Case No.:	UNDT/NY/2009/039/JAB/2008/080 UNDT/NY/2009/117
Order No.:	59 (NY/2010)/Rev.1
Date:	26 March 2010

Introduction

1. This case concerns the legality of a selection process for the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA). The applicant was a staff member who responded to a Galaxy advertisement. He was short-listed but not selected. The history of the matter is sufficiently set out in my reasons for Order No. 40 (NY/2010) and it is not necessary to set out again. The applicant had sought, during case management by the Dispute Tribunal, access to certain documents claimed to be relevant. The respondent submitted that the documents were necessarily irrelevant on the ground that the Secretary-General's decision appointing an ASG was comparable to that of a head of state appointing cabinet level officials who is accountable politically but not judicially, so that the Secretary-General's decision here was "not justiciable" and, since "the decision is not one that is open to challenge", the documents could not be relevant. It was also submitted that, at all events, the documents were privileged from production. I gave a comprehensive explanation as to why these submissions were without merit and ordered production in the following terms –

> 1 The respondent is to produce to the Tribunal by close of business Friday, 5 March 2010 the documents considered by the Selection Committee, the records of the deliberations of the Committee and any communication by it to the Secretary-General together with the documents prepared by officials in the EOSG relating to the appointment of the ASG/DESA.
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> 2 I will then determine what parts, if any, should be disclosed to the applicant and under what conditions. Before granting access, if any, the respondent will be notified of those parts intended to be disclosed and invited to make a confidential submission giving particular reasons why, it is contended, access to an identified part should not be granted.

2. On 7 March 2010 the respondent filed a submission stating that it declined to produce the documents requested, for the reasons set out in its previous submissions. No stay of my order was sought, nor was there any suggestion that the Order was a

jurisdiction reposed in it for specified purposes, here under its Statute. I concluded that a party who has wilfully disobeyed a direct order of the Tribunal is not entitled to appear in the Tribunal to advance its case, nor to call any evidence whilst that party remains disobedient and until that disobedience has been purged.

5. I mentioned that there was a further question, namely, whether the respondent was entitled to appear in *any* proceedings before the Tribunal whilst it is in wilful disobedience of an order of the Tribunal? I decided to reserve the question for the time being but intimated my view that the respondent could not be permitted to say, in effect, that it cares about outcomes in different cases differently and only complies with orders where it wants to defend a case, since I did not think that either the Tribunal or staff members could properly be subjected to such a process.

6. The applicant in the case in respect of which the order for production had been disobeyed (that is, UNDT/NY/2009/039/JAB/2008/080)—the first case) had another case (the second case) in the Tribunal which had been ordered to be heard with the first case because of certain interconnected facts. The applicant gave evidence in the first case and, when he testified as to certain facts relevant to the second case, counsel for the respondent sought to be heard. As it happened, both cases were identified as subject to my previous orders concerning both the production of documents and the respondent's right to appear. Counsel for the respondent argued that the cases were separate and that the respondent's failure to produce documents which were relevant to the first case should not preclude the respondent's representation in the second case.

7. I gave a second *ex tempore* ruling on 8 March in which I made the following points, summarized here –

> (i) The respondent was in wilful disobedience of an order to produce certain relevant documents to the Tribunal, as a consequence of which he was not entitled to be heard in respect of the first case, with the question whether he would be heard in any other case reserved. The first and second cases were

ordered to be heard together. This gave rise to the need to consider the question of appearance in the second case.

(ii) The answer to the contention made on the respondent's behalf, that a denial of appearance would undermine the administration of justice, is that the respondent is not being denied the *opportunity* to be heard but his own actions have the effect of excluding him, which can be corrected by obedience to the Tribunal's orders.

(iii) It would entirely undermine the authority of the Tribunal if the respondent could continue to invoke its jurisdiction in cases where there were no orders to which he objected, but was indifferent to what occurred in cases where there were orders he decided he would disobey. It would leave the Tribunal and staff members in the position that they would never know whether the Tribunal's orders would be complied with or not despite the undoubted legal obligation to obey the Tribunal's orders.

8. Accordingly, I ruled that the Secretary-General would not be heard in the second case and he should take fair notice that, if his counsel seeks to be heard in other cases before me, my present inclination was that, until the disobedience of the Secretary-General was purged by producing the documents ordered to be produced, accompanied by an apology to the Tribunal and an undertaking not to disobey an order again, the respondent would not be entitled to appear, before me.

9. I also pointed out that the fundamental purpose of the Tribunal's orders as to excluding involvement in the proceedings was not to punish the respondent, but to make clear that the respondent does not get to decide which orders he will comply with and which he will ignore. I noted that there was no other way the jurisdiction and integrity of the Tribunal can be upheld. In my view, the refusal constituted an attack on the rule of law embodied in the Statute of this Tribunal. I stated that the Secretary-General could either comply with the rule of law, or he could defy it, but it

should be understood that, if he defies it, he cannot expect that the Tribunal will be prepared to listen to what might be said by him or on his behalf.

10. On 9 March 2010, Case No. UNDT/NY/2009/022/JAB/2008/037 (*Islam*) (unrelated to the *Bertucci* cases) came on for hearing be

was not submitted that the order to attend was made without jurisdiction, nor was it submitted that my order was invalid. To my surprise, it appeared on further questioning that the identity of the indivi

16. It was further submitted that the Tribunal has no jurisdiction in relation to contempt or to ensure the enforcement of its orders or otherwise to order its proceedings in response to the refusal of the Secretary-General to obey its orders. Although the respondent had filed a notice of appeal, no grounds had been stated and the respondent did not intend to do so until the 45th day following the order since it was not bound to and the final grounds were, at all events, presently being researched and were unknown.

17. Counsel informed the Tribunal that the possibility of seeking a stay from the Tribunal of the order was not considered and that it was decided that the only way to deal with the order was to disobey it whilst consideration was given to the question of appeal, in respect of which there was a 45 day period available before the time for appeal expired. The application of art 11.3 of the DTS (hereafter referred to simply as art 11.3) was then raised, for the first time, as an answer to the question whether the original, or any, orders were executable at the time of the disobedience. I deal with the possible application of this provision later on in this ruling but I should point out that when I was informed of the respondent's attitude to the orders, there was no suggestion that this was a reflection of the time limit in art 11.3: it was perfectly clear that the respondent was stating that the order would not be obeyed, at whatever time. It is not surprising, therefore, that no reference to a stay for 45 days was made, since it was never intended to obey the order.

18. It is regrettably necessary to refer to one additional matter arising out of the written submission of counsel for the respondent, in which counsel "reiterates the great respect the Secretary-General has for the administration of justice as embodied by the system of justice which came into effect on 1 July 2009 and the judges of the Dispute and Appeals Tribunal". On questioning, it appeared that this submission, purporting to be made on the instructions or, at least, authorized by the Secretary-General was not, in fact, made on either basis but was a mere advocate's flourish. I am unable to understand how counsel could have thought that such a statement might be made consistently with proper notions of professional integrity. I do not know if

counsel were told to make this statement or if counsel invented it themselves but, if the former occurred, counsel should understand that they are not mere mouthpieces of their client, still less of whatever official is giving them their instructions in this case. If the latter, it is grossly improper for counsel to make statements attributed to their client but not actually made by the client. These matters follow both from the distinction between a profession and a job and the necessary relationship of implicit trust between Bench and Bar. Counsel owe the Tribunal an apology and I expect it to be forthcoming without prevarication.

19. At the close of the hearing, I ordered the respondent to make submissions in writing by 15 March as to the legal effect of the Notices of Appeal and the legal consequence, if any, for the unidentified parties who chose not to comply with the Orders. Following legal arguments, which are dealt with below, counsel submitted in the submission of 15 March that "all sanctions against the respondent in this matter as well as matters … [UNDT/NY/2009/117 and UNDT/NY/2009/022/JAB/2008/037] be lifted … [and that the] Tribunal desist from any further proceedings in this matter pending the outcome of its appeals of the Orders".

Can there be an appeal against an order?

20. On 15 March those written submissi

disposes of the case, and argued that, since the word "judgment" in both Statutes was not qualified, it should be understood as comprising both kinds of judgment.

21. A problem with the definition of "judgment" adopted by the respondent is that it clearly does not cover all interlocutory orders, such as orders for production of documents. An order for production is not an interim judgment on the issues in the case in the sense in which that phrase is used in the Dictionary cited. It seems clear that the phrase is meant to denote decisions as to issues in the case leading to the ultimate or final judgment. An order for production is not a judgment in this sense. This does not dispose of the question whether an interlocutory order, such as an order for production, is a judgment within the Statutes; it simply means that the authority cited rather tends against the respondent's argument than in its favour. The respondent also contends that the issue must be decided as a matter of substance, not form and cites the varying language used by the Tribunal for decisions which are not final decisions. This submission is correct: the issue is one of substance and not form and the name that a decision happens to have been given is immaterial. I return to this question later in this judgment.

22. The respondent also submitted that it is significant that the appeals in respect of suspensions of action and interim measures are specifically prohibited (pursuant to arts 2.2 and 10.2 of the DTS), arguing that this suggests that all other decisions are appealable "judgments". Reference is also made to the width of the orders able to be made by the Appeals Tribunal under art 2.3. Finally, it was submitted that the Dispute Tribunal does not have jurisdiction to determine whether any judgment is capable of being appealed, citing art 2.8 of the ATS.

23. So far as art 11.3 of the DTS is concerned, no action can be taken by the Dispute Tribunal, it is argued, to enforce an order until the expiration of 45 days from the day it was made.

The consequences of disobedience of an order

24. At all events, it is submitted by the respondent, no wrongdoing may be attributed in the assertion of an absolute privilege. This argument is without merit. Of course, the *assertion* of a legal argument is not wrongdoing. But that is to miss the point: the wrongdoing is to disobey an order because the party thinks that the Tribunal erred in law (or fact for that matter) in making the order. The legal obligation to obey the order does not derive from its legal correctness, since this is a matter for the Tribunal and not any party to determine, and the mere fact that the argument is that the Tribunal has no jurisdiction to make the order does not change this fundamental point. The Tribunal undoubtedly has jurisdiction to determine its jurisdiction: see art 2.6 of DTS.

25. The respondent refers to a decision of the UN Administrative Tribunal (*Robinson* (1952) UNAT 15) as authority for the proposition that the question of disclosure of privileged documents is a matter for the Secretary-General and the Tribunal has no power to order such production. Robinson was refused renewal of his contract. He claimed that the true reason for so doing was that he had been an active member of the staff association. The respondent denied that this was the reason but declined to disclose the reason, saying that because of an "obligation of confidence" it was not considered "that he should *on his own initiative* place before the Tribunal" relevant facts underlying the decision "in view of the confidential nature of certain of these facts" (italicized in original). The second justification was that a statement of the reason given on the respondent's "own initiative would imply an abandonment of his clear legal position relating to the non-renewal of contracts". The Tribunal held that the applicant had a legal right to be given the reason and went on to discuss the effect of the claimed confidentiality of certain facts, pointing out that the claim could not influence the Tribunal's judgment and it was for each party to decide what evidence to produce or not to produce in their cases. It said that that it did "not feel it is proper for it to take the initiative where the Secretary-General's obligation of confidence is involved" and when the Secretary-General "[did] not, *of*

his own initiative, produce such information and evidence, despite a number of *requests* by the Tribunal that a clear statement should be made, the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence" (italics added). The Tribunal went on to hold that the failure to adduce the reasons for non-renewal was contrary to the

with the nature of the obligation to produce a document following a legally binding requirement (whether named a "call" or an "order") and certainly does not do so in terms that make it authoritative.

27. It is also submitted that *Calvani* UNDT/2009/092 is authority for the proposition that the only sanction for refusal to comply with an order for production is that adverse inferences may be drawn against the refusing party. That judgment does not state such a proposition, nor does it imply it. It merely states that "the Tribunal must draw consequences from such refusal". This says nothing about whether or not there are other consequences arising from the disobedience.

28. Counsel points to art 10.8 of the DST as providing "that the Secretary-General is the ultimate authority when it comes to ensuring accountability of staff members of the United Nations". It is submitted that it follows that "the sensitive administrative and diplomatic issues that arise in the management of the United Nations consonant with the responsibility that is vested in the Secretary-General to protect the Organization and the obligation that the Tribunal has to search for the truth in individual disputes, an appropriate limitation must be placed on the authority of the Tribunal to order production of sensitive material", again citing *Calvani*. I will not waste time attempting to prove a negative. That judgment does not deal with, let alone discuss, this so-called responsibility. Nor does it suggest that the jurisdiction of the Tribunal to order the production of documents is limited in the way suggested. The argument of privilege is dealt with in my reasons for order and the explanation for concluding that it lacks merit may be found there. Article 10.8 has nothing whatever to do with the present question. It deals with matters that arise in the course of a case requiring some further action to be considered.

29. The UN Administrative Tribunal itself authoritatively stated on a number of occasions, as I set out in my Order No. 42 (NY/2010), that it would not accept the legitimacy of disobedience of its orders and that it was not for the Secretary-General to decide what would be provided and what would not: see, for example, *Durand*

(2005) UNAT 1204; *Alves* (2005) UNAT 1245. The reform of the system of the administration of justice has not increased the powers of the Secretary-General. He was not then a judge in his own cause and is not now. The DTS in art 9 gives power in unqualified language to require the production of documents –

> [9] 1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.
>
> [9] 2. The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

The necessity for production is therefore for the Tribunal and not for the Secretary-General to determine. The Rules of Procedure provide for confidentiality (art 18.4) –

> The Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

There is no reservation to the Secretary-General of any power to withhold documents required to be produced or to unilaterally determine the issue of confidentiality.

which it seeks to do so until that disobedience is purged. This is not a matter of punishment, it is simply the logical consequence of refusing to acknowledge the jurisdiction of the Tribunal. Accordingly although it is quite correct to describe wilful disobedience of an order as contempt, the consequence of the Tribunal being unable to hear the Secretary-General at all until the disobedience is purged is not punitive but consequential and resort to notions of contempt is unnecessary.

33. Put in another way, a party cannot pick and choose which orders it will obey and which it will not, nor can it purchase the right to disobey by being willing to pay the price of losing the case in which, as it happened, the disobeyed order has been made. It may be that, in some cases, the party who does not wish to obey an order can simply decline to litigate, so that the question of obedience becomes moot. (Subject to proof of jurisdiction the applicant would in this event be entitled to a judgment by default.) However, if the documents are relevant for other purposes, for example, the assessment of compensation, then they still have to be produced.

34. For clarification, I should point out that complying with procedural rules preliminary to a hearing, such as by filing pleadings, does not involve seeking to invoke the jurisdiction of the Tribunal, nor does the conduct of case management hearings, although these actions are preparatory to such an invocation.

35. Counsel for the respondent have submitted that "the principle of contempt" does not exist in the practice of international administrative tribunals, citing *Kimpton* (1968) UNAT 115, *ena(2 t2(7xist i b)5o8Cl*

6 The relevant passage from *Kimpton* is as follows –

> r article 10.1 of its Rules, the Respondent was requested to produce the application file of the

Administrative Tribunal in that case accepted that its "requests" were not obligatory. This is reinforced by the way in which the applicant's argument was phrased, in the sense that it did not suggest that there was a breach of a legal obligation. Certainly the reference to "contempt" suggests some degree of disobedience, however. At the end of the day, the correct understanding of this judgment is so uncertain, it cannot be

that is constituted by scandalizing a court, is altogether different. Since this kind of contempt is not in issue here, it is unnecessary to say more about it, although I would hazard the observation that, absent specific power being granted in the founding Statute, this type of contempt would likely not be within the jurisdiction of a Tribunal to deal with. However, the inherent power

Fayache. This judgment does not take *Fayache* any further except to confirm the existence of the inherent power of the Tribunal to control abuses of process by ordering its own proceedings. *Loriot* is another case in which the Administrative

preemption of the jurisdiction of the Appeals Tribunal to consider whether art 7.5 of the ATS applies in the circumstances here to proceedings in the Dispute Tribunal which are at the time of the appeal still on foot. If it is necessary to do so, the provisions of art 2.6 of the DTS impose the duty on the Tribunal to decide "a dispute as to whether the Dispute Tribunal has competence under the present Statute". The same jurisdiction to determine its jurisdiction is given to the Appeals Tribunal under art 2.8. Furthermore, on either basis, art 2.8 of the ATS does not concern a question as to the effect of art 7.5 of the ATS which does not depend on whether the judgment, execution of which is claimed in the Dispute Tribunal to be suspended, is a judgment within the jurisdiction of the Appeals Tribunal. (I return to this question later in these reasons.) In my view, art 2.8 of the ATS does not exclude the jurisdiction of the Dispute Tribunal to determine whether proceedings before it have been stayed, even if to do so involves an interpretation of the Appeals Tribunal Statute. Art 2.8 is an inclusive power. Both art 2.6 of the DTS and art 2.8 of the ATS do no more than is conventionally done when creating statutory tribunals of limited jurisdiction, namely to give to each entity the jurisdiction to decide its own jurisdiction to avoid the logical impasse that arises when making a decision that, as to a particular matter, it had no jurisdiction to consider it.

45. The point of departure is, for obvious reasons, art 11.3 of the DTS. I set out the whole of art 11, since art 11.3 should be seen in context –

> **Article 11**
>
> 1. The judgments of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based.
>
> 2. The deliberations of the Dispute Tribunal shall be confidential.
>
> 3. The judgments of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the Statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the Statute of the Appeals Tribunal.

> 4. The judgments of the Dispute Tribunal shall be drawn up in any of the official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.
>
> 5. A copy of the judgment shall be communicated to each party in the case. The applicant shall receive a copy in the language in which the application was submitted unless he or she requests a copy in another official language of the United Nations.
>
> 6. The judgments of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.

46. The question here is cast in the language of comparing an interlocutory judgment with a final judgment, but it should not be forgotten that the process which the respondent has declined to obey is an *order* for production. The nature of the process is important. Orders for production are made under art 9.1 of the DTS, where they are so described. They are not referred to as "judgments". Nor would it appear necessary that orders for production "state the reasons, facts and law on which they are based": invariably they do not since, plainly all that is necessary is that the order identify the documents required to be produced and the person which is obliged to produce them. It is not necessary that they should be translated or deposited in the archives, or made generally available by the Registry, though they should be provided to the parties. If the contention of counsel for the applicant be correct, however, all these apparently unnecessary requirements would be essential. Orders for production may be issued at the behest of a party to a person who is not a party – though, to be effective, that person would probably need to be an employee of the Organization. The parties to such an order are the person who applied for it and the person subjected to it. There is no real need to serve the other party in the case either with the application for the order or, for that matter, with the order itself and, thus, no sensible reason to apply art 11.5.

47. Moreover, on the respondent's contention, no order for production could have a shorter timescale for compliance than 45 days. It is no answer to this (as was submitted during argument) that it could voluntarily be obeyed more quickly. The

if the same exclusion was not expressed here, a right to appeal might be implied despite its description as a measure rather than as a judgment.

52. It is significant, to my mind, that orders of the Tribunal made under art 10.5 of the DTS for rescission, specific performance or compensation are described as being "part of its judgment". As such, they are plainly within art 11 and, moreover, are also executable within art 11.3, since they either change a state of affairs (as with rescission) or require the respondent to do something (as with specific performance or

not creating a *res judicata* is that the parties are still able to seek variation or even reversal during the ensuing trial.

55. I have focused on the issue of a preliminary determination on the question of jurisdiction since, at first (see below for a subsequent development) the respondent argued that the application was not justiciable, apparently denying the jurisdiction of the Tribunal to determine the validity of the impugned administrative decision and arguing that, therefore, the documents sought must be irrelevant. I would certainly accept that, in deciding to the contrary, namely that the question was justiciable, I determined that the Tribunal, at least, had jurisdiction to determine whether the impugned decision was subject to consideration by the Tribunal and hence, in substance, jurisdictional. It should be noted that the respondent, however, never sought to argue receivability on the basis that the decision in question was not an administrative decision within the meaning of art 2 of the DTS and did not seek to raise the issue of jurisdiction as such. However that may be, it is crucial for present purposes to note that the reasons I gave for my orders, which concluded that the lawfulness of the decision in question was justiciable and capable of being considered by the Tribunal, in no sense constituted an *executable* judgment. That is to say, it did not require any action of any party. Certainly, the ensuing order for production was executable, but as will be seen below, an order to produce documents is not a judgment of any kind, interim, provisional or final. For completeness, perhaps I should mention – though I should think that this is obvious – a procedural order of this kind can always be varied or even reversed by the Tribunal on its own initiative or on the application of the parties up to the time of final judgment. Nor does such an order create any *res judicata* though, of course, it is legally binding on the party to whom it is directed.

56. From what I have said about the absurd and extremely inconvenient results that would follow from imposing on executory orders, in particular for production of documents, the delay prescribed by art 11.3 of the DTS, it should follow that the provision should be construed as not including such orders within the description of

judgments "subject to appeal in accordance with the Statute of the United Nations Appeals Tribunal". I have also pointed out that the other provisions of art 11 appear to be inconsistent with regarding orders as judgments within that article.

57. Since it is clear that the Statutes of the Dispute and Appeals Tribunals must be read together, it is necessary to consid

59. Where judgment has been reversed or modified (but not affirmed or remanded) under art 2.3, this article gives jurisdiction to make consequential orders which, in the event of a successful appeal by a staff member, requires orders to be made in accordance with art 9, which provides for the making of orders in identical terms to those able to made by the Dispute Tribunal in favour of a successful staff member. Plainly such orders could only be made in respect of a staff member's appeal against a *final* judgment. This might suggest

not have any executable element: it changes nothing; it requires nothing to be done by a party; it simply makes a finding of mixed fact and law that is foundational to the exercise of its jurisdiction. Accordingly, even if such a judgment were appealable (which, for the reasons I have already given, it is not) and appealed, art 7.5 of the ATS would not have anything to suspend, since an ensuing trial is not in any sense an execution of the judgment.

Recent developments

61. On 18 March 2010, a directions hearing was conducted to consider the future disposition of this case in the event that the respondent was permitted to call evidence. During that hearing counsel for the respondent clarified the meaning of the submission that had originally been made opposing the making of the production order and which, it was said, was the legal basis for refusing to obey the order once made. Counsel expressly resiled from the submission that the Tribunal had no jurisdiction to consider the lawfulness of the process by which the applicant was not appointed to the position of ASG. Counsel stated, “We agree that Mr Bertucci could bring the case he did, it was receivable” but that, given the width of the Secretary-General’s discretion, almost any evidence would not be relevant. Counsel expressly conceded that a decision, if it were made, not to appoint the applicant was an administrative decision within the purview of the Tribunal’s jurisdiction though, if the applicant’s name had not gone forward from the interview panel – a matter which

success, or that irreparable injury would be occasioned, as by destruction of the subject matter of the litigation, or there is some other good reason for doing so. Here, the respondent has not, it appears, yet put its grounds of appeal in final form and will not do so for some time. This is surprising. It may be naïve, but one would have thought that, before deciding to disobey an order of the Tribunal, careful consideration would first have been given to the legal questions involved and a clear conclusion drawn about its legality. That it appears now that the legal issues were not clearly articulated and understood is troubling. It suggests that legality was thought

(*Signed*)

Judge Adams

Dated this 26th day of March 2010