UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-077

Bertucci

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant /Respondent)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Jean Courtial Judge Sophia Adinyira Judge Mark P. Painter Judge Kamaljit Singh Garewal Judge Rose Boyko Judge Luis María Simón
Judgment No.:	2010-UNAT-062
Date:	1 July 2010
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	François Loriot
Counsel for Appellant/Respondent:	Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The main issue in the proposed appeal of a series of rulings made by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) is whether the Appeals Tribunal has jurisdiction to receive interlocutory appeals, that is, appeals against rulings made during the course of trial before a final judgment is rendered. This Court determines that it generally has no jurisdiction to receive interlocutory appeals.

2. Specifically, because in this case, a final judgment has been entered, any decision on these appeals would have no effect on the case at this juncture. All issues raised may be decided in the appeal, if any, of the final judgment.

3. Judge Boyko dissents on the grounds that privilege, if claimed, is a threshold issue and must be determined finally before the trial may proceed. To do otherwise could lead to error by the trial judge that would result in a new trial. If the evidence in question is truly privileged, it cannot be ordered to be produced as this would destroy the privilege. Also, if truly privileged, the trial judge would err in drawing an adverse inference against its non-production.

Facts and Procedure

4. In Case No. UNDT/NY/2009/039/JAB/2008/080 before the UNDT, Guido Bertucci (Bertucci) challenges his non-selection for the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA). In Case No. UNDT/NY/2009/117, Bertucci challenges the decision to withhold USD 13, 829 of entitlements upon his retirement from the United Nations in 2008 pending the conclusion of disciplinary proceedings against him, which were instigated based on a report of the Office of Internal Oversight Services (OIOS). The cases were joined by the UNDT.

5. By Order No. 124 of 17 September 2009, Judge Adams ordered the Secretary-General to produce documents relating to the appointment of the ASG/DESA. The Secretary-General declined to disclose the documents on the grounds that they were irrelevant as the issue was not justiciable, and confidential and immune from disclosure on the grounds of

privilege. By Order No. 40 (NY/2010) of 3 March 2010, Judge Adams ordered the Secretary-General to produce to the UNDT by close of business Friday, 5 March 2010, the following categories of documents: documents considered by the Selection Committee; the records of the deliberations of the Selection Committee; and any communication by it to the Secretary-General together with the documents prepared by officials in the Executive Office of the Secretary-General (EOSG) relating to the appointment of the ASG/DESA.

6. On 7 March 2010, the Secretary-General filed a submission declining to produce the requested documents for the reasons set out in his previous submissions. On 8 March 2010, the first day of the hearing of Bertucci's application challenging his non-selection for the post of ASG/DESA, Judge Adams made an *ex tempore* order, which was recorded in Order No. 42 (NY/2010). Judge Adams ordered that, in light of the disobedience by the Secretary-General of Order No. 40, the Secretary-General was not entitled to appear before him in the matter and that Bertucci was entitled to proceed on the basis that none of the Secretary-General's material would be considered.

7. Later during the hearing on 8 March 2010, the Secretary-General sought leave to comment on the evidence concerning Bertucci's application challenging the withholding of his retirement benefits. It was argued that the failure of the Secretary-General to produce documents which were relevant to one case should not preclude the representation of the Secretary-General in another case. Judge Adams made another *ex tempore* order, which was recorded in Order No. 43 (NY/2010) of 8 March 2010. Judge Adams ruled that, until the disobedience of the Secretary-General was purged by producing the documents covered by Order No. 40, accompanied by an apology to the UNDT and an undertaking not to disobey an order again, the Secretary-General would not be entitled to appear before him.

8. On 9 March 2010, during the course of the hearing of the Bertucci cases and the case of Islam (Case No. UNDT/NY/2009/022/JAB/2009/037), the Secretary-General requested an adjournment of the hearing. By Order No. 44 (NY/2010) of 9 March 2010, Judge Adams ordered that the hearing should proceed and that if the Secretary-General wished to tender any evidence, it would be received on the *voir dire* and the decision as to its admissibility would be made depending on whether the Secretary-General continued to maintain his disobedient stance. He further ordered that the officer who made the decision not to comply with Order No. 40 appear before him at 10 a.m. on 10 March 2010.

9. On 10 March 2010, the Secretary-General notified the UNDT that the officer referred to in Order No. 44 would not appear before the Dispute Tribunal. During the hearing, the Secretary-General submitted that the grounds for the non-appearance were the same as those contained in the earlier submissions relating to the production of documents. Judge Adams made an oral Order directing the Secretary-General within 24 hours to supply the name and contact details of the officer who made the decision to disobey the Order. The oral Order was reproduced in Order No. 46 (NY/2010) of 10 March 2010.

10. On 24 March 2010, the Secretary-General applied to the Appeals Tribunal for an extension of time to appeal five Orders to 26 April 2010, 45 days from receipt of Order No. 46. In addition, the Secretary-General asked for leave to file a 50-page consolidated appeal against all five Orders.

11. The Appeals Tribunal denied the request of the Secretary-General for an extension of the time-limit for filing appeals against the Orders and directed the Secretary-General to file the appeals by 12 April 2010 and directed that the page length of both the appeal and the answer should be limited to five pages in each case. Consistent with the directions of the Appeals Tribunal, the Secretary-General filed separate appeals against Order Nos. 40, 42, 43, 44, and 46 of the UNDT on 12 April 2010. On 28 April, Bertucci filed an answer to the appeals.

Submissions

The Appeals of the Secretary-General

12. In each appeal, the Secretary-General submits that the appeals are receivable as the Orders constitute judgments within the meaning of Article 2(1) of the Statute of the Appeals Tribunal and are, therefore, subject to appeal.

13. In the appeal against Order No. 40, the Secretary-General submits that

> (1) The role of the Secretary-General is analogous to that of a Head of State and the UNDT erred on a question of fact in its conclusions regarding the role of the Secretary-General;

(2) Senior appointments by the Secretary-General are comparable to ministerial appointments by a Head of State and are thereby subject to an extremely narrow scope of judicial review;

(3) The UNDT erred on a question of fact and law in determining that senior appointments are no different from appointments of lower-level officials and that the scope of judicial inquiry should be the same;

(4) The UNDT exceeded its competence in seeking to review the consideration by the Secretary-General of factors which are appropriate and relevant to the evaluation of candidates for senior appointments;

(5) The UNDT erred as a matter of law in failing to recognize that documents of the EOSG relating to senior appointments are privileged and thereby not subject to disclosure to the UNDT; and that

(6) Those documents should be protected by a privilege analogous to executive privilege.

14. In the appeal against Order No. 42, the Secretary-General submits that the UNDT erred on a question of law

(1) In characterizing the Secretary-General's non-execution of Order No. 42 as "disobedience". Filing an appeal and declining to execute an order before it becomes executable or after an appeal has been filed is neither disobedience nor contempt;

(2) In finding that it has the authority to find and sanction contempt; and

(3) In prohibiting the Secretary-General's appearance before it in the case as a sanction for contempt. The Secretary-General argues that the UNDT erred in law in its apparent reliance on the authority of the International Military Tribunal in Nuremburg as precedent, and that the Order violated the Secretary-General's right to equality before the courts as provided for in Article 14(1) of the International Covenant on Civil and Political Rights.[1]

[1] United Nations, *Treaty Series*, vol. 999, p. 171.

15. In the appeal against Order No. 43, the Secretary-General submits that

(1) The UNDT erred on a question of law and exceeded its competence in prohibiting the Secretary-General's appearance during its examination of Bertucci's second application as a sanction for contempt in relation to Order No. 40; and

(2) Order No. 43 violated the Secretary-General's right to equality before the courts. It also violated the Secretary-General's right to an impartial tribunal.

16. In the appeal against Order Nos. 44 and 46, the Secretary-General repeats the arguments already stated above in detail. The Secretary-General requests that the Appeals Tribunal make a number of findings and vacate Order Nos. 40, 42, 43, 44 and 46 in their entirety.

Bertucci's Answer

17. Bertucci submits that the facts and procedural history, as presented by the Secretary-General in the appeals, are "intentionally inaccurate, incomplete and misleading". Bertucci submits that the appeals should be dismissed on the following grounds:

(1) No judgment has been rendered within the meaning of Article 2(1) of the Statute of the Appeals Tribunal;

(2) If it is considered that a judgment has been rendered by the UNDT, Bertucci submits that the issue is now time-barred. It is argued that the UNDT issued an Order on 17 September 2009 compelling disclosure of the documents and an appeal was not filed against that Order within the 45-day time-limit;

(3) The appeals constitute an abuse of process. The Secretary-General, through his contemptuous behaviour, is undermining judicial independence;

(4) Bertucci rejects the submissions that the Secretary-General should be considered as equivalent to a Head of State and that Assistant Secretaries-General and Under-Secretaries-General are equivalent to Ministers of State. In his view, the United Nations, as an employer, is a corporate body;

(5) The issue in this case is essentially contractual or statutory, and the main legal issue is whether the requirements of Article 101.3[2] of the Charter and Staff Regulation 4.4[3] apply to the ASG/DESA post;

(6) The Secretary-General has concealed key facts in the Appeals, namely the wrongful disciplinary actions instituted against Bertucci to cover up the appointment of a less qualified candidate; and

(7) The disclosure Orders of Judge Adams offered all reasonable safeguards to protect confidentiality, while giving Bertucci access to relevant evidence.

Considerations

Judge Painter, drafting for the majority

18. The Appeals Tribunal notes that, under Article 4 of its Rules of Procedure (Rules), this case warrants hearing by the full Appeals Tribunal.

19. The Appeals Tribunal turns to consider whether under Article 2 of its Statute it is competent to hear the present appeals, and whether they are receivable under Article 7 of its Statute. Article 2 of its Statute, which establishes the competence of the Appeals Tribunal, provides as follows:

> 1. The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:
> (a) Exceeded its jurisdiction or competence;
> (b) Failed to exercise jurisdiction vested in it;
> (c) Erred on a question of law;
> (d) Committed an error in procedure, such as to affect the decision of the case; or
> (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

[2] Article 101.3 of the Charter provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

[3] Staff Regulation 4.4 stipulates that "[s]ubject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

20. The Statute of the Appeals Tribunal does not clarify whether the Appeals Tribunal may hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings may also be considered a judgment subject to appeal.

21. In *Tadonki (No.1)*,[4] the Appeals Tribunal has emphasized that most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. In *Calvani*,[5] the Appeals Tribunal held that an appeal by the Secretary-General from an interlocutory order of the UNDT for the production of a document was not receivable. It observed that the UNDT had discretionary authority in case management and the production of evidence in the interest of justice and that, should the UNDT have committed an error in ordering the production of a document and have drawn erroneous conclusions in the final judgment resulting from the failure to produce the requested document, it would be for the Secretary-General to appeal that judgment. The Appeals Tribunal has, however, held in *Tadonki (No.1)*, *Onana*,[6] and *Kasmani*,[7] that an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.

22. Under the new system of administration of justice, the UNDT has broad discretion with respect to case management. Article 19 of the rules of procedure of the UNDT provides as follows:

> The Dispute Tribunal may, at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and do justice to the parties.

23. As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases. Further, one of the goals of the new system of administration of justice is rendering timely judgments. Cases before the UNDT could seldom proceed if either

[4] *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

[5] *Calvani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-032.

[6] *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

[7] *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

party were able to appeal to the Appeals Tribunal if dissatisfied with an interlocutory decision made during the course of the proceedings. Therefore, generally, only appeals against final judgments are receivable.

24. Article 30 of the Appeals Tribunal's Rules provides that, subject to Article 7(4) of the Appeals Tribunal's Statute, the President or the panel hearing a case may shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require. Given that an appeal against an interlocutory decision is not usually receivable and in view of the impact of the orders on the conduct of the proceedings before the UNDT, the Appeals Tribunal considered that it was in the interests of justice to shorten the time and page limit for filing the appeals against interlocutory decisions. It ordered that an appeal, if any, be filed within 15 days and that the appeal and answer briefs be limited to five pages.

25. In the present case, the Appeals Tribunal sees no reason to depart from the general rule that only appeals against final judgments are receivable. Here, the UNDT has rendered final judgments dated 3 May 2010, 14 May 2010 and 30 June 2010, in both of the *Bertucci* cases. [8] Should the Appeals Tribunal hear and pass judgment on these appeals, its judgment would have no bearing on the outcome of the cases before the UNDT. The appeals against the Orders are now moot and, therefore, not receivable.

26. Though we understand that the question of privilege, if any, will need to be decided at some point, there is no point in doing so at this stage of the proceedings. Likewise with the Secretary-General's "Head of State" contention.

27. But in this case, any arguments that the UNDT exceeded its jurisdiction or competence, or made other errors in issuing the Orders can be raised by the Secretary-General in an appeal against the final judgments of the UNDT in the *Bertucci* cases. The appeals are therefore dismissed.

[8] *Bertucci v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/080; *Bertucci v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/094; *Bertucci v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/117.

Judgment

28. This Court holds that the interlocutory appeals are not receivable and dismisses the appeals.

29. Judge Boyko dissents for the reasons given and would allow the interlocutory appeals in part and remand the case for a new trial. Judge Boyko appends her dissenting opinion to the Judgment.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(*Signed*)	(*Signed*)	(*Signed*)
Judge Weinberg de Roca, Presiding	Judge Courtial	Judge Adinyira
(*Signed*)	(*Signed*)	(*Signed*)
Judge Painter	Judge Garewal	Judge Simón

Entered in the Register on this 17th day of August 2010 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar
United Nations Appeals Tribunal

Dissenting Opinion of Judge Boyko

a) Interlocutory appeals may be brought on issues of privilege

1. Understandably, the Appeals Tribunal is loathe to entertain every type of interlocutory appeal where a party seeks to exclude evidence as this could result in a very inefficient judicial system. However, I would allow the interlocutory appeals in part, and order a new trial, on the grounds that executive privilege was claimed at trial, even if the Secretary-General did not bring a formal motion to exclude evidence on the grounds of privilege and the trial judge made no ruling on whether the documents that he ordered but the Secretary-General refused to produce were in fact privileged. The interlocutory orders made at trial that formed the subject of these appeals all relate directly or indirectly to the issue of privilege. Before the Appeals Tribunal, the Secretary-General sets out the legal basis that he relies on in advancing a claim of executive privilege; this issue should have been fully argued and ruled upon by the trial judge. I find that the trial judge erred in law because he did not first rule on the issue of whether the Secretary-General is legally entitled to the type of privilege claimed. If privileged, the trial judge must also determine whether the documents in question are privileged before demanding that in this specific case the allegedly privileged documents be produced for the trial judge's review, or tendered as evidence in the trial.

2. Privilege, if claimed, is a threshold issue and must be determined finally before the trial may proceed. To do otherwise could lead to error by the trial judge that would result in a new trial. If truly privileged, the trial judge could err in ordering its production which would destroy the privilege. Also, if truly privileged, the trial judge could err in drawing an adverse inference against its non-production. Ruling on the admissibility of privileged evidence where a party seeks to exclude it, therefore, falls into a category that demands more particular attention than ruling on evidence sought to be excluded on other grounds.

3. Allowing the hearing of an interlocutory appeal on rulings or the failure to rule on privilege would mean that the trial could be delayed until the Appeals Tribunal ruled on the interlocutory appeal concerning the admissibility of evidence. Since the Appeals Tribunal convenes only two to three times per year, allowing interlocutory appeals may extend trial

proceedings. This is why in my view only significant threshold issues raised in appeals against interlocutory orders should be allowed and the Appeals Tribunal will be very strict with respect to frivolous appeals, which are filed with the intent to gain time.

4. Should the trial judge rule that the privilege claimed was not established, and that the evidence in question was therefore admissible and should be produced, the party claiming privilege is in my view still entitled to seek a final ruling from the appellate court on an interlocutory motion, even if this prevents the trial from proceeding. It is unlikely that the litigants who bring frivolous interlocutory appeals claiming privilege would be given leave by the Appeals Tribunal which is cognizant of avoiding trial delays and straining court and judicial resources to a greater degree than in ordinary domestic courts that are more adequately resourced and convene regularly.

b) An interlocutory appeal is not moot before the time for final appeal has expired and if it is not abandoned or withdrawn before an appeal is heard.

5. The purpose of an interlocutory appeal is to obtain a ruling by the Appeals Tribunal on an issue that would significantly affect the fair and expeditious conduct of the trial. The present case is an exceptional one, because the Appeals Tribunal is seized of these interlocutory appeals in a case where a judgment has already been rendered on the merits. This occurred because the UNDT failed to stay the proceedings when the interlocutory appeals were filed. The UNDT should have stayed the proceedings if a significant threshold issue such as a ruling on the issue of privilege is appealed, pending the decision of the Appeals Tribunal.

6. Nonetheless, a legally permitted interlocutory appeal may, in my view, be heard by the Appeals Tribunal even after a final judgment has been rendered by the UNDT. The period of time allowed for an appeal to be brought against the final judgment has not expired in the instant case and the Appeals Tribunal must respond to this appeal which has not been abandoned or withdrawn by the Secretary-General. A valid interlocutory appeal only becomes moot once it is abandoned or withdrawn by the appellant or, if the final judgment is appealed, the issues merge with the final appeal.

c) Privilege may attach to information for various reasons. For example, executive privilege, or privilege accorded to certain professional relationships where the relationship between the parties demands protection, or public interest immunity to protect the functioning of the government organization.

7. Essentially the issue is whether the EOSG has the right to withhold information from the UNDT and the Appeals Tribunal on the grounds that it is or should be protected by executive privilege. Executive privilege generally pertains to communications which, if disclosed, would adversely affect the operations of the Organization. This would appear to be the nature of the communications in respect of which privilege is being asserted in this case.

8. The EOSG must have some freedom to ensure confidentiality in communications and good faith relations based on privacy with Heads of the Member States or their representatives. Executive privilege accorded to Heads of State has been curtailed over time in domestic laws and courts which have increasingly reviewed communications to which executive privilege ordinarily attaches, if they are found to be relevant to the case at trial. Courts are sensitive to finding the correct balance and will protect executive privilege pertaining to sensitive military or diplomatic information, or state secrets, which if disclosed could pose a security risk or impair the functioning of the organization.

9. Privilege may attach to information for various reasons and apart from executive privilege, communications that are based on a confidential or fiduciary relationship such as those between a lawyer and his or her client or a psychiatrist and his or her patient. Also, privilege exists under the common law principle of public interest immunity, where for example information gathered by the state cannot be disclosed if the court decides that this would be damaging to the public interest. The probative value of the impugned evidence however must be weighed by the court against the public interest sought to be protected.

10. When the United Nations was created a degree of privilege and immunity was accorded to its officials. Section 20 of the Convention on the Privileges and Immunities of the United Nations, which was adopted by the General Assembly on 13 February 1946,[9] under Article V pertaining to officials, states:

[9] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327.

> Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

The preamble of this Convention states that the purpose of this convention is to ensure that the officials of the United Nations Organization shall enjoy in the territory of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

11. The public interest to be protected is the independent functioning of the United Nations Organization in carrying out its duties. Article 100 of the Charter of the United Nations specifies that in the performance of their duties the staff members of the Secretariat must work independently from their respective Member States and the Member States must respect the exclusively international character of the tasks of the Secretary-General and of the staff under him. Among others, the United Nations is called upon to assume a peace-keeping role; to prevent world conflicts; to assist countries in need of assistance; to act diplomatically in influencing world politics; and, to work with the parties in conflict diplomatically through fact-finding and dispute resolution, all while remaining neutral. The Secretary-General is obliged to maintain, and to be seen to maintain, a degree of neutrality and independence from the Member States so that he can be in a position to exercise "quiet diplomacy" or act as mediator.

12. This demands careful weighing of many personal attributes in the appointment of senior level staff like Assistant Secretaries-General who interface more closely with the political and diplomatic functions of the Secretary-General and his Executive Office. Therefore a large measure of discretion is accorded to the Secretary-General in deciding whether a potential ASG level candidate should or should not be appointed. The exercise of this discretion by the Secretary-General may not be subject to review if privilege is established. The large measure of discretion given to the Secretary-General should not be exercised capriciously and should be reviewable unless it is based on privileged communications or there are strong public interest grounds that producing such information would impair the functioning of the Organization.

13. Senior appointments to the ASG level are subject to the same requirements for transparency and fairness in the manner of their appointments as are appointments to positions of lower levels. However the General Assembly in resolution 51/226, paragraph II. 5, adopted on 3 April 1997, clearly gives a large degree of discretion to the Secretary-General in senior level appointments, when it

> [r]equests the Secretary-General to announce all vacancies so as to give equal opportunity to all qualified staff and to encourage mobility, it being understood that the discretionary power of the Secretary-General of appointment and promotion outside the established procedures should be limited to his Executive Office and the under-secretary-general and assistant secretary-general levels, as well as special envoys at all levels.

14. In some regards, Staff Regulation 4.5 (a) makes a distinction between the appointment of ASGs and USGs and the appointment of other staff:

> Appointment of Under-Secretaries-General and of Assistant Secretaries-General shall normally be for a period of up to five years, subject to prolongation or renewal. Other staff members shall be granted either a temporary, fixed-term or continuing appointment under such terms and conditions consistent with the present Regulations as the Secretary-General may prescribe.

15. The Secretary-General and the EOSG place greater confidence in senior level officials and their ability to perform their duties well which would include receiving privileged communications and working well with the Member States. Confidence in their ability to perform in a designated position is the reason for the greater degree of discretion accorded to the Secretary-General in making appointments to senior level positions. Where the discretion of the Secretary-General in assessing the suitability of a candidate is exercised using privileged information, tribunals should accede to an appropriate privilege objection made in good faith.

16. The exercise of discretion by the Secretary-General in a senior level appointment may in some cases be reviewable by a court. It may be the case that in the exercise of the discretion not to appoint a candidate to an ASG position, there was no reliance placed on privileged information or privileged communications. Such exercise of discretion by the Secretary-General is reviewable by the UNDT. In my view, the Secretary-General cannot claim that, as a matter of principle, any information related to an appointment of an ASG is privileged; it must first bring a motion before the trial judge to exclude evidence according to the type of privilege claimed.

17. Procedurally, the trial judge should hold an *in camera* hearing. Documents alleged to be privileged may be sealed before being presented to the trial judge for his or her review and only be opened and resealed thereafter by a judge's order. Regardless of the ruling, the trial judge should seal the original motion material pending an interlocutory or final appeal to preserve the original material in a confidential manner for consideration by the Appeals Tribunal. If privilege is established on the balance of probabilities at trial, the privileged information is not admissible, unless privilege is waived by the party who claims privilege or is satisfied that a redacted version may be produced to the opposing party. To be admissible at trial, the material would have to be both probative and relevant. Subject to appeal, if ruled not to be privileged, the material filed may be given to the other party and may be admissible at trial if probative and relevant. If the order is appealed, the trial would be stayed pending appeal.

18. At trial, when the Secretary-General asserted a claim of privilege, the trial judge reasoned as follows:

> The manner provided by the law to resolve the issue of confidentiality, where that is the claimed basis for withholding material, is that it must be produced to the court or in this case the Tribunal. If the claim is upheld, the material will not be disclosed to the applicant but, if justice requires that it be taken into account because it assists his or her case, then it must be given due weight although, of course, in such a way as to retain its confidential character. If the claim is rejected, then the material should be provided to the applicant if it is capable of assisting his or her case. Sometimes part of the material is confidential and part is not, in which case the applicant will be given access to that part which is not confidential. This is frequently done by providing a redacted document. By this means, the law protects the interests of both parties and, of fundamental importance, the interests of justice are served. The point is that it is for the Tribunal to make these judgments, not the respondent. [10]

19. The trial judge however never ruled on the issue of privilege; no motion to exclude evidence on the grounds of inadmissibility due to privilege was brought by the Secretary-General at trial. Instead, certain documents were sought by the applicant, which the respondent refused to produce, and an interlocutory order to compel the production of the allegedly privileged documents was made by the trial judge.

[10] *Bertucci v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/080, para. 31.

20. In my view the trial judge erred in ordering the production of documents without first determining if the privilege claimed was established on a balance of probabilities. If privileged, the information cannot be ordered to be produced unless the Secretary-General agrees to the production of a redacted version of the document that does not destroy the privilege, for example by not revealing certain names. Otherwise, if not compellable, the trial judge can further err by drawing an adverse inference where none should be drawn, because an adverse inference can only be drawn against compellable and admissible evidence that is not produced.

d) A trial judge may prohibit a party from appearing. However once a party is allowed to attend and give evidence, evidence that is probative and otherwise admissible must be admitted at trial. The trial judge erred in changing the usual rules of admitting evidence by making the admissibility of evidence contingent on the party's compliance with the court's order to produce documents.

21. While a trial judge may prohibit a party from appearing at trial, as occurred in the instant case, once a party is allowed to attend and give evidence, as also occurred in the instant case, evidence that is not privileged and is probative and otherwise admissible must be allowed.

22. In my view the trial judge erred when he first ordered that the hearing should proceed and that the Secretary-General could appear, but then ruled that any evidence tendered by the Secretary-General would only be admissible if he complied with the order to produce documents.

23. This is plainly an error in law as the trial judge misapplied the usual rules concerning the admissibility of evidence.

e) A seven-member bench should not be convened to hear an interlocutory appeal

24. In my view only three-member panels should decide interlocutory appeals. This would be preferable so that a number of judges remain in reserve to hear any final appeal.

f) Conclusion

25. For the reasons given and because the trial has already been concluded, I would allow the interlocutory appeals, in part, and remand the case for a new trial to determine whether any kind of privilege attaches to the impugned documents that were subject to the production order at trial.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(*Signed*)

Judge Boyko

Entered in the Register on this 17th day of August 2010 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar
United Nations Appeals Tribunal