description of “Stanley” as “slim, wearing glasses, had an artificial eye, a small mustache, of medium height and about 40 years-old”. Subsequently, V03 identified the Applicant as “Stanley” from a photographic array of seven male ONUCI staff member

by transporting unauthorized passengers in UN vehicles. The Applicant was one among other UNOCI staff members who were identified by the two women from a photographic array for having engaged in sexual exploitation

staff regulation 10.2". The Applicant acknowledged receipt of that letter on 19 May 2009.

12. On 18 August 2009, the Applicant filed an application with the United Nations Dispute Tribunal (UNDT) contesting the Secretary-General's decision of 8 May 2009 to summarily dismiss him.

13. On 8 January 2010, the Tribunal through its Registry issued pre-hearing directions to the parties to which Counsels for the

person in the Bar Lido. The Applicant called four witnesses on his behalf. They all worked in Abidjan and used to live in the same residence located in "Deux Plateaux".

16.

19. The fourth witness, Ms. Connie, owner of the Graciela restaurant, stated that her restaurant was quite close to the UN office in Abidjan. She confirmed that the Applicant used to have his meals there and would come with his colleagues. Her place was mainly frequented by UN s

Applicant's statement that the two women may have seen him in some other bar or restaurant the witness was asked whether this point was cleared with the two women. The witness answered that on 6 March 2007 the investigators had no idea about the activities of women from the Philippines in Abidjan and that the Applicant had not explained why the two women might have seen him in the Gracelia restaurant.

25. The investigator further testified that no signed statements had been taken from the two women after they had identified the Applicant from the photo array. Ms. Eyrignoux explained that this was not done as the investigators were only allowed a short time with each woman because they had to be taken out of Abidjan very fast for security reasons. In fact the two women had to be moved from the shelter where the investigator met them on 7 March in view of what was considered to be suspicious movements during the night. The non-governmental organization that was taking care of the two women refused that they be interviewed through the phone for security reasons.

26. When asked to explain how the two women could be credible in view of the contradiction in their account of the Applicant's physical size, that is VO1 saying he was "kind of fat" and VO3 saying he was "slim", the witness explained that VO1 was at the time 19 and VO3 was 26. The latter was more mature. The witness added that she would rely more on the perception of VO3 because VO1 was young, very fragile and naïve. In fact, the witness was not looking for fat or slim persons but for Indian looking one.

27. The witness was also questioned on dates and times appearing on some of the witness statements taken by the OIOS. On one document dated 7 March 2007 the time 7:20 am is mentioned. The witness explained that this was not the time at which VO1 and VO3 were interviewed. In fact they were interviewed between 2 and 5:00 pm. The time 8:00 to 8:15 appearing on a document dated

31. In the light of the foregoing, the Applicant submits that the charges of sexual exploitation and improper use of a UN vehicle should be dropped. The Applicant denies the allegations that he attended the Bar Lido and has paid for sexual services. He also avers that the charges for improper use of the UN property for transporting passengers in a UN vehicle without authorization can only stand if the charge against him of having exchanged money for sex with V01 and V03 is substantiated.

32. In respect of remedy, the Applicant submits that the Tribunal should order that:

- the decision taken by the Secretary-General be rescinded;
- that the Applicant be retroactively reinstated in his former position in the United Nations;
- that he be paid all salary and benefits retroactively from the date of his separation from service until the date of the Dispute Tribunal's judgment; and,
- that the Applicant be paid compensation for moral damage.

Respondent's Reply

33. The Respondent filed its reply on 19 October 2009, supported by a large number of exhibits.

34. On the burden of proof, the Resp-9.83821(o)6.

prosecutor must prove the guilt of an accused beyond a reasonable doubt. Rather the Administration must present "adequate evidence in support of its conclusions and recommendations […] [i]n other words, sufficient facts to permit a reasonable inference that a violation of the law has occurred"[3].

35. The Respondent submits that in other words the Secretary-General does not need to prove that the alleged conduct took place. The Secretary-General is required, when considering whether to impose a disciplinary measure, to determine if the evidence is such that it is more likely than not that the alleged conduct occurred.

36. In the present matter, the Respondent argues that the Applicant was positively identified by V01 and V03 from a photographic array of similar appearing men wearing glasses when the presence of the Applicant's artificial eye was not discernable. In addition, the Applicant was identified with a more detailed description given by V03. The Respondent stresses that the positive identification of V01 and V03 provided the Secretary-General with sufficient evidence that it was more likely than not that the Applicant engaged in the alleged conduct.

37. The Respondent avers that the Applicant failed to provide countervailing evidence against his positive identification by two separate witnesses as a man who took them to his home in an official UN marked vehicle, to whom they had provided sexual services in exchange of money.

38. With regards the validity of V01 and V03's testimonies, the Respondent argues that the Applicant's explanation as to why V01 and V03 may have identified him remains entirely speculative. It assumes that V01 and V03's positive identification of the Applicant as a person with whom they each had

[3] See Judgment No. 1023, *Sergienko*, (2001)

justice, are very crucial. Evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, is an unsafe basis for an adverse finding against a person facing a charge.

43. Both VO1 and VO3 had seen the Applicant whom they identified from the photo array. Ms. Eyrignoux who was closely involved in the investigation stated that both women spontaneously and without hesitation recognised the Applicant on the photo array. Concerns have been expressed about the use of photo arrays for identification purposes. It is not disputed that the use of the standard identification parade aligns the suspect with people of similar stature and origin as him. The witnesses are then asked whether they can pick him/her up. Such a procedure cannot be resorted to in all cases. This is so because the witnesses may not be available in the p(g)16.8

Both VO1 and VO3 recognised the Applicant on the photo array, both of them stated in the course of the investigation that he was wearing glasses, a fact not denied by the Applicant; both of them added that the Applicant had an artificial eye, a fact confirmed by the Applicant. The overwhelming evidence of identification cannot simply be brushed aside by the contradiction referred to above.

46. In view of the contradiction that surfaced on the identification issue the Tribunal feels that the issue of how the investigation process was conducted needs to be addressed. When the investigator Ms. Eyrignoux was cross examined she stated that she did not ask the witnesses any more questions about the contradiction. She formed the view that the testimony of VO3 was more convincing on the identification issue as VO3 was about 26 years old and therefore more mature whereas VO1 was about 19 and appeared more fragile. The Tribunal observes that according to the investigation procedure applicable at the material time "the conduct of the investigation should demonstrate the investigator's commitment to ascertaining the facts of the case".[5] The rules of fairness should also be complied with and this requires collection and recording of clear and complete information establishing the facts, whether incriminating or exculpatory".[6]

47. It is unfortunate that the investigation did not seek to clear that contradiction on the identification issue. Admittedly, as the evidence has shown the circumstances were such that the witnesses who were victims of human trafficking needed to be removed from Côte d'Ivoire as fast as possible for their security. This however cannot justify the flaws on such an important aspect of the investigation. A shrewd investigator should have immediately reacted to this and sought clarification. The Tribunal would recall that the right to a fair trial on a criminal charge is considered to start running not "only

[5]OIOS Investigation Manual paragraph 2.1.2, Standards of Investigation
[6] OIOS Investigation Manual paragraph 2.3.4, Fairness during Investigations

upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[7] This would equally be applicable to investigation that may lead to disciplinary proceedings under the fairness requirements as expounded in the OIOS Investigations Manual.[8] Notwithstanding the fact that this contradiction was not cleared, as stated above (paragraph 46) the evidence against the Applicant was overwhelming.

48. In the case of *Diakite*[9], the Tribunal adopted the following reasoning:

> "The Tribunal has first to determine whether the evidence in support of the charge is credible and capable of being acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.
>
> Once the Tribunal determines that the evidence in support of

49. On the involvement of the Applicant in the acts he was charged with, the Tribunal has no hesitation in accepting the evidence presented by the Respondent. Both VO1 and VO3 related the circumstances in which they were taken from the Bar Lido, the payment made by the Applicant to the procurer, the travel in the UN vehicle. The Applicant called witnesses on his behalf to establish that he had never taken women to his house where some of the witnesses were also residing. The alleged act of misconduct took place between October and December 2006. The evidence of witness Alokabandara is not very relevant as that witness stated in his testimony that during that period he may have been on home leave or training. Witness Fernando stated that the Applicant never brought any girl to his house. This evidence could not stand in the light of the overwhelming evidence presented by the Respondent. Witness Rajaratnam who also worked in Abidjan came

(ii) provided with a copy of the documentary evidence of the alleged misconduct;

(iii) notified that he or she can request the advice of another staff member or retired staff member to assist in his or her response;

(iv) given reasonable opportunity to respond to the allegations.

Witnesses Confrontation

51. One of the important issues that are arising in disciplinary matters is whether a staff member should be afforded an opportunity of confronting witnesses and cross examine them. Given the manner in which the disciplinary proceedings are managed such confrontation almost never occurs. In the present case the Applicant was not given an opportunity to confront the two main witnesses VO1 and VO3 whose evidence was decisive in establishing the charges against him. The question that falls to be decided is whether such a failure has flawed the whole process.

52. In a criminal trial witnesses must be made available for cross examination or at least an opportunity must be given to the accused to cross examine them. In relation to the International Covenant on Civil and Political Rights (ICCPR), examine witnesses under the same conditions as the prosecutor is an essential it has been observed that the right to call, obtai 541(P)11.1617159R element of 'equality of arms' and thus of a fair trial

[10]. The European Court of Human Rights has reviewed on several occasions the admissibility of indirectly administered evidence. The Strasbourg Court held unanimously that,

[10] Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993)

"In principle, all the evidence must be produced in the presence of the

had a fair trial as required by Article 6(1)[15]. In the case of *Bricmont v Belgium* (1989)[16] the European Court condoned the use of statement where the witness was excused from further questioning which the defence had requested, partly because of his age and ill-health. In another case, *Artner v Austria* (1992)[17], it condoned the use of the statement where the key witness, who had been questioned by the police and by the investigating judge, but not by the defence, could not be heard because she could not be traced. The majority of the Court found that the existence of other incriminating evidence, coupled with the defendant's role in avoiding a confrontation with the witness at the pre-trial stages, justified the reception of the statement.

54. All the rights that an accused enjoys in the course of a criminal trial may not necessarily be available to a person who is subjected to disciplinary proceedings. The exercise that the Tribunal should undertake in such a situation is an analysis of whether the basic interests of a staff member were safeguarded in the light of the nature of the charges, the nature and complexity of the investigation, the need to afford protection to witnesses, whether the absence of confrontation is so detrimental to the interest of the staff member, whether the absence of witnesses so weakens the evidence in support of the charges that it cannot be relied upon and whether overall the proceedings were fair.

55. The evidence shows that the Applicant was informed in writing of the charges and was communicated a copy of the investigation report. He was asked to file his response which he did and denied all the charges. The Tribunal takes the view that notwithstanding the fact that the two main witnesses who identified him were not called at the hearing were not prejudicial to the Applicant. He was in presence of all the elements of the charges and the facts

[15] Idem, page 20.
[16] ECHR Series A 158, Application No. 10857/84
[17] ECHR Series A 242 A, Application No. 13161/87

surrounding them and was thus in a position to make a comprehensive response. There was therefore no breach of the due process requirements.

56. The sanction taken against the Applicant was the appropriate sanction in view of the charge of having resorted to the services of women for sex, women who, as the undisputed evidence has demonstrated, were the victims of human trafficking.

57. In this connection the Tribunal recalls that the United Nations Convention against Transnational Organized Crime came into force on 29 September 2003. This Convention was supplemented by two Protocols:

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol) of 2000, and,
- The Protocol against the Smuggling of Migrants by Land, Sea, and Air (the Smuggling Protocol), which came into force on 28 January 2004.

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

58. Finally, the Secretary General's bulletin[18] in no uncertain terms condemns the resort to women for sex in consideration for money. Both sexual abuse and sexual exploitation are viewed with the utmost gravity in the bulletin and they *constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal*.[19]