



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1465

Case No. 1513

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena
Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 26 December 2006, a former staff member of the United Nation, filed an Application
requesting the Tribunal, inter alia:

“II. PLEAS

....

9. ...[T]o order the Secretary General ... to disclose ... copies of ...[several] documents
that are essential to this case;

10. ...[T]o find that:

(a) the [Applicant's] due process and administrative law rights were violated by the
Respondent's failure to disclose the facts of the case against him, or to provide the
opportunity to refute the allegations against him or to confront his accusers....;

(b) the [Applicant] deserves compensation for the public and professional
humiliation and emotional damage arising out of the actions of the United Nations in
connection with the investigation and in the period of time since the [Applicant] ceased
employment with the [Organization] until the present;

(c) the investigation of the [Applicant] by OIOS [Office of Internal Oversight
Services] took an inexplicably long time, and was tainted by improper motives;

(d) the OIOS violated the [Applicant's] rights by providing the Public Prosecutor in Graz, Austria, with a detailed dossier on the internal OIOS investigation ...;

....

(f) ... the [Applicant's] privacy has been violated and his personal and professional reputation was improperly tarnished by the publicity given to the accusations ...;

(g) in closing the investigation, the Respondent acted in an improper manner for failing to make restitution, amends or apologies for the four years of humiliation inflicted on the [Applicant].

11. ...[To] order that:

(a) the Office of the [Secretary-General] investigate the accountability and culpability of the Administration staff members, who through their actions or negligence, violated the [Applicant's] rights to administrative justice and due process;

(b) the Office of the [Secretary-General] issue a written apology to help restore the [Applicant's] personal and professional reputation;

(c) to recommend that the [United Nations] Administration give the [Applicant] active and equal consideration for any [United Nations] job for which he is qualified; and

(d) the payment of three years net base salary payable in Euro at the rate in effect at the [Applicant's] separation to compensate for the costs incurred”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 25 June 2007, and once thereafter until 25 July 2007;

Whereas the Respondent filed his Answer on 20 July 2007;

Whereas the Applicants filed Written Observations on 19 October 2007;

Whereas, on 15 July 2009, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

... [The Applicant] was initially appointed on 31 August 2000 on a five-month appointment of limited duration (ALD) as Principal Officer (D-1), Post & Telecommunications, United Nations Interim Administration in Kosovo (UNMIK), Pristina. His ALD was extended for 5 months as Director (D-1) of UNMIK, Department of Communications. His ALD was again extended for one year to 30 June 2002, and for three months to 30 September 2002 when he separated from the service.

Summary of the facts

... The only Field Operations Performance Appraisal on [the Applicant's] OS file covers the period 31 August 2000 to 30 June 2002. It was signed on 15 April 2002 by ... [the] Deputy to the Deputy Special Representative of the Secretary-General, Civil Administration (D/DSRSG) and ...the (DSRSG), and gave [the Applicant] an overall rating of 2, ‘exceeds expectations.’

... Having seen press reports of irregularities in the award by UNMIK of contracts for Post & Telecommunications, Kosovo (PTK) to Austrian companies ... [the DSRSG] directed ... the Management Review and Internal Oversight Unit in his office to conduct a fact-finding inquiry.

... [The Management Review and Internal Oversight Unit] completed [its] report (A/C) on 16 June 2002...[S]ummarized ... as follows:

1. It is established that PTK has entered into contracts with two Austrian Firms, namely *Management Partners* and *Infonova* for contracts/agreements exceeding respectively € 1 million and € 40 million to supply consultancy services, hardware, software, etc. The contracts were awarded on single source basis without competitive bidding.'

2. It is reasonably clear that the decision to dispense with the requirement of bidding and to award the contracts to the two Austrian firms was taken by the UNMIK Director of Infrastructure Affairs and Communications, [the Applicant].

3. In the light of the above, the fact that the two companies *Management Partners* and *Infonova* are both based in Graz, Austria from where the Director DIA/C apparently belongs, has fuelled further speculation about the integrity of the procurement exercise at the level of UNMIK.

4. As the Deputy DSRSG ... has also appended his signature on the contract for supply and maintenance of internet and billing infrastructure with Infonova (Item I of the list at para 10) and Annex VI thereof (item I-f of the list titled 'International UPT') and marked the same as 'seen' and 'witnessed' respectively, he was aware of the nature and content of these contracts. It is not clear under what circumstances the D-DSRSG approved the contracts and why the issue of following the proper procurement procedure was not raised. Under the CFA [Central Fiscal Authority of UNMIK] guidelines the deviation from the competitive bidding process would have required the approval of the DSRSG (Civil Administration), and the approval of the contracts would have required the approval of a DSRSG other than the one who approved the deviation.

5. There has been a violation of the CFA guidelines for procurement (as indeed of the normal procurement practices adopted using public funds), starting from the stage of finalizing technical specifications for projects to be executed, through contract award, to certification of services. Even if the argument is accepted that CFA guidelines would not apply to PTK procurements, it is highly unusual and extraordinary that no alternative rules of procedure of the organization have been produced, or even that a transparent competitive procedure was followed for the procurements.

... Given the above prima-facie findings, the following recommendations are made:

i. A formal, comprehensive and complete investigation should be undertaken covering, inter-alia, the entire process of entering into these contracts, the transaction of funds under the contracts, the nature and extent of delivery of services etc.

ii. A detailed audit of the PTK be undertaken by the CFA, either on its own or by engaging an independent auditor.

iii. In the meantime, and without delay, the following steps are recommended to be taken:

(a) Instructions be repeated to the PTK and DIA/C clarifying that they should observe the CFA guidelines for procurement.

(b) A working committee comprising representatives of PTK and UNMIK be established to screen all investment and related procurement decisions to be

taken by the PTK. This could operate till the Kosovo Trust Agency fully assumes the management responsibilities to be entrusted to it. This would be in addition to strict abidance by the PTK and DIA/C to the CFA procurement instructions.

(c) The same committee be also entrusted to scrutinize the past investments and framework agreements for consultancy and services, including the contracts mentioned above, with a view to examining if the liabilities of the PTK under the contracts can be kept to the minimum. Pending such an exercise, no further supplementary contracts should be concluded by the PTK under the framework agreements signed with the two companies, except after following the process indicated at (a) and (b) above.

... The following day, ... [the DSRSG] forwarded the report to the DSRSG (European Union - Reconstruction), and the Director of Administration, UNMIK, under cover of a memo (A/D) in which he said, *inter alia*, 'While I generally agree with the report and its findings, I have asked both [the Applicant] and [the D/DSRSG] by e-mail to give their comments on the points raised in the report. Both of them are currently on leave and expected back only by mid-July.'

... [the Applicant] signed an extensive draft response to [the] report on 21 July 2002. As noted in paragraph 2, above, [the Applicant] was separated on 30 September 2002 on expiration of his last ALD.

... On 9 October 2002, ... [the] Investigations Division, Office of Internal Oversight Services (OIOS), HQ, sent a fax (A/F) (in German) to ... [the] Public Prosecutor, Graz, proposing a meeting between [the Public Prosecutor, Graz], a Senior Investigator of OIOS, and himself on the following day. Under cover of his fax was a memo also addressed to ... [the Public Prosecutor, Graz] (in English) from ... [the Director, Investigation Division, OIOS], which begins: 'The Investigations Division of the Office of Internal Oversight Services (ID/OIOS) was recently advised of an allegation that an Austrian citizen, ... [the Applicant], a former staff member of the United Nations Mission in Kosovo (UNMIK), may have been involved in criminal conduct with regard to his official duties.' [The Director, Investigation Division, OIOS] followed up in a memo of 6 November 2002 addressed to ... [the Public Prosecutor, Graz] (A/G), which begins: 'Following the previous discussions between your office and ID/OIOS, please find attached pertinent documents, in order to assist your office in a criminal investigation against [the Applicant]. These documents reflect the current status of the evidence yet adduced in the ongoing investigation into the allegations of breach of trust and corruption against [the Applicant]. The Office of Legal Affairs of the United Nations has authorized the release of the documents. However, please note that the documents are given on a voluntary basis and without prejudice to the privileges and immunities of the United Nations.'

... On 20 November 2003, an official communication to [the Applicant] from the City of Graz informed him that it had been decided to discontinue the criminal investigation.

... On 20 December 2003, [the Applicant] addressed a letter to the Secretary-General (A/I)."

On 8 April 2004, the Applicant lodged his appeal with the JAB. The JAB adopted its report on 2 May 2007. Its considerations and recommendation read, in part, as follows:

“Considerations

27. The Panel noted that on 1 March 2005, a Panel of the JAB unanimously found that this Appeal was receivable. That Panel further noted that there was a decision in which at least two Departments of the United Nations participated -- to approach the Chief Public Prosecutor in

Graz, Austria, 'in regard to a criminal investigation [of the Appellant] that may be conducted by the pertinent Austrian authorities' and to provide the Prosecutor with 'pertinent documents' to assist in that criminal investigation. That Panel also took note of the Appellant's claim that he took timely action with respect to his appeal, as soon as he learned of the UN's involvement in the Austrian criminal investigation.

28. The Panel considered all pertinent documentation submitted by the parties. It considered the case on the merits, focusing solely on the contested decision, the contention of the parties regarding the contested decision and the pleas put forward by both parties.

29. The Panel was mindful of the relevant administrative issuances relating to investigations, specially, document ST/SGB/1273 on 'Establishment of the Office of Internal Oversight Services' [citation omitted] dated 7 September 1994 and the 'OIOS Manual of Investigation, Practices and Policies', dated 4 April 2005, especially, paragraphs 49 to 55.

30. The Panel acknowledged OIOS authority to initiate the investigation into the allegations against the Appellant. The Panel noted that the preliminary fact finding report ... found *prima facie* evidence of misconduct on the part of the Appellant. The Panel found that the request made by OIOS to the Prosecutor in Graz, Austria was also legitimate action of ID/OIOS and within the scope of its mandate as spelled out in paragraph 2 of Section 2 of ST/SGB/273 [citation omitted].

31. The Panel considered the contention made by the Appellant that he was never approached by OIOS and was not given the opportunity to rebut the allegations of [the Management Review and Internal Oversight Unit's report] and thus his due process rights were violated. In this regard, the Panel noted that the Respondent alleged that: (a) the Appellant was never formally charged of misconduct and that this case remains an active investigation; (b) the Appellant was given the opportunity to express his views at the preliminary stage when he provided his views on [the Management Review and Internal Oversight Unit's report] on his draft report dated 21 July 2002; and, (c) OIOS approached informally the authorities in Graz, Austria to seek their cooperation and ways to proceed and that OIOS could not be held responsible for the course of action of the Graz Prosecutor.

32. In connection with these particular issues, the Panel noted that even if the contact with the Prosecutor in Graz, Austria was initially on an informal basis, at a later stage it became formal. The Panel noted that the Secretary-General waived [the Appellant's] immunity on 30 September 2003. The Panel was of the view that the Organisation had the duty to inform the staff member that he was still under investigation and to provide him with reasonable opportunity to put forward his version of the facts, comment on allegations and to present evidence and witnesses concerning the possible new instances of misconduct before ID/OIOS reaches any conclusions on the matter. From the information received by the Respondent's memorandum dated 8 February 2006, the Panel noted that ID/OIOS has not reached any conclusion on this case. It found disturbing that an investigation remains open for such a long time.

33. The Panel also found that, while it is true that OIOS could not be held accountable for the course of action of the Graz Prosecutor, it is also true that OIOS had the duty to cooperate with the Graz authorities and provide the expert opinion that was required by it in order to finalize this case in an expeditious way. If it was not possible to provide such an expert opinion ID/OIOS should have explored other ways to proceed and expedite the investigative process.

34. The Panel, while considering the Appellant's contentions and pleas, noted that he did not challenge the decision not to renew his contract which expired on 30 September 2002. The Panel noted that the Appellant requested to be again employed by the United Nations in his field

of expertise. In this regard, the Panel was of the view that the Appellant is free to apply and compete for any suitable vacant posts in his field of expertise.

35. As the investigation ID case No. 0144102 remains an active investigation, the Panel, having weighed all the aspects of this appeal, could not reach any conclusion with regard to whether the Appellant has suffered or not injury to his personal and professional reputation. In connection with this issue, the Panel deplored that the OIOS investigation is still open since April 2002 and that a certain error of procedure was committed as stated in paragraph 32 above.

36. The Panel also considered the remaining contentions and pleas of the Appellant and found that these were outside the scope of its mandate.

Conclusion and recommendation

37. In light of the foregoing, the Panel unanimously agreed that, in view of the fact that the investigation ID case No. 0144/02 is still open, it was unable to reach a conclusion in this case. The Panel unanimously recommends that the Secretary-General, as a matter of urgency, instruct OIOS to finalize the investigation ID case No. 0144/02 as soon as possible and once a decision has been taken regarding the investigation, the Panel leaves open the opportunity to the Appellant to appeal such a decision, including the excessive delay in closing the investigation and the other procedural violations.

38. The Panel made no further recommendation regarding this appeal.”

On 3 April 2006, the Officer-in-Charge for Management transmitted a copy of the report to the Applicant and informed him that:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. He does not share the JAB’s finding that procedural irregularities occurred in your case, as the OIOS investigation was conducted in accordance with all applicable policies and procedures. Moreover, the Secretary-General notes that staff members under investigation by OIOS have no statutory right to be informed about such investigation. Having regard to the JAB’s concern about the length of the investigation in your case and its recommendation, the Secretary-General has been advised by OIOS that, at this stage, the investigation into your case can no longer continue as the preliminary fact-finding process has been largely compromised by the actions of others in precluding further action by OIOS and in disclosing confidential witness information. In view of the OIOS decision to no longer pursue its investigation and close the case, the Secretary-General has decided to take no further action on this case. Pursuant to Staff Rule 111.2(p), this decision is “the final decision on the appeal”....”

On 26 December 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. His rights were violated when the Respondent did not disclose information regarding his case and did not offer him an opportunity to refute the allegations.
2. The Respondent violated his rights by providing the Public Prosecutor in Graz, Austria, with a detailed dossier of OIOS’s investigation, naming him but not providing “reasonable evidence” of the alleged crime committed.

3. OIOS provided and shared alleged evidence of alleged criminal activity without first applying for or securing a waiver of the functional immunity granted to him as required under the Convention on the Privileges and Immunities of the United Nations.

4. OIOS's investigation was inexplicably long and it was also closed improperly.

5. His privacy has been violated and he has been publicly and professionally humiliated by the Respondent's actions.

6. His reputation has been tarnished.

7. He should be compensated for the violation of his due process rights, humiliation, and the affect this case has had on his reputation.

Whereas the Respondent's principal contentions are:

1. OIOS acted in accordance with its mandate.

2. OIOS did not violate the Applicant's rights when it contacted the Public Prosecutor's Office in Graz, Austria.

3. OIOS did not conduct a public investigation into the allegations against the Applicant and there were no procedural irregularities prior to OIOS's contact of the Office of the Public Prosecutor, Graz, Austria.

4. The duration of OIOS's investigation is not an issue on appeal.

5. The Applicant's rights were not violated by OIOS's decision to close the investigation.

The Tribunal, having deliberated from 15 July to 31 July 2009, now pronounces the following Judgement:

I. According to the Applicant, he worked in the Austrian Post and Telecommunications services from 1967 to 2004 with an unblemished record as a civil servant in Austria. As will be seen from the Tribunal's review of facts below, during a part of this time he was also employed with UNMIK where his work came under some investigation, which, in turn, led to this appeal. It must be stated at the outset that the investigations which were commenced in April 2002 in relation to a charge of "Conclusion of a Harmful Contract" were protracted, led to no conclusive outcome, did not lead to formal charges being brought against the Applicant, and were eventually terminated by the International Prosecutor in Kosovo on 16 February 2005 on the grounds that there was "insufficient evidence" of any wrongdoing. The Assistant Secretary General for Legal Affairs in a letter to the Applicant, dated 20 January 2005, expressed concern that the investigations had lasted for as long as they did.

II. The Applicant claims that the investigations violated his due process rights as a staff member of UNMIK because the investigations were tainted by improper motives; the Respondent failed to disclose the

facts of the case against him and did not provide an opportunity for him to refute the allegations; and he did not have the opportunity to confront his accusers “before a decision was made which adversely affected his interests and reputation.” The decision of the complaint is the one taken in October 2002 by the Organization when it decided to seek the cooperation of the Public Prosecutor in Graz, Austria, in connection with the investigations being carried out, as the Applicant claims, “without any reasonable evidence” of a crime. In this connection the Applicant also claims that internal procedures were not observed prior to the waiver of immunity and, furthermore, that the investigations took an “inexplicably long time”. He claims compensation in the amount of three years net base salary for public and professional humiliation and emotional damage.

III. Before dealing with the substance of the Applicant’s case, the Tribunal considers it important in this case to recall the basic facts which led to the investigations in questions and which undoubtedly caused the Applicant considerable discomfort. The Applicant was employed by UNMIK from 31 August 2000 through 31 January 2001, on a five-month appointment of limited duration. His contract was subsequently extended through 30 June 2001 as Director (D-1), Department of Communications, UNMIK. His contract was subsequently further extended until 30 September 2002, when he separated from service.

IV. In his position as UNMIK Director in the Directorate of Infrastructure Affairs/Communications (D/DIAC), the Applicant, among others, was responsible for overseeing the Post and Telecommunications Enterprise of Kosovo (PTK) and assisting in its modernization. This work entailed assisting the PTK in negotiating a number of contracts with consulting firms. Among these contracts, the PTK entered into several contracts with certain companies in Graz, Austria, called Infonova and Management Partners, during the period August 2001 to April 2002.

V. In May 2002, UNMIK became aware of certain allegations concerning the possible involvement of some UNMIK personnel in the allegedly improper award of contracts for PTK to certain Austrian companies. Reports relating to these allegations also appeared in the local press. In response, the Deputy Special Representative of the Secretary-General (Civil Administration) (hereinafter “DSRSG (CA)”), UNMIK, requested a member of the Management Review and Internal Oversight Unit, UNMIK, to conduct a fact-finding inquiry.

VI. On 16 June 2002, the Office of Internal Oversight Services (OIOS) completed its report, (hereinafter referred to also as the “Report” or as the “Initial Inquiry Report”) and submitted it to the DSRSG(CA), UNMIK. These Reports, inter alia, states in its conclusions, as follows:

“1. It is established that PTK has entered into contracts with two Austrian Firms, namely *Management Partners* and *Infonova* for contracts/agreements exceeding EURO 1 million and

EURO 40 million to supply consultancy services, hardware, software, etc. The contracts were awarded on single source basis without competitive bidding.

2. It is reasonably clear that the decision to dispense with the requirement of bidding and to award the contracts to the two Austrian firms was taken by the [Applicant].

3. In the light of the above, the fact that the two companies *Management Partners* and *Infonova* are both based in Graz, Austria from where the [Applicant] apparently belongs, has fueled further speculation about the integrity of the procurement exercise at the level of UNMIK.

...

5. There has been a violation of the CFA (Central Fiscal Authority of UNMIK) guidelines for procurement (as indeed of the normal procurement practices adopted using public funds), starting from the stage of finalizing technical specifications for projects to be executed, through contract award, to certification of services.”

VII. On 17 June 2002, the DSRSG (CA), wrote to the DSRSG (Reconstruction), UNMIK, and also forwarded the Report to the Director of Administration, UNMIK, under cover of a memorandum, which reads, in relevant parts:

“While I generally agree with the report and its findings, I have asked ... [the Applicant] by e-mail to give comments on the points raised in the report. [The Applicant] is currently on leave and expected back only by mid-July.” In this Memo the DSRSG(CA) further stated as follows: “I have again reiterated my earlier instructions that the PTK should strictly adhere to the CFA procurement instructions. While I expect that these would be followed in letter and spirit, I propose also constituting together a working committee, on the lines suggested in the report, comprising PTK and UNMIK to screen all investment decisions to be made by PTK.”

VIII. On 21 July 2002, the Applicant submitted in writing his comments on the Report.

IX. On 30 September 2002, the Applicant was separated from service on the expiration of his last fixed-term contract. He did not appeal the decision not to renew his contract.

X. On 9 October 2002, a member of the Investigation Division, Office of Internal Oversight Services (ID/OIOS), sent a facsimile to the Chief of the Public Prosecutor’s Office in Graz, Austria, and requested a meeting to discuss the allegations against the Applicant.

XI. On 6 November 2002, at the request of the Public Prosecutor’s Office in Graz, Austria, the Director, ID/OIOS, forwarded several documents to the Chief Public Prosecutor, including, the Initial Inquiry Report, the Applicant’s response thereto, contracts between PTK and *Management Partners* and *Infonova*, respectively, and records of interviews. In connection with this submission, the Director, ID/OIOS, stated that the documents were “given on a voluntary basis and without prejudice to the

privileges and immunities of the United Nations”, and that the Office of Legal Affairs of the UN had authorized the release of the documents in question.

XII. In September 2003, the Applicant was asked to report to the Public Prosecutor’s Office in Graz, Austria. On 20 November 2003, the Applicant was informed that “the Graz Public Prosecutor’s Office examined the charge of suspicion of breach of trust brought against [him] ... and that the proceedings were terminated”.

XIII. On 20 December 2003, the Applicant requested administrative review of the decision to contact the Public Prosecutor’s Office in Graz, Austria, and to submit certain documents to the Public Prosecutor’s Office. In the absence of a substantive reply, he filed his Statement of Appeal with the JAB on 14 April 2004. The JAB issued its report in February 2006 recommending that the Respondent, as a matter of urgency, finalize the investigation. However, as the investigation was still active, the JAB concluded that it could not reach any determination as to whether the Applicant had suffered damages to his personal and professional reputation. The Panel deplored the fact that the investigation was still open.

XIV. The Applicant claims that his due process rights have been violated on the several grounds which the Tribunal will examine in turn. The most serious of the grounds he advances is that those who initiated and carried out these inquiries or investigations were “tainted by improper motives”. The Tribunal recognizes that most investigations have a potential to adversely impact on those immediately involved or who are or might become involved. Consequently, it goes without saying that such processes should not be undertaken or set in motion by an administration lightly and without due consideration. If either in the initiation or the carrying out of investigations the process is tainted by improper motives not only does it become a violation of the individual’s due process rights, but the whole process and the resulting decisions made directly thereunder could be flawed.

XV. The Applicant’s difficulty in this case, however, is that he does not produce any direct or indirect evidence in support of this claim, and furthermore, the Tribunal has been unable to extract such a conclusion from the available record. On the contrary, the record leads the Tribunal to a different conclusion.

XVI. Although the newspaper publicity that is in evidence in these proceedings might have been of doubtful authenticity, it is, nonetheless, a fact which a responsible administration could not wholly disregard. There were also troubling circumstances which clearly warranted probing. The contracts were on the basis of single source procurement and were awarded without tender. Even if the connections to the Applicant were tenuous, they bore examination. In this context, especially cogent was the

contemporaneous reiteration by the DSRSG (CA) to the DSRSG (Reconstruction) with a copy to the Director of Administration, UNMIK, that the Guidelines of the Central Finance Authority of UNMIK had been deviated from and the competitive bidding process had not been complied with. In the light of these considerations and the specific observations of the DSRSG(CA) in his memorandum of 16 June 2002 quoted above, it is clear to the Tribunal that the investigations initiated were justified and were not improperly motivated. It is the privilege and duty of an administration to gather information through administrative processes - be it internal and/or external audit - and after due and careful consideration of all the factors, to investigate in even greater depth, so that appropriate action can be considered and taken. This is especially true where public funds are at stake.

XVII. These inquiries or investigations could of course ultimately lead to action of a serious nature, including disciplinary charges. On the other hand, they may yield no concrete evidence to take the matter any further, as in the instant case. Whilst administrators have the power and, in certain circumstances, the duty to carry out such investigations, it is important – indeed critical – that staff members involved should be treated correctly and fairly. This is not a mechanical decision but invariably involves difficult balances and must at all times remain a matter of judgment anchored to the specific facts of the case. For the purpose of deciding if and to what extent and what type of inquiry or investigation should take place, an administration has to consider each case on its facts, preferably in consultation with the Legal Adviser of the Organization.

XVIII. Before leaving this significant aspect of the Applicant's case, the Tribunal wishes to observe that the Applicant was given an opportunity to comment on the Report. The Tribunal must assume that the Applicant, having been thus engaged in the process, would be entitled to place before his supervisors, senior officials of the Organization for whom he worked and/or the persons carrying out inquiries, any pertinent material he would have wished to place on record. The Applicant was made aware of the nature of the inquiry when he received the Report. He would then have known the scope of the matters on which the Organization was interested in obtaining information and could have been, in the Tribunal's view, more active in seeking to explain that, as far as he was concerned, there was no basis for further inquiry. There is nothing in the file to indicate that the Applicant was in any way prevented from making any request or clarification he may have wanted to, in addition to making out the "draft" response dated 21 July 2002. There was nothing to prevent him from volunteering any statement he wished to make. The Administration was equally not prevented from making further inquiries whether the Applicant knew of them or not. It was entirely up to the Applicant to make any reservations, requests or statements he wished, although he could not be legally prejudiced if he did not do so. Nor, does it prejudice the Administration that no interview took place even if the Applicant might have been the best source of information.

XIX. Had these inquiries led to disciplinary charges, the Applicant would of course be entitled to what the Tribunal has called in one of its previous judgments the “panoply of due process rights”, including, inter alia, the right to confront any person who may have provided evidence against or in some way implicated the Applicant. (See Judgement No. 1327 (2007)). In that case the Tribunal formulated its general approach in the following words: “Whilst the Tribunal is particular to ensure the observance of due process at all times, it is also not unmindful that, in the context of non-disciplinary situations where information has to be gathered, a more nuanced approach to the panoply of rights relevant to disciplinary proceedings is called for and that the particular circumstances of each case must be taken into account, subject, of course, to the constraint that no one can be denied the right of being dealt with fairly. The application of the rights critical to disciplinary proceedings is not automatic in every other situation”.

XX. Those cases where investigations were infected with various flaws and led in turn to adverse actions being taken against a staff member based on such defective investigations need to be distinguished from the present case. (See for example Judgement No. 1058, *Ch’ng* (2002); Judgment No. 1242 (2005); and, Judgement No. 1246 (2005)).

XXI. The Applicant was not a minor official. He was, as he claims, a civil servant of considerable experience in his national service and at the relevant time had a contract with the United Nations as a Director. If he was not content that the investigations finally did not reveal evidence sufficient to bring any charges against him, then the Tribunal would expect that, when the Applicant was put in possession of the Report of the Management Review and Internal Oversight Unit of UNMIK, he would have wished to make a more complete response and clarification on what he perceived as the subject of the investigation. If for any reason he did not wish to do so, it would have been reasonable to expect a statement that he had decided that he would not do so, for whatever reasons tactical or otherwise he considered appropriate. This is not to suggest that there was any burden of proof whatsoever on the Applicant. It is simply that his own conduct is something from which the Tribunal is entitled to draw inferences in assessing his claim that his due process rights have been violated for the alleged reason that he had not been given an adequate opportunity to refute possible implications arising from the investigation.

XXII. The Tribunal next turns to the Applicant’s claim that the investigations had taken an “inexplicably long time”. There is no question that these several investigations, in the midst of which there was also a dialogue with National Authorities, difficult and complicated as they were, started around May/June 2002 and were not terminated until after April 2006. This is, on the face of it, an excessively long period. However, quite apart from the complexity of the issues and the number of jurisdictions involved, the documents which the Applicant himself has produced indicate that there were times when one investigation was “suspended” to allow another to proceed. The records also make clear, that there were difficulties

apparently encountered in making contact with the Applicant “despite every effort made” to contact him “at his last known address”. These matters required clarification and none have been provided either by the Applicant or by the Respondent. The Respondent is quite content not to address the issue except to claim that the length of an investigation is not subject to appeal, that the length of the OIOS investigation is not properly before the Tribunal, and is not subject to review. It is correct that there was no specific decision in respect of which the Applicant had asked for an administrative review. The Tribunal however takes the view that the issue is clearly before the Tribunal as the Applicant has claimed it as one of the grounds why his due process rights have been violated and for which he seeks compensation. However, the Applicant himself makes no attempt to analyze the delays for which the record suggests he may have been partly responsible or to clarify whether and to what extent he might have contributed to the delays, given that the documents on the face indicate a possible responsibility on his part. In the circumstances, the Tribunal, while noting the delay that occurred, has decided, in all the circumstances of this case to make no award in this respect.

XXIII. Taking into account the final outcome of these investigations, the Tribunal does not wish to go over what has been described as the “connectivity” to the Applicant. However, it is on record that the Applicant repeatedly traveled to Graz to negotiate the contracts with companies in Graz. Given all the circumstances, the mandate of the OIOS and the provisions of the 1946 Convention on the Privileges and Immunities of the United Nations, which envisage cooperation with national authorities, the Tribunal is not in a position to come to a conclusion that it was in any way improper to take the decision the Respondent did in fact take, i.e., to seek the assistance of the Public Prosecutor in Graz to further the inquiries. The information was not disclosed indiscriminately but shared on a need to know basis and the Applicant’s due process rights were not infringed on this account. The Tribunal agrees that there might have been a better sharing of information between the Applicant and the Organization in the course of these investigations, but finds that it was not obligatory in circumstances when no charges were preferred against the Applicant. The relevance of any such shortcoming, had the investigations led to such action, remains therefore a hypothetical question on which the Tribunal does not comment.

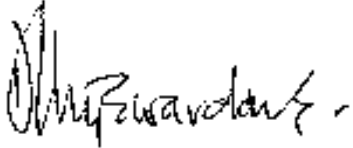
XXIV. Finally, there is the claim that the waiver of the Applicant’s immunity violated his due process rights because it was not done in accordance with internal procedures. It is clear from the record that the Office of the Legal Affairs was fully involved in this decision and indeed in the eventual restoration of the Applicant’s immunity. Throughout the common system this is an issue which is normally delegated to the office of the Legal Counsel of the Organization. Be that as it may, the Applicant does not have a legal right to privileges and immunities which are precisely as the name implies - a “privilege”.

XXV. In view of the above, the Tribunal rejects the Applicant’s claim in its entirety.

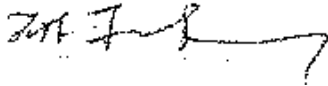
(Signatures)



Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President



Goh Joon Seng
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary