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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1022

Case No. 1124: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Amer Araim, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time-limit for filing an application with the Tribunal until 31 July 1999 and periodically thereafter until 29 February 2000;

Whereas, on 28 February 2000, the Applicant filed an Application containing pleas which read as follows:

"**II. PLEAS**

A. The Tribunal is respectfully requested to find that:

1. The [Joint Disciplinary Committee (JDC)] ... was improperly constituted ...

2. The JDC panel failed to recognize the conflict of interest since the Under-Secretary-General for [General Assembly Affairs and Conference Services], ... who initiated the investigation and forwarded the case both to the Office of Internal Oversight Services (OIOS) and the Office of Human Resources Management (OHRM)

was wrongly influenced by the Director of the Division of General Assembly Affairs, ...

3. The JDC panel failed to conduct a fair and impartial examination of the Applicant's case. It erroneously accused him of wrong-doing without substantiating its recommendations by facts but rather by depending on the biased report of OIOS and the Administration's claims;

4. By rejecting the medical reports submitted by the Applicant and approved by the Medical Services Division, the Administration caused physical and moral damage to the Applicant;

5. By refusing to renew the Applicant's G-4 Visa on his United Nations Laissez Passer to travel and attend to the medical needs of his ailing mother, the Administration caused the Applicant psychological trauma;

6. The inclusion in the report of OIOS to the General Assembly of an accusation that the Applicant was involved in forgery was aggravated by leaking his nationality to the media [which] violated the Applicant's terms of appointment and caused him irreparable harm;

B. The Tribunal is also respectfully requested to decide that:

1. The Applicant be exonerated of the false charges he was branded with;

2. The Applicant be paid all his salary and emoluments with full pension from 19 January 1999 to 30 June 2000 (the date of his projected retirement);

3. The Applicant's pension and lump-sum be adjusted [accordingly];

4. The Applicant be paid the equivalent of four years net base salary because of the financial, moral and physical injuries he suffered ...

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent answer until 31 August 2000 and periodically thereafter until 31 July 2001;

Whereas the Respondent filed his Answer on 16 July 2001;

Whereas the Applicant filed Written Observations on 13 September 2001;

Whereas, on 2 October 2001, the Respondent submitted an additional statement, on which the Applicant submitted his comments on 12 October 2001;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 8 August 1978, on a three year fixed-term appointment as a Political Affairs Officer at the P-4 level with the Security Council and Political Committees Division, Department of Political Affairs (DPA). Effective 1 April 1982, he was promoted to the P-5 level and, on 1 January 1985, he was granted a permanent appointment. Effective 1 January 1997, he was transferred to the General Assembly Subsidiary Organs Secretariat Services Branch (Decolonization Branch), General Assembly Affairs Division (GAAD), DPA, where he became Secretary for both the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Committee of 24 or C-24) and the Special Political and Decolonization Committee (the Fourth Committee).

In a letter dated 17 March 1997 to the President of the General Assembly, the Secretary-General stated his intention to "establish a Department of General Assembly Affairs and Conference Services integrating the major technical support services for the General Assembly, the Economic and Social Council and their subsidiary bodies currently provided by [DPA]" and others, as part of his efforts to reform the Organization. As a result, "the technical support services of [DPA]" were integrated into the newly established Department of General Assembly Affairs and Conference Services (DGAACS).

On 6 June 1997, however, the members of the Committee of 24 urged the Secretary-General to maintain the Decolonization Branch, and all its functions pertaining to the Committee of 24, within DPA.

Effective 15 July 1997, the Applicant was transferred to DGAACS.

On 11 September 1997, the Secretary-General submitted a report to the General Assembly regarding the proposed reforms, including the proposal that the Decolonization Branch be transferred to DGAACS (A/52/303). On 18 September 1997, the Chairman of the Committee of 24 wrote to the Secretary-General, claiming that he had no other option but to bring the issue to the attention of the General Assembly. On 8 October 1997, draft resolution A/C.4/52/L.4/Rev.1 was introduced in the Fourth Committee, urging the Secretary-General to maintain the Decolonization Branch and its functions within DPA. Following informal consultations between the Secretary-General and the co-sponsors of the draft resolution, on

15 October 1997, the draft resolution was withdrawn in favour of a proposal by the Secretary-General to establish a "stand alone Decolonization Unit" within DPA (A/52/303/Add.1).

On 8 December 1997, while reviewing a copy of draft resolution A/52/L.64, the Chief, General Assembly Secretariat Servicing Branch, noticed that the text contained an operative paragraph 15 which had not been there when the text was sent for translation. Under this new paragraph, the General Assembly welcomed the decision of the Secretary-General to maintain the Decolonization Unit in DPA. In order to meet the deadline for submission of the draft resolution to delegations, the document was issued without further changes. On 9 December 1997, the Under-Secretary-General for General Assembly Affairs and Conference Services convened a meeting with the co-sponsors, which resulted in a revision of the draft resolution. On 10 December 1997, draft resolution A/52/L.64, reflecting the Secretary-General's proposal, was adopted.

Also on 9 and 10 December 1997, Mr. Cherniavsky, a junior colleague of the Applicant's, sent the Director, General Assembly and ECOSOC Affairs Division, some speakers' notes that he claimed to have obtained from the Applicant's computer, after seeing the Applicant and Ms. Sergienko in the former's office. Mr. Cherniavsky claimed to have accessed this document from his own computer via their unit's "shared drive", having previously manipulated the Applicant's computer in order to allow for such monitoring.

Between 9 January and 30 April 1998, the Office of Internal Oversight Services (OIOS) conducted an investigation which confirmed that the Applicant, together with Ms. Sergienko, had

> "acted jointly to create, possess or otherwise deal with documents, the contents of which they had had reason to know were contrary to the Secretary-General's plan of reform with respect to the Decolonization Branch ... and that they had so acted with the aim of disrupting the transfer ... and preventing the abolition of Ms. Sergienko's P-4 post".

Specifically, the report alleged that Mr. Araim and Ms. Sergienko,

> "created, possessed or distributed and otherwise dealt with [three forged documents, two draft documents, operative paragraph 15 of draft resolution A/52/L.64, and additional documents prepared on Mr. Araim's computer], the contents of which were

> inconsistent with their duties and contrary to the Secretary-General's decisions in respect of the [de]colonization programme; that the staff members' actions impacted negatively on the Secretary-General's planning and decisions in respect to the [de]colonization programme; that these actions aimed at advancing the staff members' careers; that the staff members conspired to undermine the Secretary-General's decisions; that they misused their official positions; and that, in furtherance of their scheme, the staff members exploited documents which had been forged to undermine the Secretary-General's decisions in respect [of] the decolonization programme and which the staff members had reason ... to know were forged ... documents".

On 1 May 1998, the Under-Secretary-General for Internal Oversight Services submitted the investigation report to the Under-Secretary-General for General Assembly Affairs and Conference Services.

On 15 May 1998, the Under-Secretary-General for General Assembly Affairs and Conference Services transmitted the OIOS report to the Assistant Secretary-General, Office of Human Resources Management (OHRM), stating that DGAACS "fully [concurred] with the characterization of the events investigated ... and ... strongly [supported] its recommendations for action".

On 19 May 1998, the Assistant Secretary-General, OHRM, provided the Applicant with a copy of the OIOS report and presented him with allegations of misconduct, charging him with violating the standards of conduct expected of an international civil servant. In addition, she informed the Applicant that the Secretary-General had decided to suspend him from duty with pay, with immediate effect, pending disciplinary proceedings. She invited him to submit a written statement or explanation within two weeks. On 26 June 1998, the Applicant replied to the allegations.

On 20 July 1998, the Assistant Secretary-General, OHRM, transmitted the case to the Joint Disciplinary Committee (JDC).

In the Report of the Secretary-General on the Activities of OIOS, dated 23 September 1998 (A/53/428) the results of the OIOS investigation into this matter, as well as identifying characteristics of the staff members involved, were revealed.

The JDC adopted its report on 20 November 1998. Its considerations, conclusions and recommendation read as follows:

"*VII. Considerations*

...

71. The Panel ... felt that ... due process requirements ... had been largely complied with by the Administration in the present case.

72. The Panel would have been in a better position to state that the due process requirements had been fully respected if some official other than [the Under-Secretary-General for General Assembly Affairs and Conference Services] had reported the matter to [the Assistant Secretary-General, OHRM] in accordance with paragraph 3 of ST/AI/371. In that connection, it noted Mr. Araim's argument that [the Under-Secretary-General for General Assembly Affairs and Conference Services] action of reporting the present case to OHRM in May 199[8] represented a conflict of interest. In the Panel's opinion, [the Under-Secretary-General for General Assembly Affairs and Conference Services] should have recused himself from the case, as he had apparently formulated an opinion on the culpability of Mr. Araim during his interview with the OIOS investigators in March 1997. He should have designated his deputy or some other responsible official to review the OIOS report of investigation. Nevertheless, in the view of the Panel, that technical error had not affected the outcome of the case as the OIOS preliminary investigation appeared to indicate that the report of misconduct was well founded, and any official other than [the Under-Secretary-General for General Assembly Affairs and Conference Services] would have taken the same course of action by reporting the matter to OHRM.

...

74. ... Mr. Araim questioned the legality of the clandestine manner in which Mr. Cherniavsky had monitored his ... office computer.

...

78. ... While agreeing with [the Administration's position] that staff members did not have exclusive right of access to the computers allocated to them, or to any material generated through, or stored in, such computers, as they were installed in offices to benefit the delivery of the Organization's work programme, the Panel nevertheless felt that those computers assigned to particular staff members were not and should not be freely accessible to everyone in the same way as the files on a shared drive or the computers in a public library. ...

...

80. ... in the absence of any regulations or rules on the issue of access to the computer of another staff member, the Panel was not in a position to say that what Mr. Cherniavsky had done was illegal, and that whatever came from that illegal search was

therefore inadmissible, though it found the clandestine monitoring by Mr. Cherniavsky of Mr. Araim's computer highly intrusive and disturbing. The Panel believed that there was a real need for rules and guidelines to regulate the use of, and access to, office computers.

81. [With regard to] the OIOS annual report to the General Assembly ..., the Panel was surprised and dismayed by the OIOS decision to make public the result of its preliminary investigation of the present case, when it knew full well that the case was under active consideration by the Joint Disciplinary Committee.

82. The Panel noted that paragraph 134 of the OIOS annual report contained conclusory language with respect to the authorship of ... three forged documents. It was regrettable that the opinions and conclusions of the OIOS investigators had been transformed into 'established' facts. In the Panel's view, the publication of such conclusions was premature.

83. With due respect to the OIOS mandate to report its activities annually to the General Assembly, the Panel urged OIOS to refrain from publicizing any information that might have, or appear to have, the effect of prejudging the outcome of the investigation and deliberations of another administrative arm of the Organization.

...

88. On the basis of the totality of evidence presented, ... the Panel determined that the Administration had submitted adequate evidence indicating that Mr. Araim had possessed, distributed or dealt with, the letter from [the Chairman of the Committee of 24] to the Secretary-General of 28 August 1997, draft resolution A/C.4/52/L4/Rev. 1, and, in conspiracy with Ms. Sergienko, operative paragraph 15 of draft resolution A/52/L.64, though it was not convinced that he had created any of those three documents. The Panel also determined that the Administration had failed to prove with adequate evidence that Mr. Araim had been involved in the creation, possession, distribution of, or dealing with, the speakers' notes and the three forged documents.

...

108. Since it had found that Mr. Araim had possessed, or dealt with three documents, ... the Panel needed to determine whether those acts ... constituted misconduct. In its view, the answer was in the affirmative.

...

111. The Panel found that Mr. Araim had consistently failed in his duty as the Secretary of the C-24 to help the Secretary-General through his supervisors to better understand the real wishes and concerns of Member States of the C-24 and help the latter to better understand the extent of the commitment that the Secretary-General had

pledged to the cause of decolonization. It also found that Mr. Araim had conveniently taken advantage of the differences in understanding between the members of the C-24 and the Secretary-General as exacerbated by the forged documents, and exploited the situation to the detriment of the interests of the Organization in order to advance his own career.

112. The Panel did not think that those acts on the part of Mr. Araim were merely an indication of poor performance or incompetence. In its view, by exploiting the misunderstanding created by the forged documents between Member States of the C-24 and the Secretary-General with respect to the latter's plan to transfer the Decolonization Branch to DGAACS, and by actively concealing vital information concerning the significant developments within the C-24 from his supervisors, Mr. Araim had violated the standards expected of him as an international civil servant, particularly Staff Regulations 1.1, 1.4 and 1.5. The Panel believed that such conduct amounted to misconduct within the meaning of Staff Rule 110. 1, for which disciplinary measures were warranted. It also believed that such misconduct called into serious question Mr. Araim's continued service with the Organization.

VIII. Conclusions and recommendation

113. ... the Panel *unanimously agreed* that the Administration had presented adequate evidence to show that Mr. Araim had possessed, distributed or dealt with the letter from [the Chairman of the Committee of 24] to the Secretary-General of 28 August 1997, draft resolution A/C.4/52AL.4/Rev. 1, and, in conspiracy with Ms. Sergienko, operative paragraph 15 of draft resolution A/52/L.64, though it was not convinced that he had created any of them.

114. The Panel also unanimously agreed that the Administration had failed to prove with adequate evidence that Mr. Araim had been involved in the creation, possession, distribution of, or dealing with, the speakers' notes and the three forged documents.

115. In light of the foregoing and in view of the serious nature of the misconduct, the Panel *unanimously recommends* that Mr. Araim be separated from service, with immediate effect, with compensation in lieu of the three months' notice, and with his entitlement to the payment of termination indemnity under Staff Rule 109.4 remaining unaffected."

On 11 January 1999, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

"...

> While agreeing with the Committee's conclusion that every other official would have done exactly what [the Under-Secretary-General for General Assembly Affairs and Conference Services] did in this case, the Secretary-General points out that, contrary to the Committee's opinion, paragraph 3 of ST/AI/371 was fully adhered to when [the Under-Secretary-General for General Assembly Affairs and Conference Services] reported this matter to OHRM. The Secretary-General thus considers that the requirements of due process were fully complied with by the Administration in your case.
>
> ... The Secretary-General is also in agreement with the Committee's conclusion that, by exploiting the misunderstanding created by the forged documents between the Member States of the Committee of 24 and the Secretary-General with respect to the latter's plan to transfer the Decolonization Branch to DGAACS, and by actively concealing vital information concerning the significant developments within the Committee of 24 from your supervisors, you had violated the standards expected of you as an international civil servant, particularly Staff Regulations 1.1, 1.4 and 1.5. He is also in agreement with the Committee that your conduct amounted to misconduct within the meaning of Staff Rule 110.1 and that the seriousness of your misconduct is incompatible with your continued service with the Organization.
>
> ... the Secretary-General has decided that you be separated from service with compensation in lieu of the three months' notice pursuant to Staff Rule 110.3 (vii), with effect from close of business on the day you receive this letter.
>
> ..."

On 8 February 1999, the Applicant's spouse requested a stay of action in the disciplinary proceedings against her husband, in accordance with staff rule 111.2 (a) and (c) (i). On 10 February 1999, the Under-Secretary-General for Management responded that her request could not be accepted as the decision in question had already been implemented on 19 January, *i.e.* prior to the request.

On 16 February 1999, Counsel for the Applicant wrote to the Under-Secretary-General for Management claiming that, as the Applicant had been on sick leave since 10 January 1999, he could not be separated from service while on medical leave. He reiterated the request for a stay of action. On 23 February 1999, the Under-Secretary-General for Management again denied the request for a stay of action, and noted that the Medical Service Division had approved the request for sick leave on 21 January 1999, at which time the Applicant was no longer a staff member and was not entitled to such leave.

On 28 February 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JDC was improperly constituted.

2. The JDC failed to recognize the conflict of interest in the preliminary stages.

3. The JDC erred in accusing the Applicant of wrongdoing, basing its conclusions on a biased OIOS report.

4. The Administration caused the Applicant physical and moral damage when it rejected his medical reports as approved by the Medical Services Division.

5. The Applicant suffered irreparable harm by the inclusion in the OIOS report to the General Assembly of an accusation that he was involved in forgery. This was aggravated by the leaking of his nationality to the media.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to separate the Applicant from service with compensation in lieu of three months' notice was a valid exercise of his discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

2. The Applicant failed to meet the standards of conduct required of staff members and international civil servants, and the established facts legally amounted to misconduct.

3. The Applicant's rights of due process were fully respected.

4. The sanction imposed against the Applicant is a disciplinary measure provided for under the Staff Rules and is proportionate to the offence.

5. The Applicant was no longer a staff member when he requested medical leave from the Medical Services Division.

6. The Applicant was no longer a staff member when he requested a stay of action with regard to his separation from service. The Staff Rules do not provide for suspension of action in respect of disciplinary matters.

The Tribunal, having deliberated from 31 October to 21 November 2001, now pronounces the following Judgement:

I. The Applicant filed an Application with the Administrative Tribunal seeking to rescind the decision of the Secretary-General to separate him from service with compensation in lieu of notice, for having violated the standards of conduct expected of international civil servants. He also seeks to be paid all his salary and emoluments with full pension from 19 January 1999 to the date of his projected retirement, his pension and lump-sum to be adjusted accordingly, as well as the equivalent of four years net base salary for the financial, moral and physical injuries he suffered.

II. The Applicant joined the Organization on 8 August 1978, as a Political Affairs Officer at the P-4 level with the Security Council and Political Committees Division, Department of Political and Security Council Affairs. Effective 1 April 1982, he was promoted to Senior Political Affairs Officer at the P-5 level. In 1985 his appointment became permanent. Effective 1 January 1997, he was transferred to Decolonization Branch, and became Secretary for both the Committee of 24 and the Special Political and Decolonization Committee. Effective 15 July 1997, he was transferred to DGAACS. He was suspended from duty with pay pending investigation, effective 26 May 1998.

III. In a memorandum dated 19 May 1998, the Applicant was charged with misconduct for violating the standards of conduct expected of international civil servants. He was accused of creating, possessing, distributing and otherwise dealing with three false and forged documents and four additional documents, alone or in complicity with a colleague, Ms. Sergienko, the contents of which were inconsistent with their duties and contrary to the Secretary-General's decisions with respect to the decolonization programme. Specifically, the Administration asserted:

1. That the Applicant created, possessed, distributed or otherwise dealt with four documents, namely i) a letter of 28 August 1997 from the Chairman of the Committee of 24 to the Secretary-General; ii) draft Resolution A/C.4/52/L.4/Rev.1, introduced before the Fourth

Committee on 8 October 1997; iii) operative paragraph 15 of draft resolution A/52/L.64; and iv) speakers' notes, portions of which were used by certain delegations in the General Assembly and the Fifth Committee in December 1997.

2. That the Applicant created, possessed, distributed or otherwise dealt with three forged documents, which had been circulated amongst delegates while the issue of the decolonization programme was being discussed, namely i) a note dated 29 April 1997 purportedly from the Director, General Assembly and ECOSOC Affairs Division (GAEAD), to the Under-Secretary-General for DPA; ii) a note dated 10 July 1997 purportedly written by the former Under-Secretary-General for DPA, to the Secretary-General; and iii) a note dated 10 December 1997 purportedly prepared by a Senior Officer in the Executive Office of the Secretary-General.

According to the Administration, these actions and documents were contradictory to the Secretary-General's decisions with respect to the decolonization programme, and their aim was to advance the Applicant's career to the detriment of the initiatives and decision of the Secretary-General, to transfer the Decolonization Branch from DPA to DGAACS.

IV. The Applicant's case was considered by the JDC, which adopted its report on 20 November 1998. The JDC considered three issues: i) whether the Applicant had been accorded due process by the Administration; ii) whether the Administration had presented adequate evidence to substantiate the charges and whether the Applicant had submitted satisfactory evidence to explain and/or justify his questioned conduct; and iii) whether the misconduct as alleged had occurred and, if so, what disciplinary measures, if any, would be appropriate.

The JDC determined that:

> "... the Administration had submitted adequate evidence indicating that Mr. Araim had possessed, distributed or dealt with, the letter from [the Chairman of the Committee of 24] to the Secretary-General of 28 August 1997, draft resolution A/C.4/52/L.4/Rev.1, and, in conspiracy with Ms. Sergienko, operative paragraph 15 of draft resolution A/52/L.64, though it was not convinced that he had created any of those three documents. The Panel also determined that the Administration had failed to prove with adequate evidence that Mr. Araim had been involved in the creation, possession, distribution of, or dealing with, the speakers' notes and the three forged documents".

The JDC found that the requirements of due process were not compromised by the fact that it was the Under-Secretary-General for General Assembly Affairs and Conference Services, who had reported the matter to the Assistant Secretary-General, OHRM, because "any official other than [the Under-Secretary-General for General Assembly Affairs and Conference Services] would have taken the same course of action by reporting the matter to OHRM". Consequently, this "technical error" did not affect the outcome of the case.

In light of the above, the JDC unanimously concluded that there was misconduct of a serious nature and recommended that the Applicant be separated from office, with immediate effect, with compensation in lieu of the three months' notice, and with his entitlement to the payment of termination indemnity under staff rule 109.4 remaining unaffected. The JDC concluded as follows:

> "Since it had found that Mr. Araim had possessed, or dealt with three documents, i.e., the letter of 28 August 1997 from the [Chairman of the Committee of 24] to the Secretary-General, draft resolution A/C.4/52/L.4/Rev.1 and operative paragraph 15 of draft resolution A/52/L.64, the Panel needed to determine whether those acts on the part of Mr. Araim constituted misconduct. In its view, the answer was in the affirmative".

In its conclusions and recommendation, the JDC excluded the possibility of the Applicant dealing with the three forged documents:

> "The Panel also unanimously agreed that the Administration failed to prove with adequate evidence that Mr. Araim had been involved in the creation, possession, distribution of, or dealing with, the speakers' notes and the three forged documents".

The Secretary-General decided as follows:

> "...The Secretary-General *is also in agreement with the Committee's conclusion that, by exploiting the misunderstanding created by the forged documents between the Member States of the Committee of 24 and the Secretary-General* with respect to the latter's plan to transfer the Decolonization Branch to DGAACS, and by actively concealing ... the significant developments within the Committee of 24 from your supervisors, you had violated the standards expected of you as an international civil servant, particularly Staff Regulations 1.1, 1.4 and 1.5. He is also in agreement with the Committee that your conduct amounted to misconduct within the meaning of Staff Rule 110.1 and that the seriousness of your misconduct is incompatible with your continued service with the Organization" (Emphasis added).

V. The Tribunal has repeatedly stated that disciplinary proceedings are not of a criminal nature, but rather they are administrative proceedings, regulated by the internal law of the Organization. (See Judgement No. 850, *Patel* (1997).) As stated correctly by the JDC in its report, the Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means "reasonably sufficient for legal action" (The Random House College Dictionary Revised edition 1982), in other words sufficient facts to permit a reasonable inference that a violation of law had occurred. In Judgement No. 897, *Jhuthi* (1998), the Tribunal stated that the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference that misconduct has occurred. Once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question. (See Judgement No. 484, *Omosola* (1990) and *Patel*, *ibid.*)

Thus, it is to be determined by the Tribunal whether the Administration produced adequate evidence satisfying the standards for a *prima facie* case as established by this Tribunal.

VI. The JDC has already determined that some of the conclusions contained in the OIOS report were not supported adequately by the evidence produced. Specifically, the JDC found no evidence linking the Applicant to the speakers' notes and to the three forged documents.

As for the speakers' notes, the JDC report states that on 9 and 10 December 1997, Mr. Cherniavsky sent the Director, GAEAD, documents that he had allegedly obtained from the Applicant's computer. These documents were speakers' notes, the contents of which were contrary to the Secretary-General's reform plan. The Security and Safety Service was informed, and they launched a preliminary investigation. Several computers were impounded and six people were interviewed. The entire dossier of the preliminary investigation was then submitted to OIOS, which then conducted its own investigation, from 9 January to 30 April 1998. The report submitted by OIOS confirmed the allegations made against the Applicant during the preliminary investigation.

It is clear from the facts as appear in this case, that at least one person in addition to the Applicant, i.e. Mr. Cherniavsky, had access to the Applicant's computer. He, himself, went into the Applicant's computer files and extracted some documents, namely the speakers' notes (which,

ultimately, did not prove useful in implicating the Applicant in the charges brought against him). Mr. Cherniavsky's proven access to the Applicant's computer raises substantial doubts as to which of the documents found in the Applicant's computer can truly be linked to him and which can not.

This intrusion and search of a private computer was allegedly not the first time that something of this nature took place to the detriment of the Applicant. According to the Applicant's secretary, on 7 October 1997, well before Mr. Cherniavsky's search, the Deputy Permanent Representative of Cuba came to the Decolonization Branch looking for the Applicant in order to co-sponsor, along with other delegations, draft resolution A/C.4/52/L.4/Rev.1. As no one knew about this draft resolution, the Applicant's secretary went to his computer and discovered it on his screen. An identical typographical error found in this draft resolution, and in the text introduced in the Fourth Committee the following day, led to the JDC's conclusion linking the Applicant to this resolution.

The Tribunal notes that, in a letter dated 20 July 1999, the Permanent Representative of Cuba to the United Nations denies that his deputy visited the Decolonization Branch for the alleged purpose. In his letter he affirms explicitly that his Deputy "affirmed that he did not have any knowledge that Mr. Araim had in his possession such draft resolution, nor was that the purpose of his visit to the office of Mr. Araim".

The Applicant denied having anything to do with the document allegedly found, in his absence, on his computer.

The Tribunal wishes to express its concern that the allegations regarding this incident were disclosed to the Applicant only four months after it allegedly took place.

With regard to the charge that the Applicant had created, possessed, distributed or otherwise dealt with the letter of 28 August 1997 from the Chairman of the Committee of 24 to the Secretary-General, this was based on the evidence given by a secretary during the OIOS investigation. At a later stage however, the same secretary, the key witness to the circumstances surrounding the creation of this letter, denied in a handwritten note the content of her signed initial deposition. The JDC was of the opinion that the first deposition was more credible because it was detailed, whereas the second one was of a general character.

The Tribunal does not want to pronounce itself on issues of credibility, as it only examined the evidence before it and did not hear any witnesses. However, the finding of the JDC is not convincing. Negations do not need to be detailed, especially when the negation covers the entirety of the initial statement. When negations like that occur, they raise doubts as to the foundations of the evidence as a whole. It is then up to the JDC to conduct its own investigation in order to get to the truth.

VII. The Tribunal now turns its attention to operative paragraph 15 of draft resolution A/52/L.64 which, it seems, is the focal point of the accusations against the Applicant, particularly, that he did not inform the Secretary-General about this paragraph "through his supervisors".

The secretary of the Applicant's supervisor asserted that the Applicant, together with Ms. Sergienko, asked her to add this paragraph. According to her, she typed the document on the basis of the Applicant's handwritten notes, and added a new operative paragraph 15, which had been stapled to these notes. The evidence clearly indicates that the stapled paragraph 15 was not handwritten but was already typed and only needed to be inserted in the correct place within the text of the resolution.

The Applicant denies that this ever happened, stating that he would never have trusted his supervisor's secretary, and furthermore, he had no reason to do so in the company of a conspirator, Ms. Sergienko. The Applicant asserts that as soon as operative paragraph 15 came to his attention, he asked Mr. Cherniavsky to take the draft resolution to the secretariat of the General Assembly. However, this issue is not clear as there is no evidence pertaining to this.

According to the JDC report, the Applicant acknowledges having seen draft resolution A/52/L.64. However, the Applicant testified during the OIOS investigation, that the draft was the initiative of delegations and that it had arrived in his office as a completed draft. This was corroborated by the President of the C-24, who added that these delegations included the language of paragraph 15 in the hope of reaching a compromise with the Secretary-General on his proposed reform.

Furthermore, it is quite puzzling that the secretary, who testified against the Applicant and was the one to initially implicate him with that document, did not testify before the JDC. As

a result, we cannot foresee how she would have reacted had she been confronted with the Applicant's version of events. According to the Applicant, she was not even invited by the JDC.

The Tribunal regrets that the records of the evidence taken during the JDC proceedings were destroyed. Had the transcripts of the evidence been kept, the Tribunal would have been in a better position to form its own opinion as to the factual elements of a case such as this, which is characterized by contradicting, or worse, confusing, evidence.

VIII. The Respondent claims that the Applicant's conduct amounted to misconduct because he purportedly exploited the misunderstanding created by the forged documents and because he actively concealed significant developments from his supervisors. The Secretary-General failed to notice that this first claim was not included in the JDC's final recommendations, since it had explicitly determined that the charges against the Applicant with respect to the three forged documents could not be substantiated. Therefore, at least one of the reasons included in the Secretary-General's decision is not valid. Consequently, the decision should be rescinded in its entirety as we cannot assess what weight was given to this reason in the formulation of the Secretary-General's final decision.

It should also be pointed out that the JDC, despite its conclusions concerning the three forged documents, stated:

> "[The JDC] also found that Mr. Araim had conveniently taken advantage of the differences in understanding between the members of the C-24 and the Secretary-General, as exacerbated by the forged documents, and exploited the situation to the detriment of the interest of the Organization in order to advance his own career".

In so doing, the JDC shifted from the initial charge of "creating, possessing, distributing or otherwise dealing" with the three forged documents.

It is the Tribunal's opinion that based on the secretary's testimony, which is the sole evidence linking the Applicant to paragraph 15, the only charge that could have been brought against the Applicant with regard to this document is that he knew about it and should have immediately taken steps to inform his supervisors, i.e. either the Director, GAEAD, or the Under-Secretary-General for General Assembly Affairs and Conference Services of this development.

However, the JDC report states that "[the Applicant] asserted that he had instructed his secretaries to present copies of all correspondence of the Committee of 24 to [the Director, GAEAD]". This is another issue that remains inconclusive, as the JDC report does not indicate whether this was confirmed by the secretaries or not.

It is difficult to understand how from the initial accusation (the secretary's statement of the facts) the Panel shifted to the consideration that what amounted to misconduct was that the Applicant "failed in his duty as the Secretary of the C-24 to help the Secretary-General through his supervisors to better understand the real wishes and concerns of Member States of the C-24". Ultimately, the Applicant's conduct amounted to misconduct not because he dealt with the document, but because he knew about it and did not report it through his supervisors. This is a shift in the accusation. Had the Applicant known that this was the charge being brought against him, he would not have implicated himself during the OIOS investigation, as he did, by confirming that he had known about the draft resolution but he had not dealt with it. (See Judgement No. 744, *Eren* (1995).)

IX. The Tribunal wishes to express its concern regarding the conducting of investigations by way of private intrusions into others' computers. It cannot accept that investigations could be conducted without rules and guarantees of due process and without giving due respect to inalienable rights as proclaimed by the Organization itself in the Declaration on Human Rights. This is regardless of what the internal regulations of the Organization say as to its rights to the contents of the staff's computers. This is even more troubling when considering that even OIOS, in its guidelines, is required to at least have the staff member present when retrieving evidence from their immediate vicinity, such as their desk.

In the Tribunal's opinion, the procedures followed presented many failures which deprived the Applicant of his right to due process, as human rights and dignity demand.

X. The Tribunal considered whether in this disciplinary case the Administration had truly presented a *prima facie* case. The Tribunal finds that this requirement is not met when the Administration presents contradicting or confusing evidence, i.e. not reasonably sufficient evidence for legal action.

XI. In view of the foregoing, the Tribunal orders that:

(i) The Secretary-General's decision of 19 January 1999 to separate the Applicant from service for misconduct be rescinded;

(ii) The Applicant should be paid, as compensation, his salary and related allowances from 19 January 1999, the date of his separation from service, to 30 June 2000, the date of his projected retirement, less the compensation he already received; or,

(iii) Should the Secretary-General, within 30 days of the notification of this Judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary at the rate in effect at the date of his separation from service.

XII. In addition, the Tribunal orders the Respondent to pay the Applicant compensation of US$30,000 for the harm he sustained.

XIII. All other pleas are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary