



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/119

Judgment No.: UNDT/2010/207

Date: 30 November 2010

Original: English

**Before:** Judge Ebrahim-Carstens  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

KLEIN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George Irving

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

**Notice:** This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. The Applicant led three United Nations missions during an approximately ten-year period. In February 1996 he was selected to serve as Transitional Administrator for Eastern Slavonia, Baranja and Western Sirmium with the rank of Under-Secretary-General (“USG”), a position which he held until 31 August 1997. He was appointed Special Representative of the Secretary-General (“SRSG”) and Coordinator of UN Operations in Bosnia and Herzegovina with the rank of USG in August 1999 and served until March 2003. On 14 July 2003 he was appointed to the position of the SRSG and Coordinator for United Nations Mission in Liberia (“UNMIL”) and served in this position until his separation from the UN in April 2005. In 2008 the *Washington Post* published an article which was based on information the Applicant alleges the Respondent improperly allowed the newspaper access to, which he says has defamed him and caused him loss.

2. The Applicant took the matter before the Joint Appeals Board (“JAB”) which recommended that he be issued a letter of apology by the Office of Internal Oversight Services (“OIOS”) for having allowed his name to be tarnished, as well as one year’s net base salary as compensation, plus interest, for the violation of his due process rights. The Respondent paid the compensation (which the Applicant accepted without prejudice to further pursue his rights) but rejected the recommendation that a letter of apology be issued and interest be awarded. The Applicant has now appealed to the UN Dispute Tribunal and seeks a public apology from the Respondent, the rescission of the impugned OIOS investigation report and three years’ net base salary as compensation, with interest and legal costs.

## **Facts**

3. On 14 July 2003 the Applicant was appointed on a fixed-term appointment as SRSG at the USG level, which expired on 30 September 2003. He received a series

of extensions of his appointment of varying durations, ultimately separating from service on 30 April 2005.

4. Some time in 2004 allegations arose in the Liberian press alleging the Applicant's involvement in a US company's mining activities in Liberia, at least some of which were also alleged to be connected with the regime of Charles Taylor, the former President of Liberia who is currently undergoing trial for war crimes and other crimes contrary to international humanitarian law.

5. On 18 May 2004 a Risk Assessment Report prepared by the UN Security and Safety Service found, amongst other things, that "[n]egative press articles in the local print media are on the rise. These articles are aimed at discrediting the work of UNMIL and the SRSG". It also stated that the Applicant had been known to be outspoken regarding the Liberian media, and that as a result these issues should be addressed by the public information office and UNMIL radio on behalf of the SRSG.

6. The Respondent contends that on 23 September and 5 October 2004 it was reported in the Liberian press and to OIOS directly that the Applicant was involved in mining activities connected with the Charles Taylor regime. OIOS opened a file in relation to this matter and recorded it as Case No. 0424/04 ("First Case").

7. On 19 January 2005 the Respondent extended the Applicant's contract by providing him a new fixed-term appointment of three months and seventeen days, to 30 April 2005, on which date he separated from the Organisation. The Applicant stated that he had no contact with the Respondent since this separation, other than being advised in June 2007 that he was cleared of the allegations in the First Case (discussed below).

8. It is submitted that on 15 April 2005 OIOS received a further complaint about the Applicant concerning his alleged "improper relationship" with "a Liberian woman who [allegedly] had links with Charles Taylor" and his alleged misuse of UN assets. It was alleged that he facilitated the provision of air transport to various women who did not work with the UN. Based on these allegations, OIOS commenced another

investigation, in Case No. 0176/05 (“Second Case”). The Applicant was interviewed by OIOS on 28 April 2005 and given an opportunity to respond to various allegations, although it is in dispute whether the allegations at this interview related to both the First Case and the Second Case, or only to the former.

9. On 7 July 2005 the report in the First Case (“First Report”) was issued by OIOS, clearing the Applicant of all allegations. The First Report was forwarded to the programme manager of the Department of Peacekeeping Operations (“DPKO”) for review with the recommendation that the Applicant be advised that he was cleared of the allegations. The Applicant, however, was not advised of his name being cleared until almost two years later, on 27 June 2007.

10. On 24 October 2005 OIOS issued its report in the Second Case (“Second Report”), entitled “Allegations of Inappropriate Conduct, Abuse of Authority and Abuse of Resources by a Senior Official, UNMIL”, which was also forwarded to DPKO for review. In the Second Report OIOS concluded that the Applicant had failed to uphold the standards required by staff regulations 1.2(b) and 1.2(e) and that he had misused United Nations property and used his office for the private gain of a third party. The Applicant having already been separated from service, OIOS recommended that DPKO: (1) take note of the Applicant’s failings for future reference, and (2) consider reviewing the use of air assets in all missions.

11. On the same date, 24 October 2005, OIOS also prepared a redacted summary of the Second Report (“Executive Summary”). The Executive Summary stated that:

1. ... [OIOS] received information that a former Senior Official of [UNMIL] was involved in a relationship with a Local Woman who holds dual American-Liberian citizenship. This Local Woman has close links with the former [Charles] Taylor regime in Liberia, both personally and through her family. Her family has large logging interests in Liberia and well-documented close connections with the Taylor regime. Additionally, the Nobel Peace Prize nominated NGO “Global Witness” has alleged that her uncle has been involved in arms smuggling in the region.

2. Senior Official has invited Local Woman to functions both with UNMIL staff and persons outside the UN, some of which have been of an official nature. A number of staff interviewed by OIOS expressed concern that the Local Woman was passing information which she had gathered from Senior Official and UNMIL to Mr. Taylor and other interested parties.

3. In addition, the Local Woman had traveled on UNMIL air assets on occasion, although she was not authorized to travel on UN air assets, being neither a UN staff member nor a person with an official reason to use them. Senior Official made the request that she be permitted use of the UN shuttle, and UNMIL's senior management authorized it.

4. The [OIOS] investigation found evidence that the Senior Official:

a. By maintaining a relationship with the Local Woman, failed to uphold the standards of conduct expected by the United Nations; and

b. By authorizing the use of United Nations aviation assets by the Local Woman, a person not authorized to use such assets, failed to carry out, with the best interests of the Organization in mind, his management responsibilities.

12. According to the Respondent, on 16 January 2007 the Office of the USG/OIOS provided the Executive Summary to Member States. The Applicant was provided with neither the Second Report nor the Executive Summary, indeed to all intents and purposes he was unaware of the existence of the Report.

13. On 27 June 2007 the Applicant received a letter from the Director, Department of Field Support ("DFS"), which apologised that the Applicant had not been advised of the outcome of the First Case, stating that:

[OIOS] has advised DPKO that there is no record of you being officially informed of its findings and recommendations with regard to the allegations that you were partner in the US company ... or that you had engaged in diamond mining contracts with the former Liberian President, Charles Taylor [the First Case]. In its Report dated 7 July 2005, OIOS found no credible evidence to corroborate these allegations, but in fact found reason to disbelieve them. OIOS recommended you be cleared of the allegations. This information should have been communicated to you at that time. I apologize sincerely if this is the first advice you have received on this matter.

14. On 17 February 2008 the *Washington Post* published an article about the release and posting on a US government website, of redacted versions of confidential UN audit reports (“the Article”). The newspaper identified the Applicant by his name as the subject of a redacted OIOS report (that is, the Executive Summary), stating that while the names of posted OIOS reports’ subjects were mostly redacted, they were easily decipherable.

15. On 25 February 2008 the Applicant wrote to the USG/OIOS about his concerns over the publication of the Article which quoted from a two-page document labeled “strictly confidential” and which the writer of the Article appeared to have been given access to. He stated that he had not been provided a copy of the document in question, but nonetheless made the USG/OIOS aware of his concerns in relation to factual inaccuracies in the Article, providing specific corrections. The Applicant asked the USG/OIOS to investigate what appeared to him to have been improper access having been granted to the documents which the Article appeared to have been based upon.

16. On 13 March 2008 the Applicant was informed by the USG/OIOS that “OIOS is obliged under General Assembly resolution A/RES/59/272 [(review of the implementation of General Assembly resolutions 48/218B and 54/244), adopted 23 December 2004)] to make all reports available, upon request, to any member state ... [and that] in doing so OIOS takes sufficient care to redact certain reports ... [and that] this redaction was undertaken in the case of the document referred to [by the Applicant]”. He was also informed that OIOS had no authority to consider an investigation against the *Washington Post*’s writer, as he was not a UN staff member.

17. On 14 April 2008 the Applicant wrote to the USG/OIOS protesting the alleged violations of his due process rights and demanding to know the evidence upon which the Second Report was based. On 6 May 2008 he submitted a request for administrative review of the decision conveyed in the USG’s letter, complaining, *inter alia*, that since he was not given a chance to respond to the allegations contained in the OIOS Report, the Second Report was not properly finalised in accordance with

OIOS procedures. He also alleged that the findings in the Report which were improperly reached effectively resulted in the non-renewal of his contract.

18. On 8 May 2008 the USG/OIOS replied that an OIOS report only has the purpose of establishing facts, and that the Second Report was “an administrative process ... not designed to address the criminal law principles that you raise in your letter”. The USG/OIOS contended that the Second Report included only two propositions that were evidenced by direct admission. The Applicant was advised to contact DPKO if he wanted clarification on the handling of the matter following OIOS’ preparation of the Report.

19. The Applicant contacted DPKO on 9 June 2008, alleging that due process had not been followed in the preparation of the Second Report, and querying why he was never informed of this nor provided a copy of the Report when it was finalised. He also queried why he was never informed of the Executive Summary, referred to in the Article as a “two-page report”. He says he never received a response to this letter.

20. Having sought administrative review and finding it unsatisfactory, on 21 July 2008 the Applicant filed an appeal before the JAB regarding “the decision not to request appropriate remedial action in light of the damage caused to his reputation through the release of a privileged and confidential investigative report, resulting in its wide public dissemination”. The JAB adopted its report in May 2009 recommending that the Applicant be paid one year’s net base salary as compensation, with interest, and that he be issued a letter of apology from OIOS. By letter dated 30 June 2009 the Secretary-General rejected the recommendations other than to award one year’s net base salary to the Applicant on the basis that:

[The Applicant’s] due process rights were violated because [he was] not made aware of the scope of the possible misconduct contained in [the Second Report], and [he was] not given the opportunity to provide further evidence or responses to the allegation(s) contained in this report prior to its finalization.

21. The Applicant filed his appeal before the Dispute Tribunal on 23 September 2009.

### **Issues and scope of review**

22. In the letter dated 30 June 2009 notifying the Applicant of the Secretary-General's decision regarding the Second Case, the Respondent clearly acknowledges and accepts that the Applicant's due process rights were violated because he was not made aware of the scope of the misconduct and he was not given the opportunity to further rebut the allegations prior to the finalisation of the report, pursuant to which the Applicant was paid one year's net base salary as compensation.

23. However, in the reply (and supporting documents) the Respondent contended that the Applicant was made aware of the scope of the Second Case against him and that he was given adequate opportunity to provide comments thereon and to rebut the allegations pertaining to the Second Report. Thereafter, in a later submission dated 18 February 2010, the Respondent confirmed that "the Applicant's due process rights were violated insofar as not being informed of the scope of possible misconduct contained in the Report and ... [the Applicant] was not given an opportunity to provide additional evidence to the allegations". In this submission, the Respondent argued instead that the Applicant had been properly compensated by his award of one year's net base salary for this breach (but did not agree that the Applicant's rights were violated by the release of information to Member States). These contradicting submissions were not argued in the alternative.

24. The Respondent's final position on the matter and ultimate action in the internal review process is contained in the letter of 30 June 2009. The submission made in the Reply has not been supported by any evidence notwithstanding that access to such evidence (e.g., the records of the investigation process) was at all times in the hands of the Respondent. The Respondent did not seek to prove in these proceedings that the preparation of the Second Report did not violate due process and prescribed procedures; nor did he seek to tender the Second Report as evidence in the



matter. If a party is in the exclusive possession of documentation that supports its case and fails to disclose it, then that party should not be able to rely on the failure to advance its own case.

25. Accordingly, I find it to be established as an admitted fact that OIOS failed to comply with its procedures in respect of the investigation, preparation and finalisation of the Second Report and the Executive Summary. I therefore will not go into a further analysis of the actual investigation process in this Judgment but will move directly to consider below the implications of the admitted breaches.

### **Applicant's submissions**

26. The Applicant's arguments may be summarised under the headings of "non-renewal of contract", "dissemination of Second Report" and "relief", as follows.

#### *Non-renewal of contract*

27. The Applicant submits that if the non-renewal of his contract was a result of the allegations in the OIOS report, the Respondent had an obligation to disclose it to him. He submits that the Respondent's actions violated ST/AI/292 (Filing of adverse material in personnel records) as adverse material was placed on his file, without his being notified. The non-renewal of his contract appears to have been a disguised disciplinary measure, with none of required due process protections. Further, his contract should have been extended pending the finalisation of the investigation.

#### *Dissemination of Second Report*

28. The Second Report was an illicit document produced in violation of established rules and procedures. As the Second Report violated procedures, it should never have been officially issued or acted upon. There was ample evidence at the time of the Second Report's preparation which should have allowed the Respondent to realise its inaccuracies and the Applicant later made OIOS aware of these failings in his letters in 2008. Despite the Respondent being aware of and

admitting the failings of due process with regard to the Second Report, he refuses to withdraw it or modify its findings. The Respondent is therefore guilty of circulating false and damaging information with a reckless disregard for the truth and for the rights of the accused.

29. The Respondent's argument that the General Assembly mandates the release of all OIOS reports is mischaracterised as the General Assembly never envisaged the release of investigation reports that were not properly finalised. Furthermore, the wording of General Assembly resolution A/RES/59/272 leaves room for discretion to protect the staff concerned, none of which was exercised in this case.

### *Relief*

30. Monetary compensation alone is insufficient. The continuing mistreatment of the Applicant due to the Respondent's failure to correct an incorrect investigation report is imbued with prejudice and calls for retraction of the contested report and additional compensation with interest for the continued violation of the Applicant's rights and on-going harm to his reputation. Until the Respondent disavows the Report, this will continue.

31. As a result of the failure to retract the Second Report, the Applicant's employability since separating has been greatly prejudiced, rendering him virtually unemployable and resulting in a loss of income. He has not had a long-term appointment since his separation, despite continual attempts to obtain one. The Applicant has tendered an email from a colleague confirming that the "cloud from Liberia" continues to harm his chance at obtaining another position as SRSG. The Applicant has also suffered ongoing humiliation, stress and uncertainty. Additionally, an award of costs is justified as these proceedings have been occasioned by the Respondent's refusal to adopt an appropriate remedy in spite of a JAB recommendation in favor of the Applicant.

### **Respondent's submissions**

32. The Respondent's arguments may also be summarised under the headings of "non-renewal of contract", "dissemination of Second Report" and "relief", as follows.

#### *Non-renewal of contract*

33. The Applicant's contention regarding the non-renewal of his appointment is not receivable since it was filed more than three years after the contested decision was issued, and the Applicant did not request administrative review of the decision or show exceptional circumstances.

34. Further, the Respondent's decision not to renew the Applicant's contract was not related to the investigations and was a legitimate and lawful exercise of its discretion, in accordance with former staff rule 104.12(b), which provides that a fixed-term appointment does not carry any expectancy of renewal. There is no evidence to prove that the allegations influenced the Respondent's decision, and the record shows that the investigations of the allegations of misconduct, abuse of authority and resources (that is, the Second Case) began after the Applicant was notified about the three-month extension of his contract. The Applicant bears the burden to prove bad faith on the part of the Respondent and he has not done so.

#### *Dissemination of Second Report*

35. Pursuant to General Assembly resolution A/RES/59/272, OIOS provided a redacted Executive Summary of the Report to Member States. However, there is no evidence in the record to show that OIOS disclosed any reports to the *Washington Post*.

36. The Organisation is not required to provide staff members with a copy of draft investigation reports in order that they can check them, prior to their finalisation.

*Relief*

37. The award of one year's net base salary adequately compensated the Applicant for the violations which the JAB found with respect to the matter.

38. Given that there is no evidence to substantiate the Applicant's contention that OIOS was responsible for the disclosure to the *Washington Post*, the Secretary-General properly rejected the JAB's recommendation for the issuance of an apology.

39. There has been no manifest abuse of proceedings warranting an award of legal costs.

**Consideration and findings**

*Non-renewal of contract*

40. The Applicant did not seek administrative review of the decision not to renew his appointment within the required timeframe. The Dispute and Appeals Tribunals have held that administrative review or management evaluation is a necessary part of the Tribunal's review of an administrative decision: see e.g., *Crichlow* UNDT/2009/028; *Syed* 2010-UNAT-061. The Applicant knew at the time of his separation that there had been allegations in the press impugning his character; he was at the very least aware that the First Case raised such concerns. In his further statement to this Tribunal, the Applicant states that the Respondent relied on the rumours in the Liberian press in 2004 in limiting his final contract extension, which he himself noted was an unusually short extension. Despite this peculiarity, he did not challenge the brief extension, nor the non-renewal of his contract after April 2005. Besides, the record shows that the investigations of the allegations of misconduct, abuse of authority and resources (that is, the Second Case) began after the Applicant was notified about the three-month extension of his contract. The Tribunal finds that the Applicant has not shown any nexus between the non-renewal and the investigations. I therefore find this aspect of his application not to be receivable.

*Dissemination of Second Report*

41. The Applicant states that the Respondent should be held liable for the damage occasioned by the dissemination of the Second Report, based on an investigation he was unaware of, since it resulted, amongst other things, in the publication of the Executive Summary on which the Article that harmed his reputation was based. The Tribunal agrees with the Respondent's contention that there is no evidence that the Respondent or any staff member or agent of the Organisation disclosed the Report or the Executive Summary directly to the *Washington Post*.

42. General Assembly resolution A/RES/59/272, on which the Respondent relies for justifying disclosure of the Executive Summary to Member States, provides a discretion to modify, or even withhold, a report, stating at para. 2 that:

[W]hen access to a report would be inappropriate for reasons of confidentiality or the risk of violating the due process rights of individuals involved in the [OIOS] investigations, the report may be modified, or withheld in extraordinary circumstances, at the discretion of the [USG/OIOS] who will provide the reasons for this ...

43. I have already found, based on his own admission, that the Respondent failed to comply with proper procedures in the preparation of the Second Report and Executive Summary. OIOS procedures, and indeed, those of investigations generally, are put in place to ensure that investigations and reports do not contain factual inaccuracies or unjustified conclusions. When they are not followed, there is an appreciable risk of factual inaccuracies or unjustified conclusions. OIOS should have been aware that the Second Report was based on an inadequate investigation at the time of the preparation of the Report and the Executive Summary, and, being aware of these breaches, should have taken action to mitigate the potential damage.

44. The Applicant made general allegations regarding the alleged placing of the Second Report on his official (personnel) file in contravention of ST/AI/292. Paragraph 2 of ST/AI/292 states that material which "reflects adversely on [a staff member's] character ... may not be included in the personnel file unless it has been

shown to the staff member concerned and the staff member ... thereby given an opportunity to make comments [on it]”. The evidence before me is not sufficient to render a finding on this point and the Tribunal may require further clarification on this issue.

45. The Respondent submits that he disclosed the Executive Summary to Member States pursuant to his obligations under General Assembly resolution A/RES/59/272, but has not clearly articulated whether, despite the admitted violation of the due process rights of the Applicant, there was a reasonable or proper exercise of the discretion to “modify or withhold” the Report. Although the Respondent appears to have modified the Second Report by providing an Executive Summary (in which the Applicant’s name did not appear) rather than the entire Report, the Executive Summary described the Applicant in sufficient detail to make him readily identifiable—that is, as a former Senior UN official in Liberia in an allegedly improper relationship with a “local” woman linked to the Taylor regime. Upon reading the Executive Summary, the conclusion is readily drawn that the Applicant was in an improper relationship with a woman linked with the Taylor regime and that this relationship caused him to provide her (and by implication, the regime) with confidential information and services. This is a serious personal and professional blight on the Applicant’s character, especially in view of his position as the most senior UN official in Liberia at the time. The Executive Summary therefore impugned his character, and made findings on allegations and testimony which the Applicant had not had an opportunity to comment on.

46. The Office of the USG/OIOS had access to the Second Report and prepared the Executive Summary. A proper review may have given cause for the exercise of the discretion to either modify the Report to a greater degree than is done in the Executive Summary and indicate that it was procedurally flawed or to withhold it altogether, on the basis that proper procedures were not followed, resulting in the risk of violating the due process rights of the Applicant. This discretion does not appear to have been exercised, and if it is contended by the Respondent (which it certainly

has not clearly been) that the discretion *was* exercised, it was not done to an appropriate or reasonable standard. The USG/OIOS provided the Executive Summary of the Second Report to Member States on 16 January 2007, reporting the facts found and conclusions reached in the Report with no disclaimer as to its procedural inadequacies.

47. The Tribunal was not presented with evidence on whether the Respondent knew or ought to have known that some Member States publish the reports or executive summaries of OIOS reports. The Executive Summary of the Second Report is still publicly available from a simple internet search. OIOS clearly has an obligation pursuant to both the Organisation's rules and general principles of law to ensure that the reports it prepares are the result of proper investigative procedures, and in light of the fact that it is obliged to release reports pursuant to the General Assembly's resolution, this obligation is even more pertinent, as the harm that may result is amplified. It should be apparent that injury may be occasioned to parties (including investigation subjects, but also witnesses and other parties) when procedures are not properly followed. It is therefore a direct and foreseeable consequence that OIOS' failure to adhere to its investigation procedures could lead to Member States (and thus, the public) being provided with reports and executive summaries that draw conclusions which have not been properly reached, with the Member States (or public) unable to verify their accuracy, fairness or procedural compliance. No doubt the discretion to withhold or modify a report exists for reasons which include avoiding or minimizing harm in circumstances such as the Applicant's. Although I will not suggest how this discretion should have been exercised, I do find, in the circumstances, that the Respondent failed to exercise this discretion reasonably.

### **Conclusion**

48. The Applicant's challenge to the non-renewal of his contract is not receivable.

49. The Respondent has admitted that the Second Report was procedurally flawed and accepting this, the Tribunal finds that the release of the Executive

Summary to Member States breached the Applicant's terms of appointment, as the Respondent failed to reasonably exercise the discretion to withhold or modify it.

50. The Respondent will also have breached the Applicant's terms of appointment if he failed to notify him of the adverse material being placed on his file, in accordance with ST/AI/292. Further submissions will be required in this regard if any further relief is to be granted to the Applicant.

51. Accordingly, the parties will be ordered to make further submissions to the Tribunal on the matter of compensation and other relief, in an Order which will follow this Judgment.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 30<sup>th</sup> day of November 2010

Entered in the Register on this 30<sup>th</sup> day of November 2010

*(Signed)*

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry