

United Nations  Nations Unies
Administrative Tribunal Tribunal Administratif

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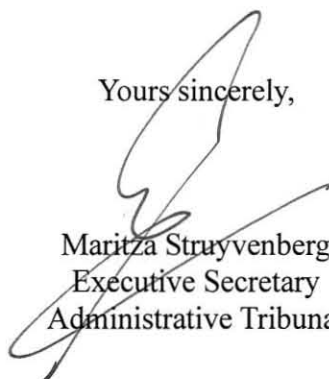
Dear Mr. Granger,

Case No. 1436: Comerford-Verzuu

I have the honour to transmit herewith, under article 11, paragraph 5 of the Statute of the Administrative Tribunal, a copy of Judgement No. 1388 delivered by the Administrative Tribunal on 25 July 2008, in case No. 1436: *Comerford-Verzuu* against the Secretary-General.

I also enclose a complete set of the documents produced by the Respondent, as requested by the Tribunal.

Yours sincerely,


Maritza Struyvenberg
Executive Secretary
Administrative Tribunal

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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1388

Case No. 1436: COMERFORD-VERZUU

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Sir Bob Hepple;

Whereas at the request of Deborah Comerford-Verzuu, a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 May 2005 and twice thereafter until 31 August;

Whereas, on 19 August 2005, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“(a) to quash the ... decision[s] of the Secretary-General [to uphold the decision to close the case following the refusal of the insurer under the [Malicious Acts Insurance Policy (MAIP)] to grant her compensation; to reject the Joint Appeals Board’s (JAB) recommendation to increase her compensation under Appendix D of the Staff Rules; and, to refuse to pay her an *ex gratia* payment]; ...

(b) to award the Applicant, in accordance with the JAB’s recommendation, compensation which is just and equitable having regard to the nature and extent of her loss and the nature and extent of the [United Nations’] numerous failures in its duties to the Applicant and her late husband; and,

(c) to make additional and ancillary orders relevant to the above requests ...”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 22 February 2006 and once thereafter until 22 March;

Whereas the Respondent filed his Answer on 22 March 2006;

Whereas the Applicant filed Written Observations on 28 July 2006, and the Respondent commented thereon on 12 September;

Whereas the Applicant submitted additional documentation on 16 October 2007;

Whereas, on 21 November 2007, the Tribunal decided to postpone consideration of this case until its summer session;

Whereas the Applicant submitted a communication on 5 December 2007;

Whereas, on 10 June 2008, the Tribunal requested information from the Respondent and, on 23 June, the Respondent provided same; and

Whereas, on 26 June 2008, the Tribunal decided not to hold oral proceedings in the case.

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“... Professional Record

... Since the [Applicant] is acting as the beneficiary of her husband [(Dr. C.)], who died on 18 August 2000, while he was on mission for [the United Nations Development Programme (UNDP)] in the Democratic Republic of the Congo (DRC), the relevant professional record to the present case is the one of [Dr. C.].

... [Dr. C.] entered the service of the United Nations in 1990, as a Consultant for [the United Nations Children’s Fund], in Monrovia, Liberia, for one year. [Between November 1993 and February 1996, he worked on periodic contracts in Africa for the Office of the United Nations High Commissioner for Refugees.] ...

... From February to December 1997, [Dr. C.] worked as a Programme Manager at the P-4 level for UNDP, Kigali, Rwanda. He was granted additional functions in December 1997 as Head of the Inter-Agency Programming Unit at the P-5 level.

... On 14 December 1999, he was granted a six-month [appointment of limited duration] as a Program Analyst, UNDP, ... Geneva. His contract was extended for 12 months as of 1 June 2000 as a Programme Specialist for UNDP at the A-4 level.

Summary of Facts

... A Medical Clearance Request [for Dr. C., who was preparing to travel to Kisangani, DRC,] was signed by the Director, Joint Medical Service, [United Nations Office at Geneva], on 8 December 1999.

... On 20 July 2000, ... the terms of reference of the Kisangani evaluation mission were issued.

... On 11 August 2000, a travel authorization ... was issued for [Dr. C.] ...

... On 18 August 2000, [Dr. C.] ... was found hanged in his hotel room, while on official mission to Kisangani, DRC.

... On the same day, the [United Nations Mission in the Democratic Republic of Congo (MONUC)] Regional Security Officer ... transmitted a 'Report on death of staff member ...' to the MONUC Chief Security Officer ...

... On 20 August 2000, a post-mortem report was issued that was signed by a consultant pathologist in Nairobi ..., on behalf of the Kenyan government.

... On 21 August 2000, [the] colleague [with whom Dr. C. had travelled to] Kisangani ..., the Chief, Office for the Coordination of Humanitarian Affairs, Kisangani ..., the hotel receptionist ... and the hotel manager ... were interviewed by the Officer-in-Charge, Civilian-Military Affairs, MONUC Force Commander's Office ...

...

... On 23 August 2000, the Director, Emergency Intervention Division, UNDP, ... was interviewed by ... MONUC ...

... On 26 August 2000, the United Nations Security Coordinator (UNSECOORD) dispatched a mission to DRC, Geneva and London to finalize the investigation started by MONUC Officers and local authorities.

... A certificate of analysis was prepared by the Government Chemist's Department of Kenya on 28 August 2000. It established that 'no chemically toxic substances were detected in the post-mortem specimens submitted'.

... The same day, the [UNSECOORD] investigator ... transmitted 'documents concerning the death of [Dr. C.]' to the Chief Security Officer, [MONUC].

... An expert opinion regarding the death of [Dr. C.] was provided on 7 September 2000 by a consultant forensic pathologist, ... Guy's Hospital, London ...

... By letter dated 14 September 2000 to the Administrator, UNDP, ... the [Applicant] inquired about the compensation that she would be paid in relation to the death of her husband.

... On 3 October 2000, the [Applicant] received a copy of the investigation report ...

... By memorandum of 10 October 2000, ... UNSECOORD ... transmitted the investigation report to ... UNDP ... [specifying] that 'with the submission of this report, UNSECOORD ha[d] fulfilled its responsibilities and that 'any follow-up action with regard to this incident [would] become the responsibility of UNDP'.

... On 11 October 2000, the [Applicant] wrote to the Secretary-General to draw his attention to 'the [Organization's] failure to take proper care of [her] husband', and to obtain answers to her suggestions and questions. She indicated that 'no matter what the findings of the [United Nations] investigation into the cause of death, [she] ha[d] serious concerns both about how the death of [her] husband ha[d] been handled by the [United Nations] and about the conditions under which he was working prior to his death'. [Thereafter, a lengthy exchange of correspondence between the Applicant and various offices at UNDP and the United Nations ensued.]

...

... On 15 December 2000, the [Applicant's] lawyer wrote to the Secretary-General to request the award of compensation under Appendix D to the Staff Rules.

...

... On 30 August 2001, at the request of the [Advisory Board on Compensation Claims (ABCC)], a forensic pathologist in New York ... reviewed the materials concerning the death of [Dr. C.] and provided an opinion with regard to the cause of death and manner of death of the latter.

...

... On 7 December 2001, [the ABCC issued its recommendation] to the Secretary-General
... The ABCC specified *inter alia*:

‘Having considered all aspects of the case and, being of the opinion that, as it would not be possible to determine conclusively whether the death of the late staff member resulted from suicide or homicide;

Recommends to the Secretary-General that the death be recognized as being attributable to the performance of official duties on behalf of the United Nations and that, therefore, compensation be awarded to the dependent survivors under article 10.2 of Appendix D to the Staff Rules’.

... On 3 January 2002, the Secretary, ABCC, transmitted to the [Applicant] a copy of the Secretary-General’s decision of 28 December 2001 to award compensation. ...

...

... By letter of 28 February 2002 to ... UNDP ..., the [Applicant]’s lawyer, stressing that ‘the [United Nations]’ view on the cause of death ha[d] been resolved’, requested that a ... claim be submitted for compensation under the MAIP.

...

... By letter of 17 April 2002, ... UNDP ... advised the [Applicant’s] lawyer that the [Applicant’s] claim under the terms of the MAIP had been channelled through UNSECOORD[, but] ... that the process was different from the one of the ABCC, and that the claim would be ‘reviewed and determined by Lloyds of London as the insurance carrier’.

...

... By letter dated 21 June 2002, ... the [Applicant’s] lawyer inquired about the processing of his client’s application to the ABCC. He notably drew up a list of correspondence he had with UNDP with regard to this matter, requested further answers to different questions related to the MAIP, and stated that his client was entitled to receive copies of the documents submitted to the insurer and the broker.

...

... By memorandum of 3 September 2002 to ... UNSECOORD ..., [the Office of Legal Affairs (OLA)] ... concurred with UNSECOORD that, although the insurance policy [did] not cover suicide, ‘it would be inappropriate to withhold from the insurer relevant documentation bearing on the claim’[, but advised that:]

‘Although the [United Nations] has taken out the policy for the ultimate benefit of the staff, the legal relationship under the policy is between the insurer and the [United Nations] and its participating agencies as the Assured parties. Staff members are not parties to the policy. Accordingly there is no legal obligation to provide [Dr. C.’s] family’s attorney with copies of the documentation in relation to the policy or the claim

under it. In addition, I would point out that communications between UNDP and UNSECOORD are internal documents not subject to dissemination.’

... [On] 12 September 2002, ... UNDP ... informed [the Applicant’s lawyer] that the claim submitted by UNSECOORD to Lloyds of London under the MAIP was being considered by the underwriters. [UNDP] indicated *inter alia*:

‘The MAIP is a policy that was negotiated between Lloyds and the United Nations (the assured), while [the broker] is the underwriting company (the insurer) we deal with and to whom the claim was submitted. The policy is a contract between the United Nations (the assured) and the insurer. Staff members are not parties to the policy and, as such there is no legal obligation to provide you with a copy of the policy, or the claim under it.’

...

... By letter of 2 December 2002, ... UNDP ... informed the [Applicant’s] lawyer that the underwriters of the MAIP had advised that ‘there [was] no evidence that [Dr. C.] died as a result of an insured contingency as detailed in the policy, or in particular, that he was “murdered by foreign enemies”’, and that therefore ‘[UNDP did] not see any grounds upon which they could make a payment under the Malicious Acts Insurance Policy in this case, unless further evidence [could] be provided that [Dr. C.] died as a result of a malicious act’. [UNDP] finally stated that ‘unless [there was] ... any additional information, not already considered by the Insurer, which could establish that [Dr. C.] died as a result of a malicious act covered by the insurance policy, the United Nations [would] consider this case to be closed’.

... By letter dated 5 December 2002, ... the [Applicant’s] lawyer ... requested ‘a substantive response to the [different] points or questions [raised in his correspondence] together with confirmation of the current status of [his] client’s claim under the Policy’. He reiterated that as an ‘insured person’, his client [was] entitled ‘to claim from the underwriters direct in the event of the [United Nations] failing to honour its obligations towards her’.

... By memorandum of 23 January 2003, ... UNDP ... informed ... UNSECOORD ... that ... [they] had contacted the underwriters ... ‘to inquire whether they would be prepared to speak direct to [the Applicant] or her attorney’ [but that] ... the underwriters had recalled that their practice was not to have contacts with third parties, since the policy pays a benefit to the policyholder.

... On 31 January 2003, the [Applicant] wrote to the Secretary-General to request that ‘the [United Nations] seek further information through [the broker] and make further efforts through [the broker] to ensure that [her] children receive compensation under the MAIP’. ...

... By letter of 4 February 2003, ... [UNDP advised the Applicant’s lawyer] that the documentation that was before the ABCC was submitted with the MAIP claim, and that, as recalled by [OLA,] there was no obligation on the part of the United Nations to provide the [Applicant] with copies of the required documentation related to the MAIP claim, for the reason that the staff member is not the assured party. [UNDP indicated] ‘... [a]s stated in [our] letter [of 2 December 2002], unless you have further evidence which could establish that [Dr. C.] died as a result of a malicious act covered by the insurance policy, UNDP must consider this matter closed’.

... On 2 April 2003, the [Applicant] request[ed] administrative review of [this] decision ...

... The same day, ... the [Applicant’s] lawyer [advised the Organization] ... that there was evidence that the death of [Dr. C.] was due to homicide. ...”

On 6 June 2003, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 14 November 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

Merits

127. The Panel examined in depth the ‘administrative failures’ presented by the Appellant in support of her appeal and underlined that these grievances were not all related to the contested administrative decision: it considered in this connection that the ‘administrative failures’ regarding her husband’s personal safety before his death, and the failure to take good care of her husband’s health and welfare, constituted different issues, which could not be appealed as such and had no link with the contested administrative decision by UNDP to close the case following the decision by the insurer not to grant the Appellant any indemnity under the MAIP.

128. The Panel decided, pursuant to relevant rules and regulations, to focus its examination on the above-mentioned administrative decision, and therefore to determine if UNDP had violated the Appellant’s rights by deciding to consider the case closed.

...

133. ... [T]he Panel found that whatever would have been the decision by the underwriters with regard to the case of [Dr. C.], UNSECOORD acted in compliance with relevant law and practices in such circumstances, as well as with its contractual obligations: an investigation was properly led based on two medical reports, and these central documents were submitted to the underwriters in addition to the submissions of the Appellant. In consequence, it deemed that the decision by UNDP to close the case following the decision of the Underwriters not to grant the Appellant compensation was justified, and did not consider that this violated any of the Appellant’s rights.

134. Moreover, it underlined that the examination of the correspondence, in particular between UNDP and the Appellant, did not reveal a lack of diligence on the part of UNDP. The Panel noted on the contrary that UNDP, UNSECOORD and the Chief of the Insurance Service appear to have done their best to answer the numerous requests formulated by the Appellant or her lawyer.

Conclusions and Recommendations

135. In view of the foregoing the Panel **concludes** that the Appellant has no grounds for contesting the decision taken by UNDP to close the case following the refusal by the insurer under the MAIP not to grant her compensation, ‘unless [she has] further evidence which could establish that [Dr. C.] died as a result of a malicious act covered by the insurance policy’.

136. In addition to this conclusion, however, the Panel wishes to stress that, given the increasingly dangerous character of United Nations missions, the Organization’s obligation to make every effort in order to ensure the security and safety as well as the physical and mental well-being of its staff on mission should also extend to their dependents.

137. In particular, the Panel is of the opinion that the United Nations could neither ignore the risk for a staff member to be killed or injured on mission, nor therefore the Organization’s obligation to protect his/her family.

138. In this regard, the Panel notes that, while the ABCC recognized that [Dr. C.'s] death could be considered as being attributable to the performance of official duties, the amount of compensation for his family was calculated according to obsolete scales, still in force but not adapted to present-day requirements and living conditions. The Panel therefore **urges** the Secretary General to take the necessary action in order to have the calculation methods **updated**.

139. Furthermore, in the present case, taking into account humanitarian considerations as well as the additional hardship suffered by the Appellant due to insufficient compensation, the Panel **recommends** to the Secretary-General to take the necessary action in order to increase the monthly amount of compensation awarded to the Appellant to a more appropriate level."

On 30 March 2005, the Officer-in-Charge, Department of Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in light of the JAB's report and all the circumstances of the case, and agrees with its conclusion that you do not have grounds for contesting the decision taken by UNDP to close the case following the refusal of the insurer under the MAIP to grant you compensation. However, the Secretary-General is regretfully unable to agree with the JAB's recommendation to increase your monthly compensation under Appendix D of the Staff Rules, since there is no legal basis for exceeding the compensation payable thereunder. The Organization's Financial Regulations and Rules generally require a legal obligation on which to justify any expenditure and, while *ex gratia* may be made in the absence of a legal obligation, this mechanism is inappropriate for offsetting inadequacies, whether real or perceived, in regular entitlements."

On 19 August 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to prosecute the MAIP claim efficiently, effectively and fairly, and in accordance with the Organization's internal guidelines, internal rules and the principle of equal treatment.
2. The Respondent failed to safeguard evidence, to conduct a thorough, professional, just and impartial investigation and to comply with the Organization's rules and procedures relating to investigations.
3. The Respondent failed to safeguard the late Dr. C.'s personal safety.
4. The Respondent failed to take good care of the late Dr. C.'s health and welfare.
5. The Respondent failed to respond to her concerns.
6. The Respondent failed to provide adequate compensation for the Applicant and her children.

Whereas the Respondent's principal contentions are:

1. The Applicant is not entitled to any compensation under Appendix D to the Staff Rules in excess of the amounts set out therein.
2. The MAIP claim was properly handled and the Applicant is not entitled to any compensation because of the alleged mishandling of the claim.

3. The Applicant is not entitled to any compensation because of alleged delays or alleged failure to respond.

4. The Applicant is not entitled to any compensation because of the alleged failure to safeguard the personal safety of her husband or the alleged failure to take good care of his health.

5. The Applicant is not entitled to any compensation because of the alleged failure to conduct a thorough, fair and impartial investigation.

The Tribunal, having deliberated from 26 October to 21 November 2007, in New York, and from 26 June to 25 July 2008, in Geneva, now pronounces the following Judgement:

I. This dispute has arisen because of the uncertainty as to how and by whose hand Dr. C died on 18 August 2000, while on an official mission to Kisangani in the DRC. Unfortunately, this central issue of fact has not been satisfactorily determined and now, some eight years after the tragic event, it is highly unlikely that the mystery will ever be solved. The Tribunal is presented with four differing conclusions on Dr. C.'s death, two of which point to homicide and two of which point to suicide. The Tribunal emphasizes at the outset that it is not its role to make a factual determination on the cause of death in this case. As it stated in Judgement No. 1009, *Makil* (2001), para. III,

“The Statute of the Tribunal does not envisage that findings of fact upon which a decision of the Tribunal is reached would ordinarily or usually be made following the Tribunal's own investigations or upon facts found by the Tribunal itself. This is so because matters coming before the Tribunal arrive almost invariably after a preliminary investigation by a [Joint Disciplinary Committee (JDC)] or a JAB or like body which carries out investigations and makes findings of facts and then reports thereon.”

Accordingly, the Tribunal's starting point is the Secretary-General's acceptance of the recommendation of the ABCC that “as it would not be possible to determine conclusively whether [Dr. C.'s] death resulted from suicide or homicide”, the death should “be recognized as being attributable to the performance of official duties on behalf of the United Nations”. This decision having been taken, the Tribunal must now determine the extent of the legal obligations it creates for the Organization.

II. Although the Applicant has raised a large number of issues, the principal question is whether the Applicant's claim, as dependent widow of the deceased under the MAIP, was mishandled by the Organization, resulting in substantial economic and moral damage to her and their dependent children. The Tribunal's deliberation on this question has also necessarily involved consideration of the plea that the Respondent failed to safeguard evidence and to conduct a just and impartial investigation into the death, as well as the plea that the Respondent failed to respond adequately or in time to the Applicant's concerns.

As a preliminary matter, the Tribunal wishes to note that, although the Applicant had requested an oral hearing in this case, the Tribunal decided on 26 June 2008 not to accede to her request. The Tribunal considered an oral hearing to be unnecessary because, as the Applicant's representative conceded, the main

areas of disagreement between the parties were not factual but legal and administrative, and these matters were fully covered in the written proceedings.

III. The relevant MAIP (dated 14 April 2000) is a contract between Lloyds of London and the United Nations and Specialized Agencies ("the Assured") to provide personal insurance to an "Insured Person" for accidents "resulting in death or disability caused directly or indirectly" by any of a number of specified circumstances such as war, acts of foreign enemies, civil commotion, sabotage, terrorist activities, murder or assault by foreign enemies. For the purpose of this insurance, an "Insured Person" is any employee of the Assured in certain categories. It is not disputed that, as a professional staff member in a designated country, Dr. C. had 24-hour cover as an "Insured Person". The Policy sets out a number of exclusions including death "directly or indirectly resulting from or consequent upon ... suicide or attempted suicide or intentional self-injury or the Insured Person being in a state of insanity". As from 1 May 2000, death benefits under the MAIP of US\$ 500,000 were payable to the beneficiaries designated by the staff member. Dr. C. had designated the Applicant and their three children for this purpose.

IV. The MAIP is administered by UNSECOORD through a broker representing the underwriters. Claims have to be submitted by the staff member or surviving beneficiary to the local Operations Manager, who is responsible for reviewing such claims and forwarding them to the Human Resources Service Centre Chief serving the duty station. By letter dated 28 February 2002, the Applicant's counsel submitted her claim, with supporting documentation. UNSECOORD submitted a claim under the insurance policy to the broker on 1 July, some five months after the Applicant's claim was submitted, in the following terms:

"In August 2000, a UNDP staff member on a short-term contract ... was found hanged in his hotel room in Kisangani, [DRC]. The findings of the investigations were that the death was self-inflicted by hanging. However, during the autopsy in Nairobi, the pathologist was of the opinion that the death could have been a homicide. The report was submitted to a forensic expert in the U.K. as well as to a forensic expert in the U.S., both of whom concluded that [the] death was self-inflicted.

[Dr. C.'s] widow and her attorney have contested this finding. During a consideration of the case by the Compensation Board of the United Nations, for purposes of payment of Appendix D, the Board was unable to reach agreement as to whether the death was self-inflicted or not and decided that [he] had died 'in the service of the United Nations'.

UNDP has now requested that we submit the case to you for consideration by Underwriters. Attached please find all the documentation regarding the case. Also included in [sic] a CD-ROM with relevant photographs of the deceased which were an integral part of the investigation. Please let me know if you require any additional information."

There were a large number of attached documents, apparently in no particular order, including local police reports, notes from an inquiry and interviews by a MONUC investigator, medical and post-mortem reports, and the report of the "Investigation into the Death of [Dr. C.]", prepared by an UNSECOORD investigator, as well as correspondence between the Applicant and her counsel and the Organization.

V. The Applicant's counsel requested an opportunity to approach the broker directly concerning the matter. On 27 September 2002, the broker informed UNDP that they were not prepared to discuss the case directly with the Applicant or her representatives because it was their practice to deal only with the policyholder and not with third parties. By letter dated 2 December, UNDP informed the Applicant's counsel that the underwriters of the MAIP had advised that "there [was] no evidence that [Dr. C.] died as a result of an insured contingency as detailed in the policy, or in particular, that he was 'murdered by foreign enemies'", and that therefore "they do not see any grounds upon which they could make a payment under the [MAIP] in this case, unless further evidence can be provided that [he] died as a result of a malicious act". UNDP added that "unless [the Applicant was] aware of any additional information, not already considered by the insurer, which could establish that [Dr. C.] died as a result of a malicious act covered by the insurance policy, the United Nations must consider this case to be closed". Despite repeated requests on behalf of the Applicant for direct access to the underwriters and for substantive reasons for refusing the claim, neither the broker nor the Respondent was willing to release any documents or provide further information. The JAB accepted that UNSECOORD had submitted to the underwriters all the documents to which it had access. Accordingly, the JAB considered that the underwriters had access to all the material needed to take a decision, and that the file submitted "did not show any bias or impartiality [sic] in the presentation of the facts". The JAB decided that UNSECOORD had "acted in accordance with relevant law and practice in such circumstances, as well as with its contractual obligations".

VI. The Applicant, as well as being a beneficiary under the MAIP on her husband's death, also happens to be a United Nations Volunteers (UNV) staff member. One of her claims is that a contractual obligation was owed to her under the terms of her employment to administer any insurance claims submitted in respect of her husband's death with proper care. This particular claim, made in her capacity as a staff member, is misguided. The only basis on which a claim can be made is that there has been a breach of an express or implied contractual duty owed to Dr. C. or to those whom he named as beneficiaries under the MAIP. The Tribunal agrees with the JAB that the Applicant does not have a cause of action as a UNV staff member. Her claim must be either as a person "who has succeeded to the staff member's rights on his ... death" (per article 2.2 (a) of the Statute of the Tribunal), or as a person who is "entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied" (article 2.2 (b)). In this case, the Applicant was entitled to rights as a beneficiary under her husband's terms of appointment. Those terms included, by implication, the benefits under the MAIP.

VII. The relevant contractual duty of the Organization, as the Assured and the administrator of claims made by staff members who are Insured Persons and their beneficiaries, may be variously described as a duty to act fairly and in good faith or as a duty not to undermine trust and confidence as between the Organization and its staff members and their beneficiaries, or as a duty of mutual co-operation to achieve

the objectives of the contract. (By way of shorthand, the Tribunal will refer to all of these as the “duty of good faith”.) In order to constitute a breach of this term, the conduct would have to seriously undermine trust and confidence. Careless conduct would constitute a breach of this term only if it demonstrates a real and unacceptable disregard for the interests of the staff member. In the context of this case, the specific elements of the Organization’s duty were, first, to conduct – or verify that local law enforcement had conducted – an adequate investigation of the death, and, second, to pursue the Applicant’s claim as beneficiary under the MAIP fairly, effectively and efficiently in her best interests.

VIII. The Tribunal has carefully considered all the documents submitted by UNSECOORD to the insurers. Its conclusion, contrary to that of the JAB, is that the Organization seriously breached both of these specific obligations. As regards the investigation, UNSECOORD failed to follow the guidelines it issued in 1994 on “Actions required in case of death of staff members under suspicious or unclear circumstances”. Those guidelines emphasized the Organization’s responsibility with regard to matters such as securing of the crime scene; local police involvement; treatment of witnesses and evidence; documentation; and, other matters.

In this case, it appears that between the time the body was found on 18 August 2000 (10 a.m.) and the time the local police arrived (noon), the scene had already been compromised by heavy traffic of unauthorized individuals and bystanders, and the body had been moved from the position in which it was found. The scene was not secured until that evening, and was unsealed again by the police the following morning. The police documents clearly show that an adequate police investigation could not be carried out for lack of equipment and resources. MONUC, which was responsible for Dr. C.’s mission, did not start an investigation until the following day. By the time they arrived, the body and personal effects had been removed. The notes of the inquiry by the MONUC investigator state that “no fingerprints or forensic evidence could be gathered because of lack of appropriate equipment”. A report on 21 August by local police under the heading “Major Difficulties” states: “Total lack of material for forensic investigation. This lack prevented us from taking fingerprints on the doorknob, key, alarm device, pavement and especially the belt used for the hanging. The blood alcohol reading could also not be carried out for lack of material.” In fact, the belt, a crucial piece of evidence, went missing in unexplained circumstances; it is not known if it was Dr. C.’s belt, and it has never been found. Under “Minor Difficulties”, the report cites “lack of funding to finance a further investigation”. Although the MONUC investigator conducted a number of interviews with relevant witnesses, there is an indication that MONUC officials refused to co-operate with local investigations into the death, citing immunities related to their status as international civil servants. This actively impeded local investigations. Not surprisingly, the ABCC made the factual finding that “[t]here had been no real criminal investigation in Kisangani immediately following the death”.

IX. These circumstances made it incumbent on UNSECOORD to conduct a thorough investigation of its own, and to be cautious about its findings in view of the absence of a proper investigation by local police and MONUC. This was particularly necessary because, as is obvious from the Terms of Reference

of Dr. C.'s mission and the report of the mission, completed after his death, the incident had occurred in Kisangani where there was a dangerous violent conflict and a precarious security situation. This made it distinctly possible that mission members, who were engaged in the sensitive assessment of loss of life and property damage, including reparations to be made by the Governments of Rwanda and Uganda, might be killed or disabled in one of the situations covered by the MAIP.

The Organization could not present the claim to the insurers in a fair and impartial manner unless it had ensured that there had been as good an investigation as was possible in all the circumstances. However, the UNSECOORD Report was seriously defective in a number of important respects. First, it attached undue weight to information about Dr. C.'s state of depression although none of this information pointed to a suicidal intent or a motive to commit suicide, nor was there a suicide note or evidence of anything that had occurred since his arrival in Kisangani that might trigger suicide. On the other hand, the UNSECOORD investigator (who admits that he is "not an expert on suicide") seems to have been unduly swayed by the fact that it looked like suicide and there was no apparent motive for murder. Moreover, the report gives no adequate explanation for rejecting the autopsy report of the pathologist in Nairobi - the only expert who actually saw the body - who concluded that the injuries "suggest a homicide". Similarly, the report does not justify its acceptance of the report of a London-based pathologist, who did not see the body but only had the Nairobi report, the United Nations report of 18 August, a witness statement, and 46 colour photographs taken at the scene in Kisangani. Curiously, there is no reference to the evidence which might point to an assault, such as the broken neck bones and the extensive bruising in the groin (a subject on which the UNSECOORD investigator had sent an e-mail to the Applicant on 29 September 2000). As a whole, the investigation report is superficial and makes no reference to difficulties with the local police or MONUC inquiries. Accordingly, its definite and unqualified conclusion that Dr. C. committed suicide was far too strong. A more appropriate conclusion would have been - as the ABCC subsequently determined - that it was not possible to conclude whether his death was due to homicide or suicide. The strength of the conclusion of suicide must have had a significant influence on the underwriters. The Applicant was caught in a Catch-22 situation: she was told that she had to produce additional information that her husband had died as a result of a malicious act, yet the failures of the investigation, over which she had no control, made it impossible for her to produce such information.

X. As regards the submission of the claim under the MAIP, the covering letter of 1 July 2002 to the broker, as set out in paragraph IV above, seriously failed to present a fair and impartial description of the circumstances leading to the claim. Instead of providing a neutral account, it highlights the weaknesses of the claim. In particular, it first states that "[t]he findings of the investigation were that the death was self-inflicted by hanging", and then adds "[h]owever, during autopsy in Nairobi, the pathologist was of the opinion that the death could have been a homicide". This construction favours the suicide theory over the homicide theory. The letter then states that the ABCC "was unable to reach agreement as to whether the death was self-inflicted or not and decided that [Dr. C.] had died 'in the service of the United Nations'". In fact, the minutes of the ABCC show that the ABCC was not in disagreement. Rather, it merely noted the

disagreement in the expert reports. The covering letter does not mention that the ABCC noted the lack of adequate investigation and the possibility that “even if the ... staff member had committed suicide, there might be some direct link between the suicide and his presence in Kisangani”. Thus, the covering letter failed to point out that the ABCC was weighing all these matters and concluded that, on balance, they led to a finding that the death was service-incurred. The letter thus does not provide an accurate account of the ABCC’s reasoning. The claim must also have been prejudiced by the fact that the documents are in disorder. Moreover, it includes a selection of letters from the Applicant, which may have prejudiced her position with the insurer when her representative asked to interact directly with the underwriter. Furthermore, an inter-office memorandum is included among the claim documents. This is not a document which needed to be sent to the insurer. It may be read as prejudicial to the claim by stating “[t]he deceased was covered under the [MAIP], however, the insurer ... may see fit to reject the claim on the grounds that it is time-barred and that the findings on the cause of death are inconclusive”.

XI. More generally, there was a failure of due process by the Organization in the handling of the Applicant’s claim. Standard UNSECOORD procedure, paragraph 6.9, provides that “[a]ll claims being submitted under [the MAIP] will be reviewed prior to submission to the underwriters by a committee convened by UNSECOORD and composed of a representative of the Security Coordinator’s Office, [OLA] and a [UNDP] representative”.

The Tribunal requested the Respondent to produce the minutes of any internal UNSECOORD, UNDP or United Nations meetings convened on the subject of the MAIP claim, and was informed that the UNDP Legal Support Team had confirmed that all files in relation to the subject of the MAIP claim had been reviewed and that no minutes of any internal meetings had been found. There is, thus, no other evidence before the Tribunal that a meeting of the kind contemplated in the standard procedures was held before the claim was submitted. It must therefore conclude that no such meeting took place. Given the mysterious circumstances of the death and the conflict of expert opinion, UNSECOORD (or UNDP) should have conducted a review in consultation with the Applicant, so as to ensure that her case was put as fully and fairly as possible to the underwriters. Instead, without consultation, a prejudicial selection of correspondence from her and her representative was included in the bundle. This was a serious irregularity.

XII. A further failure of due process was the lack of transparency by the Organization in its dealings with the Applicant. The role of UNSECOORD is to investigate the death and to administer the claim under the MAIP. The claim is made to the underwriters on behalf of the Insured Person and his dependents. The duty of good faith required UNSECOORD to share all the facts relevant to the claim with the Applicant, not only because of the contractual duty owed to the Insured Person and the beneficiary’s financial interest in the claim, but also in light of the Applicant’s moral interest in learning the full circumstances of her husband’s death. Instead of receiving humane treatment, she was callously treated: the Organization sent her husband’s soiled clothes in a heap without warning, did not provide her with counselling, and consistently denied her access not only to all the documentation sent to the insurer, but even to the text of

the relevant MAIP. There were also unconscionable delays in the handling of her claim, as set out in her submissions to the Tribunal and which were not denied by the Respondent.

XIII. Accordingly, the Tribunal finds that the Applicant has established that the MAIP claim was seriously mishandled by the Organization, in breach of the duty of good faith, and that there was also a serious failure of due process. In light of this finding, the Applicant is entitled to compensation. In assessing the amount, the Tribunal takes account of the fact that, even if the claim had been properly handled and due process had not been denied, the underwriters may still have rejected the claim on the ground that it was not due to one of the events specified in the policy (such as the act of a foreign enemy). On the other hand, had the claim been properly handled, it is not unlikely that the insurer would have felt obliged to negotiate a settlement of the claim in order to avoid litigation. In this regard, it is to be noted that the insurer expressed willingness to receive further information but the Organization made no efforts whatsoever to follow up on this, despite repeated requests by the Applicant.

In light of all these circumstances, the Tribunal assesses the compensation due to the Applicant at US\$ 250,000. Although this exceeds the equivalent of two years' net base salary - and, thus, the cap set in article 10.1 of the Statute of the Tribunal - it is justified in light of the reckless and callous treatment of the Applicant by the Organization.

XIV. The Applicant also claims that the compensation awarded to her under Appendix D to the Staff Rules is inadequate. Staff regulation 6.2 provides that "[t]he Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations". The relevant staff rule, made by the Secretary-General in relation to this regulation, states:

"Rule 306.4

Compensation for death, injury or other disability attributable to service

Staff members appointed under these Rules shall be entitled to compensation in the event of illness, injury or death attributable to the performance of official duties on behalf of the United Nations. The Secretary-General shall decide in each case whether to apply the provisions of appendix D to the Staff Rules or to offer comparable compensation."

Article 10.2 of Appendix D provides for payment of the compensation specified to the deceased staff member's widow and/or other dependents.

XV. As mentioned above, on 27 December 2001, the ABCC recommended to the Secretary-General that the death of Dr. C. be recognized as being attributable to the performance of official duties on behalf of the United Nations and that, therefore, compensation be awarded to the dependent survivors under article

10.2 of Appendix D to the Staff Rules. According to the calculations of the ABCC as provided to the Tribunal, in 2002, the Applicant's compensation was calculated to be: (a) a retroactive payment of \$31,245.15 covering the period from 19 August 2000 to 28 February 2002, and (b) a monthly payment of \$1742.29 beginning on 1 March 2002 (\$1617.12 for herself and \$8.33 for each of three children, plus an additional 6.1% cost of living increase). The JAB, having rejected the Applicant's claim in relation to the MAIP, noted the increasingly dangerous nature of United Nations missions and was of the opinion that the Organization could neither ignore the risk for a staff member to be killed or injured on mission nor, therefore, the Organization's obligation to protect his or her family. The JAB pointed out that the amount of compensation was calculated according to obsolete scales (adopted in 1966) which were not adapted to present-day requirements and living conditions. The JAB therefore urged the Secretary-General to take the necessary action in order to have the calculation methods updated. It added:

"Furthermore, in the present case, taking into account humanitarian considerations as well as additional hardship suffered by the Appellant due to insufficient compensation, the Panel recommends to the Secretary General to take the necessary action in order to increase the monthly amount of compensation awarded to the Appellant to a more appropriate level."

On 30 March 2005, the Applicant was informed that the Secretary-General was regretfully unable to accept this recommendation "since there is no legal basis for exceeding the compensation payable under [Appendix D]."

XVI. The Applicant submits that there are two principal mistakes in the Secretary-General's reasoning. The first is that it ignores the JAB's finding that there is an obligation to make every effort to ensure the well-being of the dependents. The second is that, while the Secretary-General conceded that he has discretion to authorise an *ex gratia* payment, there was no justification for his conclusion that the mechanism for *ex gratia* payments is inappropriate for offsetting inadequacies in regular entitlements. The Respondent submits that this claim is not properly before the Tribunal because the Applicant did not raise it in her request for administrative review of 2 April 2003. Further, the Respondent, citing Judgement No. 1065, *Massi* (2002), para XI, argues that there is no entitlement to higher rates than the amounts set out in article 10 of Appendix D, which apply equally to all surviving dependents, and that changes to Appendix D would require General Assembly approval. The Respondent also repeats the Secretary-General's position, as stated in his decision of 30 March 2005, "that there is no legal basis for exceeding the compensation payable under [Appendix D]".

XVII. The Tribunal has no hesitation in considering this issue since it was the subject of a recommendation by the JAB and the Secretary-General reached a decision, adverse to the Applicant, on the JAB's recommendation. So far as the merits are concerned, the Tribunal has on previous occasions noted that Appendix D requires updating. In Judgement No. 1197, *Meron* (2004), "the Tribunal conclude[d] that Appendix D, which dates from 1966, is unclear and that the competent authorities should delineate the

rights of staff members of the Organization in case of total or partial disability suffered as a result of an accident attributable to their service with the Organization”.

XVIII. The Tribunal is convinced by the facts of the present case that Appendix D no longer provides a scheme for “reasonable compensation” in respect of the death of a staff member, as required by staff regulation 6.2. In particular, because Appendix D, article 10.2 (c), contains specific caps concerning the children’s benefit, the Applicant’s compensation under Appendix D is out-dated. According to the ABCC calculations, the children’s benefit before the Appendix D cap was applied would have been US\$ 20,997.11 per child per annum (which would amount to US\$ 62,991.33 per annum for three children). The ABCC then applied the US\$ 1000 annual maximum per child provided in article 10.2 (c) (i) to reach US\$ 3,000 per annum for three children. It then applied article 4.1 (a) to deduct the deceased staff member’s annual US\$ 7,189.56 pension benefit to arrive at a negative annual children’s benefit of US\$ -4,189.56. The ABCC replaced this negative figure with the statutory minimum in article 4.1 (b), which is 10 per cent of US\$ 3,000, i.e., US\$ 300 per annum for the three children. This is manifestly less than US\$ 62,991.33, the annual children’s benefit before the application of the US\$ 1000 maximum, pension off-set, and US\$ 100 minimum. In light of this gross discrepancy, the Tribunal believes that the static caps contained in Appendix D are out-dated. Indeed, the fact that the article 4.1 (a) pension deduction could lead to a negative entitlement is another indication that the compensation caps are outdated: it results from the fact that the pension benefit has been updated but the Appendix D caps have not.

XIX. At the same time, the Tribunal agrees that an *ex gratia* payment is not an appropriate method for offsetting inadequacies in entitlements under Appendix D. The Applicant argues that the Secretary-General has discretion to make up the inadequacies by offering “comparable compensation”. In the view of the Tribunal, this is intended to cover only the situation where a person is ineligible, for some reason, to claim Appendix D benefits. It contemplates payments at the same level (“comparable”) as those provided for in Appendix D. The Tribunal has no power to invalidate the specific caps in Appendix D or to amend them. However, it strongly urges the Secretary-General to review and revise Appendix D.

XX. Finally, it is necessary for the Tribunal to address the Applicant’s claims for compensation for the alleged failure to safeguard Dr. C.’s personal safety and to take good care of his health and welfare. These claims are not properly before the Tribunal. The Applicant never requested administrative review of the alleged failure to safeguard her husband’s personal safety or his health and welfare. The Tribunal agrees with the JAB’s conclusion that these constitute different issues, which were not sufficiently linked to the contested administrative decision of UNDP. Accordingly, these claims are not receivable by the Tribunal. The Tribunal notes that the claims made concerning alleged victimization of the Applicant by senior officials of the Organization have been made the subject of a separate Application to the Tribunal and, accordingly, they are not dealt with in this decision.

XXI. It remains for the Tribunal to attend to two ancillary matters. The first is that the Tribunal requested production, *inter alia*, of all documents submitted to the insurer, and these were received by the Tribunal on 30 June 2008. The Respondent states that these documents are either privileged or confidential, and that, accordingly, the Respondent is providing these documents to the Tribunal for its review *in camera*. The Tribunal has reviewed these documents and concludes that any privilege or confidentiality was waived when the Respondent submitted the documents to the insurer. Moreover, for the reasons set out in paragraph XI above, the Respondent had an obligation to share these documents with the Applicant. The Tribunal's practice in this regard is set out in the statement appended to Judgement No. 1245, (2005), which reads, in relevant part, as follows:

"The Tribunal recalls the provisions of article 17 of the Rules of the Tribunal, contained in Chapter V, entitled 'Additional documentation during the proceedings', which states as follows: 'The Tribunal may at any stage of the proceedings call for the production of documents or of such other evidence as may be required'.

The Tribunal understands, and is sensitive to, the duty of the Administration to protect third party interests or interests of the Organization in judicial proceedings. However, at the same time, it finds unacceptable the fact that the Respondent provides requested documentation on the condition of confidentiality. The Tribunal is *duty-bound* to render justice and nothing can prevent it from doing so."

In the present case, the Tribunal does not accept and will not abide by the condition imposed by the Respondent. The documents produced are all pertinent to the just resolution of the case. It has been able to decide the case without sending these documents to the Applicant for comment because they do not reflect adversely on her case, and also in view of the protracted nature of these proceedings and the undesirability of postponing the decision until the next session of the Tribunal. However, it directs the secretariat of the Tribunal to send the bundle to the Applicant together with this decision.

XXII. The second ancillary matter is the Applicant's application for costs. The practice of the Tribunal is to award costs only in exceptional circumstances. In Judgement No. 237, *Powell* (1979), the Tribunal held:

"As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal."

The Tribunal is not satisfied that the Applicant was obliged to incur unreasonable costs in the present case and the application for costs is, therefore, refused.

XXIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant compensation of US\$ 250,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

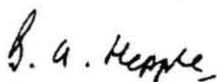
(Signatures)



Spyridon Flogaitis
President



Dayendra Sena Wijewardane
Vice-President



Bob Hepple
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary