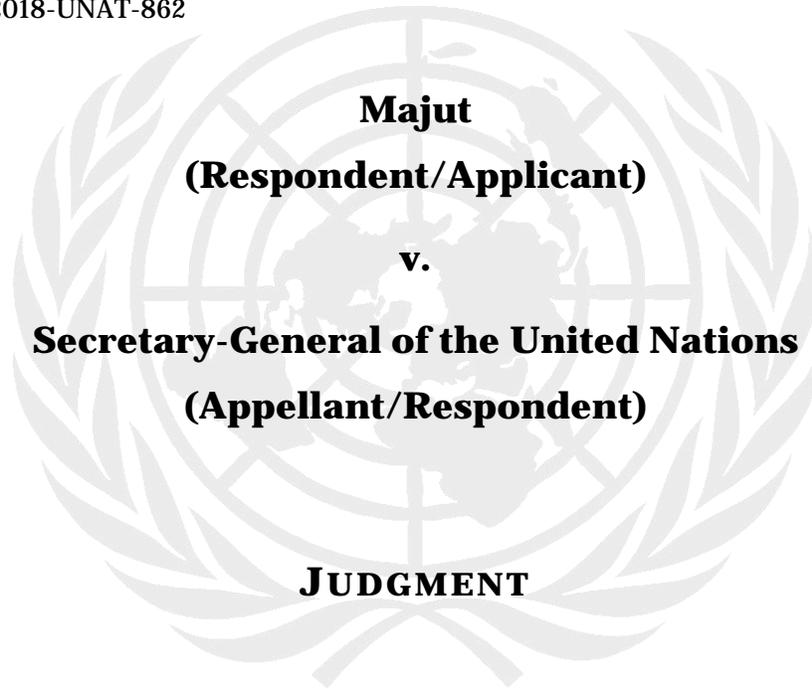




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-862



**Majut  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2018-1158
Date:	29 June 2018
Registrar:	Weicheng Lin

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Counsel for Mr. Majut:	Monyluak Alor Kuol
Counsel for Secretary-General:	John Stompor

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/100, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 December 2017, in the case of *Majut v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 27 February 2018, and Mr. Paul Mayen Majut filed his answer on 27 April 2018.

**Facts and Procedure**

2. Mr. Majut joined the Organization on 11 December 2004. On 5 November 2014, he served as a Supply Assistant at the G-4 level, with the Supply Chain at the Logistics Base in Wau, the United Nations Mission in South Sudan (UNMISS).

3. On the morning of 5 November 2014, Mr. Majut, along with another Supply Assistant, Mr. Wyclief Loguya, asked the Officer-in-Charge (OiC) of the Supply Section, Mr. Shah Syed Sadrulola, for the keys to a United Nations vehicle for his assignment to collect a cargo from the airport and transport it to the warehouse at the Logistics Base in Wau. Mr. Sadrulola gave Mr. Majut a vehicle gate pass, but told Mr. Majut that he had already given the vehicle keys to Mr. Thabani Moyo, a United Nations Volunteer, who was serving as an Assets and Material Manager.

4. According to the investigation report dated 17 November 2014, Mr. Majut and Mr. Loguya went to look for Mr. Moyo and saw him inside a parked vehicle having ignited the engine. Mr. Majut opened the driver-side door and demanded that he needed the vehicle. Mr. Moyo responded that he needed the vehicle to buy bread at a shop outside the main gate and would hand over the vehicle to Mr. Majut upon return within 10 minutes. Mr. Majut refused, insisting that Mr. Moyo give him the keys, and that Mr. Moyo should step out of the vehicle.

5. According to Mr. Moyo, he switched off the vehicle engine. As he was logging off from the carlog system and removing his personal effects from the vehicle, Mr. Majut grabbed Mr. Moyo and pulled him out of the vehicle. According to Mr. Loguya, this did not occur.

6. Mr. Moyo headed back to his office with Mr. Majut and Mr. Loguya following suit, while Mr. Loguya attempted to calm Mr. Majut down by telling him to let Mr. Moyo use the vehicle to buy bread first.

7. In his interview with an investigator of the Special Investigations Unit (SIU), Mr. Sadrulola recalled Mr. Majut telephoning to tell him that Mr. Moyo had refused to release the keys. Mr. Sadrulola went to Mr. Moyo's office, where he also saw Mr. Loguya. Mr. Moyo told Mr. Sadrulola that he needed the vehicle. Mr. Sadrulola then told Mr. Moyo and Mr. Majut that he could arrange an additional vehicle for Mr. Majut. He then left Mr. Moyo's office. When Mr. Sadrulola returned to Mr. Moyo's office, both Mr. Moyo and Mr. Majut were gone.

8. After Mr. Sadrulola had left Mr. Moyo's office, Mr. Majut began to shout at Mr. Moyo and demanded Mr. Moyo to surrender the vehicle keys. Mr. Moyo, seated at his desk, did not respond. Mr. Majut then told Mr. Loguya to leave Mr. Moyo's office. Despite Mr. Moyo's pleading for him to stay, Mr. Loguya left Mr. Moyo's office. According to Mr. Loguya, he left on his own accord, because he did not want to get involved in the argument between Mr. Majut and Mr. Moyo.

9. As Mr. Majut advanced towards Mr. Moyo, Mr. Moyo reached for his Tetra hand-held radio and pressed the emergency button for five seconds. Mr. Francis Butili, a UNMISS staff member in the radio room, confirmed hearing the emergency broadcast over the Tetra radio coming from Mr. Moyo, but could not determine what was being said over the radio.

10. Mr. Majut then hit Mr. Moyo in the face with open hands. While trying to block some of blows that Mr. Majut directed at his face, Mr. Moyo told Mr. Majut to stop or he would report him to Security. When Mr. Moyo added that everything that was happening in his office was being broadcast, Mr. Majut stopped.

11. Mr. Moyo walked out of his office and headed towards the headquarters where the Security was located, with Mr. Majut following suit. Mr. Moyo reached the Security Office and began to tell the Head of Security, Mr. Memory Bariyo and Mr. Palco Mavanga, another security officer also in Mr. Bariyo's office, what had happened to him. Suddenly, Mr. Majut burst into Mr. Bariyo's office, without first knocking on the door.

12. Mr. Bariyo recalled Mr. Moyo telling him that Mr. Majut had grabbed him and pulled him out of a pick-up vehicle, and subsequently slapped him several times when they were in Mr. Moyo's office, that he had activated an SOS button, and that he was suffering from a headache. Mr. Bariyo noticed bruises on Mr. Moyo's face, with red eyes as if he was crying. He advised Mr. Moyo to seek medical attention and furnish him with a medical report thereafter.

13. Mr. Mavanga remembered Mr. Moyo entering Mr. Bariyo's office sweating and agitated, and Mr. Moyo telling Mr. Bariyo that Mr. Majut was following him and Mr. Majut had beaten him up in his office. Mr. Mavanga also remembered Mr. Majut entering Mr. Bariyo's office without first knocking and refusing to leave the office initially after Mr. Bariyo had told him to step outside and wait.

14. Mr. Sadrulola recalled waiting for Mr. Moyo and Mr. Majut outside Mr. Moyo's office. Mr. Moyo returned and told Mr. Sadrulola that Mr. Majut had hit him and his ear was swelling. Mr. Sadrulola noticed some bruises on Mr. Moyo's right ear, which was swelling, and a small cut with some dry blood near his right ear.

15. Mr. Moyo went to the clinic, received treatment and medication and was placed on sick leave for one day. The medical officer on duty issued an undated certificate stating that Mr. Moyo had presented himself to the clinic on 5 November 2014, complaining of pain and swelling behind his right ear. He quoted Mr. Moyo as saying that he had been "punched by a colleague 30 minutes earlier at their office". The medical officer examined Mr. Moyo and found a "small 1 x 2 cm swelling surrounded by scratch marks behind the right ear lobe", but he did not notice any active bleeding.

16. In an e-mail titled "Assault incidents in UNMISS Wau" dated 7 November 2014 to three members of the SIU, UNMISS, an SIU officer referred to a series of recent assault incidents, including the one that happened on 5 November 2014 involving Mr. Majut. The SIU officer stated that he planned to call a town hall meeting to remind staff of the Organization's core values and expected conduct.

17. The SIU conducted the first round of interviews in respect of the 5 November 2014 incident as follows: Mr. Moyo on 11 and 13 November 2014; Mr. Majut on 13 November 2014; and Mr. Loguya on 14 November 2014. The SIU investigators also interviewed Mr. Mavanga and Mr. Bariyo on 13 November 2014.

18. Mr. Majut denied having assaulted or threatened Mr. Moyo. According to Mr. Majut, after Mr. Sadrulola had told him that the keys were with Mr. Moyo, he went to Mr. Moyo's office for the keys, insisting that he had priority because he was doing official business. Mr. Moyo refused and the two started an argument. Mr. Moyo then shouted at Mr. Majut and shouted over the radio "I am under attack; someone is attacking me in my office." Both Mr. Moyo and

Mr. Majut then left Mr. Moyo's office, and Mr. Majut went to Mr. Sadrulola's office to speak to him about the situation. When he stepped out of Mr. Sadrulola's office, Mr. Majut saw Mr. Moyo walking towards the headquarters. He quickened his steps to catch up with Mr. Moyo. He then met Mr. Bariyo and explained the situation to him. After that, he learnt that Mr. Moyo had gone to Mr. Bariyo's office. Mr. Majut rushed to Mr. Bariyo's office and saw Mr. Moyo and two other security officers there.

19. On 20 November 2014, the SIU sent queries to some colleagues of Mr. Majut seeking information about the past incidents involving Mr. Majut that might corroborate the misbehavior allegations against Mr. Majut.

20. On 17 December 2014, a Security Investigator, SIU, reported his findings to the Chief of the SIU. He stated that the investigation established that Mr. Majut had verbally abused and physically assaulted Mr. Moyo on the morning of 5 November 2014, resulting in swelling and scratch marks behind the right ear lobe. The investigation also concluded that Mr. Majut's account of the events was not consistent with the development of the events. The investigation further found that Mr. Majut had a pattern of threatening other staff members and his supervisors, but those incidents had not been reported because the victims were afraid of Mr. Majut's retaliation. Lastly, the investigation found that Mr. Loguya's statement was not reliable because it did not corroborate Mr. Moyo's statement that Mr. Majut had ordered Mr. Loguya to leave Mr. Moyo's office so that he could "teach this guy a lesson".

21. In a memorandum dated 17 April 2015, the Special Representative of the Secretary-General (SRSG)/UNMISS referred Mr. Majut's case to the Under-Secretary-General, Department of Field Support (DFS), for review and appropriate disciplinary actions to be instituted against Mr. Majut for "verbal threat, physical assault and harassment" of Mr. Moyo on 5 November 2014.

22. In a memorandum dated 22 May 2015 to the Assistant Secretary-General (ASG), Office of Human Resources Management (OHRM), the ASG/DFS referred to Mr. Majut's case and stated that DFS was of the view that there was *prima facie* evidence that Mr. Majut had engaged in the misconduct of assaulting Mr. Moyo, and concurred with the recommendation of the SRSG/UNMISS that Mr. Majut be subject to disciplinary action. In addition to the referral memo from the SRSG/UNMISS and its attachments, the ASG/DFS included a note prepared by the UNMISS Chief of Conduct and Disciplinary Team dated 25 March 2015 recommending that

Mr. Majut be subject to disciplinary action for verbal threat, physical assault and harassment and Mr. Loguya be issued a letter of caution for failure to prevent a felony, seek assistance to protect a colleague and/or report misconduct.

23. The SIU re-interviewed Mr. Majut on 14 May 2015, during which Mr. Majut denied making any threatening remark or gesture towards his colleagues. Between 28 July and 31 July 2015, the SIU/UNMISS re-interviewed Mr. Bariyo, Mr. Loguya, Mr. Butili and Mr. Sadrulola seeking clarification over certain aspects of the incident of 5 November 2014.

24. In an allegations of misconduct memorandum dated 4 September 2015, the ASG/OHRM charged Mr. Majut with physically assaulting Mr. Moyo by hitting him in the face with his hands. In the same memorandum, the ASG/OHRM referred to certain incidents prior to 5 November 2014, as reported by two UNMISS staff members and Mr. Majut's second reporting officer complaining about Mr. Majut using threatening and aggressive language towards them. The ASG/OHRM considered that Mr. Majut's account of events was not consistent with the witness statements whereas Mr. Moyo's version of events was supported by evidence. In this context, the ASG/OHRM noted the prior similar incidents as reported by his UNMISS colleagues.

25. On 15 October 2015, Mr. Majut provided his comments on the allegations of misconduct, again denying having ever physically assaulted Mr. Moyo and calling Mr. Moyo's allegations "unfounded and baseless", justifying his demands to use the vehicle before Mr. Moyo because he was conducting official business whereas Mr. Moyo wanted to use the United Nations vehicle during working hours to buy bread. Mr. Majut concluded by stating that Mr. Moyo's injury was a "self-inflicted action". In his comments, Mr. Majut also rebutted the statements made by some colleagues of his, who had responded to the SIU's queries. Mr. Majut challenged the manner in which the SIU had gathered information about his past behavior going back to 2012 and 2013 in order to connect those incidents to the 5 November 2014 incident and obtained "their secrets [sic] reports" to defame and tarnish his reputation.

26. In a letter dated 27 April 2016, the OiC of OHRM informed Mr. Majut of the decision taken by the USG, Department of Management (DM) to impose on him the disciplinary measure of separation from service with compensation in lieu of notice without termination indemnity for having assaulted Mr. Moyo by hitting him in the face with hands, effective upon receipt of the decision letter. The OIC stated that Mr. Majut's interviews and comments "do not displace the evidence on the record against [him]", and that Mr. Moyo's version of events was more credible

than Mr. Majut's as it was supported by statements of the witnesses. The USG/DM rejected Mr. Majut's assertion that Mr. Moyo's injury was self-inflicted. He considered that throughout the investigation and disciplinary process, Mr. Majut had been accorded due process and an opportunity to provide comments, provided with all the documentation on which the allegations of misconduct were based and given an extension of time to submit comments, and he did submit comments. In determining the appropriate sanction, the USG/DM took into account the Secretary-General's past practice in similar cases involving physical assault and the mitigating factors in Mr. Majut's case.

27. A personal security risk assessment dated 9 July 2016 indicated that there existed a real threat in the form of physical harm against Mr. Moyo in any place in Wau, in the wake of Mr. Majut's termination from service. The risk assessor therefore recommended that Mr. Moyo be reassigned to be away from Mr. Majut and his relatives. Mr. Moyo was subsequently relocated to Juba and worked there until the expiration of his contract in December 2016.

28. On 16 August 2016, Mr. Majut appealed the separation decision to the Dispute Tribunal. On 29 December 2017, the Dispute Tribunal issued the impugned Judgment. The UNDT found that there was not clear and convincing evidence that Mr. Majut had physically assaulted Mr. Moyo. It also found that the investigation had not been correctly conducted and that Mr. Majut's due process rights had not been respected, in that he had not been informed of the allegations of misconduct against him at the beginning of the interview and he had not had the opportunity to respond to them in full. The Dispute Tribunal thus concluded that Mr. Majut had been unlawfully separated from service. It rescinded the separation decision and ordered the removal of any reference to the disciplinary sanction of separation from service from Mr. Majut's official status file. As an alternative to the rescission of the separation decision, the Dispute Tribunal ordered that Mr. Majut be paid USD 5,000. In addition, the UNDT ordered the Administration to pay Mr. Majut the equivalent of his net salary for the period 17-30 June 2016 as material damages and USD 5,000 as moral damages.

## **Submissions**

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

29. The UNDT erred in fact and law in finding that the investigation was not correctly conducted and Mr. Majut's due process rights were not respected. The Secretary-General takes issue with the Dispute Tribunal's specific fact findings regarding the e-mail message of 7 November 2014 enumerating the recent assault incidents including the one involving Mr. Majut on 5 November 2014, the SIU investigation of prior similar incidents, the additional interviews in July 2015 after the issuance of the investigation report, the failure to make Mr. Majut aware of the purpose of those additional interviews or give him an opportunity to respond to the additional witness statements, and OHRM's presumption of guilt before Mr. Majut had an opportunity to respond to the allegations of misconduct.

30. The UNDT erred in fact and in law in finding that there was not clear and convincing evidence that Mr. Majut had physically assaulted Mr. Moyo. It was an error in fact and law for the Dispute Tribunal to find that the absence of the oral testimony by Mr. Moyo before the UNDT made his written evidence insufficiently credible. The incident report and witness statement were signed by Mr. Moyo. There was no evidence that Mr. Moyo would have any reason to falsely report that Mr. Majut had physically assaulted him. Moreover, his incident report and witness statement were supported by other witnesses.

31. The Secretary-General states that Mr. Moyo had valid reasons for not appearing before the UNDT. According to a personal security risk assessment in July 2016, Mr. Moyo faced a substantial threat to his personal security from Mr. Majut's relatives as a result of his having reported on Mr. Majut. Following the assessment, Mr. Moyo was transferred from Wau to Juba, South Sudan. In this regard, the Dispute Tribunal made its own speculative and factually incorrect observation that in Juba, Mr. Moyo and Mr. Majut lived in the same place for a number of months without Mr. Moyo being exposed to any proven danger from Mr. Majut and his friends/family. Mr. Moyo did not live in the same place as Mr. Majut. He lived in a secure UNMISS compound in Juba for United Nations personnel, whereas Mr. Majut did not live there.

32. It was also an error in fact for the Dispute Tribunal to find that Mr. Moyo had presented different versions of the physical assault, punched in one version and slapped on his face in the other version. There was no significant discrepancy in Mr. Moyo's descriptions of the physical

assault in the incident report and the witness statement. There was a reference in the medical certificate to Mr. Moyo having been punched. However, this was a second-hand recording, not a signed report or statement by Mr. Moyo.

33. The Dispute Tribunal erred in fact in finding that there was no supporting evidence that Mr. Moyo had requested help at the time of the assault. Both the communication officer Mr. Butili and Mr. Majut confirmed that Mr. Moyo had used the radio.

34. The Dispute Tribunal erred in fact and law in finding that there was no reasonable link between the physical assault and Mr. Moyo's injury. This finding fails to take into account the oral testimony before the UNDT of some witnesses clarifying their witness statements; it also fails to take into account the evidence of Mr. Sadrulola, who noticed that Mr. Moyo was injured around his right ear; and it further fails to take into account the wording of the medical certificate, which clearly states the date of Mr. Moyo's clinic visit.

35. The UNDT erred in fact and law in concluding that Mr. Majut was unlawfully separated from service for physically assaulting Mr. Moyo. The separation decision in regard to Mr. Majut satisfied the four factors that the UNDT set out to examine: the facts on which the separation decision was based were established to the standard of clear and convincing evidence; there were no procedural irregularities; the established facts legally amounted to misconduct; and the disciplinary measure imposed was proportionate to the offence.

36. The Dispute Tribunal erred in fact and law in awarding Mr. Majut compensation. Its material damages award of the equivalent of Mr. Majut's net base salary for 17-30 June 2016 failed to deduct from the award the compensation in lieu of notice that had been paid to Mr. Majut, resulting in unjust enrichment to Mr. Majut. The Dispute Tribunal's award of moral damages relied upon Mr. Majut's testimony without independent evidence and failed to comply with the requirements of Article 10(5) of the UNDT Statute.

37. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and uphold his separation decision in regard to Mr. Majut. Alternatively, the Secretary-General requests that the Appeals Tribunal reduce the Dispute Tribunal's award of material damages, and vacate its award of moral damages.

**Mr. Majut's Answer**

38. Mr. Majut's answer is directed at the Secretary-General's appeal paragraph by paragraph, either admitting, contesting or denying the Secretary-General's contentions. It may be summarized as follows.

39. Mr. Majut did not attack or threaten Mr. Moyo. He only had an argument with Mr. Moyo related to the latter's refusal to give the former the vehicle key. There was no clear evidence to prove that Mr. Majut had assaulted Mr. Moyo. He did not ask Mr. Loguya to leave Mr. Moyo's office. He did not hit or strike Mr. Moyo with his hand. He did not rush into Mr. Bariyo's office. Both Mr. Loguya and Mr. Bariyo stated that they did not notice any cut, bruise or swelling on Mr. Moyo's right ear.

40. The investigation was not properly conducted, as it speculated on Mr. Majut's character and took statements on past incidents that had not been proven by evidence and had not been reported nor recorded, in a "glaring abuse of discretionary authority". It was conducted in an arbitrary and discriminatory manner, and was also biased as it gave weight to the statements of Mr. Moyo, who had given different versions of the alleged assault.

41. The allegations of misconduct letter already considered Mr. Majut guilty before he had had an opportunity to file his comments thereon.

42. The medical certificate did not indicate the date and time of its issuance to corroborate Mr. Moyo's statement that the injury behind his right ear had been caused by Mr. Majut's assault.

43. Mr. Majut rejects the Secretary-General's arguments in their entirety. He submits that the decision to separate him from service was tainted by prejudice as his statements were not given credence. It was disproportionate to the offence of the alleged assault on Mr. Moyo.

44. Mr. Majut requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

**Considerations**

45. In a letter dated 27 April 2016, the OiC of OHRM informed Mr. Majut that the USG/DM had accepted the evidence on record against him in preference to the interview statement and the comments that he had provided following his receipt of the allegations of

misconduct memorandum, and had concluded that Mr. Majut had engaged in misconduct by assaulting Mr. Moyo by hitting him in the face on 5 November 2014. As a consequence, the USG/DM had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice but without termination indemnity.

46. The UNDT, in its judicial review, came to the opposite conclusion of the evidence on record. It found that:<sup>1</sup>

Having reviewed all the details of the facts established during the investigation and corroborating with the oral and written evidence presented before it, the Tribunal considers that the factual findings established by the investigation are not correct because they are not supported by clear and convincing evidence.

47. The Secretary-General challenges the UNDT Judgment, submitting that the UNDT erred in fact and in law in finding that there was not clear and convincing evidence that Mr. Majut had physically assaulted Mr. Moyo. The Secretary-General also appeals the UNDT finding that the investigation had not been correctly conducted and that Mr. Majut's due process rights were not respected.

48. This Tribunal has established that the obligations of the UNDT, when reviewing a disciplinary case, are as follows:<sup>2</sup>

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence." And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred." "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".

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<sup>1</sup> Impugned Judgment, para. 76.

<sup>2</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29, citing the relevant Appeals Tribunal jurisprudence (internal citations omitted).

49. In the present case, the Dispute Tribunal's conclusions on the evidence were based on the following findings:<sup>3</sup>

Mr. [Moyo] presented different versions of the physical assault: in one version, he was punched and, in another version he was slapped on his face and had to press the red button on his Tetra hand held radio in order to ask for the intervention of the Security.

50. We disagree with this finding. We find that a correct reading of the evidence shows that Mr. Moyo did not present contradictory versions of the assault.

51. In his incident report dated 11 November 2014, Mr. Moyo stated:

I could not escape because Mr. Mayen<sup>[4]</sup> had already cornered me in my sitting area therefore I could not maneuver past him; I immediately reached for my Tetra Hand held radio and I pressed the EMERGENCY BUTTON for 5 seconds and I assume it was broadcasting the verbal part of the incident. He began hitting me on the face, I do not know precisely how many times because I was trying to block some of the blows directed at my face. [ ... ] I proceeded to the clinic where I was examined by Dr. Ngino [ ... ]. My wounds I had sustained during the course of the attack where (sic) then cleaned and medicine was applied on them.

52. In his brief statement on 13 November 2014, Mr. Moyo stated that "Mr. Paul MAYEN assaulted me, beating me with his open hands".

53. The fact that Mr. Moyo did not mention his Tetra hand-held radio in this very short statement does not render it inconsistent with his incident report. The subject matter of his complaint was the alleged assault and both documents give versions of that incident which cannot reasonably be interpreted as being inconsistent with one another.

54. Although the medical report mentions that Mr. Moyo "was punched by a colleague", that was the doctor's statement, not Mr. Moyo's.

55. The UNDT found:<sup>5</sup>

The alleged injury of Mr. [Moyo] was confirmed only by one witness, Mr. [Sadrulola], who saw Mr. [Moyo] and [Mr. Majut] after they came from the SIU Office, and there is

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<sup>3</sup> Impugned Judgment, para. 76.

<sup>4</sup> Mr. Majut's full name is Paul Mayen Moses Majut.

<sup>5</sup> Impugned Judgment, paras. 75-76.

no reasonable explanation why the scratch behind Mr. [Moyo's] right ear was not seen by any of the other witnesses which saw Mr. [Moyo] before Mr. [Sadrulola]. ... [Mr. Loguya, Mr. Bariyo, and Mr. Mavanga], which all saw Mr. [Moyo] right after the alleged physical assault, looked at Mr. [Moyo]'s right ear to check if there was any swelling as he was complaining, and they were not able to see any bleeding, injury or scratch in the mentioned area.

56. This finding is not supported by the evidence and is quite unreasonable.

57. Mr. Loguya stated in his evidence before the UNDT that following the assault, he had not seen Mr. Moyo until the next day, and that he could not then see any injury to Mr. Moyo.

58. Mr. Bariyo, in his witness statement dated 28 July 2015, stated that he did not see any injuries, but Mr. Moyo was very emotional and had tears in his eyes. He said at the hearing that he advised Mr. Moyo to go to the clinic,<sup>6</sup> and he told the UNDT Judge that "[Mr. Moyo] was not bleeding, but a face that has been slapped can be seen with red eyes, as if he was crying."<sup>7</sup>

59. Mr. Mavanga testified before the UNDT that he did not notice Mr. Moyo's injuries when Mr. Moyo entered Mr. Bariyo's office, but Mr. Moyo complained that [Mr. Majut] had assaulted him and that his ear was swelling.<sup>8</sup> This is consistent with what he stated in his witness statement dated 13 November 2014.

60. Mr. Sadrulola, in his witness statement and in his evidence before the UNDT, stated that he had met Mr. Moyo on the way to the Medical Section following the physical assault, and that he had noticed that Mr. Moyo was injured around his right ear. When questioned by the UNDT Judge whether he saw Mr. Moyo's face when Mr. Moyo was coming from security, Mr. Sadrulola replied that Mr. Moyo's face did not look the same, his right ear was swollen and there were small bruises just behind the ear.<sup>9</sup>

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<sup>6</sup> UNDT transcript of proceedings (Mr. Bariyo), 10 May 2017, page 6, line 13.

<sup>7</sup> *Ibid.*, page 16, lines 3-4.

<sup>8</sup> UNDT transcript of proceedings (Mr. Mavanga), 8 May 2017, page 40, lines 7-8; page 53, line 23.

<sup>9</sup> UNDT transcript of proceedings (Mr. Sadrulola), 10 May 2017, page 30, lines 20-25 and page 31, lines 1-6.

61. Furthermore, the medical certificate evidences that Mr. Moyo attended the clinic on 5 November 2014. The attending doctor, Dr. Ngino Alejok, issued a medical certificate in the following terms:

This is to certify that Mr. Thabani Moyo, UNV ID 00858 presented to this clinic on 05- Nov-14 complaining of pain & swelling behind his right ear.

He also reported that he was punched by a colleague 30 minutes earlier at their office.

I examined him and found a small 1 x 2 cm swelling surrounded by scratch marks behind the right ear lobe.

No active bleeding was seen and all vital sings [sic] are within normal limits.

He has been given the necessary medical care and discharged with 1 day rest.

62. The UNDT erred in finding that there was insufficient corroboration of Mr. Moyo's injury. It appears from the evidence that it was not a serious injury, and probably not very prominent, but Mr. Moyo's statement and his incident report, Mr. Sadrulola's evidence and the treating doctor's report put the question beyond doubt that Mr. Moyo suffered an injury.

63. The UNDT found:<sup>10</sup>

The Tribunal considers that there is no reasonable link between the alleged physical assault consisting in either punching or slapping Mr. [Moyo's] face and the existing injury consisting in a swelling surrounded by a scratch behind Mr. [Moyo's] right ear.

64. In coming to this conclusion, the UNDT noted that "the medical document does not have a date and the time of issuance, in order to corroborate Mr. [Moyo's] statement that the injury behind his right ear resulted from an incident which took place thirty minutes before the medical examination".<sup>11</sup>

65. This is not a reasonable finding on the evidence.

66. Contrary to the UNDT's view, the doctor's report corroborates Mr. Moyo's claim that he had been assaulted and had suffered an injury. The UNDT was wrong to dismiss the medical report because it did not have a date and time of issuance. The report clearly states that Mr. Moyo came to the clinic on 5 November 2014 complaining of pain and swelling behind his right ear caused by being punched 30 minutes earlier. The doctor's report by itself is sufficient to contradict the UNDT's finding that "there is no reasonable link between the

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<sup>10</sup> Impugned Judgment, para. 75.

<sup>11</sup> *Ibid.*, para. 76.

alleged physical assault consisting in either punching or slapping Mr. [Moyo's] face and the existing injury consisting in a swelling surrounded by a scratch behind Mr. [Moyo's] right ear.”

67. There is also the evidence of Mr. Sadrulola, who met Mr. Moyo on his way to the clinic and saw his injury.

68. The UNDT found:<sup>12</sup>

[T]here is no supporting evidence to the factual aspect that Mr. [Moyo] requested help from the UNMISS Security while he was in his office in the morning of 5 November 2014 and was allegedly physically assaulted by [Mr. Majut]. No such message was heard and/or recorded by the Duty Security Officer.

69. This finding is not supported by the evidence.

70. Mr. Butili, a UNMISS staff member working in the radio room, stated that he “was working that morning when [he] heard an emergency broadcast come over the Tetra radio” and that “[he] looked at the radio and saw that it had come from [Mr. Moyo's] radio”.<sup>13</sup>

71. Mr. Majut himself in his witness statement declared: “Mr. Thabani MOYO started shouting at me and shouting over the radio claiming that he was under attack. Mr. Thabani MOYO called radio room and said ‘I am under attack, someone is attacking me in my office’.”<sup>14</sup>

72. The UNDT found:<sup>15</sup>

[W]ith the absence of [Mr. Moyo's] testimony in the present appeal, as the only direct witness except [Mr. Majut], the Tribunal considers that Mr. [Moyo's] version of facts does not corroborate the other witnesses' statements, except Mr. [Sadrulola's], who had only an indirect knowledge of the alleged incident.

73. The Dispute Tribunal erred in fact and in law in discounting Mr. Moyo's evidential statement because he was not present at the hearing before it.

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<sup>12</sup> *Ibid.*, para. 72.

<sup>13</sup> See *Ibid.* paragraph 6(IV), page 6.

<sup>14</sup> See also *Ibid.* paragraph 6(IV), page 7.

<sup>15</sup> *Ibid.* para. 76.

74. The Appeals Tribunal emphasized in *Applicant* that disciplinary cases are not criminal and liberty is not at stake. Cross-examination is not an absolute right and it is not always necessary for a complainant to be present in court. Indeed, there are cases in which it is impossible, or inadvisable, for a witness to attend court. The attendance of a witness can be dispensed with so long as the Tribunal is satisfied that the staff member accused of misconduct is given a fair and legitimate opportunity to defend his position.<sup>16</sup>

75. In the present case, a United Nations personal security risk assessment identified a real threat to Mr. Moyo from Mr. Majut and his relatives and recommended that he be reassigned to Juba.

76. Nevertheless, the UNDT did not consider this to be a legitimate reason for Mr. Moyo failing to testify, finding that Mr. Majut had moved to Juba around the same time and this did not result in Mr. Moyo being exposed to any proven danger from Mr. Majut and his family.

77. There is no evidential basis for this finding. The United Nations personal security risk assessment had already identified a threat to Mr. Moyo. There was no evidence upon which the UNDT could conclude that, despite the assessment, Mr. Moyo was not exposed to any danger in Juba.

78. The United Nations personal security risk assessment, by itself, constituted a valid reason for Mr. Moyo not attending the UNDT hearing.

79. Moreover, the UNDT failed to take into account that Mr. Moyo provided a signed incident report and a signed witness statement which bore the affirmation: "I have read over the statement on pages numbered from one and [sic] to two in the English language which I clearly understand and I solemnly declare upon my honor and conscience that it is the truth, the whole truth and nothing but the truth."

80. No logical reason was established on the evidence as to why Mr. Moyo would make a false claim of assault. Also, his documentary evidence was strongly corroborated by the other evidence on record.

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<sup>16</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

81. The witness, Mr. Loguya, in his statement of 28 July 2015, stated that, although he did not witness any assault, he heard loud voices as he entered Moyo's office as Mr. Moyo and Mr. Majut were arguing over a vehicle key, thus supporting Mr. Moyo's report that Mr. Majut was shouting at him in his office over the vehicle keys.

82. Mr. Butili supported Mr. Moyo's statement that he had engaged the emergency button on his radio at the time of the assault. Mr. Butili, in his witness statement of 28 July 2015, stated that "I was working that morning when I heard an emergency broadcast come over the Tetra radio. I looked at the radio and saw that it had come from Mr. Thabani MOYO's radio."

83. The evidence of Mr. Bariyo and Mr. Mavanga supported Mr. Moyo's statement that he had been chased by Mr. Majut as he went from his office to the Security Section.

84. Mr. Mavanga stated on 13 November 2014 that on 5 November 2014 he was in Mr. Bariyo's office when Mr. Moyo entered looking tired and annoyed. He heard Mr. Moyo telling Mr. Bariyo that he had been beaten by Mr. Majut and saying "look at my right ear, it is swelling and I have a headache, I think I am injured". Suddenly, Mr. Majut entered the office without knocking, "looking very serious, he was sweating and his shirt was very wet. Then Mr. Memory Bariyo requested him to go out, and asked him to knock before getting into the office. At first he refused, Mr. Memory BARIYO incited [sic] for him to go out, he again refused and stood there saying 'I am following this guy' pointing his finger out towards Thabani."

85. Mr. Bariyo stated on 28 July 2015 that on 5 November 2014, Mr. Majut had come into his office twice.

The first time he came into the office in a hurriedly fashion right behind Mr. Thabani MOYO[.] I did not observe any cuts, bruises or swellings on Mr. MOYO. Thabani was very emotional and had tears in his eyes. Mr. MOYO did state that he was assaulted by Paul MAJUT. Paul appeared that he wanted to grab Thabani. I told Paul to get out of my office. Paul left and slammed the door on his way out. About two (2) minutes later Paul came back into the office and stated that Thaban[i] must surrender the vehicle key. Paul was very combative and did not show me a gate pass. [Mr. Butili] from the radio room did inform me sometime that day that he did hear an emergency broadcast on the radio.

86. Mr. Moyo's report that he had been assaulted by Mr. Majut was supported by Mr. Sadrulola's witness statement and the medical certificate.

87. Mr. Sadrulola said, in his statement of 31 July 2015, that

I was informed by [Mr. Loguya] that Thabani and Paul went to the Security Office. [Mr. Loguya] said they were arguing and he left as he did not want to be involved. I was waiting for them outside the office. Thabani informed me that Paul hit him and his ear was swelling. I noticed some bruises on his right ear. I noticed Thabani had a small cut with some dry blood near his right ear. Thabani said he informed Security and was on his way to the Medical Unit for a check-up. I asked Paul what happened. Paul said that Thabani [h]it the emergency button on his radio and Thabani stated "I am under attack". I asked Paul why Thabani would say this. Paul said I don't know. Thabani said that I hit him and that he (Thabani) went to Security.

88. In view of the corroborating evidence, we find that the UNDT erred in fact and law in holding that the absence of the oral testimony by Mr. Moyo diminished the credibility of his incident report and witness statement.

89. In conclusion, we find that the UNDT did not evaluate the evidence objectively. It gave misplaced importance to minor inconsistencies, came to unreasonable conclusions on the facts which were not supported by the evidence, and made speculations instead of findings based on the evidence.

90. The UNDT erred in fact and in law in its finding that the facts of misconduct were not established by clear and convincing evidence. A proper consideration of the whole of the evidence could only have led to one conclusion, and that is that Mr. Majut assaulted Mr. Moyo.

*The Dispute Tribunal's finding that the investigation had not been properly conducted and that Mr. Majut's due process rights had not been respected*

91. The UNDT noted that an e-mail message sent on 7 November 2014 with the subject "Assault incidents in UNMISS Wau" called a town hall meeting to remind staff of the core values of the Organization and the expected conduct. It listed a number of assault cases, including "Paul [Madut] [sic] of Supply chain assaulted Thambani [sic] Moyo on 05 Nov 2014".

92. The UNDT considered that the e-mail identified “a series of incidents which took place between 5 and 7 November 2014 ... prior to the initiation of the investigation in [Mr. Majut’s] case”.<sup>17</sup> The UNDT also noted that Mr. Moyo, in his incident report, “made reference to these prior incidents between [Mr. Majut] and other staff members, even if he was not involved in these incidents”.<sup>18</sup>

93. The UNDT found that<sup>19</sup>

[T]hese elements created a perception among UNMISS staff members that [Mr. Majut] was and continued to be a serious threat to other staff members. Therefore, the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident that happened between Mr. [Moyo] and [Mr. Majut], which consisted only in physical assault.

94. This finding is purely speculative.

95. Regarding the e-mail message of 7 November 2014, its purpose was to call a town hall meeting. There was no evidence that it was sent to any staff member in the SIU conducting the investigation. Further, there was no evidence that it had created “a perception among UNMISS staff members that [Mr. Majut] was and continued to be a serious threat to other staff members” or that “the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident [ ... ]”.

96. The UNDT found that although from the beginning of Mr. Majut’s interview he was informed that the investigation was concerned with the incident on 5 November 2014 in which Mr. Moyo was assaulted, the findings and conclusions in the investigation report of 17 December 2014 indicate that the investigation was conducted also in relation to incidents prior to the one on 5 November 2014 “without [Mr. Majut] being informed or interviewed regarding this event”.<sup>20</sup> The UNDT noted that the first paragraph of the incident report refers to incidents which were investigated “via email after the parties and witnesses were already interviewed in relation to the incident from 5 November 2014”.<sup>21</sup>

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<sup>17</sup> Impugned Judgment, para. 61(b).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, para. 61(c).

<sup>20</sup> *Ibid.*, para. 61(e).

<sup>21</sup> *Ibid.*

97. The UNDT's finding that "the investigation was conducted also in relation with incidents prior to the one alleged to have occurred on 5 November 2014, without [Mr. Majut] being informed or interviewed regarding this event" is not borne out by the facts. The investigation was clearly focused on Mr. Moyo's reported assault. The e-mail messages from other staff members were considered in that context. Mr. Majut was given the chance to comment on the e-mail messages in his additional interview on 14 May 2015. In that interview, he denied threatening staff members and supervisors mentioned in the first paragraph of Mr. Moyo's incident report. Copies of these e-mail messages were also attached to the allegations of misconduct memorandum from the ASG/OHRM to Mr. Majut on 4 September 2015, which is mentioned on pages 49, 51 and 52 of the UNDT Judgment.

98. The UNDT found that, long after the investigation report was issued on 17 December 2014, the investigation continued in relation to paragraph 5.3 of the report (which referred to past incidents in which Mr. Majut had threatened different staff members and his supervisors), resulting in a breach of Mr. Majut's due process rights.

99. The UNDT further found that Mr. Majut's additional interview took place on 14 May 2015, but that the investigator did not inform him of the purpose of the additional interview and he was only aware that he was being interviewed regarding possible misconduct. Two of the witnesses, Mr. Loguya and Mr. Bariyo, had an additional interview on 28 July 2015 and were interviewed only in relation to the incident on 5 November 2014. Their statements were taken after Mr. Majut had been interviewed on 14 May 2015 "and he was never given the chance to address the aspects from these statements. On 28 July 2015 and 31 July 2015, Mr. Butili and Mr. Sadrulola were interviewed for the first time in relation with the incident of 5 November 2014, and the elements that they provided were also not brought to [Mr. Majut's] attention for him to prepare a proper defense."<sup>22</sup>

100. These findings are not supported by the evidence on record.

101. The interviews included an additional interview with Mr. Majut, which is referred to on page 39 of the UNDT Judgment. Furthermore, the witness statements resulting from the interviews were annexed to the ASG/OHRM's memorandum of 4 September 2015 notifying Mr. Majut of the allegations of misconduct against him (This memorandum is referred to on

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<sup>22</sup> *Ibid.*, para. 61(l).

pages 49, 51 and 52 of the UNDT Judgment). In his e-mail of 15 October 2015 to OHRM, Mr. Majut responded to all allegations of misconduct against him.

102. The purpose of the additional interview on 14 May 2015 was quite obviously to question Mr. Majut about his alleged threats to other staff members. Mr. Majut denied any such threat in that interview. He stated in the interview that he did not object to making a statement and that he was aware that the interview was in regard to possible misconduct. He did not indicate that he was in any doubt as to why he was being interviewed.

103. Mr. Majut was provided with the additional witness statements of Mr. Loguya and Mr. Bariyo, as well as the witness statements of Mr. Butili and Mr. Sadrulola dated 28-31 July 2015. These documents were attached to annex A/3 to the ASG/OHRM's 4 September 2015 memorandum notifying him of the formal allegations of misconduct against him. Mr. Majut responded directly to aspects of each of these witness statements in his comments on the formal allegations of misconduct that he submitted to OHRM on 15 October 2015.

104. The UNDT further found that Mr. Majut “[had] not [been] informed of the allegations held against him at the beginning of the [initial] interview and he did not get the opportunity to respond to them in full”.<sup>23</sup>

105. Contrary to this finding, Mr. Majut was informed of the allegations against him and given an opportunity to respond. In his initial witness statement of 13 November 2014,<sup>24</sup> Mr. Majut affirmed that he was making his statement “in regards to the incident that occurred on 05 November 2014 in which Mr. Thabani MOYO was assaulted”.

106. The UNDT found that:<sup>25</sup>

[I]n the letter of allegation of misconduct, the ASG/OHRM already considered that [Mr. Majut] was guilty before he had the opportunity to file his comments on the allegations of misconduct, since she indicated that the account of events presented by [Mr. Majut] was not consistent with the witnesses' statements, and that, on the contrary, Mr. [Moyo's] version of events is supported by the evidence, particularly the other witnesses' statements. The [Dispute] Tribunal considers that this represents a breach of [Mr. Majut's] due process rights during the investigation.

<sup>23</sup> *Ibid.*, para. 61(k)

<sup>24</sup> Quoted on page 35 of the UNDT Judgment.

<sup>25</sup> *Ibid.*, para. 62.

107. This finding is purely speculative and is arrived at after an incorrect interpretation of the allegations of misconduct memorandum.

108. The ASG/OHRM stated in the memorandum that “it has been decided to issue these formal *allegations* of misconduct against you. ... *If established, your conduct would constitute* a violation of Staff Regulation 1.2(a), Staff Regulation 1.2(f) and Staff Rule 1.2(f).”<sup>26</sup>

109. It is clear from the language of the document that the ASG/OHRM did not consider Mr. Majut guilty and was giving him the opportunity to present his case.

110. Staff Rule 10.3, which deals with due process in the disciplinary process, provides:

- (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. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

111. We find that there is no evidence that Mr. Majut’s due process rights were infringed in any way. The requirements of Staff Rule 10.3(a) were complied with, as he was fully informed of the charges against him and was able to mount a defence in which he was given ample opportunities to make his case. He was able to present his version of the events and was given, and availed himself of, the opportunity to challenge the allegations against him.

112. We find that the UNDT erred in law and in fact, resulting in a manifestly unreasonable decision, when it determined that the investigation had not been properly conducted and that Mr. Majut’s due process rights had not been respected.

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<sup>26</sup> Emphases added.

*The Dispute Tribunal's holding that "the contested disciplinary decision to separate [Mr. Majut] from the Organization ... is unlawful for both procedural and substantive reasons"*

113. Staff Regulation 1.2(b) provides:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

114. Staff Rule 1.2(f) provides:

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

115. Staff Rule 10.1 provides in part:

**Misconduct**

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

116. Mr. Majut's assault on Mr. Moyo amounts to misconduct in that he has violated his obligations under the above provisions.

117. Moreover, the facts of the assault have been proven by clear and convincing evidence, and there were no procedural irregularities.

118. We therefore find that the UNDT erred in law in finding that the decision to separate Mr. Majut from the Organization was unlawful.

*Proportionality*

119. Staff Rule 10.3(b) provides:

Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

120. In considering an appropriate sanction, the USG/DM took into account the Secretary-General's past practice in similar cases involving physical assault, which normally attracted sanctions at the stricter end of the spectrum. The USG/DM also took into account as mitigating factors Mr. Majut's service of over 10 years with positive performance evaluations and his claimed personal frustration and stress.

121. The Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. We find that the sanction imposed in this case for assaulting a fellow staff member falls well within that discretion and was not disproportionate to the misconduct.

122. It follows, from our findings, that the Judgment of the UNDT cannot be allowed to stand.

**Judgment**

123. The appeal is allowed and Judgment No. UNDT/2017/100 is vacated.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2018 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Knierim

Entered in the Register on this 10<sup>th</sup> day of August 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar