		UNDT/NY/2009/039/
	Case No.:	JAB/2008/080
		UNDT/NY/2009/117
UNITED NATIONS DISPUTE TRIBUNAL	Order No.	46 (NY/2010)
	Date:	10 March 2010
	Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for applicant:
François Loriot (not present)

Counsel for respondent:
Susan Maddox, ALS
Stephen Margetts, ALS

1.   This Order is to be read in conjunction with my previous Orders Nos. 40, 43 and 44 (NY/2010). Decisions are not made by the Organization or by the Secretariat. They are made by individuals. Those individuals are personally responsible for them. It is clear that the decision to disobey the Tribunal's Order No. 40 (NY/2010) as to production of documents was taken by an officer of the Organization. Accordingly, yesterday I also ordered (Order No. 44 (NY/2010)) the officer who had made the decision to disobey the order, whose identity has not been disclosed, to appear in the Tribunal this morning at 10:00am, expecting that counsel for the respondent then in court would take appropriate steps to ascertain that person's identity and inform him or her of the order to appear. Under art 17 of the Rules of Procedure the Tribunal "may make an order requiring the presence of any person or the production of any document." These Rules of Procedure were adopted by the General Assembly on 9 August 2009.

2.   At shortly after 9:30am this morning the Registry was informed in a document entitled "submission" and signed by a legal officer and the Chief of the Administrative Law Section of the Office of Human Resources Management as follows—

> In response to Order No. 2010/44, the respondent notifies the Tribunal
> that the officer referred to … will not be appearing before the Tribunal
> at 10.00am on 10 March 2010.

3.   At the hearing on 10 March 2010, counsel for the respondent appeared. I asked counsel for the grounds relied on for the non-compliance with the Order requiring appearance. I was informed that those grounds were the same as those contained in the submissions originally made in support of the contention that the production of the documents sought to be produced in the *Bertucci* case should not be required, submissions that I rejected as without merit in my ruling requiring production to the Tribunal. Those submissions concerned documents and had nothing to do with the order requiring attendance of the officer who had decided that they would not be produced. When I pointed this out to counsel, she simply repeated

the submission and would not further elaborate. In answer to questions, she conceded that it 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 individual concerned was not known to counsel and she did not know whether my Order had actually been brought to that person's attention. She told me that it had been conveyed to "my bosses" and she had no further information.

4.   As I have already said, the refusal to obey the Tribunal's Order is a brazen attack upon the rule of law embodied in the Tribunal and cannot be disregarded. In other jurisdictions, serious personal penalties would apply to officials who willfully disobeyed the order of a court. That sanction is not available to the Tribunal except through misconduct proceedings. It follows therefore that the Tribunal must use other means of enforcing the jurisdiction which has been entrusted to it by the General Assembly under the Charter and pursuant to its Statute. The Tribunal has an inherent jurisdiction to safeguard its own proceedings, to ensure that they are not abused by any party and to ensure, so far as possible, that its orders are obeyed. A party which is in willful disobedience of an order cannot at the same time expect that he, she or it will be permitted to invoke the jurisdiction of the Tribunal to vindicate their contractual rights. The Tribunal is no respecter of persons. The Organization, which is represented by the Secretary-General, is a mere contracting party before the Tribunal, with no status greater or better than that of the staff member, and is subject to the same rules.

5.   I note that pursuant to art 17.2 of the Rules of Procedure, the Tribunal "may, if it considers it appropriate in the interest of justice to do so, proceed to determine a case in the absence of a party." However, at all events, the Tribunal has inherent jurisdiction to order its proceedings in accordance with the interests of justice, here requiring exclusion of the respondent for the reasons I have already given.

6.   The question is whether the rule of law will be applied or if these matters will be governed by administrative fiat. When the Tribunal was established, from 1 July 2009 the second of these alternatives was ended.

7.   It seems that cooperation cannot be assumed. Accordingly, I made an oral Order in these terms—

> The respondent is ordered within twenty-four hours to supply the name and contact details of the officer who made the decision to disobey the order made by the Tribunal to produce the documents identified in the Tribunal's ruling in *Bertucci*.

8.   When counsel was directed to convey my Order to the decision-maker, she informed me that she needed to "talk to her bosses" and could only convey my Order "through my hierarchy". I informed counsel, "Your bosses should understand that, if my Order is not obeyed, I will expect a person to appear tomorrow morning to explain why. It is the professional obligation of a lawyer to convey decisions of the court to the client. I expect that obligation to be fulfilled. If there is a question about whether it is fulfilled or not, I will expect an explanation." The Chief, ALS/OHRM was in the Tribunal at the time, but did not seek to appear for the respondent.

(*Signed*)

Judge Adams

Dated this 10th day of March 2010