



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

CAMPEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 28 April 2017, the Applicant contests the decision to release a United Nations Board of Inquiry (“BOI”) report to German authorities, in relation to the prosecution of an individual involved in the Applicant’s kidnapping in Syria in 2013. The Respondent filed his reply on 31 May 2017.

Facts

2. The Applicant was kidnapped on 17 February 2013 while working for the United Nations Disengagement Observer Force (“UNDOF”). He was held captive for eight months in Syria by an armed Islamist jihadist rebel group, and managed to escape on 16 October 2013.

3. In December 2013, the Under-Secretary-General, Department of Field Support (“USG/DFS”), Department of Peacekeeping Operations (“DPKO”), constituted the Headquarters BOI 13/005 to review the circumstances surrounding the disappearance and abduction of the Applicant, and his return from captivity on 17 October 2013. The BOI subsequently issued a report on 22 February 2014, which the Organization never shared with the Applicant.

4. In January 2016, a Syrian refugee, S. A-S. (“the accused”), was arrested in Germany for his involvement in the Applicant’s kidnapping in Syria.

5. By *Note verbale* dated 26 July 2016, the Office of Legal Affairs (“OLA”), in response to an official request from the German Federal Prosecutor, released the BOI report to the Permanent Mission of the Federal Republic of Germany to the United Nations in New York for further transmittal to the German Federal Prosecutor.

6. A German Court held its first hearing in the war crime case against S. A-S. on 20 October 2016. It was only at the beginning of said hearing, in October 2016, that the Applicant, who acted as private accessory prosecutor in the German proceedings, received a copy of the BOI report from his lawyer.

7. By letter dated 4 November 2016, the Applicant's lawyer before the German Court requested the United Nations to remedy the release of the BOI report, which he noted had a negative impact on the German judicial proceedings.

8. On 22 November 2016, the Applicant's lawyer met with OLA, to no avail, to discuss any action OLA could undertake with respect to remedying the release of the BOI report to the German authorities.

9. On 16 December 2016, the Applicant sought management evaluation of the decision to release the BOI report. The Management Evaluation Unit informed the Applicant on 23 February 2017 of its finding that his request was not receivable *ratione materiae*.

10. The Applicant testified before the German Court in February and March 2017 for a total of nine days. On 20 September 2017, the High Regional Court in Stuttgart, Germany, convicted the accused as an accessory to (i) deprivation of liberty; (ii) attempt of extortion under threat of force, and (iii) (aggravated) kidnapping. The accused was sentenced to three and a half years of imprisonment.

11. A book authored by the Applicant and entitled *Meine Seele kriegt ihr nie* ("the book") was published on 5 October 2017. Therein, the Applicant describes his captivity in Syria in 2013. The name of the Applicant's wife and the city where she lives are provided in the book. Furthermore, the Applicant describes in it the critical role played by his wife in the negotiations with his captors during his captivity. It also discloses that the Applicant gave his captors his wife's phone number, and that they called her several times as well as the Applicant's parents.

Proceedings before the UNDT

12. Following some case management, including the holding of a case management discussion on 5 July 2017, the parties were convoked to a hearing on the merits that took place on 2 and 3 October 2017. During the hearing, a witness from OLA and the Applicant were heard. Since the witness from OLA was not able to satisfactorily respond to the Tribunal's questions, the Tribunal ordered the Respondent to identify one witness from the United Nations Department of Safety

and Security (“UNDSS”) and one from DFS, to seek from them answers to its questions.

13. Furthermore, after the Respondent filed information on the publication of the book (*Meine Seele kriegt ihr nie*), the Tribunal granted the Respondent’s motion to recall the Applicant as a witness. The hearing was thus continued on 31 October 2017, and the two above-mentioned additional witnesses identified by the Respondent upon the Tribunal’s order, as well as the Applicant, were heard. Also during the hearing, the Applicant’s lawyer gave evidence to the UNDT stressing that Counsel for the accused referred to the BOI report in the German Court proceedings, using it as ammunition to question the Applicant’s credibility and even to question whether the kidnapping had actually taken place.

14. The parties filed their written closing submissions on 13 November 2017.

Parties’ submissions

15. The Applicant’s principal contentions are:

- a. Contrary to what the Respondent argues, the decision to release the report is an administrative decision and the application is receivable;
- b. The release of the BOI report without redacting the name of the Applicant’s wife and the whereabouts of some of his relatives constitutes a lack of duty of care; it would have been judicious not to release this information and not to make it public in the context of the prosecution of a person accused of having taken part in the Applicant’s kidnapping;
- c. The release of the report did not in any way facilitate the administration of justice or help the German prosecutor with his criminal investigation;
- d. There is no evidence available to the Applicant indicating that DFS or UNDSS made an assessment of the impact of revealing the name of the Applicant’s wife and the whereabouts of his relatives in the BOI report on their security; this lack of consideration amounts to negligence;

e. The criteria applied in deciding whether or not to release the BOI report, as reflected in the Respondent's response to Order No. 137, were insufficient and mainly refer to the interests of the Organization; they do not account for the Organization's duty of care;

f. The book did not exist at the time of the release of the BOI report. Therefore, the Respondent cannot use it to excuse himself for divulging confidential information prior to its publication; in any event, the mention of the whereabouts of the Applicant's wife is an unfortunate editorial mistake and was unintentional; the next edition of the book will omit this information;

g. Contrary to the released BOI report, the book does not reveal the whereabouts of his parents, nor of his first son and the mother of the latter; he did not inform the Tribunal about the publication of the book because at the time of the first UNDT hearing sessions (2-3 October 2017), it was copyrighted and belonged to the publisher; he did not have any malicious intent; also, he does not have to make the Respondent's case;

h. It cannot be presumed that the accused knew this information or that had he known about the whereabouts of his wife at the time of his captivity, he would still remember it three years later; the accused played a minor role in the Applicant's captivity and was, most likely, not part of any negotiations for ransom;

i. Also, the release of the BOI report made the information much more public since it became accessible to the public attending the court hearing, including journalists or family members of the accused;

j. At the time of his captivity, his captors asked for a phone number to "discuss his case", and after unsuccessfully calling what the Applicant thought was the phone number of UNDOF in the Golan, he gave them the phone number of his wife; he did not believe that it would jeopardize her security: the captors were thousands of miles away from her, and the accused and his relatives were not physically in Germany at the time; he had no other option than to cooperate with his captors to increase his chances to survive;

k. The release of the BOI report constitutes a violation of sec. 16 of the Policy Directive on Boards of Inquiry (“the BOIs policy”), which stipulates that when a BOI report is shared with a contributing government, it “is for official use only and not to be made public in any way, including for judicial or legislative proceedings”; in stating that the BOI report was not to be used “for any purpose other than the prosecution of [Mr. Al-S.]”, the *Note verbale* allowed just the opposite of what the BOIs policy intends;

l. Sec. 14 of the BOIs policy contains an exception to the rule when it grants the USG/DFS or USG/DPKO discretion to make a BOI report available to a troop-or-policy-contributing State; since Germany was not such a state, the UN should not have released the report to an outside entity;

m. Sec. 14 of the BOIs policy implicitly refers to requests from national governments and thus to the Convention on Privileges and Immunities of the United Nations (“the Convention”); the Respondent’s argument that the Convention prevails over the BOIs policy cannot stand; sec. 21 of the Convention has to be read together with e.g. its sec. 4 on the privileges and immunities of the Organization’s archives;

n. It is illogical to talk about a treaty obligation to release the BOI report and, at the same time, to refer to the release being done on a “strictly voluntary basis” and to sec. 4 of the Convention;

o. The Organization was also asked to release other information to the Court, such as proof-of-life videos, but refused to provide them; the obligation under the Convention thus starts and stops wherever and whenever suits the Organization; at best, there is an obligation to cooperate, but not an obligation to release any specific document, including the BOI report;

p. The report of the Secretary-General to the General Assembly on information sharing (A/63/331) provides in para. 14, with respect to the issue of cooperation with member states’ judicial authorities, that the Secretary-General’s “decision on the nature and extent of the cooperation to be extended is a consequence of a determination of the

Secretary-General”; hence, while there may be a treaty obligation to cooperate, the extent of that cooperation remains at the discretion of the Secretary-General; that report further refers, *inter alia*, to confidentiality and interests of the Organization, which were not respected in his case;

q. The argument by one witness that the proof-of-life videos were not provided because they were somewhat inappropriate and would present a risk for the Organization as they could be posted on YouTube is not convincing; those videos would have been beneficial for the trial and prime evidence that the kidnapping took place; the BOI report, on the contrary, had almost no evidentiary value to convict the accused; rather, it questioned the credibility of the Applicant and led to a lengthy hearing where the accused’s defence strategy was built upon the character assassination of the Applicant;

r. The release of the BOI report also constitutes a violation of secs. 17 and 18 of the BOIs policy;

s. The Respondent failed to respond to the Tribunal’s question about *who* decided to release the BOI report; under sec. 14 of the BOIs policy, it should have been either the USG/DFS or the USG/DPKO, or some of their delegates; the *notes verbales* were however signed by OLA;

t. The release of the BOI report also constitutes a violation of sec. 78 of the Standard Operating Procedures (“SOPs”) on BOIs, which provides that if a BOI report is to be shared within the mission, “special consideration shall be given to the protection of interests of individuals who testified to the Board”; that protection should be given even more emphasis if the release of the BOI report is done outside of the Organization; such special consideration was not given to the Applicant’s interests in the case at hand;

u. Sec. 82 of the SOPs on BOIs was also violated; testimony during the hearing in the merits showed that it was clear to OLA that if the BOI report was released, it would be included in the court file and would thus be made available to a third party, i.e. defence counsels of a terrorist involved in the Applicant’s kidnapping; it was also clear that it would have a detrimental

impact on the trial and on the Applicant as a witness, and that it would be used by the accused's defence Counsels—as it was the case—in support of an acquittal of their client; the Applicant's lawyer confirmed in his testimony to the UNDT that the report was strong ammunition for the accused's defence Counsels;

v. He, as a victim of a war crime, did not get the proper support from the Organization; in light of the content of the BOI report, the argument that the Organization released the report to see the accused being brought to justice is not tenable;

w. Sec. 32 of the Policy on Guidance Development issued by DFS clearly provides that compliance with the policies and SOPs on BOIs is mandatory; both the SOPs and the BOIs policy applied to the request for the release of information by the German authorities; they, as well as the Policy on Guidance Development, are also part of the Applicant's terms of appointment; the Organization violated several provisions of the BOIs policy and of the SOPs when releasing the BOI report;

x. BOI 2013/005 violated secs. 49 and 50 of the SOPs on BOIs because when it established its report, the Applicant was not given an opportunity to respond to the allegations made against him, thus rendering the report unreliable;

y. As his lawyer confirmed, his testimony in the German Court was rendered extremely difficult in good part because of the BOI report. Right at the outset of the trial, the BOI report casted doubt on the Applicant's integrity and became a tool for further questioning by the German Court as well as an avenue for the defence counsels to try to undermine the Applicant's credibility;

z. The German Court and its President expressed their opinion that the United Nations did not support the case, and that the release of the BOI report did not help the case brought before it; and

aa. As a result of the release of the BOI report, the Applicant suffered enormous pressure and stress as the principal witness before the German Court, triggering Post-Traumatic Stress Disorder in the form of intense anxiety and chronic insomnia; the risk to the safety of his relatives is also real; he requests financial compensation for moral damages in the amount of USD100,000 and access to all United Nations files concerning his kidnapping.

16. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae*; the Organization's discharge of its treaty obligations under the Convention does not constitute a reviewable administrative decision, as it does not produce direct legal consequences to the terms of the Applicant's appointment;

b. The Organization did not breach its duty of care to the Applicant in carrying out its treaty obligations under the Convention;

c. Policy documents are not incorporated into a staff member's terms and conditions of employment; the BOIs policy and the SOPs on BOIs are not part of the Applicant's terms of appointment, and do not give rise to enforceable rights; the BOIs policy and SOPs on BOIs were not breached and the Convention prevails;

d. The Applicant himself provided his wife's phone number to his captors and told them her nationality; she was called approximately twenty times by different captors, using the Applicant's own mobile phone; the Applicant's parents also received calls from the captors;

e. OLA consulted with UNDSS to review the BOI report from a safety and security point of view; the witness from UNDSS confirmed that the disclosure of the BOI report did not create a security risk for the Applicant; the captors were already aware of the Applicant's wife's name and location in Vienna, and this was thus not considered to be sensitive information that

would have posed a risk to the Applicant and his family; German authorities were asked to keep the redacted BOI report confidential;

f. The Applicant is not entitled to any relief and the Tribunal has no authority under its Statute to decide whether the redacted BOI report is inadmissible in the German criminal proceedings;

g. The Applicant's claim for pecuniary and/or non-pecuniary damages was not substantiated; the Applicant himself, through his book, disseminated to a larger audience information that he considered would put him and his family at risk; he suffered no harm because of the release of the BOI report, and his request for damages should be rejected; and

h. The application should be dismissed.

Consideration

17. The Applicant challenges the decision to release a BOI report to German judicial authorities in relation to his kidnapping in Syria. The decision was taken by the United Nations Legal Counsel at the end of a consultative process that included consultations with UNDSS and DFS.

18. The Applicant alleges that the decision was unlawful as the Organization did not respect the duty of care towards him and did not consult him before sharing the BOI report. From the Applicant's perspective, the release of the BOI report violated several sections of the BOIs policy and of the SOPs on BOIs, jeopardised his standing as a victim in German judicial proceedings, and exposed his wife and other relatives to undue risk by disclosing private and personal information about their whereabouts.

Receivability

19. The Tribunal first has to assess whether the contested decision constitutes an administrative decision for the purpose of art. 2.1(a) of its Statute.

20. The Organization argues that when it released the BOI report, it merely fulfilled a treaty obligation under the Convention—albeit on a voluntary basis—and that such release did not constitute an administrative decision.

21. As will be further developed below, the Organization could have refused the disclosure of the BOI report on the basis of the inviolability of its archives. The Tribunal recalls that under the Convention, privileges and immunities are granted to the Organization and not for the benefit of individual staff members (cf. *Kozul-Wright* UNDT/2017/076 with respect to functional privileges and immunities). The foregoing notwithstanding, the decision by the Organization to disclose a document containing information about a staff member and/or his/her family can potentially impact his/her terms of appointment, to the extent that it concerns the exercise of the Organization’s duty of care vis-à-vis its staff.

22. The applicability of the duty of care to International Organizations had already been addressed in the earliest years of the United Nations: in its Resolution 258/III of December 3, 1948, the United Nations General Assembly raised “with greater urgency ... the question of the arrangements to be made by the United Nations with a view of ensuring to its agents the fullest measure of protection”.

23. The duty of care was formally addressed in ST/SGB/2009/7 (Staff Rules - Staff Regulations of the United Nations and provisional Staff Rules), by requiring the Secretary-General to ensure, having regard to the circumstances, that all necessary safety and security arrangements be made for staff carrying out the responsibilities entrusted to them.

24. The duty of care is expressly spelled out in the Staff Rules and Staff Regulations of the United Nations (ST/SGB/2016/1). Particularly, staff regulation 1.2(c) provides that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

25. The Secretary-General, in his commentary to the 2016 Staff Rules and Regulations, noted that as Chief Administrative Officer of the Organization, he has an inherent responsibility to seek to ensure the safety of staff, and that staff regulation 1.2(c) recognizes that responsibility as a basic right of staff.

26. The jurisprudence of the United Nations formal internal justice system has also clarified that the Organization has a duty of care towards its staff members (*Carlton* Order No. 262 (NY/2014) and *Gatti et al.* (Order No. 126 (NY/2013)); see also *McKay*, UNDT/2012/018, affirmed by the Appeals Tribunal in *McKay* 2013-UNAT-287):

The general principle of the duty on the part of the Organization to exercise reasonable care to ensure the safety, health and security of its staff members as an express or implied term of their contracts of employment is well established.

27. Since this duty of care is part of the Applicant's terms of appointment, the decision to disclose the BOI report to the German authorities constitutes an administrative decision to the extent that it may impact on the Applicant's right to safety and security arising from the Organization's duty of care.

Merits

28. With respect to the merits of this case, the Tribunal has to address the following issues:

- a. What are the extent and limits of the Organization's duty to cooperate with judicial authorities of Member States?
- b. How does the duty to cooperate relate to the Organization's duty of care towards the Applicant, and did the Organization respect its duty of care towards the Applicant when it decided to disclose the redacted BOI report to the German authorities?
- c. Were the Organization's internal BOIs policy and/or SOPs on BOIs violated? and

d. Was the Organization obliged to inform or to consult with the Applicant before releasing the BOI report?

Extent and limits of the Organization's duty to cooperate with judicial authorities of Member States

29. Section 21 of the Convention stipulates that “[t]he United Nations shall cooperate at all times with the appropriate authorities of Member [States] to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in [Article V of the Convention]”. This constitutes a leading legal principle that is binding on the Organization: to duly cooperate with Member States to facilitate justice and law enforcement.

30. However, the Tribunal notes that the extent and scope of that duty to cooperate under the Convention is limited by several other principles: first and foremost, the Organization enjoys privileges and immunities, which extend to its assets and archives. Indeed, the Convention states as follows:

Article II

PROPERTY, FUNDS AND ASSETS

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity.

...

SECTION 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

31. In accordance with the provisions of the Convention, it is clear for the Tribunal that the BOI report and its annexes belong to the United Nations and are protected by the Organization's privileges and immunities, which include the inviolability of its archives.

32. Therefore, the statement in the *Note verbale* that the BOI report was shared on a “strictly voluntary basis” is entirely correct. Indeed, in light of the above privileges and immunities, while the Organization has a duty to cooperate, the extent of that duty is subject to the Organization’s exercise of discretion as to what documents it decides to disclose. Certainly, the Organization could very well have decided not to disclose the report on the grounds of its inviolability. Therefore, in sharing the BOI report, the Organization exercised its discretion under the Convention in connection with its duty to cooperate with German national authorities.

33. Relevantly, for the purpose of the present case, the Organization, in exercising that discretion, further had to weigh its duty to cooperate under the Convention against other factors, including its duty of care vis-à-vis the Applicant. Indeed, the duty to cooperate is neither an absolute nor an intangible legal principle and it has to be balanced against other legal principles. Therefore, if after performing a risk assessment the Organization concludes that sharing certain internal documents or information may harm e.g. the fulfilment of its mandate, it is not obliged to share them and can exercise its privileges and immunities under the Convention.

34. Legal principles (contrary to the rules) have a very high level of abstraction and play a heuristic role in the context of legal argumentation. As such, the role of the interpreter is more demanding since it implies the densification of their meaning and scope, as well as an optimisation exercise vis-a-vis other contradictory legal principles.

35. In deciding whether to release the BOI report, and in considering to exercise its privileges and immunities, the Organization had to weigh two apparently antagonistic legal principles in this case, namely its duty to cooperate with German authorities and its duty of care vis-à-vis the Applicant.

36. The Applicant argues that the duty of care towards him was not taken into account when OLA decided to release the BOI Report to the German prosecutor.

37. The Tribunal will therefore examine the meaning of the duty of care as it applies to the case at hand, and how it relates to the Organization's duty to cooperate with German authorities.

How does the duty to cooperate relate to the Organization's duty of care towards the Applicant, and did the Organization respect its duty of care towards the Applicant when it decided to disclose the redacted BOI report to the German authorities?

38. As described above, it is a commonly accepted principle of international law that International Organizations have a duty of care towards their staff members. The duty of care has a multidimensional nature and can have different meanings depending on the context in which it is applied. The Organization's duty of care towards its staff implies, first and foremost, that it has to provide a healthy and safe working environment for and to ensure the safety of its staff. That may encompass a duty to protect its staff against outside risks, e.g. when divulging information, including personal data, that may impact on the safety and security of the staff member or his immediate family. In the case at hand, it can be understood as the obligation of the Organization to safeguard the physical and psychological integrity of the Applicant and his family, as well as his and his family's personal data.

39. The Tribunal recalls that after the Applicant's escape, the USG/DFS constituted a BOI to review the circumstances surrounding his disappearance, abduction and return. The BOI issued its report on 22 February 2014. On 5 October 2015, the German authorities, who were investigating the possible involvement of an individual in Germany in the abduction of the Applicant, requested the United Nations to provide them with information on whether it had conducted an investigation of the Applicant's abduction and any relevant documents or other elements on this event.

40. By *Note Verbale* dated 26 July 2016, OLA provided a partially redacted copy of the BOI Report to the Permanent Mission of the Federal Republic of Germany to the United Nations in New York for transmission to the German Prosecutor, and requested therein that the BOI Report be treated confidentially and not be publicly

disclosed to the extent possible under the applicable law. The BOI report contained, *inter alia*, the name of the Applicant's wife, the name of the city where she and their son resided, as well as the city of residence of Applicant's ex-wife, first son and parents.

41. The Respondent informed the Tribunal that one day after the first part of the hearing of this Tribunal took place, a book authored by the Applicant was published, in which he disclosed the important role his wife had played in the negotiations with his captors, as well as her name and whereabouts. Furthermore, the evidence that this Tribunal heard from the UNDSS witness during the hearing confirmed that long before the release of the BOI report, the captors had already been provided with the name and phone number of the Applicant's wife (whom they called directly several times), as well as the phone number of his parents, who the captors also called. In fact, it was the Applicant himself who had provided that information to his captors during his captivity in 2013. The witness also confirmed to the Tribunal that when the BOI report was submitted to UNDSS for redaction/consideration as to its release, these details were not redacted because the Organization was aware that the captors already knew them. The UNDSS witness further informed the Tribunal that the Organization had sent a "group of negotiators" to the respective duty station to negotiate the Applicant's release, and that it was aware that the Applicant's wife, as well as his parents, had already been contacted by and were involved in conversations with the captors. Under these circumstances, it is evident to the Tribunal that it was not the release of the BOI report that disclosed main information about the Applicant's family members.

42. Moreover, the Tribunal notes that its judicial review is limited to assessing whether the Organization correctly exercised its discretion when it considered the release of the BOI report to the German authorities, and the extent of its redaction, if any.

43. With respect to the extent of judicial control of the exercise of discretion by the Administration, the Appeals Tribunal clarified in *Sanwidi* (2010-UNAT-084) that:

38. Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

and that

39. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

44. Where the Administration disposes of discretion, it is bound to exercise it and such exercise has to be done in accordance with the parameters set down by the Appeals Tribunal in *Sanwidi*.

45. After hearing the evidence from several witnesses, and particularly from the UNDSS witness, the Tribunal is satisfied that the Organization duly assessed the Applicant's safety, and that of his family, both in deciding to disclose the BOI report and in considering its level of redaction. The Tribunal recalls that in making that risk assessment, the Organization had to balance its duty to cooperate with German authorities, its duty of care vis-à-vis the Applicant, and the interests of the Organization.

46. The evidence provided before the Tribunal showed that the Organization, notably through DFS and UNDSS, made a risk assessment on the disclosure of the BOI report on the basis of the following parameters:

- a. Risk of the safety of individuals who are mentioned in the documents;
- b. Violation of a duty of confidentiality that the Organization owes to a third party;
- c. The confidentiality of the Organization's internal decision-making process; and
- d. The effective functioning of the Organization's current or future operations.

47. The Tribunal reiterates that it is at the discretion of the Secretary-General to decide on the scope and limits of this cooperation, and to find a balance between the needs to fulfil its international commitments and the interests of the Organization, which also include the duty of care towards its staff members.

48. The Tribunal notes that it was after performing such a risk assessment that the Organization decided to share the redacted BOI report. Unless unreasonable or arbitrary, the Tribunal will not get involved with the way in which such risk assessment was conducted. Therefore, and while the Tribunal agrees that it may have been more cautious for the Organization to redact the name of the Applicant's wife, that of her city of residence, and that of other family members (on account of the confidentiality of a staff member's personal data), the failure to do so was not unreasonable or arbitrary. Therefore, the Tribunal cannot find that the Organization failed to correctly exercise its discretion in this respect.

49. The Applicant argues that the Organization acted arbitrarily in that it decided to disclose the BOI report, while it withheld other documents/sources that would have been of much greater evidentiary evidence to the German court, such as the proof-of-life videos. In that respect, the Tribunal notes that after undertaking a similar risk assessment, the Organization decided to neither disclose the proof-of-life videos nor the names of the negotiators. Indeed, the witness from

UNDSS credibly conveyed that the Organization decided that sharing the names and identities of the negotiators would not be adequate since, if they were to become public, it could put at risk their personal safety at future negotiations for the United Nations. Moreover, the witness in question also explained at the hearing that the proof-of-life videos did not contain any information about the captors because they only showed the Applicant and not his captors. He also conveyed that it was the Organization's view that if such proof-of-life videos were to become public, they could jeopardise the United Nations mission in Syria.

50. After hearing the evidence, the Tribunal is satisfied that it was a reasonable exercise of discretion not to share the proof-of-life videos and the names of the negotiators, to protect the interests of the Organization and the security of its staff. This appears reasonable due to the particular security risks that serving at the United Nations mission in Syria entails, which involve the protection of the Organization's staff members in the field and of those who act as negotiators in situations like the one the Applicant endured. Contrary to what the Applicant suggests, the Organization did thus not exercise its discretion in an arbitrary way with respect, on the one hand, to the disclosure of the BOI report and, on the other hand, concerning the non-disclosure of the proof-of-life videos and the names of the negotiators.

51. The Tribunal recalls that regarding the exercise of discretion, it cannot substitute its assessment to that of the Secretary-General. Therefore, and while it may have come to a different conclusion about the level of redaction of the BOI report, the Tribunal finds that under the above-described circumstances—and particularly since the Organization knew that information on the name of the Applicant's wife and her whereabouts, and that of other relatives, had already been disclosed by the Applicant himself—the disclosure of the BOI report, and its level of redaction, were not arbitrary, unreasonable or unfair towards the Applicant.

52. The Applicant also argues that the release of the BOI report jeopardised his standing as a victim and witness during criminal proceedings in Germany, as it was used by the accused's defence Counsels to undermine his credibility. The Tribunal reiterates that its judicial control in matters of exercise of administrative discretion

is limited, and that it cannot find that the disclosure of the BOI report in its redacted form was unreasonable or arbitrary on the mere account that it may have casted doubt on the credibility of the Applicant or exposed him to challenging interrogation by the accused's defence Counsels. Under the rule of law, all criminal procedures entail a contradictory process during which both witnesses and victims are questioned by either the judge, the prosecution or the defence. This is the normal course of justice that escapes the control of the United Nations.

53. The Tribunal also finds reasonable the explanation received from one of the witnesses concerning the content of the BOI report. He explained that the BOI report was not of a disciplinary nature but rather a managerial tool used to identify gaps and breaches of security protocols in the field mission operations. Due to the particular nature of the Organization and the functions it performs, BOI reports are an essential element to allow the Organization to improve its security protocols and the training of its personnel in the field. As such, the BOI report cannot be seen as an instrument to "punish" the Applicant or to "undermine" his credibility, but instead as a management tool that gives directions and lessons learned to the Organization.

54. As a consequence, the Tribunal is satisfied from the evidence provided at the hearing that by releasing the BOI report, the Organization had no intention to undermine the Applicant's reputation or credibility. Most relevantly, the Tribunal further notes that the accused was convicted by the German Court. Hence, while it may have made it more difficult and stressful for the Applicant to provide his evidence in light of the BOI report, ultimately the conviction of the accused demonstrates that the release of the BOI report had either no impact or a positive one on the outcome of the criminal proceedings against the accused. Within the realm of judicial control of discretionary decisions, the Tribunal is therefore satisfied that the disclosure of the BOI report was the result of a proper assessment undertaken by the Organization, and did not violate its duty of care towards the Applicant.

55. Finally, and accessorially, the Tribunal notes that the Organization inserted a sentence in the *Note verbale* underlining that the content of the BOI report should be kept confidential and should not be publicly disclosed to the extent possible under the applicable law. While the Organization may or should have been aware that under the applicable law the BOI report would become part of a Court case file, it underlined its confidential nature in an attempt to minimise any further disclosure of it, and thus any potential negative impact on the Applicant. This constitutes sound management by the Organization in the exercise of its discretion.

Were the Organization's internal BOIs policy and/or SOPs on BOIs violated?

56. The Tribunal has to examine the Applicant's argument that the Organization violated its internal BOIs policy and SOPs on BOIs and, if so, whether it had an impact on the Applicant's case.

57. Under para. 14 of the BOIs policy, the USG/DFS or USG/DPKO, or their delegates,

have discretion to make reports available to a troop- or police-contributing state, particularly in cases that involve the personnel of that State and that may have implications for that State's procedures, training or other actions. The supporting documentation attached to such reports is normally held back to safeguard the interest of individuals.

58. Article 15 of the BOIs policy states that:

In deciding whether to make a report available to an outside entity the USG/DFS or the USG/DPKO shall refer cases that may potentially involve legal issues to the Office of Legal Affairs for advice.

59. Article 16 of the same Policy reads as follows:

When a Board of Inquiry report is shared with a contributing government, it remains, nevertheless, an internal document of the United Nations and is for official use only and not to be made public in any way, including for judicial or legislative proceedings.

60. The Applicant argues that by providing the BOI report to the German authorities, the Organization violated the BOIs policy and also several provisions of the SOPs on BOIs.

61. The Tribunal first notes that in the hierarchy of norms, the Convention takes precedence over the BOIs policy and the SOPs on BOIs. The Tribunal has concluded that the Organization's exercise of discretion in sharing the BOI report with the German authorities was done in full accordance with the Convention, and respecting the Organization's duty of care towards the Applicant.

62. The BOIs policy defines its purpose, and that of its accompanying SOPs, as "to clarify what Boards of Inquiry are, when they shall be convened and what they are to do". The rationale of BOIs is described "as an analytical as well as managerial tool to review investigation reports and record the facts of serious incidents in field missions", and as being "useful in identifying gaps in procedures and policies and for strengthening internal controls to avoid recurrence and to improve financial and managerial accountability". It also underlines that a BOI "is neither an investigative nor a judicial process and does not consider questions of compensation, legal liability or disciplinary action". Any reference in the Policy on the release to outside entities refers, implicitly, to the inviolability of the BOI reports, and not to rights of individuals, which are covered by the Organization's duty of care that the Tribunal has already addressed above.

63. The BOIs policy and SOPs on BOIs are, therefore, tools to guide the Administration in establishing lessons learned for future missions. Failure to comply with them could probably lead to managerial responsibility. However, the purpose of these policy documents is not to establish rights for individual staff members, which would become part of their terms of appointment in addition to the duty of care as established through the Staff Regulations and Rules.

64. Therefore, the Tribunal notes that any alleged violation of the internal BOIs policy or the SOPs on BOIs is not relevant for its finding that the decision to share the BOI report was a legal exercise of administrative discretion, which did not violate the Applicant's terms of appointment. There is thus no need for the Tribunal

to further examine the applicability of the BOIs policy and of the SOPs on BOIs to the case at hand, and whether any provision of these policy documents was violated in the present case.

Was the Organization obliged to inform or to consult with the Applicant before releasing the BOI report?

65. The Tribunal notes that no internal legal provisions exist that impose on the Organization the duty to consult or to inform staff members before sharing information that involves them directly or indirectly. It is the Organization that has to decide, based on the principles of proportionality, adequacy and necessity, and on a case-by-case analysis, whether to consult or inform staff members before sharing any information that concerns them.

66. The Tribunal is of the view that at least as long as staff members serve as international civil servants, their personal data belongs to the Organization. This does not mean that the Organization has an absolute power over this data; rather, it means that the Organization acts as its guardian, and that it falls upon it to make a risk assessment regarding the use of such privileged information. In the case at hand, there is no legal basis obliging the Organization to engage in previous consultations with the Applicant before the release of the BOI report. The legal obligation is limited to the duty of care, which, as analysed above, was duly respected by the Organization.

Remedies

67. The Respondent argued that the Tribunal does not have the power to grant some of the remedies that the Applicant requested. Since the Tribunal found that the decision to release the BOI report to the German authorities constitutes a lawful exercise of administrative discretion, which did not violate the Applicant's terms of appointment, it will not address the question of whether under its Statute it has the power to grant the requested remedies. Any request for remedies fails already on account of the finding of lawfulness of the contested decision.

Conclusion

68. In view of the foregoing, the Tribunal DECIDES that the application is dismissed.

(Signed)

Judge Teresa Bravo

Dated this 29th day of November 2017

Entered in the Register on this 29th day of November 2017

(Signed)

René M. Vargas M., Registrar, Geneva