UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/055/ JAB/2008/104
Judgment No.:	UNDT/2010/030
Date:	22 February 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ABBOUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON

CONSEQUENTIAL ORDERS

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Adele Grant, ALU
Susan Maddox, ALU

Introduction

1. The factual background in this case is set out in considerable detail in my principal judgment of 6 January 2010 in which I upheld the applicant's appeal and rescinded a decision of the Under-Secretary-General of the Department for General Assembly and Conference Management (Mr Shaaban). My judgment raised two distinct matters of concern in respect of which I made adverse judgments of Mr Shaaban's conduct. The first of these was the way in which he considered the applicant's complaint about the conduct of a member of an interviewing panel and the second was the way in which he gave evidence in the Tribunal. It went on to state―

> [46] It follows from what I have already said about Mr Shaaban's conduct that the question arises as to whether it should be referred to the Secretary-General for possible action to enforce accountability pursuant to article 10.8 of the Statute of the Tribunal. In fairness such a decision should not be made without hearing from the parties ... It might well be appropriate that Mr Shaaban, whose interests are directly affected, should be separately represented, and I will give favourable consideration to any application made by him to this effect.

2. Having regard to its general importance and art 10.8 of the Statute not having been so far the subject of consideration by the Tribunal, I decided that the Staff Union should also have the opportunity to make submissions on the matter. Article 10.8 is as follows―

> 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.

3. Another matter on which I sought the assistance of counsel concerned the form of the order requiring the respondent to arrange to have the applicant's complaint properly considered, having regard to the supercession of ST/AI/371 by ST/SGB/2009/7, in particular, whether it was appropriate to utilise the provisions of sec 2.2 of the former instrument.

The submissions

4. It was first submitted on behalf of the respondent that there was no need to conduct a hearing for the purpose of determining whether there should be a referral under art 10.5, since the Tribunal had neither jurisdiction nor responsibility to determine whether the Secretary-General should hold Mr Shaaban accountable for his actions and, if so, in what way. Furthermore, it was submitted, the Secretary-General might come to a different conclusion about certain aspects of the case by considering any new evidence. By way of example of such evidence, an e-mail was tendered from the Special Assistant (SA) to the Under-Secretary-General to Mr Shaaban timed 6.26pm and dated 9 July 2008, comprising a report on the panel's interviews. It reflects some defensiveness about SA's conduct and attempts a justification. The applicant's complaint about his conduct addressed to various officials and the members of the panel including SA was e-mailed at 4:44 pm on the same day. It is reasonable to infer that the defensiveness and attempted justification in SA's e-mail was, at least in part, a response to the applicant's complaint.

5. Counsel for the respondent then submitted that I should not refer the case to the Secretary-General, since the Secretary-General already had power to consider this issue by virtue of his functions under the Charter and other instruments, and in particular, rule 10.1(b) of ST/SGB/2009/7, which is in the following terms—

> Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

6. (It is somewhat strange to hear a submission made on behalf of the Secretary-General that a case should not be referred to him when, if a reference was made, it will be necessary for him to consider whether any, and if so what, action should be taken. But this is a consequence of his capacity as representative of the UN *for the purpose of the proceedings* by virtue of art 2.1 of the Statute; the true respondent is, of course, the Organization itself and, properly understood, this submission is made

on behalf of the Organization. I point this out, not because there is any impropriety in the submission, but to explain its seemingly odd appearance. Should the case be referred, it will be necessary for the Secretary-General to consider it in his capacity of chief executive officer of the Organization and not as its representative.)

7. Thirdly, since it is proposed to appeal my decision to the UN Appeals Tribunal, counsel for the respondent submitted I should defer consideration of referral until after the appeal had been determined since, if it were successful, the question of referral would be moot. It was also submitted that referral of the case did not fetter in any way the Secretary-General's discretion to determine what action should be taken and that it was not inherent or implicit in the Dispute Tribunal's power to refer to require the Secretary-General to inform it as to the action taken pursuant to the referral.

8. Counsel for the respondent also submitted that sec 2 of ST/AI/371 had not been implicitly repealed by ST/SGB/2009/7 and, accordingly, it was appropriate to require the reconsideration of the applicant's complaint in accordance with the procedure mandated by that provision.

9. The applicant made no submissions.

10. On 13 January 2010 an e-mail was sent to Mr Shaaban stating—

> As your interests are directly affected, his Honour, Judge Adams has directed [the Registry] to inform you that if you wish to submit an application to the Tribunal on this matter and/or to be represented during the proceedings, any such application should be made to the UNDT Registry by Wednesday, 20 January 2010.

On 18 January 2010 I was informed, however, by counsel for the respondent—

> The respondent also respectfully informs the Tribunal that Mr Shaaban has been advised not to make any submission on the accountability issue or to take part in the hearing proposed for 1 February 2010.

11. Not surprisingly perhaps, Mr Shaaban was not present either personally or by counsel at the hearing. It appears to have been thought by counsel for the respondent that somehow the information concerning the legal advice given to Mr Shaaban was relevant to the issue whether a referral should be made at all or the question deferred

until after the foreshadowed appeal is determined. It seems to me that it is entirely irrelevant. It would have been appropriate, as a matter of courtesy though not of legal necessity, to have informed the Tribunal of the fact, if it were the fact, that Mr Shaaban declined to take advantage of the opportunity to appear, either personally or by counsel, or to make submissions. Whether this was done pursuant to legal advice or not was immaterial. My direction in relation to his appearance made it clear that it was not mandatory and whether he appeared was a question entirely for him to decide. Be that as it may, the disclosure of the advice tendered to him raised a matter of concern relating to the professional conduct of counsel and the duties of counsel to the Tribunal which, in my view, is important to clarify and which I discuss at the end of this judgment.

12. The hearing was conducted on 3 February 2010. Mr Shaaban was not present either personally or by counsel. The applicant was represented, as was the respondent. Also present, at my direction, was the lawyer from the Office of Legal Affairs who had advised Mr Shaaban not to attend or be represented by counsel. It became apparent that there was a risk, albeit a small one, that Mr Shaaban may not have appreciated that I was concerned with his conduct in relation to both the impugned decision and as a witness. For obvious reasons, I did not wish to question the lawyer (who had given him advice) as to this matter. Accordingly, I gave Mr Shaaban a further opportunity to make a submission (this time, in writing) on the question of referral, bringing specifically to his attention the issue of "referring … [his] conduct in giving evidence before the Tribunal". On 8 February 2010 Mr Shaaban filed a written submission, noting that my direction, "made only a general reference to … [his] 'conduct in giving evidence'" (underlined in original) and contending that "… due process requires that I should be provided with specifics about any allegations against me so that I may have a meaningful opportunity to comment on the question of the referral to the Secretary-General of my conduct". In my principal judgment I set out clearly the evidence of Mr Shaaban upon which I could place no reliance and the reasons for this conclusion. I do not doubt that he has read the judgment. He has also had the advantage of legal advice concerning the proposed referral, though it is regrettable that this advice was plainly not independent.

In my view, Mr Shaaban had sufficient particulars to enable him to make an adequate submission on the referral issue. In substance and effect, he has declined to take advantage of the now two opportunities he has had to make that submission. Justice does not require him to be given and I do not intend to give him yet a third opportunity. This litigation must come to an end.

13. The Staff Union informed the Tribunal that it did not wish to be heard on the application of art 10.8. It "agreed", however, that the Tribunal should refer the case to the Secretary-General in accordance with that provision.

Should the case be referred to the Secretary-General?

14. The mere fact that the Secretary-General has power to independently consider whether any staff member should be held accountable for their actions cannot mean that the Tribunal should not exercise its functions under art 10.8 since this would have the consequence that no referral would ever be made and the article is pointless. Nor can the fact that the Secretary-General might in any particular case discover additional evidence that is relevant to the question whether the impugned conduct occurred and, if so, what should be done in respect of it, justify not referring an appropriate case. So far as the tendered e-mail is concerned, it does not suggest in any way that Mr Shaaban either interviewed or sought to interview SA. Nor does it, in the slightest degree, compromise any finding of fact expressed in the principal judgment.

15. It is obvious that the Secretary-General can only take action in relation to matters of which he is informed. This information comes from many sources. It was clearly the intention of the General Assembly that one of those sources should be the Tribunal, where a case, in the opinion of the Tribunal, warranted consideration by the Secretary-General. It is a widespread practice in domestic legal systems for judges to refer to relevant state authorities matters that might require action by those authorities, especially (but by no means limited to) apparent cases of official misconduct, attempts to convert the course of justice or perjury. In this respect the judge is not acting judicially, but by virtue of a generally understood obligation to bring certain kinds of inappropriate conduct, especially that which might be criminal

in character, to the attention of officials charged with considering what action should be taken in respect of that kind of matter, usually the Attorney General and sometimes the Director of Public Prosecutions or similar officer. I do not think that it can be doubted that, even if it were not for art 10.8, it would be proper for a judge of the Tribunal to bring conduct warranting consideration and, possibly, action by the Secretary-General to his or her attention. This would include, but is not limited to, conduct that indicated misconduct or some other inappropriate behaviour. I do not accept the submission made by counsel for the respondent that art 10.8 is limited to those cases in which the Secretary-General might take action pursuant to staff rule 10.1(b) to obtain reimbursement. All staff members of the Organization are ultimately accountable to the Secretary-General for the performance of their duties as well as any other conduct in respect of which either a disciplinary or a non-disciplinary measure may be appropriate. There is nothing in the provision that suggests the "accountability" of the staff member is not to be understood in its ordinary English meaning, let alone limited to financial reimbursement. If this were intended, it would have been a simple matter to indicate so.

16. As to deferring consideration of referral, there may be some cases in which the respondent can appeal in respect of one or other aspect of a judgment of the Tribunal and, in that event, it could be useful or convenient for the Tribunal to defer considering other aspects of the case pending determination of the appeal. I am doubtful that a case can be split in this way. One of the obvious objections to such a procedure is that there might conceivably be two or more appeals in respect of the one case leading to very substantial delays, especially given the time limit for appealing, the automatic stay resulting from an appeal and the fact that the Appeals Tribunal does not sit continuously. Another more fundamental objection is that referral is not dependent upon whether or not the impugned administrative decision is found to be wrong. Of course, if it is not wrong, the question of reimbursement will not arise but, even if the decision be correct or, perhaps, not receivable it might nevertheless be that the evidence in the case will justify referral to the Secretary-General of conduct of the decision-maker that has come to light or, indeed, conduct of someone else that should be brought to the attention of the Secretary-General. As

it happened, in this case, the impugned conduct was also that of the decision-maker, but it is not an essential requirement of referral that this should be so. At least one aspect of Mr Shaaban's conduct in the case (and the more serious) falling to be considered for referral concerns his conduct as a witness and, hence, in his personal, and not official, capacity.

17. At all events, even if I had the legal power to do so (which I doubt) there is no good reason to defer completely disposing of this case. Apart from other considerations of inconvenience and delay, my appointment as a judge of the Tribunal expires on 30 June 2010, and it might well be that the appeal might not be determined before that date. Accordingly, I refuse the application for deferral.

18. I now come to the question whether, in this case, there should be a referral to the Secretary-General. It is important to bear in mind, that art 10.8 requires the case to be referred to the "Secretary-General … or the executive heads of separately administered … funds and programmes for possible action to enforce accountability". This necessarily implies that the Secretary-General or executive head has responsibility, at least, to determine what should be done in the first instance, for example, personally to consider and determine what should be done or to delegate that decision to an appropriate officer. The fact that at least the initial consideration of the referral is undertaken at this level indicates, to my mind, that the conduct to be referred should be such that it could reasonably be seen as significantly inappropriate. Another relevant feature, of obvious relevance in this case, is the seniority of the official whose conduct is in question. There is no bright line dividing those cases in which referral should be ordered from those in which it should not, although it is obvious that this is a question of relative seriousness. As at present advised, it seems to me that the fundamental issue to be considered by the Tribunal is, therefore, whether the matter is so serious or potentially serious as to require the personal attention of the Secretary-General, even if the matter can appropriately be delegated to another official, and in this respect, the most relevant matters are the inherent seriousness of the impugned decision and the seniority of the relevant official. The

mere fact that the matter might otherwise come to the attention of and be considered by the Secretary-General or executive head must be irrelevant.

19. The case raises two separate issues, the first and much less serious concerning the way in which Mr Shaaban dealt with the applicant's complaint and the second involves the far more serious question of his conduct before the Tribunal. So far as the first issue is concerned, it is clear that Mr Shaaban is responsible only to the Secretary-General in respect of the exercise of his responsibilities, there being no intermediate supervising official. This would suggest that any consideration at all within the Organization of whether any action should be taken in respect of his conduct should be taken at a high level, possibly even by the Secretary-General personally, since, in the absence of any intervening supervisor, Mr Shaaban as an Under-Secretary-General is, at all events, directly accountable to the Secretary-General in respect of the performance of his duties. This factor mediates in favour of referral. As to its importance, it must be borne in mind that the decision whether to institute a preliminary investigation was the direct responsibility of Mr Shaaban as head of the Department by virtue of the specific provisions of sec 2 of ST/AI/371. To my mind, this strongly suggests that the decision must be regarded as an important one. Such a decision could never be regarded as trivial. Furthermore, Mr Shaaban's conduct was not a genuine attempt to fulfil his responsibilities that happened to be legally flawed and hence require rescission of his decision. Mistaken decisions are part of the human condition and no system of administration can rationally expect every decision to be right, let alone optimal. Mr Shaaban's conduct is described in detail in the principal judgment and does not need to be repeated here. In my view, it raises serious questions about his readiness to take offence and his willingness, if not his ability, to perform his responsibilities when his *amour-propre* has been offended, as to justify referral to the Secretary-General, despite the relative unimportance (compared to his other responsibilities) of the matters disclosed in the applicant's complaint.

20. By far the more troubling question concerns the way in which Mr Shaaban conducted himself before the Tribunal. In my principal judgment, I said—

> I regret that I have concluded that Mr Shaaban is an unreliable witness in respect of every important issue of fact that is not independently corroborated, although I do not go so far, I should say in fairness, as to conclude that he was actively dishonest. Having paid close attention to his testimony at the time and carefully reread the transcript I must say, however, that I am left with the powerful impression that he was not concerned to tell the truth but thought, rather than being a witness obliged to tell the truth, he could enter into a self-justifying negotiation and state as fact what was no more than a mixture of surmise and self-serving argument. At the conclusion of his evidence, I informed counsel for the respondent, in substance, that I did not think Mr Shaaban's honesty was in issue so much as his reliability. After having carefully reviewed the evidence in light of the submissions of both parties, reread the transcript several times and listened again to the way in which he gave evidence, I have reluctantly concluded that my initial inclination to explain away the unsatisfactory aspects of his testimony as mere unreliability was mistaken.

21. It will be readily understood that judges are very reluctant to come to conclusions of this kind and only do so if they are certain that the criticism is justified and almost invariably express those conclusions in guarded language that does not go one inch further than is strictly necessary. Nevertheless, when the conclusion is reached, it must be stated in forthright and unambiguous terms. In domestic tribunals, criminal prosecutions can deal with cases of perjury or attempts to pervert the course of justice. Courts also have inherent powers to punish for contempt. In the context of the UN however, neither of these sanctions are available, and the Tribunal's only course is to identify such conduct where it appears and leave it to the Secretary-General to take appropriate action. In considering what action should be taken, the Secretary-General is acting in a quasi-judicial role, whose primary function is to protect the integrity of the UN justice system. It follows, of course, that no personal considerations can be permitted to intrude. It would not be surprising, considering the administrative and probably personal propinquity that an Under-Secretary-General must have with the Secretary-General that they might be personal friends rather than professional acquaintances. If this is so, the Secretary-General is potentially conflicted, and it would be right to delegate to another senior official, perhaps the head of a fund or programme, responsibility for undertaking the relevant

action and making the appropriate decisions. Of course, I know nothing of the actual situation so far as Mr Shaaban and the Secretary-General are concerned: these comments are designed to elucidate the nature of the Secretary-General's responsibilities.

22. Before giving evidence to the Tribunal, Mr Shaaban undertook in solemn language, binding on his conscience and honour, to tell the truth, the whole truth and nothing but the truth. However, he was, at the very least, careless about whether he told the truth or not and his evidence was untruthful in a number of significant respects. It may be that he had an insufficient understanding of the role of the Tribunal, the significance of the hearing, and the consequences of breaching his undertaking. Possibly he thought that, as an Under-Secretary-General, his word would simply be accepted, whatever it was he found it convenient to say. It matters not. Indeed, the fact that he is a very senior official makes his conduct all the more reprehensible. It cannot be contended that this is not serious misconduct.

23. Such conduct falls well within the four corners of the case, however "case" is to be interpreted in the context of art 10.8, and must be referred to the Secretary-General for action. This is especially since the Tribunal has no power to deal with the impugned conduct directly.

The role of the Secretary-General when a referral is made

24. It has been submitted on behalf of the respondent that, in respect of exercising his or her functions, where a case that has been referred, the Secretary-General is independent of the Tribunal. This is correct as far is goes but it does not follow that the Tribunal's findings can be ignored. Much depends on the matter giving rise to referral of the case. Thus, in this case, the Tribunal has determined (as a matter of mixed fact and law) that the decision that there was no reason to believe that conduct had occurred requiring a preliminary investigation was wrong. For the purpose of accountability, that finding must be regarded as binding, both as to the facts found and the law stated. To do otherwise is inconsistent with art 11.3 and would undermine the necessary authority of the Tribunal. That is not to say that any new facts that come to light should not be considered but, absent such a circumstance,

it is not for the Secretary-General or any other official to differ from the Tribunal. If the Secretary-General considers that the Tribunal's findings are wrong, the only proper mode by which they can be corrected is by appeal to the UN Appeals Tribunal. This is the structure set in place by the General Assembly and provides an exclusive pathway for correcting errors, if any, made by the Dispute Tribunal. It is otherwise with a referral of a case where the Tribunal has not made any relevant findings. In such a case, the Secretary-General will need to consider and determine the appropriate process for dealing with the matters giving rise to the referral and make a decision about them in due course.

25. What, then, of a finding of the Tribunal that particular conduct was wrongdoing amounting to misconduct? The imposition of disciplinary measures is a matter entirely in the hands of the Secretary-General and, plainly, is not a matter for the Tribunal. The process by which such a measure can be imposed is governed by Chapter X of ST/SGB/2009/1, in particular, rule 10.3. In the discussion below dealing with this Chapter, I point to serious shortcomings in drafting that give rise to inappropriate uncertainty in the application of this provision, which does not require repetition here. It is enough to say that it is entirely consistent with the provisions of Chapter X that the Secretary-General should apply any findings of fact or law made by the Tribunal to the questions he or she is required to consider under that Chapter. Thus, for example, there must be an investigation, the staff member must be given an opportunity to bring any new facts into account and he or she must be able to put forward any mitigating facts reflecting on the nature of the disciplinary measure that might be imposed. Such a process does not undermine the authority of the Tribunal. However, an investigation into whether the findings of the Tribunal were correct upon the evidence before the Tribunal would do so and, moreover, would undermine the authority of the Appeals Tribunal as the sole repository of the responsibility for correcting errors, if any, made by the Dispute Tribunal.

26. I have not overlooked the point that the staff member would not normally be a party to the proceedings in the Tribunal, although he or she might be joined by the Tribunal under art 11 of the Rules of Procedure. The requirements of procedural

fairness are sufficiently satisfied if (as here) he or she is given an opportunity to contend in the Tribunal that no referral should occur and, in the Chapter X proceedings, to bring any new matter into account.

Contempt

27. Given my findings in respect of Mr Shaaban's evidence, the question arises whether he should be dealt with for contempt pursuant to the inherent jurisdiction of the Tribunal. In the result, I have decided not to institute such proceedings. Because of the importance of this question, however, it is desirable that I should explain why. The first matter of importance, of course, is whether the Tribunal has the power to deal with relevant wrongdoing by contempt, although jurisdiction to do so is not explicitly conferred by its Statute. This question has been considered by several international tribunals in respect of their jurisdictions.

28. In the *Nuclear Tests Case* (*Australia v France*) 1974 ICJR 253 at 259-260, the International Court of Justice stated the general rule about inherent powers in this way—

> 23. In this connection, it should be emphasized that a Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons*, Judgment, I.C.J. Reports 1963, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

Although this statement was made in connection with the need to determine whether one of the preconditions for the exercise of the Court's jurisdiction was satisfied, the principle is fundamental and applies to all powers that are necessary to ensure that a judicial entity such as this Tribunal can duly exercise its jurisdiction to decide cases on the true merits and safeguard its basic judicial functions. It was relied on by the

International Criminal Tribunal for the Former Yugoslavia (ICTY) in its consideration of the issue and is equally applicable to this Tribunal.

29. The leading judgment in the ICTY is *Prosecutor v Tadić, Judgment On Allegations Of Contempt against Prior Counsel, Milan Vujin* of 31 January 2000, Case IT-94-1-A-R77, which dealt with the situation that arose when one of the lawyers acting for a defendant was accused, amongst other things, of instructing witnesses to lie, signaling to witnesses when being interviewed, dissuading witnesses from telling the truth. The statement of principle by the ICTY is both very useful and relevant to this Tribunal's position. It is useful to set out the reasoning of the ICTY *in extenso* (omitting footnotes)—

> 13. There is no mention in the Tribunal's Statute of its power to deal with contempt. The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice. The content of that inherent power may be discerned by reference to the usual sources of international law.
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> 14. There is no specific customary international law directly applicable to this issue. There is an international analogue available, by way of conventional international law, in the Charter of the International Military Tribunal (an annexure to the 1945 London Agreement) which gave to that tribunal the power to deal summarily with "any contumacy" by "imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges". Although no contempt matter arose before the International Military Tribunal itself, three contempt matters were dealt with by United States Military Tribunals sitting in Nürnberg in accordance with the Allied Control Council Law No 10 (20 December 1945), whereby war crimes trials were heard by the four Allied Powers in their respective zones of occupation in Germany. That Law incorporated the Charter of the International Military Tribunal. The US Military Tribunals interpreted their powers as including the power to punish contempt of court.
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> 15. It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and

refined (where applicable) in international jurisprudence. Historically, the law of contempt originated as, and has remained, a creature of the common law. The general concept of contempt is said to be unknown to the civil law, but many civil law systems have legislated to provide offences which produce a similar result.

16. In a passage widely accepted as a correct assessment of the purpose and scope of the law of contempt at common law as developed over the centuries, the Report of the (UK) Committee on Contempt of Court, published in 1974, described it as:

[…] a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.

The rule of law, which lies at the heart of society, is necessary to ensure peace and good order, and that rule is directly dependent upon the ability of courts to enforce their process and to maintain their dignity and respect. To maintain their process and respect, the common law courts have, since the twelfth century, exercised a power to punish for contempt. In order to avoid any misconception, it is perhaps necessary to emphasise that the law of contempt as developed at common law is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.

17. Although the law of contempt has now been partially codified in the United Kingdom, the power to deal with contempt at common law has essentially remained one which is part of the inherent jurisdiction of the superior courts of record, rather than based upon statute. On the other hand, the analogous control exercised in the civil law systems over conduct which interferes with the administration of justice is based solely upon statute, and the statutory provisions, in general, enact narrow offences dealing with precisely defined conduct where the jurisdiction of the courts has been or would be frustrated by that conduct.

18. A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal’s powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.

> 19. This Tribunal has, since its creation, assumed the right to punish for contempt.

The judgment goes on to mention various provisions of its Rules of Procedure and Evidence and their relationship with the inherent jurisdiction of the Tribunal. This discussion is, if I may say so with respect, instructive but is not relevant for present purposes.

30. This judgment was approved on appeal (*Prosecutor v Tadić* Case IT-94-1-A-R77) and has been subsequently applied: eg, in *Aleksovski* Case IT-95-14/1-AR77, *Marijačić and Rebić* Case IT-95-14-R77.2-A, *Jović* Case IT-95-14/2-R77; *Margetić* Case IT-95-14-R77.6, *Haxhiu* Case IT-04-84-R77.5 (where it was alleged that the defendants had knowingly violated an order of the Tribunal to keep certain information confidential) *Jokić* Case IT-05-088-R77.1-A (where the defendant had refused to answer questions when giving evidence) and *Haraqija* Case IT-04-84-R77.4 (interfering with a witness).

31. This Tribunal also has no provision for contempt in its Statute. In A/Res/63/253 the General Assembly, in creating the new system of administration of justice, affirmed that the Dispute Tribunal "shall not have any powers beyond those conferred under … [its] statute". I do not see this affirmation as excluding powers that are necessarily inherent in the establishment of the Tribunal itself. As distinct from the ICTY, as it happens, the Tribunal's Rules of Procedure do not make provision for contempt proceedings. In my view, however, this does not mean that the Tribunal has no power, in an appropriate case, of dealing with contemptuous conduct *ad hoc*, if it deems it necessary to do so (cf art 36 of the Rules of Procedure), since the source of the power is not the Rules of Procedure but the inherent jurisdiction of the Tribunal itself.

32. The ability to deal by way of contempt with attempts to frustrate the due exercise by the Tribunal of its jurisdiction is, in my view, an inherent power of the Tribunal and necessary to safeguard its judicial functions.

33. Wilful breach of an undertaking to the court is a contempt at common law. However, perjury is a crime as such and is not a contempt, although refusing to give

evidence at all is. It is unnecessary to enter into the accident of history that made perjury a crime *sui generis*, which reflected the peculiar English attitude about the taking of an oath. There can be no question that attempting to influence a witness to lie is a contempt (see *Vujin*) and I do not see a substantial difference between the wrongdoing involved in this misconduct and the act of lying itself. To my mind, the giving of untrue testimony, indifferent as to whether it is true or not, is substantially the same. It is conduct calculated to obstruct, prejudice or abuse the administration of justice by the Tribunal. In the Tribunal, a witness solemnly undertakes to tell the truth, the whole truth and nothing but the truth. In my view, the wilful breach of this undertaking is a contempt of the Tribunal.

34. It follows from possession of the jurisdiction to deal with a staff member for contempt that the Tribunal must have the power to punish where that contempt is found. This jurisdiction is not related to, nor is it concerned with, that exercised by the Secretary-General under Chapter X of ST/SGB/2009/7 for misconduct, although there can be no doubt (as I have already suggested) that wilful interference with or obstruction of the processes of the Tribunal, will also amount to misconduct and, in many cases, serious misconduct.

35. Before the Tribunal could deal with a staff member by way of contempt, it would be necessary to charge him or her with contempt and hold a hearing to determine the facts. It is obvious that there are issues of pre-judgment where the judge deciding the contempt question is also the judge who heard the evidence in the first place and brought the charge. This problem has been dealt with in various ways by the common law, depending on the particular circumstances, usually by reference to the distinction between contempts generally and contempts in the face of the court.

36. As has been noted, the Rules of Procedure of the Tribunal do not deal with the issue of contempt. Since it affects the rights of the accused staff member, the procedures must be careful to ensure procedural fairness and a transparent process. The sanctions that could be imposed, of course, can only affect the staff member's contract one way or another but should be spelled out. The Rules of Procedure are established by plenary agreement of the judges of the Tribunal and are subject to the

approval of the General Assembly. I am hesitant to adopt a procedure *ad hoc* in relation to a matter of considerable importance which has not been considered by the judges of the Tribunal, let alone by the General Assembly, and I would not do so unless no other course was, as a matter of practicality, available. Having regard to the provisions of art 10.8 of the Statute, I have concluded that *ad hoc* proceedings by way of contempt are not strictly necessary in the present case and therefore have decided not to institute them. To avoid misunderstanding, I should state, what should at all events be implicit, this decision should not be interpreted as suggesting that I am of the opinion that the Tribunal does not have, or it is doubtful that it has, the power to deal, by way of contempt, with attacks on the administration of justice, including a wilful breach of the obligation to tell the truth when testifying.

37. For the sake of completeness, I should make it clear, although again this is implicit in what has already been said, that whether the Tribunal should proceed by way of a charge of contempt or by way of referral under art 10.8 is a matter of judicial discretion, the exercise of which will depend on a consideration of all the circumstances.

The form of order

38. The question of the form of order requiring the applicant's complaint about the conduct of SA to be properly reconsidered is more difficult to answer and depends on whether the procedure prescribed by sec 2 of ST/AI/371 has been implicitly repealed by ST/SGB/2009/7. This depends, in substance, on the extent to which the process for dealing with alleged misconduct prescribed by the later instrument is inconsistent with that prescribed by the earlier. In particular, they differ in that the later (as distinct from the earlier) does not prescribe any, let alone a mandatory, process for launching an investigation into allegations of misconduct and dispenses with the necessity to refer matters to the Joint Disciplinary Committee (JDC).

39. The former staff rule 110.4 provided that no disciplinary proceedings could be instituted until the staff member had been notified in writing of the allegations against him or her and had been given a reasonable opportunity to respond to them. It also

provided that no disciplinary measure could be imposed until the matter was first referred to a JDC for advice as to what measures, if any, were appropriate, except where referral was waived by mutual agreement and in cases of summary dismissal. Having regard to the abolition of JDCs by sec 3 ST/SGB/2009/11, which must be read together with the institution of the new procedure by ST/SGB/2009/7, it cannot be doubted that the provisions of ST/AI/371 applicable to JDCs have been implicitly repealed in respect of any cases pending on or after 1 July 2009. The position as to the institution of disciplinary proceedings without first notifying the staff members of the allegations and affording an opportunity to respond is more difficult. In rule 10.1 and 10.3 the phrase "institution of disciplinary proceedings" is not defined, though it is obviously used to distinguish "[subjection] to disciplinary measures]". Section 6 of ST/AI/371 requires the staff member to be informed of the allegations and given opportunity to respond but this is to occur after the preliminary investigation has taken place, apparently on the assumption that, although this investigation has occurred with adverse results, "disciplinary proceedings" have not yet been instituted, and that this occurs when the matter is referred to a JDC or the staff member is summarily dismissed. (The apparent inconsistency between the ordinary meaning of "disciplinary proceedings" in the rule and the procedure provided by the administrative instruction does not have to be resolved in this case.) The new rules divide the procedures into an investigation of allegations, the institution of the disciplinary process, and the imposition of disciplinary measure.

40. It is not altogether obvious whether an investigation into allegations of misconduct of a kind where only a non-disciplinary measure would be contemplated is within rule 10.1(c), which refers only to the imposition of a disciplinary measure. Rule 10.1 does not provide for the imposition of a non-disciplinary measure, although it provides such a measure is not to be imposed without first giving the staff member an opportunity in writing of responding to the charges. The requirement of proportionality imposed by 10.3(b) refers only to a disciplinary measure although it is at least arguable that proportionality would be an implied requirement for a non-disciplinary measure. The appeal provided for in 10.3(c) contemplates the imposition of a non-disciplinary measure "pursuant to staff rule 10.2", however, that sub-rule is

merely a list of disciplinary and non-disciplinary measures and says nothing about imposition.

41. It is a strange and unfortunate feature of both the old scheme and the new that there is no reference to any requirement that the staff member actually be found guilty of misconduct before imposing either a disciplinary or non-disciplinary measure. Under ST/AI/371 (all italics added), if the preliminary investigation "*appears to indicate* that the report of misconduct is well founded" (sec 3) then, depending upon its *apparent* nature and gravity, a recommendation as to suspension might be made (sec 4), a decision to whether to pursue the matter is made (sec 5), the staff member is informed of the allegations (sec 6), is given an opportunity to respond (sec 7), a dossier is prepared and sent to a senior official (secs 7 and 8), who is to decide whether the case should be closed or, if "the facts *appear to indicate* that misconduct has occurred" either refer the matter to a JDC for advice or, if "the evidence *clearly indicates* that misconduct has occurred" is sufficiently serious to warrant it, recommend summary dismissal (sec 9). The task given to the JDC is to provide advice as to "what disciplinary measures, if any, would be appropriate" (sec 10). It must be assumed that the imposition of a disciplinary measure would necessitate a finding by the JDC of wrongdoing and, if there were no such finding, the advice would necessarily be that no disciplinary measure would be appropriate. Such a fundamental matter should not be the subject of an assumption.

42. The new rule 10.3 is even worse. It seems to have been drafted for the specific purpose of conferring as wide a discretion as possible on the Secretary-General (and his or her delegates – where I refer to the Secretary-General from now on, the term includes the delegates) to do from beginning to end whatever they happen to think is reasonable and give the staff member as little traction as possible to question the process. This offends the important requirement of transparency. It is also inefficient (and other more critical language readily comes to mind) to construct a system whose elements will only gradually be discovered by both management and staff when the latter have the fortitude to litigate.

43. Under art 10.3, the Secretary-General *may* consider imposing a disciplinary or non-disciplinary measure on the staff member (ie, institute a "disciplinary process"), where the investigation merely *indicates* that misconduct *may* have occurred. The use of the italicised words suggests an inappropriate provisionality that expresses not only a formula for uncertainty but confers a discretion which is so indeterminate as to encourage arbitrary and capricious decision-making. I think that one would be driven to imply the requirement of first finding that the misconduct actually rather than possibly occurred, because of the necessary logic of the process to a lawyer at least, though perhaps not to management, but it is a surprising and regrettable oversight that there is no explicit provision in this regard though, perhaps, rule 10.1(a) might be called in aid.

44. Moreover, the process by which such a finding would be made is not provided for, except the requirement of an investigation. What are the responsibilities of the Secretary-General in relation to the investigation – is he bound by the findings of primary fact, the inferences drawn by the investigators, their findings of law or their views of the proper, useful or convenient scope of the investigation? Nor is there an explicit obligation to document the process by which the Secretary-General reaches his or her conclusion (though this, too, might be implied). Although the staff member must be given the opportunity to respond to the charges, there is no express requirement that the response should be taken into account, nor what should happen if new facts are disclosed. Is the applicant entitled to see the report, interview the witnesses or request the investigators to obtain other information (and, if not, why not)? Nor does the rule contemplate, at least explicitly, that neither a disciplinary nor a non-disciplinary measure might be imposed. Even the right of appeal to the Tribunal is confined to the imposition of the disciplinary or non-disciplinary measures and a challenge to the finding of guilt is permissible, if at all, only by implication.

45. The description in the heading of this rule as providing "due process" is a misrepresentation. Of all the examples of bad drafting to which I have been exposed in my short term as a judge of the Tribunal, this is the worst. It was said from the bar

table by counsel for the respondent that the administrative instruction designed to provide for the relevant procedural steps *is still being drafted* although the new rule has been in operation since 1 July 2009, and in contemplation for some years before that. Good intentions, though no doubt better than bad ones, are without legal significance.

46. Moreover, whether a subordinate instrument is legally capable of qualifying the unqualified powers conferred by a superior instrument is somewhat doubtful although it may be that by practice in the UN the administrative instruction is a legally binding expression of the mode by which the Secretary-General intends to exercise the discretions reposed in him or her. The usual approach is to include a provision in the superior instrument that certain processes or procedures are to be as prescribed in the subordinate instrument. However, until an administrative instruction is promulgated, this remains mere hypothesis.

47. It is imperative that, one way or another, each of the steps to be taken following the investigation and before a staff member is found guilty of misconduct and a disciplinary or non-disciplinary measure imposed is clearly identified and the relevant matters to be proved are specified in a manner that is legally binding. It is completely unsatisfactory to leave these important matters to be implied by a process of judicial, let alone management, interpretation.

48. Given the substantial differences between the scheme in the new rule and that provided in ST/AI/371 it is apparent that, at least, most of the latter has been implicitly repealed. The question, then, is whether sec 2 has survived, as counsel for the respondent contends. The major difficulty facing this contention is that the new rule does not provide for any process analogous to a preliminary investigation, which is a pre-requisite to an investigation by an independent committee, whose advice the Secretary-General is obliged to take into account; on the contrary the new process is inconsistent with any such procedure. The only investigation contemplated by the new rule is a complete investigation leading to a decision by the Secretary-General to impose a disciplinary or non-disciplinary measure although it may be that the Secretary-General has a discretion to require a preliminary investigation as part of the

investigative process. The problem here is that the preliminary investigation provided for in sec 2 of ST/AI/371 is mandatory whilst a discretionary procedure (on the hypothesis that one were instituted) could not be. Thus, the only candidate for possible survival is the commencement of the investigative process by a determination that "there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed", disregarding the fact that the only investigative process triggered by this finding is a preliminary one and meaning "investigative process" in its widest sense.

49. The most obvious difference between the two regimes for instituting an investigation (disregarding the difference between a preliminary investigation which, in certain events, leads to a proceeding before a hopefully independent tribunal and a final investigation with no such interposition) is that the older is objective and mandatory and the later discretionary and permissive. This is such a substantial difference as to lead to the necessary implication that the former process is repealed. Taking a broader view, the requirement for "reason to believe etc" is so much an integral part, not only of the scheme in sec 2, but of the entire scheme of the administrative instruction that it cannot survive alone. Accordingly, I conclude that the whole of ST/AI/371 has been implicitly repealed by ST/SGB/2009/7 as necessarily inconsistent with the latter instrument.

50. The requirement in sec 2 that there be "reason to believe" that relevant conduct occurred triggered only a preliminary investigation. The matter then went through a procedure which, summary dismissal aside, resulted in an independent assessment by the JDC, if it were decided to proceed against the staff member. Even though the JDC was able only to advise, the hearing before the JDC was a very substantial right since it involved an independent and hopefully critical assessment of the investigation and the report and, if the JDC thought it appropriate, gave a staff member an opportunity personally or through counsel to test the evidence, request other witnesses be called, present other evidence and to testify. The removal of this process is obviously of the greatest significance from the staff member's point of view. Where such a procedure is available, the threshold for commencing a

disciplinary process is justifiably low. However, this procedure has now been abandoned and the question necessarily arises (the matter not being provided for) as to the test for determining whether an investigation should be launched. Of course, not only does the launching of an investigation have consequences for a staff member, at the very least in respect of his or her reputation, but it involves the utilisation of the Organization's resources and, potentially, considerable expense. All significant administrative decisions affecting the rights of staff require, as a pre-requisite, consideration of the relevant significant factors. In respect of allegations of misconduct it seems to me that these factors include: a reasonable suspicion that conduct has occurred that would be likely to justify the imposition of a disciplinary measure; it is reasonably likely that an investigation will discover within a reasonable timeframe facts sufficient to enable a rational decision to be made as to whether or not the impugned conduct occurred; and that the seriousness of the matter is not significantly disproportionate to the extent of resources necessary to resolve the issue.

51. I mention these matters not in any prescriptive sense but as an attempt to indicate the relevant considerations that a sensible decision-maker would bring to bear on a question of this kind. Different cases may throw up different considerations for the decision-maker to weigh up before launching an investigation. For obvious reasons, it is desirable for an appropriate instrument to be promulgated that gives useful guidance in these circumstances. Regrettably, however, as I have mentioned, this has not yet been done and the relevant managers simply have to do the best they can. Whether in any particular case coming before the Tribunal the decision to launch an investigation has been made without taking into consideration significant relevant matters and ignoring irrelevant ones and is not unreasonable in all the circumstances will be a matter for the Tribunal to decide and the suggested list of considerations set out above cannot be regarded as anything more than indicative, though perhaps it will be useful as providing some guidance in place of the vacuum that presently exists.

Conflict of interest

52. If the Tribunal refers the case to the Secretary-General under art 10.8, it would be the duty of the Secretary-General to consider whether to launch disciplinary proceedings against Mr Shaaban and, if the outcome were adverse, what action should be taken. The two relevant matters to consider would be, potentially, his conduct in relation to the applicant's complaint, and his conduct when giving evidence in the Tribunal. The interests of the Secretary-General as chief executive officer of the Organization plainly conflicted with those of Mr Shaaban. It seems to me self-evident that it was inappropriate for a lawyer from the Office of Legal Affairs to advise Mr Shaaban about what he ought to do in order to avoid the step that triggered the Secretary-General's duty and it does not matter, in this respect, that it was intended to submit on behalf of the Secretary-General that it was not necessary to conduct a hearing or otherwise the question of referral should be deferred until after the appeal was determined. The advice that Mr Shaaban should not make any submissions to the Tribunal was plainly a tactical device designed to add support to submission to be made on behalf of the Secretary-General, as indeed it was used in the written submission filed. As will be seen, I intend to order a referral. Under art 10.8 it will be necessary for the Secretary-General to consider what action to take. That action includes the commencement of disciplinary procedures against Mr Shaaban and, depending on the outcome, taking disciplinary measures against him. This consideration would have been initiated by the very referral as to which Mr Shaaban was advised on behalf of the Secretary-General not to make any submissions. To describe this as unfortunate is to understate the position. It was indicated that no further advice would be given to Mr Shaaban if the case were referred but this step, though necessary, does not correct the position. In my view, it is also necessary that the lawyer who gave the advice to Mr Shaaban should not be involved in advising the Secretary-General as to what action he should take pursuant to the referral or to investigation if one is directed.

53. The matters potentially to be referred concerned Mr Shaaban's *official* conduct as Under-Secretary-General in relation to the applicant's complaint, and his

personal conduct in giving evidence. In respect of the potential referral, his interest as to *both* categories of conduct was a *personal* one since the referral involved his personal and not official accountability. This was all the more obvious, of course, in the case of his evidence. A witness in the Tribunal gives evidence in a *personal* capacity, although he or she might be an official of the Organization, and it matters not whether the official conduct of that witness is in question or the witness is simply disclosing relevant facts. The obligation to tell the truth, the whole truth and nothing but the truth is a *personal*, not an official, obligation although it is also a contractual obligation, breach of which may well constitute misconduct within the legal instruments embodied in the contract of employment.

54. The function of the Office of Legal Affairs with respect to advising the Secretary-General and other officials of the Organization does not comprehend the giving of legal advice in respect of their personal interests, but only in respect of their official duties, rights and obligations. The invitation to Mr Shaaban to seek to make submissions to the Tribunal was plainly not directed to him in his capacity as Under-Secretary-General, since the role of representing the Organization was that of the Secretary-General, who was already represented and had a right of appearance. As Under-Secretary-General, Mr Shaaban could have no interest independent or separate from that of the Secretary-General. Accordingly, the invitation must necessarily have been directed to him as an individual who might be adversely affected by an order of the Tribunal and against whom, ultimately, serious personal consequences might be visited on him at the hand of the Secretary-General, whose lawyer was unfortunately giving Mr Shabaan advice as to what he should do.

55. It was not within the remit of the Office of Legal Affairs to tender any advice to Mr Shaaban about what he should or should not do in connection with the referral. It became clear during the hearing that the relevant lawyer regrettably did not understand the distinction between Mr Shaaban's official and personal capacities. Had this been clearly understood, the problem of conflict of interest would not have arisen.

Informing the Tribunal on outcome of referral

56. As has been mentioned, the decision of the Secretary-General as to what action he is to take on the referral is a matter for him, although, of course, it must be made properly, and for the purposes for which his authority is conferred. His discretion cannot be capriciously or arbitrarily exercised. In respect of a referral in the ordinary course, the Tribunal has no interest in the outcome and the matter not only can but should be left to Secretary-General to act appropriately. The referral in respect of Mr Shaaban's evidence is not a referral in the ordinary course but concerns conduct which undermines the integrity of the internal justice system and the processes of the Tribunal itself. As such, it is a matter in which the Tribunal has a substantial interest. Certainly, there is no explicit power given to the Tribunal to require the Secretary-General to inform it of the outcome of the referral and, in principle, it must be very doubtful whether such a power is inherent in that conferred by art 10.8, given the different functions of the Tribunal on the one hand and the Secretary-General on the other. The case is less clear where the impugned conduct directly involves the Tribunal and its necessary, though inherent, powers to govern its own proceedings.

57. In the result, it seems to me that the better course, rather than exercising a power of arguable validity, is to request the Secretary-General as a matter of courtesy to inform the Tribunal of the outcome of the referral.

IT IS ORDERED THAT—

1. The respondent is to appoint an official of at least the rank of Under-Secretary-General, other than Mr Shaaban, to consider afresh the complaints of the applicant in respect of the conduct of SA.

2. In the event that it is concluded that it is reasonable to suspect that SA acted in such a way as to justify the imposition of a disciplinary measure and that it is appropriate to launch an investigation within rule 10.1 of ST/SGB/2009/7 in respect of those allegations as to which there is such a conclusion, he or she is to take all necessary steps to arrange for such an investigation to be launched.

3. The case is referred to the Secretary-General under article 10.8 of the Statute of the Tribunal for the purpose of considering—

(a) what action should be taken in respect of the conduct of Mr Shaaban in dealing with the complaints made by the applicant; and

(b) what action should be taken in respect of the conduct of Mr Shaaban in giving evidence to the Tribunal.

(*Signed*)

Judge Michael Adams

Dated this 22nd day of February 2010

Entered in the Register on this 22nd day of February 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York