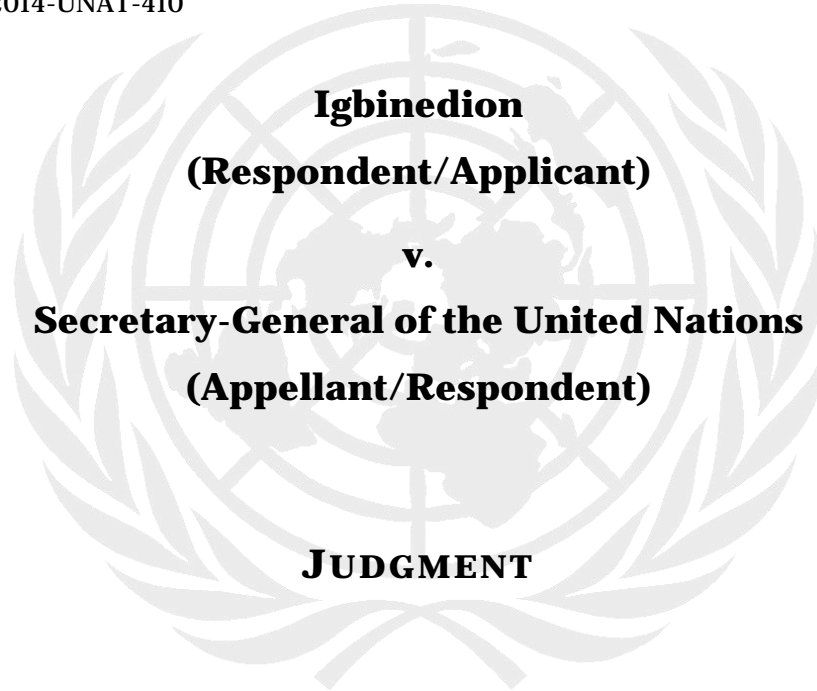




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-410



**Igbinedion  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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**Before:** Judge Mary Faherty, Presiding  
Judge Inés Weinberg de Roca  
Judge Sophia Adinyira  
Judge Luis María Simón  
Judge Richard Lussick  
Judge Rosalyn Chapman

**Case No.:** 2013-460

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Samson Nyaberi

**Counsel for Appellant/Respondent:** Rupa Mitra/John Stompor

**JUDGE MARY FAHERTY, PRESIDING OVER THE APPEALS TRIBUNAL SITTING AS A FULL BENCH.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against a “Judgment on Contempt”, Judgment No. UNDT/2013/024, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 18 February 2013, in the case of *Igbinedion v. Secretary-General of the United Nations*.

**Facts and Procedure**

2. Mr. Joseph Igbinedion, a staff member of the United Nations Human Settlements Programme (UN-Habitat) who had been advised that his appointment would not be extended beyond 18 April 2011, requested management evaluation of this decision on 9 April 2011.

3. Thereafter, on 11 April 2011, he filed a motion for suspension of action with the Dispute Tribunal in Nairobi. On 15 April 2011, the UNDT issued Order No. 30 (NBI/2011), suspending the impugned decision until 13 May 2011. In accordance with the Order, the Secretary-General extended Mr. Igbinedion’s appointment until 13 May 2011, and simultaneously appealed the Order.

4. On 9 May 2011, the Dispute Tribunal held a hearing on Mr. Igbinedion’s motion for suspension of action. The next day, the Management Evaluation Unit (MEU) rejected his request for management evaluation as time-barred. On 11 May 2011, the UNDT was informed of the MEU outcome, and the Secretary-General filed a motion moving the Dispute Tribunal to vacate Order No. 30.

5. On 12 May 2011, the Dispute Tribunal issued Order No. 33 (NBI/2011), concluding that Mr. Igbinedion had “established a *prima facie* case for suspension of action” and ordered that the “suspension will remain in force until the case is finally determined on its merits”. The Secretary-General promptly filed an appeal against Order No. 33.

6. On 16 May 2011, UN-Habitat informed Mr. Igbinedion that his appointment had not been renewed beyond 13 May 2011, and that the MEU decision had superseded Order No. 33. Mr. Igbinedion then filed an “Application to commit the management of UN-Habitat for contempt of the Tribunal” for its failure to execute Order No. 33.

7. On 24 June 2011, the Dispute Tribunal issued Order No. 110 (NBI/2011), in which it reiterated Order No. 33 that the decision not to renew Mr. Igbinedion's appointment "is suspended until the matter is heard and determined on the merits".

8. In Judgment No. 2011-UNAT-159, which was rendered on 8 July 2011 and published on 29 August 2011, the Appeals Tribunal vacated UNDT Orders No. 30 and No. 33. In respect of Order No. 30, the Appeals Tribunal concluded that the UNDT had exceeded its jurisdiction and committed an error of law, as it had extended the suspension of action until 13 May 2011, beyond the date of completion of management evaluation. Regarding Order No. 33, the Appeals Tribunal concluded that the UNDT had exceeded its jurisdiction by extending the suspension of action until the final determination of the case on its merits, in contravention of Article 10(2) of the UNDT Statute, which excludes such a possibility in cases of appointment, promotion or termination.

9. From September to November 2011, and then again in October 2012, the Dispute Tribunal held hearings on Mr. Igbinedion's application for a finding of contempt of court.

10. In its Judgment No. UNDT/2013/024, the Dispute Tribunal held that there was an obligation to execute UNDT Order No. 33, which had not been met. It held, at paragraph 75: "Not all decisions handed down by a court of law are palatable to all parties concerned, but this is no reason to ignore or disobey them. It is open to the aggrieved party to use the appellate process to challenge the decision he or she is unhappy with. The solution is not ... disobedience of a judicial order."

11. The UNDT concluded that, *inter alia*, the Executive Director of UN-Habitat, the Director of the Programme Support Division of UN-Habitat and the Office of Legal Affairs were in contempt of its authority. It decided to refer the Executive Director, the Legal Officer serving as the Secretary-General's representative before the UNDT and the Office of Legal Affairs to the Secretary-General for possible action to enforce accountability. It also recommended that the Legal Officer "be subsequently reported to the Bar association of his national jurisdiction ... for engaging in conduct not befitting an officer of the court".

12. On 22 April 2013, the Secretary-General appealed Judgment No. UNDT/2013/024. On 26 April 2013, he filed a motion for confidentiality, requesting that the Appeals Tribunal not use the names of the UN-Habitat staff members implicated in this matter and order the Dispute Tribunal to redact their names from Judgment No. UNDT/2013/024. On 24 June 2013, Mr. Igbinedion filed comments on the motion for confidentiality as well as an answer, which he perfected on 8 July 2013.

### **Submissions**

#### **The Secretary-General's Appeal**

13. The Secretary-General submits that the UNDT erred in concluding that there was an obligation to execute UNDT Order No. 33. He maintains that the Order was clearly unlawful as the Dispute Tribunal had no authority to suspend a contested decision beyond the deadline for the completion of management evaluation.

14. The Secretary-General also submits that there is no obligation to execute an UNDT order until the period of appeal expires, if no appeal is filed. If an appeal is timely filed, this would further suspend the party's obligation to execute the order. The Secretary-General argues that such interpretation is consistent with the right to appeal in the Statute of the Appeals Tribunal, as interpreted by this Tribunal in *Onana v. Secretary-General of the United Nations*,<sup>1</sup> the existing Appeals Tribunal jurisprudence, and the General Assembly's legislative intent and its subsequent resolutions 66/237 (2011) and 67/241 (2012). In this connection, the Secretary-General requests that the Appeals Tribunal reconsider its guidance in *Villamorán v. Secretary-General of the United Nations*<sup>2</sup> and *Benchebbak v. Secretary-General of the United Nations*.<sup>3</sup>

15. With respect to the issue of contempt, the Secretary-General maintains that the Dispute Tribunal erred in considering that it had the authority to hold officials in contempt. He stresses that the UNDT cited an opinion of the International Court of Justice and a decision of the International Criminal Tribunal for the former Yugoslavia out of context, and relied upon the Appeals Tribunal's *obiter dictum* reference to the notion of contempt

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<sup>1</sup> Judgment No. 2010-UNAT-008.

<sup>2</sup> Judgment No. 2011-UNAT-160.

<sup>3</sup> Judgment No. 2012-UNAT-256.

procedures in *Igunda v. Secretary-General of the United Nations*.<sup>4</sup> The Secretary-General submits that the power to find contempt is not an inherent power of the Dispute Tribunal, and the General Assembly did not authorize the Dispute Tribunal to exercise such powers.

16. The Secretary-General maintains that, in any event, the Organization's reliance on the Appeals Tribunal's clear and consistent jurisprudence cannot constitute grounds for finding contempt. In this connection, he draws attention to the fact that the UNDT Judge who issued the Judgment under appeal also issued the Judgments in *Tadonki v. Secretary-General of the United Nations*<sup>5</sup> and *Kasmani v. Secretary-General of the United Nations*<sup>6</sup> that were overturned by the Appeals Tribunal, but he has continued to suspend decisions beyond the management evaluation deadlines in six other cases, despite the two-tier nature of the system of internal justice established by the General Assembly.

17. Regarding the issue of referral for accountability, the Secretary-General submits that the UNDT committed both substantive and procedural flaws when it failed to specify the conduct for which it referred the UN-Habitat Executive Director and the Legal Officer for accountability, thus failing to meet the high standard of personal wrongful action that the referral power was intended to address, and when it violated the due process rights of the Executive Director, the Legal Officer and the Office of Legal Affairs by finding and imposing sanctions for contempt, *i.e.*, ordering their referral to the Secretary-General for accountability. The Secretary-General further submits that the UNDT exceeded its authority in recommending the reporting of a staff member to his national jurisdiction's bar association for engaging in conduct not befitting an officer of the court.

### **Mr. Igbinedion's Answer**

18. Mr. Igbinedion submits that the Secretary-General has failed to identify any mistake in fact or in law made by the UNDT. He submits that the power to adjudicate and find contempt is an inherent power that a judge may exercise, and the Dispute Tribunal has such jurisdiction under Article 36 of its Rules of Procedure.

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<sup>4</sup> Judgment No. 2012-UNAT-255.

<sup>5</sup> Judgment No. 2010-UNAT-005.

<sup>6</sup> Judgment No. 2010-UNAT-011.

19. Mr. Igbinedion also submits that the Dispute Tribunal did not err in finding contempt in the present case. The contempt finding was arrived at after due process and extensive hearings. It is a solid conclusion that should not be altered, varied or annulled.

### **Considerations**

20. The Appeals Tribunal is presented in this case with a number of significant questions of law, pertaining, *inter alia*, to the binding nature of its jurisprudence and to the judicial powers of the United Nations Dispute Tribunal and, by extension, the Appeals Tribunal itself. As such, it determined that the appeal warranted consideration by the Appeals Tribunal as a whole, pursuant to Article 10(2) of its Statute.

#### *United Nations Appeals Tribunal jurisprudence*

21. The instant case stems from a decision by the UNDT to contravene the clear and consistent jurisprudence of the Appeals Tribunal that, pursuant to the former's Statute, the Dispute Tribunal can not order the suspension of action of an impugned decision beyond the pendency of management evaluation.

22. The Secretary-General is correct in arguing that, when the UNDT issued Order No. 33, it directly contradicted the Appeals Tribunal's decisions in the above-cited *Tadonki*, *Onana* and *Kasmani*. Indeed, in Judgment No. 2011-UNAT-159, in which this Tribunal vacated Order No. 33, the Appeals Tribunal registered its surprise at the Order, given its decisions in those cases.

23. Article 1 of the Statute of the Dispute Tribunal states: "A tribunal is established by the present statute as the first instance of the two-tier formal system of administration of justice, to be known as the United Nations Dispute Tribunal." Article 1 of the Statute of the Appeals Tribunal provides, in similar terms: "A tribunal is established by the present statute as the second instance of the two-tier formal system of administration of justice, to be known as the United Nations Appeals Tribunal."

24. There can be no doubt that the legislative intent in establishing a two-tier system was that the jurisprudence of the Appeals Tribunal would set precedent, to be followed in like cases by the Dispute Tribunal. The principle of *stare decisis* applies, creating foreseeable and predictable results within the system of internal justice. The Appeals Tribunal has the power

of judicial review of the Dispute Tribunal's decision making, and the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal's jurisprudence.

25. Accordingly, the Appeals Tribunal finds that the Dispute Tribunal acted unlawfully in issuing an Order in direct contravention with the Appeals Tribunal's jurisprudence.

*Obligation to respect a UNDT Order until overturned by the Appeals Tribunal*

26. Whilst the Appeals Tribunal has ruled that the Dispute Tribunal acted unlawfully in this matter, nothing in the foregoing should be construed as limiting the validity of a UNDT order, pending a decision of the Appeals Tribunal to vacate it.

27. The Appeals Tribunal cannot accept the argument proffered by the Secretary-General that he had no obligation to execute UNDT Order No. 33 on the basis of its unlawfulness, or that his appeal stayed the Order. On the contrary, regardless of the legal analysis of the Secretary-General – or, indeed, his prediction as to the likelihood the Appeals Tribunal would overturn the Order – he was obligated to comply with Order No. 33 until such time as it was vacated by the Appeals Tribunal.

28. The Appeals Tribunal notes that, notwithstanding the Secretary-General's appeal of UNDT Order No. 30, which suspended the non-renewal of Mr. Igbinedion's appointment until 13 May 2011, he complied with that Order and kept Mr. Igbinedion in service even after the MEU decision to reject Mr. Igbinedion's request. When the Dispute Tribunal issued Order No. 33 on 12 May 2011, ordering that the "suspension [of action must] remain in force until the case is finally determined on its merits", the Secretary-General should, once again, have complied. His opinion of the legal foundation of the Order was irrelevant except insofar as it motivated his appeal to this Tribunal. From a practical perspective, maintaining Mr. Igbinedion in the employ of the Organization for the short period of time pending the appeal, which was disposed of on 8 July 2011, would have avoided a great deal of litigation.

29. It is unacceptable that a party before the Dispute Tribunal would refuse to obey its binding decision in this manner, regardless of the fact that, in the instant case, the Order was ultimately vacated by the Appeals Tribunal. To rule otherwise would undermine legal certainty and the internal justice system at its core, and would incite dissatisfied parties to consider UNDT Orders as mere guidance or suggestions, with which compliance is voluntary.

30. The Appeals Tribunal must register its surprise at having to rule on this issue. It is vexatious of the Secretary-General to continue to pursue the matter, given that the Appeals Tribunal's jurisprudence in *Igunda* and *Villamoran* is clear and decisive:

Finally, this Tribunal reiterates its jurisprudence in *Villamoran* as follows:

Article 8(6) of the Rules of Procedure of the Appeals Tribunal provides that '[t]he filing of an appeal shall suspend the execution of the judgment contested'. This provision however does not apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

... This Court emphasizes that a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.<sup>7</sup>

*Authority to conduct contempt proceedings*

31. The Secretary-General contends that the power of the Dispute Tribunal is limited by its Statute and, as such, cannot be interpreted as extending to the power to conduct contempt proceedings. The Appeals Tribunal cannot agree. The ability to promote and protect the court, and to regulate proceedings before it, is an inherent judicial power. In the opinion of this Tribunal, it is essential to, *inter alia*, a tribunal's case management and ability to conduct hearings.

32. A tribunal must be able to find natural persons appearing before it, whether as parties, counsel or witnesses, in contempt if their conduct is improper or they fail to comply with its strictures. Similarly, legal persons, including the Organization, must conduct themselves appropriately and must comply with orders and judgments of the court.

33. Contempt may be found to have harmed the other party in litigation, potentially leading to an award in favour of that party or the drawing of adverse inferences against the party in contempt, or it may be directed towards the court itself without necessarily harming the opposing party. Where a party behaves with disrespect during a hearing, for example, a

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<sup>7</sup> *Igunda*, paras. 31-32, citing *Villamoran*, para. 48.



tribunal may find contempt towards the court even in the absence of shown harm by a party before it.

34. There are, admittedly, certain limitations on the sanctions international administrative courts can impose. The issue of possible measures that can be imposed, howsoever limited, is quite distinct from the principle that the UNDT clearly enjoys the right to regulate conduct before it and the power to find disregard of its decisions as constituting contempt.

35. In any event, this issue is *res judicata*, having been settled in *Igunda*, as cited above. The Judgment in *Igunda* is clear, and the Appeals Tribunal, *en banc*, confirms it herewith.

*Referral for accountability*

36. The Secretary-General appeals the UNDT referral of individuals and the Office of Legal Affairs for accountability. He argues that the referrals were substantively and procedurally flawed and that they violated the due process rights of the natural and legal persons concerned.

37. The authority of the UNDT to refer cases for accountability derives from Article 10(8) of its Statute, which provides: “The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.” The Appeals Tribunal has similar powers under Article 9.5 of its Statute. Both Statutes make reference to the referral of cases, but this does not preclude the referral of individuals within the context of a case. This statutory power of referral for accountability, which is independent of inherent judicial powers relating to contempt and which is not predicated upon a finding of contempt, has been exercised, albeit sparingly, by both Tribunals.

38. A referral for accountability is made to the Secretary-General (or applicable executive head). In the event that the Secretary-General decides to take action against an official, on foot of such a referral, his action could constitute an appealable administrative decision by that official. Referrals for accountability made under Article 10.8 of the UNDT Statute may be appealed to the Appeals Tribunal by a party in the underlying case.

39. In the instant matter, the Appeals Tribunal finds that the UNDT exercised its statutory authority improperly in making Article 10.8 referrals under the guise of sanctions for contempt. In the parlance of Article 10.8, this was not an “appropriate case... .. for possible action to enforce accountability”.

40. Accordingly, the referrals for accountability as set out in the impugned Judgment are vacated.

### **Judgment**

41. The Appeals Tribunal upholds the appeal in part.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

*(Signed)*

Judge Lussick

*(Signed)*

Judge Chapman

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar