

NBI/2014/010

Judgment No.: DT/2014/092

DISPUTE TRIBUNAL

Date:

Original:

## **Introduction**

1. The Applicant has challenged “the decision by United Nations Office at Nairobi (UNON) management to use the Kenyan police in resolving prohibited conduct (ST/SGB/2008/5) hence attempting to circumvent the wheels of justice after an inordinate delay in handling a conflict and eventually breaching the Vienna Convention on Diplomatic Relations”.

2. The Applicant has also alleged that:

- a. the seven-month delay in constituting the fact finding panel by the Director-General (DG), UNON, into his complaint of prohibited conduct did not meet the threshold of promptness stipulated in section 5.14 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority);
- b. the DG breached the duty to take prompt and concrete action into his complaint;
- c. the DG was neither fair nor impartial in handling his complaint; and
- d. the DG was misinformed about a falsified police bond dated 30 August 2013.

## **The issues**

3. The two principle issues arising from the Application are:

- a. Whether the UNON Administration unlawfully delayed an investigation into his complaint of prohibited conduct and;
- b. Whether the UNON Administration acted lawfully in relation to the detention and charging of the Applicant by the Kenyan police in August 2013.

4. The scope of the Tribunal’s considerations are limited to these two issues, however, in order to understand the sequence of events during the period of alleged delay and the circumstances surrounding the contact by the UNON officials with the

Kenya Police about the Applicant it was necessary for the Tribunal to canvass numerous facts. Many of these facts are the subject of ongoing investigations by the investigation panel set up under ST/SGB/2008/5 to investigate the Applicant's complaint of prohibited conduct and by the Ethics Office to whom he also complained. There may be future misconduct investigations against the Applicant by the United Nations. There are outstanding criminal charges against the Applicant in the Kenyan Magistrate's Court and he has complained to the Kenya Police Oversight Authority and others. The Tribunal makes no findings on matters that are entirely within the province of the bodies authorized to undertake those investigations.

5. For example, there was disputed evidence given at the hearing about the dates of the incidents reported by the Applicant in his complaint of prohibited conduct and the identity of those who attended each meeting. These are matters for the investigation panel to decide. As they do not affect the ultimate decisions to be made by the Tribunal on the two main issues in this case, the Tribunal mai60(n)19(duc)3(t)-22( )1(s)8(ue)-16(s)

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invited them to return at a later date so that she could bring the matter to the Applicant's attention.

14. On 30 or 31 January 2013, after the Applicant had signed out from his night shift, he was summoned to the Inspector's office. Present were Inspector Okal, Lieutenant Kimathi and another DSS officer, the Constable and two complainants. When Inspector Okal asked the Applicant if he knew the complainants he agreed and said he had private matters to settle with them. There is a dispute between the parties about what occurred at that meeting including whether the Applicant wrote and signed agreements to pay the debts owed to the complainants and what Inspector Okal and Lieutenant Kimathi said and did in relation to the Applicant. The meeting ended with an agreement that there would be another meeting on 4 February 2013.

15. This plan changed so that instead of meeting at the UNON compound, the complainants and the Applicant would meet at the Constable's office at the Gigiri police station. The Constable told the Applicant of this change. The complainants met there but the Applicant did not turn up. When the Constable contacted him about the money he asked for more time and said he would pay by 6 February 2013.

16. On 4 February 2013, while the Applicant was on duty, Inspector Okal spoke to him about the money he owed. He alleges that she gave him a final warning to pay the money or she would remove him from the list of Security Officers who were to go on mission to Dadaab. He told her it was none of her business. She told him to return his firearm, he asked why. She said it was her instruction.

17. After consulting with his team leader about the firearm the Applicant says that he went to the Crisis Center to find the Armorer to return it. The acting Armorer asked him to wait until the Armorer arrived. As he was waiting he was

refused and said he had a duty to return it to the armory. The facts about this incident are yet to be determined by the Investigation Panel but for the purposes of this case there is no doubt that there was an acrimonious encounter between the Inspector and the Applicant in the UNON lobby.

18. On 6 February, the Constable informed the Inspector that the Applicant had not paid the money to the complainants.

19. On 7 February 2013, Inspector Okal told the Applicant that she was instructed to take him to the office of the Assistant Chief of Security. There was another scene between the two. The Applicant alleges she tried to grab his belt. She denies that. That is a matter for the fact-finding panel.

20. Inspector Okal told the Tribunal that the meeting with the Assistant Chief of Security was to explain to the Applicant the United Nations' obligations under the Host Country Agreement with Kenya which included that criminals are not allowed to hide in the United Nations complex. They wanted to give him a chance to deal with the complainants. The Applicant said that at the meeting he was insulted by a Security Officer and that profanities were used. At the end of the meeting he was instructed to change out of his uniform into civilian clothes and was escorted out of the compound. There he found the Constable waiting for him. Inspector Okal denies she had set up this meeting. After speaking outside the nearby United States Embassy for 15 minutes the Applicant and the Constable agreed they would meet with all of the complainants that day.

21. The Applicant then phoned Inspector Okal and asked if he should report back to work. When she asked where he was he said he was outside the United States Embassy. He believes she was surprised that he was not at the police station. He returned to the UNON compound, changed back into his uniform and returned to work.

22. On the Constable's evidence, the planned meeting with the Applicant went ahead later on 7 February 2013 at Maggie's Hotel. They all took tea and some money

changed hands although it seems not all the complainants were completely satisfied. The Constable told the Tribunal that by then he had sufficient evidence to lay criminal charges against the Applicant relating to the cheques and car parts but he did not and instead continued with his efforts to get the Applicant to settle all his debts completely.

23. After the meeting with the Assistant Chief of Security and Inspector Okal on 7 February 2013, the Applicant had had enough of the interference of the United Nations' officials in his private affairs and decided to lay a complaint. He went to see Inspector Mkunde of DSS UNON who is in charge of the Special Investigation Unit (SIU) at UNON to explain what had happened. As Inspector Mkunde was of the same rank as Inspector Okal he could not take any action against her but told the Applicant that he would raise it with the Chief of Security. The Chief of Security called a meeting. Inspector Mkunde tried to persuade the Applicant to attend as he wanted the matter to be settled by the Chief of Security but the Applicant refused to attend in the company of Inspector Okal.

24. On 18 February 2013, the Applicant filed a complaint of prohibited conduct pursuant to ST/SGB/2008/5 with the DG against the Assistant Chief of Security, Inspector Okal and another Security Officer. The complaint was copied to the President of the Staff Union and the Chief of Security, DSS UNON. It specified the date and places of the alleged incidents and named witnesses to the incidents. It concerned the alleged treatment he had received from his superiors over the disputes with the complainants. He stated that:

...these prevailing circumstances make me feel unsafe although I am supposed to be the one guarding the staff members and the property of the United Nations... I request that I be given a fair hearing and be treated fairly devoid of the harassment and bullying I have received in the recent days.....I also request that this matter be resolved so as to avoid a recurrence.....

25. The DG gave evidence to the Tribunal. She described h

Host Country Agreement. She also explained that DSS UNON has a dual reporting line. As DG, she is in charge of DSS Kenya but DSS also reports to DSS New York.

26. The DG received the Applicant's complaint on 20 February 2013. She reviewed it and sought advice on how to proceed. During the next few months she was away two or three times on mission and her legal advisor was on leave for a month. She said that it was apparent from the body of the complaint that there was a personal dispute between the Applicant and his creditors and she was concerned whether the complaint necessarily merited the establishment of a fact-finding panel.

27. The DG said she also faced the practical problem that there are very few staff members who have been trained by the Office of Internal Oversight Services (OIOS) to sit on panels under ST/SGB/2008/5, and it is difficult to find willing and able staff with this training who are not unduly burdened by their official duties. Therefore, such panels should not be embarked on without very good cause. She also had concerns about the suitability of a "civilian panel" investigating Security Officers (SO) which she thought might be intimidating as the SOs are in charge of the staff members' security both in and out of work.

28. At the same time, without advising the DG, the Chief of Security UNON told Inspector Mkunde that the Applicant's complaint should be investigated by SIU to establish the facts before the DG came to him to find out what had happened.

29. Inspector Mkunde gave the complaint letter to Sergeant Ndunda of SIU and instructed him to carry out an internal investigation into the alleged harassment of the Applicant by Inspector Okal.

30. On 13 March 2013, the Applicant notified the DG by email that he was still awaiting a response or acknowledgment of his complaint. He advised her that he had been informed that the matter was unofficially being investigated by Sergeant Ndunda of SIU and pointed out that Sergeant Ndunda had a conflict of interest as he was deputy to one of the persons who was adversely mentioned in the complaint.





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better position to establish the facts. She also said there was a possibility that the Applicant may have been involved in misconduct due to his engaging in outside activities. She told the Tribunal that she considered it both efficient and pragmatic to refer both complaints to OIOS.

41. The DG advised the Applicant of the referral of his 18 February complaint to OIOS for possible investigation. She told him that if he felt he was the subject of retaliation, he should make a report to the Ethics Office. She did not tell him that there were allegations of misconduct made against him.

42. The DG told the Tribunal that she learned of the SIU enquiry into the protected activity complaint after she submitted the Applicant's complaint to OIOS. She saw the report when the Chief of Security brought it to her. She did not know that the Applicant had not been interviewed during that investigation.

43. On 6 May 2013, the Chief of ID/OIOS advised the DG that the case would be presented to the OIOS Investigators' intake committee for consideration and that the related matter of the cab service would be referred to the USG/DSS for action. This was done the same day.

44. On 17 June 2013, without reference to the DG, the Director ID/OIOS referred the Applicant's 18 February complaint of harassment to the USG/DSS.

45. On 8 July 2013, the Acting Head of DSS in New York reported to the Director ID/OIOS on the investigation into the Applicant's complaint and on the allegations of misconduct. He said there was a *prima facie* case that the Applicant had issued bad cheques, a criminal offence. It was yet to be confirmed if the Kenya Police were actively seeking the Applicant. The letter said: "DSS/DHSS/SSS Nairobi has to confirm with Kenya Police that DPU are actively seeking SO Biryra on suspicion of having committed a criminal offence, namely issuing bad cheques". If that was the case DSS New York recommended placing the Applicant on leave until the police investigation was completed and formally referring the matter to the appropriate Kenyan authorities for investigation.

46. On 6 August 2013, the DG wrote to the Acting Head of DSS New York to enquire if he had or was intending to take any action in respect of the allegation of misconduct and the complaint of prohibited conduct presented by the Applicant.

47. The accounts to the Tribunal of what happened next differed markedly from witness to witness but the following facts can reliably be found from the oral and documentary evidence.

48. On 19 August 2013, the Acting Head of DSS New York replied to the DG's 6 August letter. He said the SIU investigator had concluded that the Applicant's complaint of prohibited conduct was unfounded. However, it and the misconduct case had been referred back to DSS UNON for further investigation. DSS UNON had been asked to take statements from officers

51. Sergeant Ndunda reported

Effort to summon the subject who is a suspect and work[s] in your organization bear no fruits in the past. Kindly instruct him to appear before the OCS Gigiri for further action.

55. Sergeant Ndunda brought the police letter to Inspector Mkunde. The Chief of Security showed the letter to the DG.

56. The Applicant told the Tribunal that on 21 August the Constable phoned him and told him that some United Nations “bosses” went to the Gigiri police station in relation to a report from New York about the Applicant and that to “save the situation” some charges should be preferred against the Applicant by the Kenya Police. The charges would relate to stealing motor vehicles spare parts and issuing bad cheques. In his evidence the Constable denied that he phoned the Applicant and said he had stopped communicating with him since June.

57. However he found out about the matter, the Applicant arrived at the Gigiri police station an hour or so after Sergeant Ndunda took the letter to UNON. He went to the OCS’ office. The OCS called the Constable and said “take your man”. He was charged and finger printed. The Constable told the Tribunal that the Applicant “was a prisoner”. When the Applicant pleaded to be released the OCS set a KES20,000 bond. The Applicant had no money to meet the bond and unsuccessfully tried to get someone to assist him.

58. Eventually the OCPD instructed the Constable to release him on a free bond to appear in the Magistrate’s court in one week. The bond gave his appearance date as 27 August 2013.

59. Sergeant Ndunda was informed that the Applicant was at the police station. He was told that the police had wanted to detain the Applicant to take him to court but he was released on a free bond for a week. Sergeant Ndunda told the Tribunal that on 21 August he saw a bond requiring the appearance of the Applicant in the Magistrate’s Court

60. On 22 August 2013, the Applicant emailed the DG enclosing a letter (misdated 22 September) for her urgent attention. He told her the police had been asked to address a letter to the Chief Security Officer at UNON to demand that he be handed over for questioning and subsequent arrest and he had been told that to be safe he should make a statement dropping all allegations about the two staff members he originally named in February. He said he was also told that the United Nations headquarters had ordered the Kenya Police to conduct an investigation into his conduct. He asked for protection.

61. A week after visiting the Police Station, Inspector Mkunde called the OCPD to find out what had happened. He was told that the Applicant had failed to appear in court and a warrant of arrest had been issued. Inspector Mkunde told the Tribunal that he had nothing further to do with the matter.

62. The evidence about the date on which the Applicant was to appear in court was confused to say the least. The Applicant produced a top copy of a stamped bail bond dated 21 August 2013 with the original date of appearance of 27 August 2013 over-written to read 6 September 2013. The Respondent produced two other bonds both dated 21 August. One had an appearance date of 27 August, the other of 30 August.

63. As best as can be adduced from the evidence, on 21 August the Applicant was bailed to appear in the Magistrate's court on 27 August 2013. On 26 August he went to the Gigiri police station to speak to the OCPD to protest the charges and to request an extension of that date. The OCPD called in the Constable and instructed ~~him to~~ change the appearance date on the bail bond from 27 August to 6 Sept to give the OCPD more time to go through his file. The OCPD's secretary confirmed this in evidence.

64. In contrast, the Constable said that on 26 August the OCPD agreed to extend the appearance date to 30 August 2013





him. In that letter he said that he had to appear in the Magistrate Court in Kiambu on 6 September 2013.

71. On 4 September,

75. The Tribunal heard evidence about this incident from the Applicant, another Security Officer who was in the van and Constable Githendu.

76. It is not for the Tribunal to make conclusive findings on the conflicts of evidence given about this incident as it is the subject of another investigation but it appears that it arose while the Constable was trying to execute the warrant issued on 30 August by arresting the Applicant.

77. On 9 September 2013, the Applicant made a formal request to the Ethics Office for protection against retaliation. The DG talked to the Chief of Security about these allegations. She placed it in his hands to refer the matter to the Chief, Security Information Operations Center (SIOC), for an investigation into the allegation of threats. As at the date of the hearing, she had not received a report on this matter and the Applicant has not been interviewed about it. There was no evidence as to whether the Ethics Office had commenced an investigation.

78. The DG advised the Applicant on 9 September that she had also decided to initiate a fact finding panel under ST/SGB/2008/5 as originally requested by him in his letter of 18 February. In that letter the DG also stated:

I understand that a warrant has been issued for your arrest following your failure to appear at Kiambu Magistrate's court, to which you had been summoned to appear on 30 August 2013.

79. She reminded him of his duty as a United Nations staff member to comply with local laws and orders of competent courts. She stated that in accordance with art. 21 of the General Convention, the United Nations has the obligation to cooperate at all times with the appropriate authorT/Shat a warr-7(-30(a)7(a)3(9))-22(981 0 0 1 324 245.52 Tm [(.)-10

official functions. Therefore the immunity provided for in Section 18(a) does not apply in this case.

81. Letters were sent to the three persons named in the Applicant's 18 February complaint advising them that a panel had been set up and requiring them to cooperate fully with the investigation.

82. On 19 November 2013, the Applicant was called before the investigation panel for an interview. As at the date of the hearing, the panel has not reported and no disciplinary proceedings have been instituted against him.

83. The DG told the Tribunal she had known of the involvement of the Kenya Police for some time because earlier she had seen the allegations and police efforts not being fruitful in that regard. She wanted to avoid an arrest. She also said that she was disappointed at the way OIOS had handled the matter by not conducting an investigation itself but sending it to DSS.

#### **Submissions of Respondent**

84. The Respondent submitted that between 20 February and 3 May the DG promptly reviewed the Applicant's complaint as required by section 5.14 of ST/GB/2008/5. In the context of the DG's heavy schedule and in the absence of her Legal Advisor, her reaction was prompt.

85. The result of the review was her decision that there was no case for a fact-finding investigation by a civilian panel but that the matter should be referred to OIOS. Although that action was not done under the ST/SGB, she did take steps as required.

86. This was not a clear case for an investigation panel as the complaint revealed elements of possible misconduct by the Applicant.

87. The Applicant did not allege that his rights had been infringed when the DG referred his complaint to OIOS. Even if there were a breach of the procedure under the ST/SGB there were no adverse consequences for the Applicant.

88. Once referred to OIOS, the matter was taken out of the DG's hands. The delay that followed was by OIOS and the DSS investigations. The DG followed up in August to ascertain progress by OIOS and found that DSS was investigating. Any delays were not her fault.

89. Throughout she liaised with the Chief of Security and acted on all memos received.

90. On 4 September, the DG set up an investigation panel. The delay advantaged the Applicant as all his complaints since then could be dealt with.

91. In relation to the responsibilities of the United Nations in case of arrest or detention of a staff member the Respondent accepted the statements of law in paras. 74 to 81 of *Kamunyi* UNDT/NBI/2012/214 and also referred to Article V, section 18 of the General Convention and the Host Country Agreement section 9(a) which confers extraterritoriality on the United Nations and 9(b) which prevents United Nations premises from being used as a refuge by persons avoiding arrest under Kenyan law.

92. The Respondent does not accept that the expert evidence given by the then Senior Legal Advisor of UNON and described in para. 83 of the *Kamunyi* judgment reflected the correct procedures concerning the waiver of immunity. He relies on the advice of the current ASG OLA as conveyed to the DG.

93. The Respondent submitted that the findings in *Kamunyi* para. 83 can be distinguished because the host country did not request a waiver of immunity. He

95. It is the case for the Respondent that the charging of the Applicant may have been triggered by the visit of Inspector Mkunde to the Police station but denies there was any pressure applied by the United Nations as he was only requesting a written request. The Respondent submitted that there is no evidence of a conspiracy between the DG and the Police to have the Applicant drop his prohibited conduct allegations or of malice towards the Applicant by the DG.

96. The Applicant failed in his obligations to report to the Magistrate's Court and is using these proceedings to mask the misconduct allegations against him.

97. The procedures followed in this case were fully in accordance with the law of the Organization. The DG acted on correct legal advice.

#### **The Applicant's submissions**

98. The Applicant submitted that on receiving his complaint of Prohibited Conduct the only option for the DG was to set up an investigation panel. The reason for setting it up on 4 September 2013 existed in February 2013. The seven-month delay does not amount to prompt and concrete action as required by ST/SGB/2008/5.

99. The fact-finding panel can only investigate the complaint as laid on 18 February. There is no advantage to the Applicant in the delay. The delay opened up the possibility of other investigations and police involvement all of which could have been avoided if the investigation had taken place promptly.

100. The DG's referral to OIOS was not in accordance with ST/SGB/2008/5. The investigations by SIU and DSS do not add up to concrete action.

101. The Administration conducted an investigation into his misconduct without his knowledge or involvement in breach of ST/AI/371 (Revised disciplinary measures), staff rule 10.3 and ST/SGB/2009/7 (Staff Rules).

102. The Applicant submitted that the relationship between the United Nations and the host country is covered by the General Convention. UNON staff violated this

Convention by inviting the Kenya Police into the compound to interrogate a staff member. The Applicant further submitted that based on his previous experience as a police officer in the Kenya Diplomatic Police Unit, all United Nations matters are dealt with by the OCS Diplomatic Police and the Kenyan Ministry of Foreign Affairs. The proper procedure is that the requesting police station should have written to the Ministry of Foreign Affairs. The UNON desk at the Ministry of Foreign Affairs would then have advised further.

103. The United Nations was in conspiracy with the Kenya Police. DSS officers went to the police station in relation to the prohibited conduct complaint and immediately after that he was charged.

104. The Applicant requests the Tribunal to make sure that the United Nations upholds its own rules and procedures.

## **Considerations**

### **Issue 1. Delay of Investigation into Applicant's Complaint of Prohibited Conduct**

105. ST/SGB/2008/5 provides processes for staff members to make complaints of prohibited conduct and for the administration to deal with those complaints.

106. Section 5.3 imposes a duty on managers and supervisors to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to do so may be considered a breach of duty.

107. The action required of the managers who receive such reports is set out in section 5.14:

Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission

concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

108. The procedures of the fact-finding panel are contained in sections 5.15 to 5.16. Section 5.17 requires the investigation panel to submit its report to the responsible official

should be established promptly. Any delay at this point reduces the time for the panel to investigate and report its findings of fact.

114. In this case, the DG eventually concluded that the fact-finding panel should be appointed and on that basis she must have been satisfied that the complaint was made in good faith and warranted a fact-finding panel.

115. However as she did not request an investigation of the Applicant's complaint of prohibited conduct until seven months after its receipt, it was impossible for the investigation to be completed within the normal three-month time frame required by ST/SGB/2008/5.

116. The Tribunal accepts that the DG faced practical difficulties first in finding time and advice to adequately review the complaint and second in finding suitable persons to conduct the fact-finding investigation. In addition the complaints of the Applicant's debtors created confusion about the way they should be handled and this contributed to the time it took for a decision to be made but none of these reasons justify the seven-month delay in appointing a fact-finding panel.

117. While the prohibited conduct complaint and the alleged misconduct of the Applicant were closely linked, they were two separate and discrete matters.

118. The prohibited conduct complaint made detailed allegations against named DSS UNON staff members. It alleged that they harassed and bullied the Applicant. That is a matter properly dealt with under ST/SGB/2008/5 and, where appropriate, an investigation by an investigation panel to establish the facts.

119. The misconduct allegations related to the behaviour of the Applicant in his dealings with complainants from outside the United Nations.

120. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, ST/AI/371 provides a process including the investigation by the responsible officer. Contrary to



the Applicant's submission, there is no lawful requirement for the person being investigated to be informed under ST/AI/371<sup>3</sup>.

121. The Respondent correctly conceded that ST/SGB/2008/5 does not provide for a responsible official to refer a staff complaint to OIOS. A preliminary investigation under ST/AI/371 is not normally referred to OIOS.

122. The Tribunal holds that the DG erroneously referred both the Applicant's complaint and the misconduct allegations to OIOS. This caused further delays. To date neither matter has been resolved.

123. It is of considerable concern that without the knowledge of the DG UNON initially took it upon itself to unilaterally investigate the complaint of harassment and bullying alleged against its own officers. OIOS later referred the harassment complaint back to DSS UNON. This breaches the requirement that a complaint of protected activity should be investigated fairly and impartially.

matter had turned out.

### **Conclusions on Delay**

125. The normal time frame of three months from receipt of a complaint to the report of the investigating panel set by ST/SGB/2008/5 provides a benchmark against which to judge whether the responsible official acted promptly as required by both section 5.3 and 5.14. In this case it took seven months to appoint the investigating panel. As at the date of this judgment over one year after the complaint was laid the panel has

126. Further, had an impartial investigation panel reported on the complaint within the time allotted by the ST/SGB, the events which followed may not have arisen. The Tribunal does not accept the Respondent's argument that the Applicant has an advantage from the delay in that all his issues can be dealt with at o

129. On the facts in this case, the Tribunal holds that the DG failed in her legal obligation to review and promptly appoint an investigation panel. The Tribunal appreciates that the practical system for setting up an independent fact-finding panel does not fully support the legal requirements of ST/SGB/2008/5. At least in UNON, there is a shortage of suitable and available staff members to undertake what can be an onerous imposition on their professional time. However, in this case there is no evidence of any positive steps taken by the DG to try and resolve those problems within an acceptable time frame. The referral to OIOS was not an appropriate solution.

## **Issue 2. Regularity of United Nations' dealing with Kenya Police**

### *Factual Findings*

130. The Tribunal finds as a matter of fact that although the Kenya Police had evidence to charge the Applicant from early 2013, they took no independent steps to arrest or to charge the Applicant. Instead, Constable Githendu tried actively to resolve the issues between the complainants and the Applicant without resorting to criminal charges. Until August 2013, the Constable was still trying to contact the Applicant but was not pursuing the investigation with any vigor.

131. The requests for information by DSS New York in July and August prompted DSS UNON to approach the Kenya Police. Within a few hours of the visit by DSS, the Applicant had been charged and detained as a prisoner, albeit briefly, without any consideration of whether there should be a waiver of his immunity and if so on what conditions.

132. The circumstances surrounding the date of the Applicant's appearance in the Magistrate's Court are disturbingly uncertain given the three conflicting bail bonds produced to the Tribunal.

133. The bail bond

Tribunal, the OCPD's secretary corroborated the Applicant's explanation of how the date was changed; the Applicant made contemporaneous references to the appearance date being 6 September in his letters to the DG and the DPP; and he instructed his lawyers to appear at the court on 6 September. All of this makes it highly probable that he had been led to believe that he was to appear on that day. The police relied on a bond that set the appearance date as 30 August. The Tribunal finds this bond was suspect. It was said to have been issued on 26 August, but was dated 21 August.

134. Given the serious implications of a non-appearance by an accused person, the way these bonds were issued was, at best, highly negligent. At worst they are *prima facie* evidence of a plot to have a warrant issued for the arrest of the Applicant by ensuring he did not appear on the day set by the police.

135. The Tribunal finds that DSS UNON knew that the Applicant was in jeopardy of being charged and arrested by the Kenya Police when the DSS officers visited the Gigiri Police Station on 21 August.

136. Inspector Mkunde requested and received a document from the Police requiring the United Nations to instruct the Applicant to appear before the Gigiri



by the United Nations and a determination made by the Secretary-General or the Under-Secretary-General for Legal Affairs whether a waiver should be granted<sup>5</sup>. The Secretary-General did not appeal that part of the decision. However the circumstances were different from the present in that United Nations officers were found to have approached the Kenya police to ask them to request a waiver. The need for a waiver was not in issue in that case.

143. The question in this case is whether the host country should have sought a waiver before the Applicant was detained and charged.

144. In 2008, by resolution 62/247, the General Assembly requested the Secretary-General to submit a report on the practices relating to the sharing of information between the Organization and law enforcement authorities of Member States and referrals of possible criminal cases related to United Nations staff, United Nations officials and experts on mission. The Secretary-General responded in A/63/331 (Information-sharing practices between the United Nations and national law enforcement authorities, as well as referrals of possible criminal cases related to United Nations staff, United Nations officials and experts on mission).

145. Although the response in A/63/331 refers throughout to United Nations officials and experts on mission the heading indicates that these practices also apply, where appropriate, to staff members.

146. Part IV concerns practices in relation to information sharing with and referrals to national law enforcement officials. Section 11 states:

The two principal situations in which information is passed between the Organization and law enforcement authorities are: (a) when the Organization, through its own investigative processes, has uncovered prima facie evidence of potential criminal conduct within the jurisdiction of one of its Member States and decides to refer that evidence to the Member State for its appropriate action; and (b) when the Organization has been approached by a Member State for access to information or material and/or witnesses in the context of an external

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<sup>5</sup> Ibid, at paras. 83 and 84.

investigation by law enforcement authorities and/or criminal proceedings being conducted by the Member State.

147. Section 11 of the Secretary-General's report advised the General Assembly that where, after proper internal investigation using its own investigation processes, the Organisation establishes a credible allegation that a c

through their permanent missions to the United Nations, for the waiver of immunities of the individual concerned.

151. Section 22 of the advice quotes sections 20 and 23 of the General Convention and the Advisory Opinion of the International Court of Justice (ICJ)<sup>6</sup> that it is for the Secretary-General to determine if agents of the United Nations have acted within the scope of their functions.

152. Section 24 states:

Accordingly, if the Secretary-General determines that the official or expert on mission concerned acted outside the scope of his/her functions, unless the official in



determine if the official acted outside his or her function. Section 24 begins with the word “accordingly” which links the content of that section to those preceding it.

155. On this interpretation, having received a request for a waiver of immunity it is for the Secretary-General to make a decision whether the alleged acts were functional. If so, he is required to make a second decision as to whether in the circumstances a waiver ought to be granted. If the Secretary-General decides that the acts are not functional then there is no requirement for the Secretary-General to make a decision whether to waive the immunity as no immunity attaches to such acts.

156. The Tribunal holds that the second interpretation is consistent with the reading of the whole of Part V. A request for a waiver of immunity is the sole mechanism by which the host country law enforcement authorities may properly bring the alleged criminality of a United Nations staff member to the attention of the Secretary-General. At that stage the Secretary-General must address the question of functionality. The fact that the Secretary-General is to advise the law enforcement authorities in writing that no waiver is required assumes that a request has been made. This is in accord with the Secretary-General’s exclusive right and duty to waive immunity conferred by section 20 of the General Convention.

157. The Tribunal finds that the classification of alleged criminal behaviour by a United Nations staff member as functional or non-functional may only be decided by the Secretary-General in the context of a request for waiver of immunities from the law enforcement authorities. In the case of the Kenyan Host Country Agreement, this is through the Ministry of Foreign Affairs.

**b. When a staff member is arrested or detained**

158. The obligations of the United Nations are set out in ST/AI/299, which establishes formal reporting procedures by which the United Nations is enabled to safeguard staff members who have been arrested or detained.



162. The referral to the Kenya Police should have been by way of a written report to the permanent representative of the Kenya Mission to the United Nations.

163. None of these steps were taken. The internal investigation was not complete as at 19 August. It had been referred back to DSS to report again on a further investigation. DSS UNON did not advise the Director-General, as the designated official for security matters, or OLA of their intention to refer the allegations to the Police. DSS UNON did not approach the Kenya Police in writing through the permanent representative.

164. If, on the other hand, the actions of the DSS UNON officers on 21 August were in response to a request by the host country for information about possible criminal behaviour by the Applicant, such a response could only be made upon the receipt of a written request by the host country for waiver of immunity. A waiver was not requested.

165. In fact the Tribunal finds that on 21 August the DSS officers neither referred the behaviour of the Applicant to the Kenya Police for investigation nor were they responding to a request from the Kenya Police. Instead they unlawfully but successfully persuaded the Kenya Police to detain and charge the Applicant.

166. Once the Applicant had been detained by the police, ST/AI/299 required the designated official for security matters urgently to gather information from the Foreign Ministry of the Kenyan Government to transmit to Headquarters. Although the DG was shown the letter from the Police she did not request any information from the Foreign Ministry.

167. The Applicant advised both the DG and ASG/OHRM in New York of his detention shortly after it occurred. Neither took appropriate steps at that stage as required by ST/AI/299.

168. The Tribunal holds that the following actions were unlawful:

a. The UNON DSS officers approached the Kenya Police on the basis of an uncompleted internal investigation into the Applicant's behaviour and persuaded them to charge the Applicant with criminal offences. This went well beyond the written instructions to DSS UNON from DSS New York, which were to find out if the police were actively pursuing the Applicant. It was in breach of the Secretary-General's obligations under the Charter and the Secretary-General's procedures set out in A/63/331 including the requirements for a waiver of the Applicant's functional immunity.

b. There was no written request to the permanent mission of the host state for information about the allegations and the United Nations Headquarters was not advised of the circumstances until the warrant of arrest was issued some days later.

c. When the DG and the ASG/OHRM were informed by the Applicant after his detention about his concerns about the way DSS UNON was acting in relation to him and later when she was advised about the detention of the Applicant neither sought the relevant information about the detention from the Foreign Ministry to convey that to the United Nations Headquarters.

## **Conclusions**

169. The Director-General failed in her legal obligation to review and promptly appoint an investigation panel into the Applicant's complaint of bullying and harassment dated 18 February 2013. The delay was unlawful and resulted in serious consequences for the Applicant.

170. The instigation by DSS UNON of the detention and charging of the Applicant by the Kenya Police without a waiver of immunity by the Secretary-General was unlawful.

171. DSS UNON acted covertly without the knowledge of the Director-General or the United Nations Headquarters in its dealings with the Kenya Police on 21 August. This prevented the United Nations from meeting its lawful obligations to the Applicant and to the Organization before the Kenya Police detained the Applicant.

172. The Director-General and ASG/OHRM acted in breach of ST/AI/299 by failing to obtain all relevant facts about the detention of the Applicant from the Kenyan Foreign ministry.

### **Compensation**

173. In his Application the Applicant requested compensation for ‘emotional anxiety and moral distress’. At the hearing he advised the Tribunal that his principal concern was that the United Nations as an organization upholds its own rules and procedures.

174. There are a number of outstanding matters concerning the Applicant to be decided by a number of different bodies. Within the United Nations system the independent fact-finding panel is yet to report; the initial phase of the investigation into alleged misconduct by the Applicant may or may not result in charges of misconduct against the Applicant; there is an outstanding request to the Ethics Office for protection against retaliation. Outside the United Nations, the Applicant has made at least two formal complaints to the Kenyan authorities that have not yet been resolved.

175. The compensation that may properly be awarded in this case is limited to the effects on the Applicant of the delay in setting up the fact-finding panel and the unlawful procedures adopted by the DSS UNON officers in instigating the detention and charging of the Applicant on 21 August.

176.

or other steps in the light of the findings in this judgment and in the interests of the maintenance of the Rule of Law in the United Nations”.

181. The Tribunal has not been advised of any steps that were taken by the Secretary-General following that judgment. It is concerned that in the present case DSS UNON has again acted with impunity and disregarded the United Nation’s obligations under the General Convention as well as with the relevant resolutions of the General Assembly and the Secretary-General’s G(s)[(o)-20(r)-7( )-50(ot)-220(a)3(s)82(m)17-It case