offices, thereby belittling accountability for corrupt practice, which in turn undermines the very foundations on which the United Nations' work and culture stand.

2. BACKGROUND OF EVENTS¹

James Wasserstrom was a senior member of the UN Interim Administration Mission in Kosovo (UNMIK henceforth). In 2005 he blew the whistle on some of his superiors who were part of a conspiracy to pay UN and Kosovo senior officials a kickback of \$500 million. The consequence was that the exposed UN officials took measures through the UNMIK Administration against Wasserstrom.²

Wasserstrom then turned to the UN Ethics Office in 2007, holding that he believed these measures were a form of retaliation for his denouncement of misconduct. The Ethics Office, responsible for whistleblower protection, initially found there to be a *prima facie* case of retaliation, and submitted it to the UN Investigative Division OIOS. However, OIOS found no evidence of a case of retaliation and the Ethics Office reversed its initial *prima facie* decision. Mr. Wasserstrom appealed to the United Nations Dispute Tribunal (UNDT henceforth) to have the decision by the Ethics Office reviewed. The UNDT concluded two things, firstly that the Ethics Office's uncritical acceptance of the OIOS investigation review was "an error in law", and awarded Mr. Wasserstrom

¹ A detailed chronological reconstruction of the events can be found in Judgment No. 2014-UNAT-457

² These measures included initially closure of his office and ending his assignment with UNMIK. Later, seizure of his national passport at the Kosovo border with the aim to restrict his movement, searches of his private vehicle and residence, placement of a poster with his photograph at the entrances of UNMIK headquarters to prevent his entry as well as visibly sealing off his office for an extensive period of time.

\$65.000 in damages;³ secondly, despite the first point, UNDT maintained that there was insufficient evidence for it to be considered a retaliation case. The UN Secretary General then made an appeal to the United Nations Appeals Tribunal (UNAT henceforth) claiming that the Ethics Office's decision was not under an administrative one and so not UNDT judicial jurisdiction, concluding that Mr. Wasserstrom's appeal of retaliation to UNDT was not legally receivable in the first place.⁴

3. ACCOUNTABILITY FOR RETALIATION

Having reviewed the facts to give us a context for analysis, I will now divide this chapter in two parts. Firstly, I will briefly analyse the UN Ethics Office, reviewing its trackrecord as guarantor of accountability by protecting whistleblowers since its date of inception in 2006. Secondly, I will turn to what I believe is the core issue of the poor exertion of function of the Ethics Office, namely the *receivability* question, highlighting that there is much difficulty for whistleblowers to have a decision of non-retaliation by the Ethics Office reviewed by a UN Tribunal, thereby disincentiving misconduct report and leaving misconduct unjustifiably unpunished.

2.1 The Ethics Office: a question of accountability

In *Judgement 2014-UNAT-457*, the outcome of the Wasserstrom vs Secretary-General case, held at the UNAT in June 2014, was that the Ethics Office's finding of non-retaliation was not administrative in nature and so could not be reviewed judicially and therefore it's decision was final. The consequence is it will be so for future similar cases involving protection against retaliation. Since UNAT has the final and definitive say on the cases it judges on, it follows that the Ethics Office cannot be questioned nor its finding subjected to revision. This means that a whistleblower suffering retaliation can find satisfaction within the UN only through the Ethics Office and the decision taken therein with the assistance of OIOS. In reviewing some figures from

³ UNAT's *Judgement on Relief* awarded Mr. Wasserstrom \$50.000, and UNAT's *Judgement on Liability* ruled that the Secretary-General pay \$15.000 to Mr. Wasserstrom.

⁴ This question of receivability will be the focus of my paper.

official reports⁵ we find that, from 2006 to 2012, of the 297 cases of retaliation filed, 12 were treated as prima-facie retaliation cases by the Ethics Office, and of these only 1 was ruled in favour of the whistleblower. This does not prove objectively that the Ethics Office should have turned in favour of all the whistleblowers who applied.⁶ But it does provoke a healthy skepticism regarding how much, if any, protection is afforded to whistleblowers within the UN. The real issue (of my paper) is that the Ethics Office has now the last word,⁷ and whistleblowers do not even have the chance to bring their case to the internal justice system of the UN when retaliation is not found. And when the internal justice system had the chance to review a case of (Wasserstrom's) retaliation, it judged that the decision taken by the Ethics Office could not be transferred to judiciary revision. So the problem lies clearly in the final decision taken by UNAT on the Wasserstrom case, decreeing that a decision by the Ethics Office of non-retaliation is not receivable by an internal tribunal in the UN, in the present case by the UNDT. Therefore, it would seem appropriate to scrutinise, not just by looking at statistics through a common sense directed view, the legal incongruities on which *Judgement 2014-UNAT-457* rests. To confirm that not only does it *seem* an unhealthy process, but that it *is* also certifiably contradictory and flawed, I now turn to analyse the receivability question in detail, with reference to the Wasserstrom vs Secretary-General case held by UNAT.

2.2 The Receivability question

In *Judgement 2014-UNAT-457* UNAT stated that “[t]he Secretary-General submits that the UNDT erred in finding that Mr. Wasserstrom’s application challenging the Ethics Office’s determination of no retaliation was receivable.” The UNAT’s final judgement was that “the Secretary-General’s appeal on receivability is upheld.”⁸ Let us review and analyse the facts. The UN Secretary-General maintained that, since the Ethics Office is a body “independent” from the Secretariat and its administration,⁹ the *recommendations* it took by upholding the OIOS review of no retaliation were not receivable by the UNDT, because [he maintained] only *decisions* taken by

⁵ All figures, regarding retaliation cases from 2006 to 2013, can be fact-checked in the annual reports published yearly by the Ethics Office at <http://www.un.org/en/ethics/annualrep.shtml>

⁶ Cases not taken because of credible motives.

⁷ Of course, another issue at hand, and the most visible at that, is the actual reliability of the Ethics Office decisions. Whether its decisions are final or not, the Ethics Office needs to be scrutinised and revised, because it clearly displays a lack of reliability. I will briefly touch on this point in part 3, but it is however beyond the scope of my essay.

⁸ *Judgement 2014-UNAT-457*, p. 6; p. 12

⁹ The General Assembly resolution 60/1 “request[ed] the Secretary-General to submit details on an ethics office with independent status”.

the Secretary-General's administration were receivable by the UNDT, according to article 2(1) of the UNDT Statute.¹⁰ However, it would be difficult to maintain that the Ethics Office is not an administrative body simply because it only produces recommendations, which are merely the basis on which the S-G takes the administrative decisions¹¹. Indeed, following Judge Faherty "it is inconceivable that a finding of the Ethics Office pursuant to its statutory mandate can be otherwise than an "administrative decision" capable of review by the Dispute Tribunal."¹² Focusing the attention on this "statutory mandate", the Ethics Office is certainly *operationally independent*, but it is a part of the Secretariat nonetheless,¹³ as stated by Section 1 of the bulletin on the *Ethics Office establishment and terms of reference ST/SGB/2005/22*.¹⁴ And as part of the Secretariat Administration, the recommendation it took on the present Wasserstrom case is unmistakably part of the administrative decision-taking process. So recommendations are indeed administrative decisions. "To hold otherwise would render nugatory the substantive protection and remedies afforded to staff members under ST/SGB/2005/21." Following an analytical inspection, ST/SGB/2005/21, entitled *Protection against retaliation for reporting misconduct*, is a set of rules written and signed by the head of the Secretary-General. It concerns whistleblower protection, and the body in charge of this is the Ethics Office, whose responsibility, as described in section 3.1 (b) of ST/SGB/2005/22, is of course "the protection of staff against retaliation for reporting misconduct". Protection against whistleblowers is therefore an administrative responsibility. And the Ethics Office, in charge of such a responsibility, is (as shown) an administrative body. So how can the Ethics Office, an administrative body in charge of an administrative responsibility, produce non-administrative decisions? It is clear that, although the Ethics Office takes decisions *operationally independent* of the Secretariat, it must make those decisions on the authority and in accordance with the bulletins written and signed by the Secretariat. It therefore seems both reasonable and logical to claim that the Ethics Office is an administrative body, and as such, its recommendations have the scope and nature of administrative decisions. This means that the

¹⁰ UNDT Statute, Art. 2.1 "The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual [...] against the Secretary General as the Chief Administrative Officer of the United Nations: a to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment."

¹¹ The Ethics Office makes "its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management." ST/SGB/2005/21

¹² Judge Mary Faherty's *Dissenting Opinion* in *Judgement-2014-UNAT-457*, pp. 14-25

¹³ To quote UNAT on the *Koda vs Secretary General* case, "since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System".

¹⁴ ST/SGB/2005/22 Section 1.1: "The Ethics Office is established as a new office within the United Nations Secretariat reporting directly to the Secretary-General."

UNDT was correct in receiving the Wasserstrom case, and that the UNAT was in error in upholding the Secretary-General's appeal of non-receivability.

3. CONCLUSION: THE CONSEQUENCES OF NON-RECEIVABILITY

The underlying motive of the paper is best understood with a question: how to improve accountability within the UN, and by consequence how to combat corruption within the UN? Given the length of the paper, I have not focused on these issues directly in general terms, but rather analysed one specific question arising from one specific case, which would bear greatly on the understanding of those concepts. The Wasserstrom case I reviewed is a landmark as it has substantial consequences. I reviewed first the facts of the Wasserstrom case, and, secondly, I identified the body most responsible for dealing with his case, namely the Ethics Office in charge of protecting whistleblowers from retaliation. Having reviewed its role, I then turned to the central problem of the case (and my paper), whether the Ethics Office's decision is legitimately considered to be final, and then to the consequences of such a conclusion. The purpose of 2.1 was to show the internal inconsistencies within the UN organisation regarding the protection of whistleblowers. Specifically, notwithstanding common sense arguments, it is a way to show how this issue should and can be scrutinised and resolved on a legal level as well. Let us see the consequences of UNAT's judgement. Clearly, not affording protection, and indeed impeding necessary steps for the rightful protection of whistleblowers, is an indication of poor accountability. The UN and the Ethics Office hold that they favour "a culture of accountability and integrity." The history of cases and now, since the Wasserstrom case, the UNAT's decision to limit the right to a hearing of UN employees it is meant to hear, clearly undermine such a culture. The consequences are that such a decision taken by UNAT favours corruption, or at least unimpedes it, because whistleblowers will be disincentivised to report misconduct on the (reasonable) assumption that it will simply be detrimental to their personal and professional lives.

Having raised some of the issues faced by UN employees and the UN as a whole, it is important to remember that alongside these negative notes, there have of course been positive signs. One of these is the work done by UNCAC, which has been fighting corruption across institutions worldwide since 2003¹⁵. Focusing on the UN itself, one decidedly positive

¹⁵ http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

development has been the introduction of ethics offices within UN individual and specialized offices, and also, with regards to OIOS, there has been a more serious commitment on its part in very recent years. The hope is that these points may serve as a springboard from which to continue challenging and improving the corruption issues highlighted in my paper. Indeed, only by taking seriously the deficiencies within its own legal and administrative structure, can the UN have a serious claim as leader in promoting international anti-corruption.

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