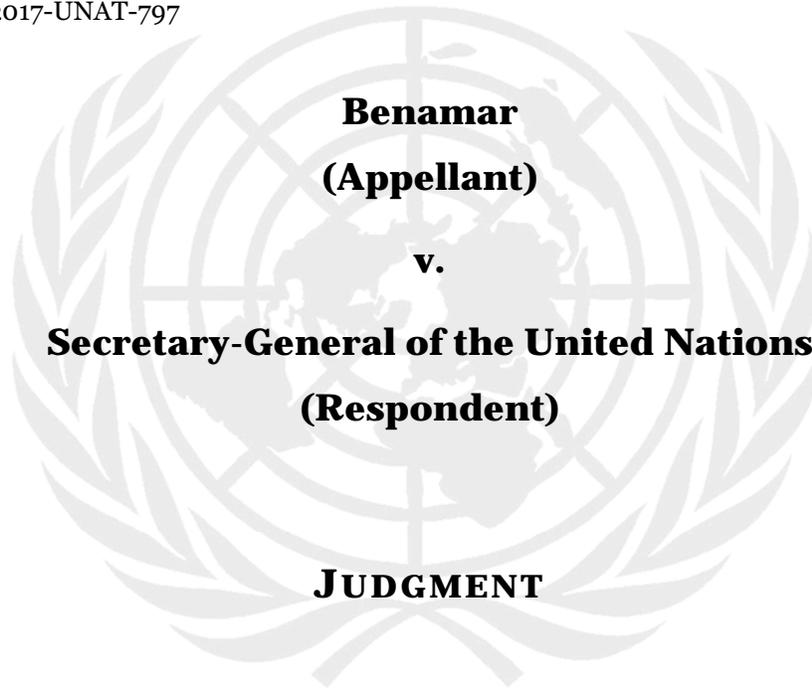




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2017-UNAT-797



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Before:	Judge Martha Halfeld, Presiding Judge Richard Lussick Judge Dimitrios Raikos
Case No.:	2017-1082
Date:	27 October 2017
Registrar:	Weicheng Lin

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Counsel for Mr. Benamar:	Richard Sédillot
Counsel for Secretary-General:	Stéphanie Cartier

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/025, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 10 April 2017, in the case of *Benamar v. Secretary-General of the United Nations*. Mr. Karim Anisse Benamar filed the appeal on 7 June 2017, and the Secretary-General filed an answer on 8 August 2017.

**Facts and Procedure**

2. Mr. Benamar joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in October 2005 as a General Service staff member at the G-5 level. On 1 November 2007, he was appointed to the post of Finance Officer at the P-3 level in the Democratic Republic of the Congo. He was assigned to the post of Senior Administration/Finance Officer in Burkina Faso in September 2012. He was then reassigned to the same post at the same level in Jordan in February 2014. At the time of his application before the UNDT he was serving in Turkey.

3. On 3 January 2013, the child S.M. Benamar was born of Mr. Benamar's union with Ms. J.W.G., his former partner.

4. The relevant facts commenced on 20 October 2013, when Mr. Benamar was still serving in Burkina Faso.<sup>1</sup> On 20 October 2013, a car with armed men arrived at the place of residence of Mr. Benamar, who was not home at the time. The armed men entered the house and left with the child S.M. Benamar and Ms. J.W.G., despite protests from Mr. Benamar who, having been notified by his guards, had arrived at his house 15 to 20 minutes after the car had arrived.

5. In the document "Security incident report" filed with the appeal, Mr. Benamar reported the following:<sup>2</sup>

FACTS: On Sunday 20 October 2013 at 23:30, while I was not in my residence, my guards called me in panic to alert me that the police entered violently in my property. Consequently, I ran to my place which was only a few hundred meters away from the place I was.

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<sup>1</sup> At that time, Mr. Benamar had left his home and was living with a colleague from work, in order to minimize the tensions between him and his partner, even though he still looked after their child as becomes apparent from the "note for the file" signed by Mr. Jaquet and his testimony.

<sup>2</sup> Emphases added.

- Upon arrival, I encountered the presence of numerous policemen with machine guns. In addition, there was an individual who claimed to be the U[nited Nations] Guards in front of my residence that he is the Consul of the Democratic Republic of the Congo in Burkina Faso. *This person, named, [D. K.], had been intrusive in my private life for several months already.* That night, he was there, in my residence without any valid reason! At the end, he abducted and sequestered my son, a nine-month old baby, together with the support of the Burkinabe police.

To try to get my son back, and because of the involvement of the Police of the host government and the use of violence, *we had no choice [but] to request the support of the host government through a “note verbale” addressed to the [M]inistry of Foreign Affairs [(MFA)].* According to the General Secretary of the [MFA] of Burkina [F]aso, at that time [M. M. S.], the [C]ongolese individual, [M. D. K.], has absolutely no rights nor immunities linked to his so-called consular title.

Burkina authorities have requested to bring back my son to his residence.

During the interview, it has also been mentioned by the general secretary that if anything happened against this order, there would be an official and personal claim against the authors of this criminal action, [M. D. K].

6. An official “note verbale” was sent the following day (21 October 2013) by the Representative of UNHCR in Burkina Faso to the MFA of the same country. In it, the Organization’s representative, Mr. Jaquemet, requested that the MFA make an inquiry about the event and intervene to find a quick solution for the situation, as it was “essential that Mr. Benamar receive news of his son and have access to him”.<sup>3</sup>

7. A third person was involved in the incident, a so-called “honorary vice-consul of the Democratic Republic of Congo to Burkina Faso”, who, according to Mr. Jaquemet, however, had never been accredited by the MFA in Burkina Faso and whose “complicity” with the baby’s mother, with whom he spoke in their national language, was crucial to the event.<sup>4</sup> According

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<sup>3</sup> The UNHCR Representative in Burkina Faso also signed the “note for the file” dated 5 December 2013, in which he detailed the situation.

<sup>4</sup> As stated by Mr. Edouard Kabore in his testimony. We also take note that the so-called “honorary vice-consul” picked up the maternal grandmother of the child at the airport, when she arrived to stay with her daughter at the clinic, therewith rendering in vain the wait of the Deputy Representative with a UNHCR driver, who went there to take her to her daughter at the daughter’s request.

to both the Organization's guards at Mr. Benamar's house, the baby's mother had broken the window panes before the policemen arrived.<sup>5</sup>

8. There followed two meetings with the General Secretary of the MFA of Burkina Faso, first only with Mr. Benamar and Mr. Jaquemet and then also with the "Vice-Consul" and the mother, in October 2013. These meetings served to return the baby to his home and therein the mother decided to come back. However, she later changed her mind, left, and eventually checked into a psychiatric clinic.<sup>6</sup>

9. The description of the ensuing events is taken from the impugned Judgment:<sup>7</sup>

... On 30 October 2013, the Applicant's lawyer filed a motion before the *Tribunal de Grande Instance of Ouagadougou* to determine custody of the child.

... On 29 November 2013, the Applicant filed a complaint against X with the Public Prosecutor of Burkina Faso at the *Tribunal de Grande Instance of Ouagadougou* for trespassing, abduction and complicity in the abduction and forcible confinement of his child and the child's mother. On 10 January 2014, the *Tribunal de Grande Instance of Ouagadougou* issued an order entrusting custody of the child S.M. Benamar to his mother and granting the Applicant visitation rights. The Applicant's lawyer appealed that order before the Court of Appeal on 22 January 2014.

... On 29 January 2014, the Applicant requested, on the UNHCR travel authorization form (PT8), for his son, S.M. Benamar, to travel with him to Jordan. He subsequently travelled to Jordan with his son without obtaining prior authorization from the child's mother.

... On 10 February 2014, the Applicant's former partner filed a complaint against him with the Inspector General's Office of UNHCR for sexual exploitation, kidnapping and forcible confinement, physical and psychological violence, use of privileges and

<sup>5</sup> As stated in the handwritten affidavit of Mr. Adama Sawadogo and Mr. Rahamané Tapsoba. According to the carer's affidavit, the baby's mother regularly insulted and threatened Mr. Benamar and, on the day of the event, after insulting him, she first turned the television up loud and then started to break household objects, yelled, even bit the carer, to the point that the baby awoke, and afterwards she phoned the so-called "Consul" to tell him that she no longer wanted to stay in the house. It was after that that the policemen arrived with the "Consul".

<sup>6</sup> Once she arrived at Mr. Benamar's house, the baby's mother asked for money to travel alone to her country of origin, the Democratic Republic of the Congo, to meet her family and rest, leaving the baby with the carer. Mr. Benamar gave her a certain amount, equivalent to about USD 4,000 and purchased the flight tickets to Kinshasa (according to the testimony of Mr. Jaquemet). After spending the night in a hotel at her demand, the next day, she was very agitated and refused to leave, especially after the visit of the "honorary vice-consul" who had taken her passport away. Due to her confused behaviour, she was offered the opportunity to check into a psychiatric clinic the same day (25 October 2013), where she stayed until 25 November 2013. We also note that, during this period, the UNHCR office kept regular contact with her and her family and staff members visited her regularly.

<sup>7</sup> Impugned Judgment, paras. 7-33 and 35.

immunities, and refusal to comply with local laws. Part of the complaint was also directed against the Resident Representative of UNHCR in Burkina Faso, another UNHCR staff member in Burkina Faso and a driver.

... On 11 April 2014, the Inspector General's Office of UNHCR ("IGO") received another written complaint from the Applicant's former partner addressed to the High Commissioner, in which she alleged that the Applicant had abducted their son, S.M. Benamar. IGO then opened an investigation into the allegations and, having noted that the complaint was not patently frivolous, assigned an investigator to the case.

... On 13 March 2015, the Applicant's Counsel filed with the Public Prosecutor at the *Tribunal de Grande Instance of Paris* a complaint, dated 5 May 2014, against the child's mother for abduction of a minor and extortion; against Mr. Dieudonné Kazumba (supposedly a consul of the Democratic Republic of the Congo), for abduction of a minor in an organized gang and usurpation of title; and against X, for abduction of a minor in an organized gang and trespassing.

... In an e-mail dated 6 June 2014, an IGO investigator informed the Applicant that he was the subject of an investigation and summoned him for an interview. In the e-mail, the investigator also informed the Applicant that "the allegations against [him] [were] related to [his] purported failure to comply with the provisions of the order of 10 January 2014 of the *Tribunal de Grande Instance of Ouagadougou* in Burkina Faso regarding custody of [his] son, [S.M.] Benamar".

... The Applicant responded to the e-mail the following day, informing the IGO investigator that the case would be litigated before the Court of Appeal of Ouagadougou on 16 July 2014 and requesting a response to the complaints that he had filed. He also provided the e-mail address of his lawyer.

... An initial telephone interview was conducted with the Applicant on 30 June 2014, at the start of which the Applicant was officially informed that he was the subject of the investigation. During the interview, the investigators asked the Applicant to provide them with the documentation relating to the appeal filed against the order of 10 January 2014, as well as any other documents that would corroborate that the Applicant had custody of his son S.M. Benamar at the time that he had brought the child to Jordan and at the time of the interview.

... By decision No. 94 of 20 August 2014, the Court of Appeal of Ouagadougou confirmed that custody of the child S.M. Benamar had been entrusted to the mother, awarding maintenance to the mother and granting the Applicant visitation rights. The child's mother sent a certified copy of this decision by e-mail to the Inspector General of UNHCR on 3 September 2014, requesting him to ensure that the Applicant complied with the courts' decisions.

... On 17 October 2014, the Applicant filed an appeal on points of law before the Court of Cassation of Burkina Faso against the decision of the Court of Appeal.

... In an e-mail of 27 October 2014, the IGO investigator asked the Applicant to confirm, before 1 December 2014, that he was complying with the terms of decision No. 94 of the Court of Appeal, particularly with regard to the handover of the child to his former partner. She also informed him that a “failure to confirm ... [could] constitute professional misconduct”.

... A second telephone interview was conducted by the IGO investigator with the Applicant on 15 December 2014, during which the Applicant stated that “all remedies [had not] been exhausted and [were] far from having been exhausted,” and that his appeal to the Court of Cassation was still pending. The investigators asked him to provide them with proof, before 7 January 2015, that (1) the decision of the Court of Appeal was not enforceable and (2) the Applicant had filed an appeal to the Court of Cassation. They reiterated that request by e-mails of 30 December 2014 and 12 January 2015, granting the Applicant an extension until 13 January 2015.

... The Applicant replied by e-mail on 13 January 2015, indicating, *inter alia*, that the decision of the Court of Appeal would be subject to an appeal before the Court of Cassation, that it was not enforceable beyond the borders of Burkina Faso, and that, if necessary, he would refer the matter to the competent international authorities. He also noted that the best interests of his son were at stake and that, after the aggression and forcible confinement that his son had been subjected to, it was inconceivable that he should again be placed in contact with his aggressors.

... On 11 February 2015, the Applicant was temporarily reassigned to the UNHCR representative office in Hungary, effective 1 April 2015. On his travel authorization application, signed on 22 February 2015, he listed himself and his son, S.M. Benamar. He also listed his son on the dependency allowance application form, signed on 15 February 2015. The Applicant travelled from Amman to Budapest on 1 April 2015 and the Organization paid his son’s travel expenses.

... By an e-mail of 25 February 2015, the IGO investigator replied to the Applicant’s message of 13 January 2015, requesting him to send a copy of the appeal on points of law before 5 March 2015 and informing him that, after that deadline, IGO would consider the order of the Court of Appeal as final.

... In an e-mail of 5 March 2015, the Applicant sent a certificate of 2 March 2015, signed by his Counsel, affirming that an appeal on points of law had been filed before the Supreme Court of Burkina Faso against the decision of the Court of Appeal of Ouagadougou.

... The investigator acknowledged receipt of the certificate in an e-mail of the same date, while emphasizing that he had requested a copy of the statement in support of the appeal on points of law, and giving the Applicant until 10 March 2015 to send it to him.

... In an e-mail of 10 March 2015, the Applicant informed the investigator that his lawyer, who was on mission at the time, had contacted his colleague in Burkina Faso, who had prepared the appeal, requesting him to obtain a copy of the statement.

... In an e-mail of 17 April 2015, the IGO investigator sent the Applicant the preliminary findings of the investigation, inviting him to submit comments prior to 3 May 2015, a deadline that was subsequently extended to 8 May 2015. The applicant submitted his comments by an e-mail of 8 May 2015.

... The mother of the child S.M. Benamar contacted the Inspector General of UNHCR again by an e-mail of 16 May 2015 to request that follow-up action be taken on the court decisions regarding custody of her son.

... In a letter of 15 July 2015, the Director of the Division of Human Resources Management, UNHCR, informed the Applicant of the allegations of misconduct against him. Specifically, he was charged with:

- a. “[F]ailing to promptly notify the Secretary-General, in writing, of any changes affecting [his] status under the Staff Regulations or Staff Rules (staff rule 1.5)”;
- b. “[F]ailing to fulfil [his] duty to comply with and perform [his] private legal obligations in accordance with the order issued by the *Tribunal de Grande Instance of Ouagadougou* on 10 January 2014 and the decision of the First Civil Chamber of the Court of Appeal of Ouagadougou on 20 August 2014 (staff regulation 1.1 (f) and staff rule 1.2 (b))”; and
- c. “[K]nowingly failing to cooperate with an investigation by the Inspector General’s Office (staff regulation 1.2 (r))”.

... The Applicant was invited to respond to these allegations in writing and was informed of his right to seek the assistance of counsel, in accordance with administrative instruction ST/AI/371/Amend.1 [(Revised disciplinary measures and procedures)].

... The Applicant responded to the allegations on 10 August 2015.

... In a letter of 11 April 2016 entitled “Disciplinary measures”, the Director of the Division of Human Resources Management, UNHCR, informed the Applicant of the decision of the High Commissioner to impose three disciplinary measures on him, namely: a written censure, the loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion, pursuant to staff rule 10.2 (i), (ii) and (vi). She included a copy of the written censure, dated 1 April 2016, and informed the Applicant that it would be placed in his personnel file.

... In the written censure, the High Commissioner refers to the three disciplinary measures and notes:

You are currently failing to comply with your private obligations, as you have not obeyed the rulings of the courts of Burkina Faso. Consequently, you are required to report every six months on measures taken to fulfil your private legal obligations. The Division of Human Resources Management will expect

your first report [on] 1 September 2016. If you refuse to submit a report every six months or if you refuse to comply with the court orders, I will initiate a new disciplinary process that could lead to more severe disciplinary measures.

... On 27 June 2016, the Applicant filed an application with the United Nations Dispute Tribunal contesting the disciplinary measures imposed on him by the High Commissioner of UNHCR.

...

... On 27 September 2016, the [Dispute] Tribunal held a directions hearing and, on 28 November 2016, a hearing on the merits was held.

10. The UNDT rendered its Judgment on 10 April 2017 dismissing the application in its entirety. The Dispute Tribunal concluded that the decision to impose disciplinary measures against Mr. Benamar had been lawfully taken. It found, in particular, that (i) the facts underlying the allegations of misconduct against Mr. Benamar had been satisfactorily established; (ii) the established facts amounted to misconduct; (iii) the disciplinary measures imposed were proportionate to the gravity of the misconduct; and, (iv) Mr. Benamar's right to due process was respected during both the preliminary investigation and the disciplinary proceedings.

11. On 18 September 2017, Mr. Benamar filed a motion for leave to file additional pleadings and documents. The Secretary-General filed his response to the motion on 2 October 2017.

## **Submissions**

### **Mr. Benamar's Appeal**

12. Mr. Benamar submits that the UNDT erred in law in finding that the Administration sufficiently took into account the "best interests of the child" as a mitigating circumstance in the determination of disciplinary measures against Mr. Benamar. Recognition of the best interests of the child should have led the Organization to refrain from penalizing Mr. Benamar, "as the sole purpose of his conduct was to protect his son (...) from the dangers to which he was exposed". The UNDT also erred on questions of fact resulting in a manifestly unreasonable decision "by ignoring the circumstances of the alleged acts perpetrated by Mr. Benamar". Moreover, the UNDT erred in finding that the disciplinary measures were proportionate when in fact they were excessive. In particular, the UNDT failed to take into account the mitigating circumstances, namely Mr. Benamar's positive performance evaluations, his years of employment with no history of

disciplinary proceedings and the fact that the child was currently supported entirely by him. Instead, the UNDT accorded “excessive importance” to the sole aggravating circumstance, namely his refusal to comply with orders of the Burkina Faso courts.

13. Mr. Benamar further asserts that the UNDT erred in law by not finding that he should have been exonerated of the charges of misconduct. The Dispute Tribunal erred in finding that the Burkina Faso courts had fully considered the child’s best interests and had based their decision to award custody to the mother on a sound and comprehensive reasoning. The fact that Mr. Benamar himself had referred the matter to these courts “does not prevent him from criticizing the conditions in which the decisions were made”. In particular, the UNDT disregarded Mr. Benamar’s line of argument regarding the Burkina Faso courts’ failure to sufficiently consider the child’s best interests in light of the events of 20 October 2013 and to follow up on his complaints of abduction. In view of the national courts’ partiality and inaction to protect his son, Mr. Benamar argues that he cannot be faulted for not following court orders rendered by the same justice system.

14. Moreover, the UNDT erred in finding that there were “no new elements indicating extreme and grave circumstances (...) which could enable [it] to conclude that [Mr. Benamar] had no choice but to keep the child with him in order to protect his integrity”.<sup>8</sup> In fact, the events of 20 October 2013 and related press coverage suggest otherwise. Mr. Benamar further asserts that the UNDT failed to take into account the context and special circumstances of the case when it considered that taking the child outside of Burkina Faso without the mother’s—and thus the child’s legal guardian’s—consent also prevented the child from seeing his mother which could be regarded as contrary to the child’s best interests. Since the mother had organized the abduction which took place in “extremely violent circumstances”, the child would have been put in danger if returned to his mother. In addition, he claims to have invited the mother to visit the child at his expense several times.

15. Mr. Benamar contends that the UNDT erred in law by finding that his due process rights had not been violated as a result of the fact that he had not been able to call and cross-examine witnesses during the disciplinary proceedings. In addition, some witnesses which he considered essential were available at the disciplinary stage but not during the UNDT proceedings. This “lack of adversarial proceedings” led to a “substantial infringement” of his rights.

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<sup>8</sup> *Ibid.*, para. 99.

16. Based on the foregoing, Mr. Benamar requests that the UNDT Judgment be vacated, the Administration's decision to impose disciplinary measures be rescinded, his rights be retroactively restored and he be reinstated in the position of Senior Administration Officer. Alternatively, if the Appeals Tribunal should find that the disciplinary proceedings were not invalid, Mr. Benamar asks that the disciplinary sanctions be reduced "to a fair level". In addition, he requests that an oral hearing be held before the Appeals Tribunal and that a witness, namely Mr. Stéphane Jacquemet, who was the UNHCR representative in Burkina Faso in October 2013, be heard during such hearing.

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

17. The Secretary-General submits that the UNDT correctly concluded that the facts underlying the allegations of misconduct—namely that Mr. Benamar (i) had not respected the final and enforceable decision No. 94 of 20 August 2014 of the Court of Appeal of Ouagadougou; (ii) had not promptly notified the Secretary-General in writing of the change of his status; and, (iii) had knowingly failed to cooperate with an investigation by the IGO—had been established.

18. The UNDT also correctly found that such facts supported the finding of misconduct. Mr. Benamar had violated (i) Staff Rule 1.2(b) by failing to cede custody of his son to Ms. J.W.G. in disregard of a final and enforceable court order; (ii) Staff Rule 1.2(c) by failing to provide a copy of his statement of appeal to the Court of Cassation to the IGO during the investigation despite repeated requests; and, (iii) Staff Rule 1.5(a) by failing to inform the Administration that he did not legally have physical custody of his son, even when he travelled with him to his new duty station for official purposes and received reimbursement from the Organization for the expenses thereof.

19. The Secretary-General further contends that the UNDT did not err in concluding that the disciplinary measures were proportionate to the misconduct. In view of its limited review of the proportionality of disciplinary measures, the UNDT correctly found that the Administration had not exceeded the bounds of its broad discretion in determining the disciplinary measures. In particular, the UNDT found that the Administration had taken due account of both mitigating circumstances (including the child's best interests, especially in the context of the events of 20 October 2013) and aggravating circumstances to determine the appropriate measures.

20. The Secretary-General claims that Mr. Benamar has failed to establish any other error by the UNDT warranting a reversal of the Judgment. In particular, Mr. Benamar has not established any error by the UNDT in not finding that Mr. Benamar should have been exonerated of the charges of misconduct. As the UNDT correctly observed, decisions concerning the legal and physical custody of a child are matters exclusively for national courts and the UNDT does not have the authority to grant or deny such custody. By submitting arguments regarding who should be granted custody, Mr. Benamar is in fact seeking the Appeals Tribunal to interfere with decisions of national courts and their assessment of this matter. In any event, the UNDT appropriately considered the circumstances surrounding the events of 20 October 2013 as well as the principle of the best interests of the child in reviewing the Administration's decision to impose disciplinary measures. The fact that Mr. Benamar himself had initiated the judicial proceedings before national courts is relevant because it shows that he had confidence in the justice system and only started his criticism when the outcome was unfavorable to him—which does not exempt him from having to comply with such orders and judgments under Staff Rule 1.2(b).

21. Further, the UNDT did not err in concluding that Mr. Benamar's due process rights had been fully respected during the disciplinary proceedings. In particular, the UNDT correctly stated that, under the relevant legal framework of ST/AI/371 as amended,<sup>9</sup> the right to call and cross-examine witnesses does not apply during the disciplinary proceedings which are administrative and not criminal in nature. Moreover, Mr. Benamar does not put forward any evidence of the alleged unavailability of witnesses during the UNDT proceedings and therefore his claims of due process violations "stand only on his bare assertions without any legal or factual support".

22. The Secretary-General submits that Mr. Benamar's other claims of error by the UNDT fall outside of the scope of the Appeals Tribunal's jurisdiction. To the extent that Mr. Benamar criticizes the national court order and acts of national authorities, the Secretary-General asserts that the Appeals Tribunal does not have jurisdiction pursuant to Article 2(1) of the Appeals Tribunal Statute (Statute) to entertain such criticism. In addition, his claims regarding decision No. 94 of the Ouagadougou Court of Appeal are ill-founded as a plain reading of the decision is sufficient to show that the court had thoroughly considered the parties' arguments,

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<sup>9</sup> The applicable version of ST/AI/371 was last amended by ST/AI/371/Amend. 1, effective 11 May 2010.

in particular with respect to the child's best interests, and had provided detailed and reasoned ground to support its decision.

23. Finally, the Secretary-General asserts that Mr. Benamar's request for oral testimony by a witness before the Appeals Tribunal is not in accordance with the Statute and Appeals Tribunal Rules of Procedure (Rules) and should, thus, be denied. Neither of these sets of rules expressly provides for a hearing of witnesses during the Appeals Tribunal's oral proceedings. In any event, Mr. Benamar has not claimed, let alone established, that any exceptional circumstances warrant the introduction of additional evidence and he has not shown that this evidence was not available to him at the stage of the UNDT oral proceedings. In fact, Mr. Jacquemet did testify before the UNDT.

24. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

#### *Oral hearing*

25. Mr. Benamar requests that the Appeals Tribunal hear the testimony of Mr. Stephane Jacquemet, a former UNHCR representative in Burkina Faso. Article 18(1) of the Rules establishes:

##### Oral proceedings

... The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case.

Article 8(2) of the Statute stipulates:

... The Appeals Tribunal shall decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose.

In the present case, however, an oral hearing would be neither necessary nor useful, since the relevant facts are clear.

26. Moreover, the witness whom Mr. Benamar wishes to call to testify before us was already heard by audio conference before the UNDT, having been subject to examination and cross-examination, as this Tribunal has verified from the audio recording of that hearing.

27. Furthermore, Mr. Jaquemet also signed two documents that were presented as annexes to the appeal: i) an official “note verbale”, sent on 21 October 2013 to the MFA of Burkina Faso; and ii) a “note for the file” dated 5 December 2013, directed to the IGO. In his evidence before the UNDT, Mr. Jaquemet referred to both documents, which give sufficient information about the event and its earlier developments.

28. The general allegation of an “unusual context of this case [which] provides grounds for an oral hearing” is not enough to indicate any fact or issue that could be refined by this specific testimony.

29. We are, therefore, not convinced that an oral hearing would assist us in the expeditious and fair disposal of the case.

30. The request is thus rejected.

*Motion for additional pleadings*

31. After having filed his appeal on 7 June 2017, Mr. Benamar filed a motion for additional pleadings on 18 September 2017, together with a number of annexes, some of which had already been filed with the appeal.

32. We agree with the Secretary-General that in this motion, Mr. Benamar simply reiterates the arguments previously submitted to the Appeals Tribunal, although phrased differently. We also find that there is no exceptional circumstance such as to justify the submission of additional evidence under Article 2(5) of the Statute and Article 10(1) of the Rules or additional pleadings under Article 31(1) of the Rules and that the evidence now submitted would not have any bearing on the outcome of the case.

33. The motion is thus rejected.

*Lawfulness of the disciplinary measures*

34. Mr. Benamar was sanctioned with three disciplinary measures by letter dated 11 April 2016: i) a written censure; ii) loss of three steps in grade; and, iii) deferment, for a period of three years, of eligibility for consideration for promotion. The written censure also established an obligation to report, “every six months on measures taken to fulfil [his] private legal obligations”.

35. It is uncontested that Mr. Benamar failed to comply with the order subsequently issued in a case filed by himself, before the *Tribunal de Grande Instance* of Ouagadougou, which entrusted custody of his son to the mother, his former partner. The order was later confirmed by a decision of the Court of Appeal of Ouagadougou.

36. When reviewing a sanction imposed by the Administration, the UNDT will examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.<sup>10</sup> In the present case, we find no error in the UNDT’s finding that the facts were established, that they constitute misconduct in light of Staff Rules 1.2(b), 1.2(c) and 1.5(a) and also Staff Regulation 1.1(f), 1.2(r), and that the sanction was proportionate, as will be developed below.

37. In his appeal before us, Mr. Benamar begins by asserting that the UNDT erred when it did not consider as excessive the disciplinary measures arguing that the sanctions imposed were clearly disproportionate. He submits that the Dispute Tribunal accorded undue importance to what he considers to be the sole aggravating circumstance (namely the fact that he failed to comply with the national court order) when compared to the mitigating factors.

38. We do not agree. In making such a dogmatic statement, Mr. Benamar’s arguments rest on his bare assertion. He did not present any additional arguments, but only manifested his discontentment with the UNDT Judgment, which is insufficient for an appeal to succeed.<sup>11</sup> We consider the UNDT Judgment to be meticulous and thorough.

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<sup>10</sup> *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 17.

<sup>11</sup> *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 30, citing *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

39. Mr. Benamar also claims that the Dispute Tribunal's decision is erroneous on a question of law because it did not consider the fact that he acted in the best interests of the child as sufficient grounds for exoneration, but only as a mitigating circumstance.

40. Mr. Benamar further contends that the Court of Appeal in Burkina Faso had not responded to certain arguments put forward by him, especially with regard to the attempted abduction of the child by his mother. Consequently, he claims that the UNDT wrongly assessed that decision.

41. Moreover, Mr. Benamar argues that it was incorrect for the Dispute Tribunal to refuse to absolve him of responsibility in this case on the basis that he himself had referred the matter to the Burkina Faso courts, which eventually granted the custody to the mother. Mr. Benamar claims that a court decision can be criticised even by the party who had referred the matter to it.

42. First, the fact of referring the matter to the national courts indicates that Mr. Benamar had in fact relied on the national justice system to solve the unfortunate private issue he was facing with his former partner, despite his freedom to disagree with and appeal against the decision.

43. Second, while we understand Mr. Benamar's despair in not having what he considers to be a sufficient response to his official complaints before the national courts, we must consider that Mr. Benamar does have other legal means at his disposal for criticising and appealing against the decision he does not agree with - as he did before the Supreme Court of Burkina Faso or could possibly have done before the African Commission on Human and Peoples' Rights, assuming with the possible consequences therefor.

44. Third, although a decision of a national court may be subject to criticism by both parties (and also by a third party), it must be obeyed if and to the extent that it is enforceable. Consequently, the parties should generally comply with an executable judicial decision; otherwise they would be taking justice into their own hands, which is not acceptable according to general principles based on the rule of law.

45. In this particular case, we note that there is not the slightest evidence that the child would be in danger or subject to violence, if his mother, his legal guardian, was caring for him. Once she holds that status, there is no possibility of her abducting the child. Hence, for the

purposes of this administrative appeal, the fear of recurrence of violence, which he claims to have occurred during the “abduction”, is groundless as there is no evidence of a violation of the principle of the best interests of the child. Besides, this principle was expressly considered by the Court of Appeal in its decision.

46. The UNDT did not err in finding that Mr. Benamar’s refusal to comply with the national court’s order, his failure to inform the Organization of his change in status and to cooperate in the investigation constitute violations of Staff Rules 1.2(b), 1.2(c) and 1.5(a) and also Staff Regulations 1.1(f) and 1.2(r), which respectively state:

Staff Rule 1.2(b)

Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

Staff Rule 1.2(c)

Staff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

Staff Rule 1.5 (a)

Staff members shall be responsible for supplying the Secretary-General with relevant information, as required, both during the application process and on subsequent employment, for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

Staff Regulation 1.1 (f)

The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located, nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.

Staff Regulation 1.2(r)

Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

47. Fourth, we agree with the well-reasoned findings of the UNDT that the alleged fact about bias, ineffectiveness and inadequacy of the national system of justice in Burkina Faso is not relevant as regards the competence of this internal justice system.

48. In his appeal, Mr. Benamar does not seem to have understood this specific point: The Organization's internal justice system does not have jurisdiction over civil cases concerning the private or personal life of its staff members, much less to reconsider or ignore a judicial decision by a national court, which is immediately enforceable, albeit subject to appeal. Although this is an international tribunal, it does not have a jurisdictional function over the Member States of the Organization, nor over their nationals. Both the Dispute Tribunal and the Appeals Tribunal are administrative and internal courts, designed to deal with administrative decisions concerning the Organization's staff members and other cases within the narrow scope of competence accorded by Article 2(1) of their respective Statutes.

49. Fifth, it follows that Mr. Benamar could only take his son with him to another country, Jordan, with the consent of the child's mother. However, he did not have that consent. Not only did he not inform UNHCR that he did not have the custody of his child at the time of the journey, but he also requested that the Organization pay for his son's travel expenses, at the beginning of 2014, and this request was granted.<sup>12</sup>

50. Mr. Benamar also claims that he has remained in contact with his former partner in order to organize her visits to the child, including possible payment of her travel expenses. Nevertheless, the judicial decision stipulates quite the opposite, since the custody of the child was granted to the mother and visitation rights to the father. Furthermore, from the e-mails filed with the appeal, we note that the mother's voyage to Turkey was cancelled, despite Mr. Benamar's willingness to support all its charges.

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<sup>12</sup> At the beginning of 2015, the same proceedings were repeated when he was temporarily reassigned to Hungary, but this time he also listed his son on the Organization's dependency allowance application form.

51. In his appeal, Mr. Benamar lastly challenges the correctness of the proceedings during the preliminary investigation stage, when he was unable to examine or cross-examine the witnesses who were heard. He also asserts that some witnesses were not able to participate in the hearing before the UNDT, due to the distance, difficulties in communication or because they were not invited.

52. The procedure to be followed in implementing disciplinary measures is established by ST/AI/371 as amended.<sup>13</sup> Its paragraphs 3, 5, 6 and 7 read as follows:

3. If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.

...

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted. ...

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

(a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her right to seek the assistance of counsel in his or her defense through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense, and offer information on how to obtain such assistance.

...

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<sup>13</sup> The UNDT, in paragraph 75 of the impugned Judgment, cites the original version ST/AI/371 of 2 August 1991, stating that it “was in force at the time”. However, we find that the ST/AI/371/Amend.1 effective 11 May 2010 is applicable, considering that the alleged misconduct as well as the disciplinary procedure took place after 11 May 2010.

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

53. The investigation phase is not a disciplinary proceeding, which is only initiated after the completion of the investigation. In this regard, Staff Rule 10.3 states:<sup>14</sup>

(a) *The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred.* No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. ...

54. As is made clear by this Staff Rule, it is only after the investigative process is over and the disciplinary process has begun that the staff member has a right to receive written notification of the formal allegations and to respond to them; these due process entitlements do not exist during the investigation stage.

55. It is also relevant to point out that this is not a criminal procedure, in which the entitlements of the person under investigation would be handled with greater flexibility. Moreover, Mr. Benamar did not indicate any specific witnesses—apart from Mr. Jaquemet who had already testified before the UNDT—who would have been essential to be heard during the UNDT proceedings.

56. We have stated in *Powell*:<sup>15</sup>

... Obviously, all of the due process rights provided in former Staff Rule 110.4 and ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated.

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<sup>14</sup> Emphasis added.

<sup>15</sup> *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295, para. 23 (internal citation omitted).

57. Also in *Akello*, we held:<sup>16</sup>

... Furthermore, it has not been suggested that as soon as Ms. Akello was identified as a wrongdoer (that is post the (...) investigation), she was not afforded a right to counsel. Paragraph 99 of the UNDP Legal Framework provides:

The charge letter initiates the disciplinary proceedings. In that letter, the staff member is notified in writing of the formal charges ... [and the staff member is] given a specified period of time ... to answer the charges and produce countervailing evidence, if any. The staff member shall also be notified of his or her right to counsel to assist in his or her defence, and be informed as to how to obtain the assistance of the Panel of Counsel.

... While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the *Applicant* case, our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply.

58. It follows that the UNDT handled the case correctly, as no error of law or fact leading to a manifestly unreasonable decision was established.

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<sup>16</sup> *Akello v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-336, paras. 35-36 (internal citations omitted).

**Judgment**

59. The appeal is dismissed and Judgment No. UNDT/2017/025 is affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2017 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Raikos

Entered in the Register on this 8<sup>th</sup> day of December 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar