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International Law - United Nations - Administrative Tribunals As Adjudicators of Disputes Arising out of Employment Contracts with International Organizations

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COMMENTS

INTERNATIONAL LAW—UNITED NATIONS—ADMINISTRATIVE TRIBUNALS AS ADJUDICATORS OF DISPUTES ARISING OUT OF EMPLOYMENT CONTRACTS WITH INTERNATIONAL ORGANIZATIONS—A crucial though relatively unpublicized problem arising from the creation of international organizations is that of establishing and maintaining the staff or secretariat needed to perform the administrative

functions of these organizations. Such a staff must possess not only the competence and integrity of a national civil service, but also an international loyalty or outlook which includes ". . . an awareness . . . of the needs, emotions, and prejudices of the peoples of differently-circumstanced countries . . . [and] a capacity for weighing these frequently imponderable elements in a judicial manner before reaching any decision to which they are relevant."[1]

If such an outlook is to be achieved, the members of an international secretariat must be guaranteed a degree of independence from the international organization's member states, from which, of necessity, they are recruited. Security of tenure is essential, except possibly in the case of the highest officials, in order to insure this needed independence from national pressures.[2] At the same time, providing security of tenure to its staff presents unique problems to international organizations.

International organizations have no tradition of civil service security that exists in many national states. Furthermore, the director of an international secretariat has less contact with a politically responsible organ than does the head of many national civil services, even though he usually possesses wider discretionary power over his staff. And while the United Nations, like the League of Nations, has resorted to individual employment contracts in an attempt to guarantee the requisite security, initially no remedy was available on these contracts because the paramount need of an international organization for freedom from undue national pressures generally necessitates its immunity from suit in national courts.[3] In addition, it has been felt that employment disputes are not of sufficient importance to warrant the jurisdiction of the International Court of Justice.[4]

I. *League Attempts to Solve the Problem*

The League of Nations first attempted to supply a contract remedy by granting an aggrieved staff member the right of appeal

[1] Jenks, "Some Problems of an International Civil Service," 3 PUB. AD. REV. 93 at 95 (1943).

[2] Also required are privileges and immunities similar to traditional diplomatic privileges and immunities, the degree of which may vary with the level of the official involved. See Cohen, "The United States and the United Nations Secretariat: A Preliminary Appraisal," 1 MCGILL L.J. 169 at 171 (1953).

[3] Article 105 of the United Nations Charter provides: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes," and a specific immunity provision is inserted in each U.N. employment contract.

[4] L. of N. Doc., Records of the 2nd Assembly, Meetings of the Committees II 71-72 (1921).

to the Council of the League.[5] Upon the exercise of this right, however, the Council, recognizing the shortcomings of having an organ of one party to the contract act as judge, submitted the dispute to an ad hoc committee of jurists appointed by it, declaring in advance that it would adopt the conclusions of the committee as its own.[6]

Feeling, perhaps for practical administrative reasons, that ad hoc bodies were not the solution, the League finally established a permanent administrative tribunal[7] as an "exclusively judicial body set up to determine the legal rights of officials on strictly legal grounds."[8] This administrative tribunal continues today under the International Labor Organization.

II. *The Administrative Tribunal of the United Nations*

Using the League's experience as its guide, the United Nations General Assembly, in 1949, established a similar administrative tribunal.[9] In 1953 this tribunal declared illegal the Secretary-General's dismissal of United States nationals for invoking the Fifth Amendment of the United States Constitution before a federal grand jury or a Senate investigating committee or, in some cases, both.[10] This decision gave rise to a request from the General Assembly to the International Court of Justice for an advisory opinion on the question:

> "Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"[11]

[5] L. of N. Doc., Records of the 1st Assembly, Plenary Meetings 663-664 (1920).

[6] L. of N., O.J., 6th year, No. 7, Minutes of the 34th sess. of the Council 858 (1925).

[7] L. of N., O.J., SPEC. SUPP. No. 54, Records of the 8th Assembly, Plenary Meetings 201, 478 (1927).

[8] L. of N., O.J., SPEC. SUPP. No. 58, Records of the 8th Assembly, Meetings of Committees, Minutes of the 4th Committee 251 (1927).

[9] U.N. Gen. Assembly Off. Rec., 4th sess., Annex, Agenda Item No. 44 at 170 (Doc. No. 1142) (1949). Under article 2 of the statute the tribunal is given jurisdiction over all contract disputes, including the interpretation of relevant rules and regulations. It is not given jurisdiction to review disciplinary action of the Secretary-General, unless, of course, such action constitutes a contract dispute.

[10] Judgments of the Administrative Tribunal, U.N. Docs. AT/DEC/18 to AT/DEC/38 (1953). [While the texts of tribunal decisions are not published, they are available at United Nations headquarters for inspection.]

[11] U.N. Gen. Assembly Off. Rec., 8th sess., Annexes, Agenda Item No. 38, at 16 (Doc. A/2534) (1953).

Answering this question in the negative, the court concluded from an examination of the statute of the tribunal[12] that it " . . . is established . . . as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions."[13]

While assuming that the question submitted had reference only to decisions by a properly constituted tribunal acting within its statutory competence, the court added:

> "In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary . . . that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect."[14]

In any event, the court expressed doubt as to the ability of the General Assembly to exercise the function of judicial review.

III. *The Law Applicable by the United Nations Tribunal*

Granting the premise that the United Nations tribunal is a truly judicial body, the question arises as to what law it should apply. There is, of course, no international law of contract, international contracts generally being subject to the municipal law where made or primarily to be performed.[15] Under article 104 of its charter, the United Nations enjoys "in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." Therefore, in principle at least, its employment contracts might appear

12 Especially: Art. 2: "The Tribunal shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment. . . ."

Art. 3: "No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service."

Art. 10: "The judgments shall be final and without appeal." U.N. Gen. Assembly Off. Rec., 4th sess., Annex, Agenda Item No. 44, at 170 (Doc. No. 1142) (1949).

13 Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. REP. 47 at 53. See Honig, "Effect of Awards of the U.N. Administrative Tribunal," 104 L.J. 534 (1954).

14 1954 I.C.J. REP. 47 at 56. It is also interesting to consider article XII of the amended statute of the administrative tribunal of the International Labor Organization. "In any case in which the Governing Body of the International Labour Office . . . challenges a decision of the Tribunal confirming its jurisdiction or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted, . . . for an advisory opinion, to the International Court of Justice." Records of Proceedings of the 29th sess. of the Int. Labour Conference 229 (1946), cited in Memorandum by the International Labour Office, Pleadings, Oral Arguments, Documents, I.C.J. Adv. Op. of July 13, 1954, 73 (1954).

15 See KELSEN, THE LAW OF THE UNITED NATIONS 313 (1950).

to fall under this general rule.[16] Assuming its theoretical validity, however, such a proposition is of little practical value, since the only remedy available on these contracts is recourse to the administrative tribunal, which has not been directed to apply the municipal law of any particular state.

The administrative tribunal is directed to apply the terms of the contracts and the staff regulations and rules incorporated in them.[17] While the staff regulations do not spell out a detailed code of contract law, the tribunal, dealing as it does with a particular kind of contract, would not appear in need of such a code. To the extent that it may require principles of law other than those laid down by the staff regulations, it would seem in order for it to adopt as a matter of first impression those it deems most appropriate. And the principles clearly most appropriate are those intended by the parties to be applicable. If necessary, this intent of the parties may be implied from the terms of their contract and the nature of their relationship. For example, from the very fact that a contract has been made, it may be assumed or implied that the parties intended to be governed by the most fundamental and universal rules of municipal contract law, e. g., neither party may alter the terms of the contract without the consent of the other.

But reference to any but the most universal and fundamental principles of municipal contract law would not seem to be in order, unless clearly indicated by the parties. This is especially

16 Brandon suggests a contrary view, saying: ". . . some transactions taking place within the premises of diplomatic mission may, having regard to their nature, be considered as governed by . . . the law of the state sending the mission. . . . This will be so with respect to such transactions as contracts made between the Organizations and their staff . . . concerning which it may be presumed local law was not intended to apply." Brandon, "The Legal Status of the Premises of the United Nations," 28 BRIT. Y.B. INT. L. 90 at 98 (1952). The Headquarters Agreement between the United States and the United Nations provides in article 3, §7, that "Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district." It is provided in §8 that the U.N. is granted ". . . the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions." And "no federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district." 11 U.N. TREATY SER. 18 (1947).

17 In the few cases thus far coming before it, the tribunal has apparently found these sources of law sufficient. For a discussion of the interpretation and application of staff regulations in the Fifth Amendment cases [U.N. docs. AT/DEC/18 to AT/DEC/38 (1953)], see Cohen, "The United Nations Secretariat—Some Constitutional and Administrative Development," 49 AM. J. INT. L. 295 at 306-309 (1955).

true of attempts sometimes made[18] to apply, by analogy, the principle of municipal public law that a public administration always retains the right to abridge the contract rights of its staff if the public interest so demands, as long as this right is not exercised arbitrarily. Any application of such a principle to United Nations employment contracts is clearly both unwarranted and unnecessary. By subjecting their contracts to the staff regulations as they may be amended by the General Assembly,[19] and by giving the Secretary-General the right to award compensation in lieu of specific performance,[20] the parties to these contracts have expressly defined the means by which the United Nations, admittedly analogous to a public organization, may protect the "public interest." By so doing they evidence an intent that these means be exclusive.

Furthermore, in regard to international organizations generally, the attempt to apply municipal public law concepts overlooks several significant legal distinctions between employment with such organizations and with a national state. A national state which contracts with an individual is not only a party to the contract but also possesses the overriding sovereign power to legislate in the public interest. The United Nations General Assembly and other international organs presently in existence have no general legislative power but only the specific powers granted them by their charters. An individual contracting with an international organization does so not as a subject of that organization but as an equal, and therefore any rights and duties either party has toward

[18] See, e.g., Written Statements of the U.S.A., Pleadings, Oral Arguments, Documents, I.C.J. Adv. Op. of July 13, 1954, 131 at 177 (1954).

[19] The significance of this provision is seen by the fact that while the General Assembly may not set aside an award made by the tribunal, if the recent opinion of the I.C.J. is followed, it could amend the staff regulations so as to provide that use of the Fifth Amendment, even prior to the amendments of the regulations, would be a proper ground for dismissal by the Secretary-General. Following the Fifth Amendment cases (note 17 supra), the Eighth General Assembly did in fact amend the staff regulations and rules so as to limit permissible political activities of staff members and to give the Secretary-General broader grounds upon which to dismiss. U.N. Gen. Assembly Off. Rec., 8th sess., Annexes, Agenda Item 51, at 45-46 (Doc. A/Resolution/191) (1953). For a discussion of these amendments, see Cohen, "The United Nations Secretariat—Some Constitutional and Administrative Developments," 49 AM. J. INT. L. 295 at 309-312 (1955).

[20] Article 9 of the tribunal's statute provides: "If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in the case. . . ." U.N. Gen. Assembly Off. Rec., 8th sess., Annexes, Agenda Item 51, at 46 (Doc. A/Resolution/191) (1953).

the other must stem from their contract.[21] Thus, even in the case of the League, where employment contracts entered into prior to 1932 were not expressly subjected to a right of its Council to amend staff regulations, attempts to apply the concept of a unilateral right to abridge were unsuccessful in most instances.[22]

V. *Conclusion*

Professor Cohen has expressed the view that, in light of the cold war, "it is remarkable . . . that an international . . . organization, embracing both 'East' and 'West' should . . . be carrying on its political and welfare activities with considerable vigor."[23] This being true, it would seem not unwarranted to conclude that administrative tribunals of the nature of the United Nations tribunal are proving a solution to the problem faced by international organizations of insuring security of tenure to their staffs. Therefore, as the number of international organizations increase and their functions expand, it may be expected that the significance of these administrative tribunals will increase correspondingly. Today, in addition to the United Nations and International Labor Organization, organizations accepting the jurisdiction of one of the tribunals of these two organizations include the World Health Organization, the International Telecommunication Union, the United Nations Educational, Scientific, and Cultural Organization, and various other United Nations agencies. While heretofore the number of cases coming before these tribunals has been too small to give rise to a recognizable system of jurisprudence,[24] such a system should become discernible as the number of cases inevitably increases.

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21 Here, as in international law generally, the distinction between rights and powers must always be kept in mind. The power to enforce rights against a state, and here against an international organization, depends, in effect, upon the consent of the state or international organization.

22 See, e.g.: Report of the Committee of Jurists in 1932, L. OF N., O.J., SPEC. SUPP. No. 107, Records of the 13th Assembly, Meetings of the Committees, Minutes of the 4th Committee 206-208 (1932); Report of the Committtee of Thirteen, L. OF N., O. J., SPEC. SUPP. No. 88, Records of the 11th Assembly, Minutes of the 4th Committee 290 (1930); Thirteen decisions of the League tribunal of February 26, 1946, referred to in L. OF N., O.J., SPEC. SUPP. No. 194, Records of the 20th (Conclusion) and 21st Sessions of the Assembly 261-263 (1946).

23 Cohen, "The United Nations Secretariat—Some Constitutional and Administrative Developments," 49 AM. J. INT. L. 295 at 319 (1955).

24 Prior to 1946, the League tribunal gave judgments in only 21 cases and affirmative relief in only eight of these. HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE 221 (1944) (Carnegie Endowment for International Peace Series).