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# The Use of Discretionary Authority by International Organizations in their Relations with International Civil Servants

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The purpose of this article is to review both the exercise of discretionary authority by international organizations with respect to treatment of their staff, and the reactions by some international administrative tribunals to such exercise of discretionary authority as perceived through the judgments of such tribunals, particularly those of the United Nations Administrative Tribunal (UNAT), the International Labor Organization Administrative Tribunal (ILOAT), and the World Bank Administrative Tribunal (WBAT).

## I. INTERNATIONAL ADMINISTRATIVE LAW

It falls beyond the scope of this article to deal with the legal-theoretical problems of what constitutes "international administrative law" (i.e., the internal law of an international organization, including the law governing the relationship between an international organization and its staff) as part of and as a wholly separate branch of public international law. It is sufficient to state for the purposes of this article that the domestic law of international organizations, sometimes called "infra-international law," is recognized in doctrine as an autonomous legal branch of public international law.[1]

This international administrative law is, however, not a well-defined nor all-encompassing body of law. C.W. Jenks stated:

> [A]s international administrative law developes further, it will be necessary to resolve the series of dilemmas already brought into focus in the preliminary stages of its development. They will not necessarily be resolved in a clear-cut and uniform manner.
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> At its present stage of development international administrative

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1. Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Pleadings 343; A. VERDROSS, ON THE CONCEPT OF INTERNATIONAL LAW 493 (1949); Bastid, *Have the United Nations Administrative Tribunals Contributed to the Development of International Law?*, in W. FRIEDMAN, TRANSNATIONAL LAW IN A CHANGING SOCIETY 307 (1972); S. BASDEVANT (BASTID), *Les fonctionnaires internationaux*, thesis 68-69, 283 (1931). *See also*, Oral Statements to the International Court of Justice (June 11, 1954).

> law is primarily a law governing the international public service and the administration of international public funds; as it developes further it may well be increasingly concerned with the exercise of administrative powers directly affecting third-party interests.
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> If these varied dilemmas are to be successfully resolved, the further development of international administrative law must be nourished by a wide and deep understanding of administrative law generally, and disciplined by a full and instinctive awareness of the practical realities of international administration.[2]

As K.S. Carlston put it, analysis of international administrative law must start with an analysis of the employing organizations themselves. Pointing to the goals outlined for this autonomous branch of law, Carlston stated:

> [I]nternational administrative law, as all law, is directed to ensuring the preservation and fullest expression of an idea in action. When that idea is expressed in the complex and permanent system of action which we call an organization, law is concerned with preserving the integrity of the organization as an expression of its essential idea. It is concerned with preserving those ways of action which are necessary to enable the fullest expression of the idea which is at the heart of the organization. Its control of conduct flows from the necessity of maintaining the integrity of those patterns of action to which the system must adhere, if it is to maintain itself and be vigorous. International administrative law is, accordingly, more than an individual necessity in the functioning of the secretariat as a system of authority. It is an organizational necessity. . . . Ultimately, the rules of international administrative law represent a compromise between the values of the organization and the values of the individual participant in the day-to-day functioning of the secretariat. The organizational values of flexibility and discretion in the exercise of authority often clash with individual values of stability and security.
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> International administrative law discharges its functions when it harmonizes these conflicting values upon a viable basis, assuring to the administration a reasonable degree of authority and flexibility for the accomplishment of administrative goals and to individuals a reasonable degree of protection against abuse of authority . . . .[3]

## II. THE SOURCES OF LAW

The sources of the relationship between international organizations and their staff are to be found primarily in legal instruments constituting or emanating from international organizations: international administrative law is primarily a law made by and for international organizations.

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2. C.W. JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 128-29 (1962).

3. Carlston, *International Administrative Law: A Venture in Legal Theory*, J. PUB. L. 334, 337 (1959).

Its first decision, *de Merode v. The World Bank*,[4] gave the WBAT the opportunity to survey the sources of the legal relationship between the World Bank and its staff. It found as possible sources of such relationship contractual documents (letters offering and accepting appointment),[5] provisions in the constituent instruments of the organizations,[6] and staff regulations or, in their absence, instruments such as manuals, circulars, notes or statements that include undertakings which form part of the conditions of employment of international organizations' staffs.[7]

The WBAT also stated that, in certain circumstances, the organization's regular practice may become part of the conditions of employment,[8] and further:

> [O]bviously, the organization would be discouraged from taking measures favorable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its Advisory Opinion on Judgments of the Administrative Tribunal of the ILO.[9]

The WBAT also found that "[t]he specific circumstances of each case may also have some bearing on the legal relationship between the Bank and the individual member of the staff, particularly the actual conditions in which the appointment has been made."[10]

The International Court of Justice had stated in its 1956 Advisory Opinion that "it is necessary to consider these contracts not only by reference to their letter but also in relation to the actual conditions in which they are entered into and the place which they occupy in the Organization."[11] The UNAT acknowledged the above-mentioned opinion, and de-

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4. World Bank Administrative Tribunal (hereinafter cited as WBAT or World Bank Admin. Trib.) Decision No. 1, World Bank Admin. Trib. Rep. (1981), Decisions 1-4, at 1.

5. *Id.* at 9, para. 17.

6. *Id.* at 9-10, paras. 18-19.

7. *Id.* at 11, para. 22. *See* Haghou v. International Centre for Advanced Technical and Vocational Training, Judgements I.L.O. Admin. Trib. No. 421 (Dec. 11, 1980), for the impact of an information. *See* Powell v. Secretary-General, Judgements U.N. Admin. Trib. No. 237 (Feb. 13, 1979), for the impact of a circulaire. *See* Smargiassi-Steinman v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 319 (Nov. 21, 1977), for the notion of an "informative" v. a "normative" text. *See* De Bonel v. Secretary-General, Judgements U.N. Admin. Trib. No. 145 (Apr. 18, 1971), for the notion of "aide-mémoire." *See also*, Advisory Opinion on Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 359, at 518 (Schwebel, S., dissenting, with regard to the status of personnel action forms).

8. de Merode v. The World Bank, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12, para. 23.

9. *Id.*

10. *Id.* at 12, para. 24.

11. Judgements of the Administrative Tribunal of the International Labor Organisation

clared that "[t]he terms and conditions of employment of a staff member of the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances."[12] The WBAT confirmed further that "certain general principles of law, the applicability of which has in fact been acknowledged by the Bank in its written and oral pleadings,"[13] formed another source of the rights and duties of staff.

It may appear necessary, however, to make some reservation with regard to the application of principles of law. While Alain Plantey[14] lists general principles of law as a source of international administrative law, he confirms that such principles do not prevail over a clear and written provision, citing *Lacher*[15] as support. One may conclude, following Plantey, that if general principles of law are a source of international administrative law, they essentially serve as a guide to the interpretation or application of express provisions, possibly completing them where they are not fully developed.[16] Thus, it may be that, in the words of Akehurst,[17] "[T]he relevance of traditional international law [in determining legal relations between organizations and their staffs] is startlingly limited."[18]

The WBAT has treated with caution the question of whether the conditions of employment of staff include the rights and duties defined in relation to other international organizations by other administrative tribunals, i.e., whether there exists a corpus juris shared by all international officials. It should be recalled that, in *Chadsey*,[19] in *Irani*[20] and in *Teixeira*,[21] the respective administrative tribunals spoke of "general prin-

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upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. 76, (Advisory Opinion of Oct. 23, 1956), *cited in* de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12, para. 23.

12. Bhattacharyya v. Secretary-General, Judgements U.N. Admin. Trib. No. 142 (Apr. 14, 1971), and Sikand v. Secretary-General, Judgements U.N. Admin. Trib. No. 95 (Sept. 29, 1965).

13. de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12, para. 25. *See also* Zihler v. European Organization for Nuclear Research, Judgements I.L.O. Admin. Trib. No. 435 (Dec. 11, 1980), *and* Angelopoulos, O.E.C.D. Appeals Comm. Decision No. 71 (Apr. 6, 1979).

14. A. PLANTEY, THE INTERNATIONAL CIVIL SERVICE, an updated English version of DROIT ET PRATIQUE DE LA FONCTION PUBLIQUE INTERNATIONALE (1977).

15. Lacher, O.E.C.D. Appeals Comm. Decision No. 53 (May 2, 1975).

16. A. PLANTEY, DROIT ET PRATIQUE DE LA FONCTION PUBLIQUE INTERNATIONALE 74 (1977); *see* Bastid, *Les Tribunaux Administratifs Internationaux et Leur Jurisprudence*, in 92 II RECUEIL DES COURS 369 (1957); Wolf, *Le Tribunal Administratif de l'O.I.T.*, in ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 33, 56 (1969).

17. M.B. AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS (1967).

18. *Id.* at 98.

19. Chadsey v. Universal Postal Union, Judgements I.L.O. Admin. Trib. No. 122 (Oct. 15, 1968).

20. Irani v. Secretary-General, Judgements U.N. Admin. Trib. No. 150 (Oct. 6, 1971).

21. Teixeira v. Secretary-General, Judgements U.N. Admin. Trib. No. 230 (Oct. 14,

ciples of international civil service law." In *Irani*,[22] the UNAT spoke also of a "body of rules applicable to the international civil service."[23] As part of *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*,[24] Judge Ammoun, in a dissenting opinion, spoke of a "common administrative law" in the course of formation and "tending towards unity and becoming universal."[25]

The WBAT, while reaffirming its character as an international tribunal[26] and thereby reaffirming the dictum and implied pronouncements of the International Court of Justice in its 1956[27] and 1973[28] opinions, considered that it was its task "to decide internal disputes between the Bank and its staff within the organized legal system of the World Bank, and that it must apply the internal law of the Bank as the law governing the conditions of employment."[29]

The WBAT stated further:

> [T]he Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the differences between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service. Whether these similar features amount to a true *corpus juris* is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particulary those of the United Nations family. In this way the Tribunal may take account both of the diversity of international orga-

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1977).

22. Note 20 *supra*.

23. *Id.*

24. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 249 (Advisory Opinion of July 12, 1973).

25. *Id. See also* Fernandez-Lopez v. Secretary-General, Judgements U.N. Admin. Trib. No. 254 (Apr. 23, 1980).

26. de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12, para. 27.

27. 1956 I.C.J. at 97.

28. 1973 I.C.J. at 212.

29. de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12, para. 27.

> nizations and the special character of the Bank without neglecting the tendency towards a certain rapprochement.[30]

## III. DISCRETIONARY AUTHORITY

Discretionary authority is a term often used but seldom defined in the context of the relations between international organizations and their staffs. The discretionary authority of an international organization may be stated plainly to mean its freedom to act.[31] As Akehurst points out, the use of the expressions "discretionary powers" or "discretionary authority" and the resulting definitions thereof are in fact, however, oversimplifications.[32] He states:

> [T]he Administration may well be bound to do a particular act, but be free to choose the time or method; conversely, it may be free to act or not to act, but be obliged to follow a certain procedure if it does decide to act. It is therefore more accurate to speak, not of discretionary powers, but of discretionary elements in the exercise of powers.[33]

The holding in *de Merode*[34] allowed the WBAT to state its views comprehensively in regard to such discretionary "elements" in the exercise of the organization's powers while reflecting on the staff's conditions of employment. The WBAT stated that "[c]ertain elements [in their conditions of employment] are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance."[35] These elements may be unilaterally changed in the exercise of the organizations' powers, subject to limits and conditions, but even so, "discretionary power is not absolute power."[36]

The organizations' power to amend nonessential terms may be exercised subject to certain limitations:

> [F]irst, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals. The principle of non-retroactivity is not the

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30. *Id.* at 13, para. 28; *See* Zihler, Judgements I.L.O. Admin. Trib. 435, *and* Angelopoulous, O.E.C.D. Appeals Comm. Decision No. 71.

31. *See* de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. at 14, para. 30; Hoefnagels v. World Health Organization, I.L.O. Admin. Trib. No. 25 (July 12, 1957); Plissard v. I.L.O., Judgements I.L.O. Admin. Trib. No. 12 (Sept. 3, 1954); Mauch v. Secretary-General, Judgements U.N. Admin. Trib. No. 54 (June 2, 1954).

32. M.B. AKEHURST, *supra* note 17, at 115.

33. *Id.*

34. de Merode, WBAT Decision No. 1, World Bank Admin Trib. Rep. 12 at 19.

35. *Id.* para 42.

36. *Id.*

> only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing "the highest standards of efficiency and of technical competence." Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.[37]

What is an essential right is difficult to establish. As the WBAT stated in *de Merode*:[38]

> The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern what is reasonable and unreasonable, fair and unfair, equitable and inequitable. Each distinction turns upon the circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination. However, this difficulty has not prevented distinctions of this kind from playing a central role in the application of the law generally and the Tribunal sees no reason for rejecting the relevance of such a distinction in the internal law of the Bank. Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely—both principle and implementation—to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential.[39]

Also, with regard to non-essential rights, WBAT stated in *de Merode*[40] that "the Tribunal must satisfy itself in each case that the Bank's power to change the non-fundamental elements in the conditions of employment of its employees has not been exercised either retroactively or in an arbitrary or otherwise improper manner."[41]

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37. *Id.* paras. 46-47.
38. *Id.* para. 43.
39. *Id.*
40. *Id.*
41. *Id.* para. 48.

Paying due respect to the reservation expressed above, what is and is not within the discretionary authority of an international organization in its relations with its staff is a matter in which a review of the case law of international administrative tribunals may give some guidance. Also, if a matter is within the discretionary authority of an international organization, a review of the case law of international administrative tribunals may clarify what should be considered "arbitrary," "abusive" or "improper" uses of such authority.

The wide range of executive discretion may be divided into a number of general areas when studying the case law of international administrative tribunals. A first area concerns the determination of professional qualifications, often coupled with or accompanied by a decision to terminate, extend or review an appointment.

In *Yanez*,[42] appellant contested the non-renewal of his fixed-term appointment with the International Civil Aviation Organization (ICAO). Appellant requested, inter alia, the examination of his right to expect the renewal of his contract, and the rescission of the contested decision which he alleged constituted a disciplinary measure and was vitiated by procedural defects. The ICAO contended that the appellants' contract carried no expectancy of renewal, such terms being clearly stated in Field Service Staff Rule 2.3(c) to which complainant was subject; that there had been no termination in that complainant's contract expired in accordance with its terms; that the allegations of procedural defects were unfounded in view of the fact that appellant suffered no damage from the first confidential report; and that the provisions on which appellant relied were irrelevant. The Tribunal dismissed the appeal.[43] It affirmed that appellant was subject to Field Service Staff Rule 2.3(c)[44] and declared that the decision not to renew a contract on its expiry was within the Secretary-General's discretion.[45] The Tribunal also rejected the other claims of complainant and, in particular, declined the complainant's request that it examine the presumed or possible motives for the non-renewal of the contract by stating that, as it had decided in previous cases:

> [T]he Tribunal cannot, in principle, undertake an examination of the reasons or grounds for a decision not to renew a contract where the administrative decision in question does not affect any right or legitimate expectation, as in the case of a staff member whose appointment ends simply because its period has expired.[46]

The Tribunal in *Vanhove*[47] held that "[t]he determination of stand-

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42. Yanez v. International Civil Aviation Organization, Judgements U.N. Admin. Trib. No. 112 (Oct. 25, 1967).

43. *Id.* at 276.

44. *Id.* at 274.

45. *Id.*

46. *Id.*

47. Vanhove v. Secretary-General, Judgements U.N. Admin. Trib. No. 14 (Jan. 26, 1952).

ards of qualification is a matter of administration and not one for the Tribunal."[48] International administrative tribunals have been unequivocal in upholding this principle. It was reaffirmed in *Levinson*,[49] *Mohan*,[50] *Wang*[51] and *Brown*.[52] In *Brown*,[53] UNAT held that "the Secretary-General is entitled to set standards for recruitment to permanent appointments as appear appropriate to him."[54] In *Levinson*[55] and *Mohan*,[56] the UNAT held to this principle despite the fact that the appellants' immediate supervisors considered them fully qualified for the posts they occupied. Their supervisor's assessment did not limit the right or responsibility of the Secretary-General to set standards, nor did it establish improper motivation for the termination of the appointment as the responsibility was the Secretary-General's, not the immediate supervisor's. The Tribunal held in *Zimmet*,[57] that findings as to the quality of the work of the appellant and his habits of industry and productivity were matters "properly left to the sound discretion of the Secretary-General."

ILOAT confirmed the same principle in *Sherif*,[58] stating that "the professional values of which he was subject" were "neither within the jurisdiction nor the possibility of this Court."[59]

It was held in *Waghorn*[60] that "the Director-General had the right to terminate the complainant's employment on the grounds of unsatisfactory services, the evaluation of such services falling within his discretionary powers, subject to review in the event of an abuse of power."[61] In *Baracco*[62] the Tribunal upheld a termination of a probationary appointment on medical grounds as within the discretion of the organization.[63]

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48. *Id.* at 41.

49. Levinson v. Secretary-General, Judgements U.N. Admin. Trib. No. 43 (Dec. 11, 1953).

50. Mohan v. Secretary-General, Judgements U.N. Admin. Trib. No. 45 (Dec. 11, 1953).

51. Wang v. Secretary-General, Judgements U.N. Admin. Trib. No. 48 (Dec. 11, 1953).

52. Brown v. Secretary-General, Judgements U.N. Admin. Trib. No. 50 (Dec. 11, 1953).

53. *Id.*

54. *Id.*

55. Levinson, Judgements U.N. Admin. Trib. No. 43 at 214.

56. Mohan, Judgements U.N. Admin. Trib. No. 45 at 223.

57. Zimmet v. Secretary-General, Judgements U.N. Admin. Trib. No. 52 (May 29, 1954).

58. Sherif v. I.L.O., Judgements I.L.O. Admin. Trib. No. 29 (July 13, 1957).

59. *Id. See* Campanella v. UNESCO, Judgements I.L.O. Admin. Trib. No. 34 (Sept. 23, 1958).

60. Waghorn v. I.L.O., Judgements I.L.O. Admin. Trib. No. 28 (July 12, 1957).

61. *Id.*

62. Baracco v. I.L.O., Judgements I.L.O. Admin. Trib. No. 192.

63. For termination of probationary appointment on grounds of unsatisfactory performance, see Wakley v. WHO, Judgements I.L.O. Admin. Trib. No. 53 (Oct. 6, 1961); Mange v. WHO, Judgements I.L.O. Admin. Trib. No. 8 (May 16, 1960); McIntire v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 13 (Sept. 3, 1953). For discretionary authority with respect to an evaluation of performance in the process of deciding on the confirmation of a probationary appointment, see Buranavanichkit v. The World Bank, WBAT Decision No. 7, World Bank Admin. Trib. Rep. (May 25, 1982).

In *Corredoira-Filippini*,[64] the Tribunal threw out a complaint against a decision not to renew a fixed-term appointment despite a recommendation to renew by the Appeals Committee, stating that "there was no reason for the Director-General, who has sole responsibility for the smooth running of the Organization, not to exercise his authority"[65] in respect of the non-renewal of Appellant's appointment.[66] In *Chadsey*[67] and *Ballo*,[68] the Tribunal quashed decisions not to renew a contract, in one case because of the contract's illegal basis, and in the other, because of an incomplete assessment of appellant's performance. The Tribunal in *Chadsey* restated its view, however, that such decision-making authority lay properly within the U.P.U.'s Management Committee's discretion.[69]

*Roy*[70] concerned a staff member of ICAO who held a permanent appointment and was discharged for misconduct. Appellant requested the Tribunal to order implementation of the recommendations of the Advisory Joint Appeals Board and the rescission of the discharge decision. This Board recommended that the appellant be granted the indemnity, payable in case of termination of a permanent appointment by mutual agreement between the Secretary-General and the staff member. The Tribunal rejected the appellant's first request, on the ground that it had no competence over matters such as the payment of termination indemnities. The indemnities require certain actions that are within the discretionary powers of the Secretary-General, and therefore it could not give binding force to the Board's recommendation. Furthermore, the Tribunal, without deciding the merits of the case, ordered the case remanded on the ground that respondent had not met the requirements of due process prior to taking the decision to discharge the appellant. It ordered the correction of the procedural defect and awarded appellant compensation for the loss caused by the procedural delay and costs.

A request for the rescission of the decision to dismiss appellant was

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64. Corredoira-Filippini v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 312 (June 6, 1977).

65. *Id.*

66. *See* Reitan v. International Labor Organization, Judgements I.L.O. Admin. Trib. No. 316 (Nov. 21, 1977); Magassouba v. International Computing Center (WHO), Judgements I.L.O. Admin. Trib. No. 324 (Nov. 21, 1977).

67. Chadsey, Judgements I.L.O. Admin. Trib. No. 122.

68. Ballo v. United Nations Educational, Scientific, and Cultural Organization, Judgements I.L.O. Admin. Trib. No. 191 (May 15, 1972).

69. *See* Anciaux v. European Southern Observatory, Judgements U.N. Admin. Trib. No. 266 (Apr. 12, 1976); De Sanctis v. Food and Agriculture Organization of the United Nations, Judgements U.N. Admin. Trib. No. 251 (May 5, 1975); Stracey v. Food and Agriculture Organization of the United Nations, Judgements U.N. Admin. Trib. No. 136 (May 6, 1974); Goyal v. United Nations Educational, Scientific, and Cultural Organization, Judgements U.N. Admin. Trib. No. 191 (May 15, 1972). For EEC cases, see Kergall v. E.E.C., II E.E.C. COURT OF JUSTICE DECISIONS, 23-24 (1955-1956), and Mirossevitch v. E.E.C., II E.E.C. COURT OF JUSTICE DECISIONS 387 (1955-1956).

70. Roy v. I.C.A.O., Judgements U.N. Admin. Trib. No. 123 (Oct. 31, 1968).

rejected by the Tribunal in *Reid*[71] on the ground that the Secretary-General enjoyed wide discretion under the Staff Regulations in respect of disciplinary matters, particularly in view of the fact that here the contested decision was properly taken and did not suffer from lack of due process. The appellant was a former security guard at the United Nations who was separated from service following findings of misconduct. He appealed the Secretary-General's rejection of the recommendations of the Joint Disciplinary Committee and of the Joint Appeals Board, alleging that he was wrongfully dismissed and claiming either reinstatement or compensation for damages. The Tribunal, however, rejected the complainant's pleas on the above grounds. Additionally, it found that the Secretary-General, in deciding not to accept the Committee's recommendations to merely censure the complainant, "was acting within the scope of his authority,"[72] inasmuch as such recommendations were merely advisory in character. As to the recommendations of the Joint Appeals Board to treat the separation as an agreed termination and to pay an enhanced termination indemnity to the appellant, the Tribunal held that such matters involved the exercise of discretion vested in the Secretary-General. As it had decided in *Roy*,[73] the Tribunal also held here that "in the absence of legal obligations on the part of the Respondent, it has no competence to give binding force to such a recommendation."[74]

In *Plissard*[75] and *Gausi (No. 1)*,[76] the Tribunal recognized the discretionary nature of the power of the Director-General to retain an official in the service beyond normal retirement age. The facts were similar in both cases: appellants had reached the normal retirement age and had appealed to the Tribunal to rescind the decisions of the Director-General refusing an extension of their appointments. The Tribunal upheld the decision in the first case.[77] It found that the Staff Regulations conferred unlimited discretionary powers on the Director-General to decide on exceptions to the general rule on retirement age. Furthermore, the Tribunal found that the decision not to grant an extension had properly been taken, and consequently, declared the Director-General's decision "final and not subject in law to any rule which has not been observed."[78] In the second case, however, the Tribunal reached the opposite conclusion on

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71. Reid v. Secretary-General, Judgements U.N. Admin. Trib. No. 210 (Apr. 12, 1976).

72. *Id.* at 410.

73. Roy, Judgements U.N. Admin. Trib. No. 123.

74. *Id. See also* X, O.E.C.D. Appeals Comm. Decision No. 2 (Apr. 25, 1950): "Considérant qu'il n'appartient pas à la commission, juge de droit, de comparer la valeur professionnelle et les qualifications techniques des agents de l'Organisation, ainsi que leurs titres respectifs a être affectés ou maintenus dans un service"; similar language is used in Bessoles, O.E.C.D. Appeals Comm. Decision No. 30 (May 13, 1959), at 56; *see* Angelopoulous, O.E.C.D. Appeals Comm. Decision No. 49 (Dec. 17, 1974), at 63.

75. Plissard, Judgements I.L.O. Admin. Trib. No. 12.

76. Gausi v. Int'l Centre for Advanced Technical and Vocational Training (Gausi No. 1), Judgements I.L.O. Admin. Trib. No. 223.

77. Plissard, Judgements I.L.O. Admin. Trib. No. 12.

78. *Id.*

the latter point.[79] It found that the decision not to renew the complainant's appointment had no basis in substance, that the decision had not properly been taken and that it was tainted.[80]

Appellant in *Molina*[81] complained of the non-confirmation of a permanent appointment. Concerning the discretionary power not to confirm, ILOAT stated:

> [T]he Tribunal emphasizes again the exceptional character of the Director-General's discretion in refusing to confirm probationary service. Perhaps the most important object of probation is to enable the Director-General to ascertain whether the probationer fits in with the Organization; this is something that can never be completely ascertained from his record or from interviews. Yet the work of a group may be ruined by incompatibility and the Director-General has to bear the heavy burden of seeing that it is not.
>
> In this case he has concluded in effect that there is sufficient evidence to show that the complainant was incompatible. If he had based this solely upon the complainant's inability to achieve an harmonious working relationship with the first-level supervisor, there is ample evidence to show that in this respect the complainant would not have been exceptional. But there is other evidence of incompatibility. In a case in which the Director-General has personally and after the exercise of great care concluded that there is sufficient evidence to show that the complainant has 'not satisfactorily adjusted to WHO service' it is virtually impossible for the Tribunal to intervene.[82]

Additional areas of executive discretion concerned the grading, reclassification and regrouping of staff. The Tribunal in *Cardena*[83] held that a complaint relying in substance on an individual appreciation of the relative merits of one official against another must fail, the Tribunal not having jurisdiction in the absence of evidence showing that the complaint was the subject of arbitrary or improper treatment amounting to an illegality under the regulations. The determination of the salary scale of the International Telecommunications Union (I.T.U.) and the classification of officials within those scales were deemed "matters falling within the sovereign authority"[84] of the Plenipotentiary Conference, the Administrative Council and the Secretary-General:

> [I]n the absence of any evidence that a particular decision taken in virtue of such authority was arbitrary or in bad faith, the Tribunal cannot constitute itself as a body competent to scrutinize the classification of officials and thus to assume a hierarchical authority over the

79. Gausi (No. 1), Judgements I.L.O. Admin. Trib. No. 223.

80. *Id.*

81. In re Molina, Judgements I.L.O. Admin. Trib. No. 440 (Dec. 11, 1980).

82. *Id.* at 9, 10.

83. Cardena v. International Telecommunications Union (I.T.U.), Judgements I.L.O. Admin. Trib. No. 39 (Sept. 29, 1958).

84. *Id.*

organization and its executive head.[85]

In *Opinion Given by the Members of the Administrative Tribunal of the International Labour Organisation on the Questions put to Them Jointly in Accordance with the Decision of the Governing Body of the International Labour Office Taken at its 205th Session*,[86] ILOAT stated that "it would no doubt be an abuse of his discretion for the Director-General to direct a new survey merely for the purpose of getting rid of a salary scale which he disliked."[87] But ILOAT found that "the Director-General, having acted properly within his discretion in accepting the recommendations of the ICSC, would not infringe the acquired rights of existing officials by imposing the new scales."[88]

The WBAT in *de Merode*[89] reviewed the World Bank management's powers to change the existing tax reimbursement policy for those staff members whose salaries are subject to national taxation (mostly U.S. staff members). The WBAT confirmed that the Bank did not "have the power unilaterally to abolish the tax reimbursement system or to repay a lesser amount than the the taxes which each of the Applicants is required to pay . . ." as this was deemed to be an essential element in the conditions of employment.[90] It did note, however, that the method of computation of the tax reimbursement could be changed by the Bank at its discretion, albeit that such discretion should not be abused.[91] The WBAT also decided that, while the World Bank is obliged to carry out periodic reviews of salaries, taking into account various relevant factors, it "is under no duty to adjust salaries automatically to increases in the cost of living [as applicants had argued] and it retains a measure of discretion in this regard."[92] It then found that the World Bank did not fail to observe the contracts of employment or terms of appointment of applicants by exercising its discretion with regard to general salary increases.[93]

*Champoury*,[94] *Coffinet*,[95] *Ducret*,[96] *Fath*[97] and *Snape*,[98] in which the

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85. *Id.*

86. I.L.O. Admin. Trib. Opinion (May 16, 1978).

87. *Id.*

88. *Id. See* Bernard and Coffino v. I.L.O., Judgements I.L.O. Admin. Trib. No. 380 (June 4, 1979); Hatt and Leuba v. I.L.O., Judgements I.L.O. Admin. Trib. No. 382 (June 4, 1979); *See also* Maupain, *Une nouvelle dimension jurisprudentielle du droit de la fonction publique dans la famille des Nations Unies*, in R.G.D.I.P. 794 (1980).

89. de Merode, WBAT Decision No. 1, World Bank Admin. Trib. Rep. 12 at 40.

90. *Id.* at 40, para. 82.

91. *Id.* at 41, paras. 82-83. *See also* paras. 47 & 88.

92. *Id.* at 56, para. 112.

93. *Id.* at 57, para. 113.

94. Champoury v. Secretary-General, Judgements U.N. Admin. Trib. No. 76 (Aug. 17, 1959).

95. Coffinet v. Secretary-General, Judgements U.N. Admin. Trib. No. 77 (Aug. 17, 1959).

96. Ducret v. Secretary-General, Judgements U.N. Admin. Trib. No. 78 (Aug. 17, 1959).

97. Fath v. Secretary-General, Judgements U.N. Admin. Trib. No. 79 (Aug. 17, 1959).

98. Snape v. Secretary-General, Judgements U.N. Admin. Trib. No. 80 (Aug. 17, 1959).

U.N. Administrative Tribunal upheld claims by U.N. proofreaders at Geneva to be reclassified on the same basis as proofreaders in New York, appear at first to represent an exception to the general principle that the classification of staff is a matter within the discretion of the Secretary-General. But it is an apparent exception only and can be explained by the terms and confusion over the scope of the applicable General Assembly decisions. Appellants in these cases were employed as proofreaders at the P-1 level in the Geneva office of the United Nations and appealed the Secretary-General's decision not to reclassify them. The Secretary-General had agreed with appellants and had submitted a budget to the U.N. General Assembly, including funds specifically allocated to pay for the upgrading of six positions in Geneva. The U.N. General Assembly struck out such funds when approving the budget and the Secretary-General informed appellants that their request must be denied. Appellants went before the U.N. Joint Appeals Board, which recommended that the Secretary-General upgrade the appellants pursuant to their request. The Secretary-General rejected such advice, saying he had to conform to the decision of the General Assembly. Before the Tribunal appellants argued that equal pay for equal work mandated regrading, pointing to various staff regulations adopted by the General Assembly.

Appellants also argued that, as the International Court of Justice had held in the 1954 *Effects of Awards of Compensation* case,[99] the power to approve the budget does not mean that the General Assembly had the power to avoid honoring obligations already incurred by the organization. Instead, the power of the General Assembly must be limited by obligations under the Staff Regulations, promulgated by the General Assembly, to adopt post-classification rules which call for equal pay for equal work. The Secretary-General responded by arguing that equal pay did not require absolute equality and that the Tribunal was not competent to overrule the exercise by the General Assembly of its budgetary functions, which constitute a legislative act under the U.N. Charter, and its functions to classify posts.

The Secretary-General further argued that the Tribunal was a judicial body of limited jurisdiction and would be exceeding its powers if it ruled on the validity of an action of the General Assembly dealing with the budget or the Staff Regulations.

The response to this by the Tribunal was stated as follows:

> [T]he Tribunal notes that under its Statute it is competent to hear and pass judgment upon applications alleging non-observance of the Staff Regulations. The application alleges non-observance of Staff Regulation 2.1. Consequently the Tribunal is competent to interpret and apply Regulation 2.1. Under this Regulation, the General Assembly expressly reserved for itself, in respect to general principles affect-

99. Effects of Awards of Compensation made by the United Nations Administrative Tribunal, 1954 I.C.J. Pleadings 242 (Advisory Opinion of July 13, 1954).

> ing classification, certain powers which, to the extent to which they are exercised, limit the power of the Secretary-General. In interpreting this provision with reference to a particular decision, the Tribunal must consider whether or not, in the case in question, the Assembly exercised its power under Staff Regulation 2.1 and, consequently, whether or not the Secretary-General's freedom of action was reduced by such exercise. As in the case of the other provisions of the Staff Regulations, the Tribunal, in applying this provision, is competent to say whether Respondent's interpretation is legally valid.[100]

It then held that the General Assembly's action did not modify generally the application of the Staff Regulations on classification of posts and that, the action still being in effect, the Secretary-General would be required to comply with it. Since the Tribunal felt the Regulation required regrading in this case, it quashed the decision of the Secretary-General refusing to regrade the appellants. The Tribunal indicated that the Secretary-General had misinterpreted such Regulation and that regrading would not be inconsistent with the actions of the General Assembly in rejecting a specific budget item, since that action did not in itself change the underlying principle on post classification adopted by the same General Assembly. The decision, in an awkward way, stresses the authority which the Secretary-General might—must—exercise to avoid arbitrariness.[101] *Walther*,[102] *Boyle*,[103] *Joshi*,[104] *Dadivas and Callanta*,[105] and *Routier*[106] have amply confirmed the principles of nonreviewability of (re-)grading decisions, which are subject to review by an international administrative tribunal only when flawed.

In *Sharma*[107] ILOAT held "that there can be non-acquired rights as regards the relative position of an official within the administrative hierarchy, nor any right to promotion, the latter being within the exclusive authority of the official's supervisors."[108]

The discretionary authority of the organization in this field has been

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100. *Id.*

101. Compare Pouros v. Food and Agriculture Organization, Judgements I.L.O. Admin. Trib. No. 138 (Nov. 3, 1969), in which the non-exercise of a discretionary power by the Director General of UNESCO was treated by the I.L.O. Administrative Tribunal as the consequence of an error of law and the challenged decision was quashed.

102. Walther v. United International Bureau for Protection of Industrial Property, Judgements I.L.O. Admin. Trib. No. 106 (May 9, 1967).

103. Boyle v. I.T.U., Judgements I.L.O. Admin. Trib. No. 178 (May 3, 1971).

104. Joshi v. Universal Postal Union, Judgements I.L.O. Admin. Trib. No. 208 (May 14, 1973).

105. Dadivas and Collanta v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 153 (May 26, 1970).

106. Routier v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 252 (May 5, 1975).

107. Sharma v. International Labour Organization, Judgements I.L.O. Admin. Trib. No. 30 (July 14, 1957).

108. *Id.*

upheld in *Lamadie*[109] and *Andary*,[110] in which the Tribunal reasserted the primacy of the organization's discretionary powers as to promotion, and added that the organization may amend its criteria for promotion (e.g., by adding criteria) even if such action would "deprive any particular category of officials of their benefits"[111] or even when such action is contrary to the recommendations of an advisory body, such as a Careers Committee.[112]

In *Tranter (No. 1)*,[113] ILOAT held that the comparative evaluation of the services of two individuals on the occasion of a reduction of staff is a matter within the discretion of the organization. The *Tranter (No. 1)*[114] Judgment has been reaffirmed in *Hermann*,[115] despite its quashing of a UNESCO decision for failure to follow certain procedural requirements. The right of an organization to regroup its forces to meet new situations has also been recognized by the European Economic Community Court of Justice in the *Kergall* decision[116] and in *Aubert*,[117] in which the Tribunal held that "the organization has the right . . . to effect reduction of posts . . . to abolish either individual posts or categories of posts and [to] substitute others more suitable for the carrying out of necessary duties in the changed circumstances."[118] *Howrani*[119] expressed the same necessity to preserve, in general, the organization's flexibility and adaptability in the face of new demands.[120]

A third area of executive discretion concerns what may be termed matters of staff organization and personnel procedure. The Tribunal in *Hoefnagels*[121] held that the Director-General of WHO "enjoys discretionary powers in respect of the transfer of staff members to posts other than

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109. Lamadie v. International Patent Institute, Judgements I.L.O. Admin. Trib. No. 262 (Oct. 27, 1975).

110. Andary v. International Patent Institute, Judgements I.L.O. Admin. Trib. No. 263 (Oct. 27, 1975).

111. *Id.*

112. *Id. See also* Brisson v. International Patent Institute, Judgements I.L.O. Admin. Trib. No. 303 (June 6, 1977); Karkens v. International Patent Institute, Judgements I.L.O. Admin. Trib. No. 304 (June 6, 1977); Ledrut and Biggio v. International Patent Institute, Judgements I.L.O. Admin. Trib. No. 300 (June 6, 1977).

113. Tranter (No. 1), Judgements I.L.O. Admin. Trib. No. 14 (Sept. 3, 1954).

114. *Id.*

115. Hermann v. United Nations Educational, Scientific, and Cultural Organization, Judgements I.L.O. Admin. Trib. No. 133 (Mar. 17, 1969).

116. Goyal, Judgements U.N. Admin. Trib. No. 191. *See also* Borgeaux v. E.E.C., II E.E.C. COURT OF JUSTICE DECISIONS 457 (1955-1956).

117. Aubert v. Secretary-General, Judgements U.N. Admin. Trib. No. 2 (June 30, 1950).

118. *Id.* at 5. *See also* Chuinard v. European Organization for Nuclear Research, Judgements I.L.O. Admin. Trib. No. 139 (Nov. 3, 1969), *and* Glatz-Cavin v. United Nations Educational, Cultural, and Scientific Organization, Judgements I.L.O. Admin. Trib. No. 127 (Oct. 15, 1968).

119. Howrani v. Secretary-General, Judgements U.N. Admin. Trib. No. 4 (Aug. 25, 1951).

120. *Id.* at para. 47.

121. Hoefnagels, Judgements I.L.O. Admin. Trib. No. 25.

those to which they are initially assigned."[122] *Reynolds*[123] held that the Director-General of the FAO may assign an official to any one of the duty stations of the organization and that, while a refusal of the complainant to comply with a decision to transfer her from Washington to Rome did not constitute a voluntary resignation or provide grounds for her summary dismissal for serious misconduct, it did nonetheless constitute a breach of her statutory obligations. It was then open to the organization to initiate proceedings for the termination of her appointment. This principle was subsequently reaffirmed.[124]

In *Campanella*[125] the Tribunal held that it had no authority to supervise or to state the terms of a certificate containing any evaluation whatsoever of the services of a person whose engagement had been terminated. Appellant contested, inter alia, UNESCO which set forth the manner in which the Director-General proposed to appraise the quality of appellant's past service with UNESCO. Appellant had been employed under a fixed-term contract to serve in a mission to Guatemala, and had been separated from the service following a request by Guatemalan officials to terminate appellant's mission. The appraisal which the Director-General would have given would have taken into account the unfavorable opinions of these officials, to which appellant objected. The Tribunal dismissed the complaint for failure to file in due time. The Tribunal observed, however, that even had the complaint been receivable, it had "no authority to supervise or to state the terms of a certificate containing any evaluation whatsoever of the services of the person concerned, this being a prerogative of the Director-General."[126]

The Tribunal held in *Coutsis*,[127] that it was not competent "to express views on the accuracy of the diagnosis or conclusions of the medical profession."[128] Appellant had not been renewed in a fixed-term appointment on medical grounds. He had contracted dysentery during an assignment in Haiti, whereupon, following a number of medical examinations, the Medical Director of the United Nations Health Services recommended that appellant not be re-employed in tropical areas. Appellant alleged, inter alia, that the Secretary-General of the United Nations

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122. *Id.*

123. Reynolds, Judgements I.L.O. Admin. Trib. No. 138.

124. *See* Bidali v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 166 (Nov. 17, 1970); Frank v. International Labor Organization, Judgements I.L.O. Admin. Trib. No. 154 (May 26, 1970); Silow v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 151 (May 26, 1970); Douwes v. Food and Agriculture Organization of the United Nations, Judgements I.L.O. Admin. Trib. No. 129 (Mar. 17, 1969); Tarrab v. International Labor Organization, Judgements I.L.O. Admin. Trib. No. 132 (Mar. 17, 1969); Nowakowska v. World Meterological Organization, Judgements I.L.O. Admin. Trib. No. 115 (Oct. 18, 1967).

125. Campanella, Judgements I.L.O. Admin. Trib. No. 34.

126. *Id.*

127. Coutsis v. Secretary-General, Judgements U.N. Admin. Trib. No. 69 (Aug. 22, 1957).

128. *Id.* at 418.

based his decision contrary to an opinion issued by appellant's private physician. The Secretary-General asserted, inter alia, that his decision could not be deemed to be arbitrary merely because he accepted the Medical Director's recommendation, and refused a review of his decision as being inconsistent with his authority, under Staff Regulation 4.6, to establish and apply medical standards. The Tribunal found that the decision under review had been taken without prejudice or improper motivation, and refused to rescind the Secretary-General's decision. The Tribunal rejected appellant's claims and held, inter alia, that, in view of the absence of any express provision for a reference in cases of conflict of medical opinions, it must be considered "the normal course for the Secretary-General under Staff Regulation 4.6 to follow the Medical Director's recommendations as to which staff members should be deemed fit for appointment."[129] The Tribunal concluded that it "cannot proceed to a review on medical grounds of the Secretary-General's decision based upon the Medical Director's recommendation merely because of the applicant's contention that the Medical Director's findings were erroneous and conflicting with the opinions of other doctors."[130]

The Tribunal in *Roux*[131] held that annual leave was subject to the requirements of the service. Appellant, in this case, went on sick leave on the strength of a medical certificate after his request for annual leave was refused due to the requirements of the service. A complaint was filed after appellant's annual review. The Tribunal observed that the actions taken by appellant's supervisor had not resulted in injury to appellant—in effect appellant's annual leave remained intact and an increment was even granted. It held that the decision had been taken in accordance with the Staff Regulations and, furthermore, that these actions were within the discretionary power of the supervisor and did not constitute an abuse of power as alleged by appellant. It held, finally, that the discretion exercised by the supervisor was not subject to review by the Tribunal.

The appellant in *Bang-Jensen*[132] filed a protest against the proceedings of the Joint Disciplinary Committee which had led to a recommendation for his dismissal. Appellant had been charged with grave misconduct because of his behavior as a member of the Secretariat for the Special Committee for Hungary, and, in particular, because of his failure to comply with instructions to return to the Secretariat confidential papers which were in his possession. The Tribunal rejected the appellant's claim of lack of due process and illegality, rejecting, also, inter alia, the appellant's contention that inadequate security arrangements existed in the UN for the safeguarding of confidential papers. The Tribunal held that a statement by the Executive Assistant to the Secretary-General of the UN

129. *Id.*

130. *Id.*

131. Roux v. I.L.O., Judgements I.L.O. Admin. Trib. No. 36 (Sept. 29, 1958).

132. Bang-Jensen v. Secretary-General, Judgements U.N. Admin. Trib. No. 74 (Dec. 5, 1958).

that adequate security arrangements and procedures for the preservation of secret and confidential papers existed within the Secretariat of the UN "must be taken as conclusive of the matter."

In the *De Pojidaeff*[133] case the Tribunal held it inappropriate "to intervene in what are administrative matters as to the method and manner of presentation of periodic reports," indicating that it "would at any time be cautious about passing any comment which discouraged the development of the best possible annual reporting system."[134] The Tribunal in *Roux*[135] held that an evaluation by a supervisor contained in an annual report is made within the exercise of discretion and constituted only an opinion prior to a decision by the Director-General. It held that there could be no recourse to the Tribunal in relation to such an evaluation.

Failure to follow prescribed procedure may be grounds for judicial relief, but whether a prescribed administrative procedure is appropriate appears not (unless the procedure appears to be tainted) to be a matter for consideration by international administrative tribunals. For example, in the *De Pojidaeff*[136] case the Tribunal stated that it was not part of its functions to indicate views on alleged weaknesses in internal administrative procedures and that if a recommendation of the Appeals Board revealed weaknesses in the machinery of the Secretariat it was for the Secretary-General to deal with the matter. In *Levinson*,[137] *Bergh*,[138] *Mohan*,[139] *White*,[140] *Carter*,[141] and *Carruthers*,[142] the Tribunal rejected allegations that there had been an absence of due process before a Selection Committee entrusted with the selection of members of the staff to be offered permanent appointments; it noted that "the Committee was an internal administrative body, established by and functioning in the way approved by the Secretary-General in order to tender him advice"[143] and that "it is not for the Tribunal to express an opinion on internal administrative practices adopted by the Secretary-General."[144] However, in

133. DePojidaeff v. Secretary-General, Judgements U.N. Admin. Trib. No. 17 (Dec. 16, 1952).

134. *Id.* at 64.

135. Roux, Judgements I.L.O. Admin. Trib. No. 36.

136. DePojidaeff, Judgements U.N. Admin. Trib. No. 17 at 63.

137. Levinson, Judgements U.N. Admin. Trib. No. 43.

138. Bergh v. Secretary-General, Judgements U.N. Admin. Trib. No. 44 (Dec. 11, 1953).

139. Mohan, Judgements U.N. Admin. Trib. No. 50.

140. White v. Secretary-General, Judgements U.N. Admin. Trib. No. 46 (Dec. 11, 1953).

141. Carter v. Secretary-General, Judgements U.N. Admin. Trib. No. 47 (Dec. 11, 1953).

142. Carruthers v. Secretary-General, Judgements U.N. Admin. Trib. No. 49 (Dec. 11, 1953).

143. Bergh, Judgements U.N. Admin. Trib. No. 44 at 210; Carruthers, Judgements U.N. Admin. Trib. No. 49 at 242; Carter, Judgements U.N. Admin. Trib. No. 47 at 232; Levinson, Judgements U.N. Admin. Trib. No. 43 at 213; Mohan, Judgements U.N. Admin. Trib. No. 50 at 223; White, Judgements U.N. Admin. Trib. No. 46 at 228.

144. Carruthers, U.N. Admin. Trib. No. 49 at 242.

*Newton*,[145] the Tribunal stated that it "is not precluded from making observations if it considers that legislative acts of the Organization appear contrary to the general principle of nondiscrimination . . . and such observations can be considered by the competent authorities as recommendations."[146]

## IV. INTERNATIONAL ADMINISTRATIVE TRIBUNALS AND ORGANIZATIONAL DISCRETION

International administrative tribunals are—as are international organizations themselves—a relatively new phenomenon. The League of Nations first attempted to deal with staff grievances by granting officials who had been appointed for five years or more a right to appeal their dismissal to the Council.[147] When confronted with the first appeal under this system, however, the Council referred the case—*Monod*[148]—to an ad hoc Committee of Jurists for an advisory opinion which it undertook, in advance, to accept.[149] It was only on September 26, 1927 that the League Assembly voted to set up an administrative tribunal.[150] The Tribunal was first established on a trial basis.[151] The International Institute of Agriculture, predecessor of the FAO, set up an ad hoc administrative tribunal on October 17, 1932 which apparently never rendered any decisions.[152] The League Tribunal was established September 26, 1927[153] and from 1929 to 1946, it held eight sessions and pronounced judgment in thirty-seven cases. The League of Nations, upon liquidating itself, transferred the tribunal in 1946, where it was reconstituted under the International Labour Organisation (ILO).[154] The reconstituted administrative tribunal exists to this day as the International Labor Organisation Administrative Tribunal (ILOAT)[155]

Other international organizations may recognize the jurisdiction of ILOAT, subject to approval by the Governing Body of the ILO. To date

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145. Newton v. Secretary-General, Judgements U.N. Admin. Trib. No. 240 (May 15, 1979).

146. *Id.* at 8.

147. Assembly Resolution of December 17, 1920, Acts of the First Assembly, Plenary Sessions 663-64. *See also* P. GRUNEBAUM-BALLIN, DE L'UTILITRE D'UNE JURIDICTION SPÉCIALE POUR LES RÉGLEMENT DES LITIGES INTÉRESSANT LES SERVICES DE LA S.D.H. COMPARÉE 67, 1921 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION.

148. Monod v. League of Nations, League of Nations Case No. 1 (1925).

149. LEAGUE OF NATIONS O.J. 1441-47 (1925).

150. LEAGUE OF NATIONS O.J. 751-56 (1928).

151. LEAGUE OF NATIONS O.J. Spec. Supp. No. 93, at 152 (1927).

152. *See* S. Bastid, note 1 *supra*; P. SIRAUD, LE TRIBUNAL ADMINISTRATIF DE LA SOCIÉTÉ DES NATIONS (1942).

153. *See* Statute of the League of Nations Admin. Trib. (Sept. 26, 1927), *reprinted in* H. AUFRICHT, GUIDE TO LEAGUE OF NATIONS PUBLICATIONS 485 (1966).

154. LEAGUE OF NATIONS O.J. Spec. Supp. No. 194 at 281.

155. Minutes of the 29th Session of the International Labor Conference 341-43 (Oct. 1946); Minutes of the 30th Session of the International Labor Conference 413 (July 11, 1947).

twenty organizations have done so: (in chronological order) World Health Organization (WHO), United Nations Educational, Scientific, and Cultural Organization (UNESCO), International Telecommunications Union (ITU), World Meterological Organization (WMO), Food and Agricultural Organization of the United Nations (FAO), European Council for Nuclear Research (CERN), ICITO-GATT, IAEA, World Intellectual Property Organization (WIPO), EUROCONTROL, Universal Postal Union (UPU), IIB, European Southern Observatory (ESO), CIPEC, EFTA, Inter-Parliamentary Union, European Molecular Biology Laboratory, World Tourism Organization (WTO), CAFRAD and Central Office for International Railway Transport (OCTI).[156] ILOAT may, by virtue of article II of its Statute, be called upon to act as a panel of arbitrators for ILO originated cases.[157] It has also heard a claim by a WHO official in similar circumstances even though article II only speaks of arbitration clauses entered into by the ILO.[158]

The Preparatory Commission of the United Nations recommended the creation of an administrative tribunal in 1945. The United States and the Soviet Union in particular, however, regarded its creation as pointless and an unwarranted interference with the Secretary-General's control over the Secretariat, and the establishment of the Tribunal was delayed until November 24, 1949.[159] The tribunal has jurisdiction over the UN, including inter alia, UNRWA, UNICEF, UNIDO and UNDP, and over two specialized agencies, ICAO and IMCO. It also hears disputes arising out of the Regulations of the Joint Pension Fund from participants employed by international organizations participating in the Fund.[160]

The Organization for European Economic Cooperation (OECD) set up an Appeals Board in 1950, which evolved into the Organization for Economic Cooperation and Development (OECD) Appeals Board. As in the case of the NATO, Council of Europe and European Space Agency Appeals Boards, it is, despite its name, a genuine administrative tribunal. The European Economic Community (EEC) Court of Justice, through Article 179 of the EEC Treaty and Article 152 of the Euratom treaty, and

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156. *See* J. BALLALOUD, LE TRIBUNAL ADMINISTRATIF DE L'ORGANISATION DU TRAVAIL ET SA JURISPRUDENCE (1967); Letourneur, *La Jurisprudence du Tribunal Administratif de l'O.I.T.*, in MÉLANGES COUZINET 449 (1974); Letourneur, *Le Tribunal Administratif de l'Organisation Internationale du Travail*, in I MÉLANGES WALINE 203 (1974); Wolf, *Le Tribunal Administratif de l'O.I.T.*, in ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 331 (1954); Wolf, *Le Tribunal Administratif de l'O.I.T., in* R.G.D.I.P. 279 (1954).

157. *See* Waghorn, Judgements I.L.O. Admin. Trib. No. 28.

158. *See* Rebeck v. I.L.O., Judgements I.L.O. Admin. Trib. No. 77 (May 11, 1964).

159. G.A. Res. 351 (IV), *reprinted in* D. DJONOVICH, 2 UNITED NATIONS RESOLUTIONS 329 (1973).

160. *See* H. WRIGGINS & E.A. BOCK, THE STATUS OF THE UNITED NATIONS SECRETARIAT: ROLE OF THE ADMINISTRATIVE TRIBUNAL (1964); Bastid, *Les Tribunaux Administratifs Internationaux et Leur Jurisprudence*, 92 RECUEIL DES COURS 347 (1957); Bastid, Le Tribunal Administratif de Nations Unies, in ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 15 (1969); Friedman & Fatourous, *The United Nations Administrative Tribunal*, XI INT'L ORG. (1957).

through an interpretation of Article 43 of the ECSC treaty, has jurisdiction over disputes between the Communities and their officials.[161] There have been administrative tribunals at the Organization of American States (OAS) since 1971, and at the Institute for the Unification of Private Law (Unidroit) since 1952. A Joint Appeals Board was created in 1956 at the Western European Union, and there exist appeals boards also at the Intergovernmental Committee for European Migration and the International Institute for the Management of Technology. (Disputes between the International Court of Justice and its staff are, according to its Staff Regulations, settled in a manner to be decided by the Court.) The Inter-American Development Bank recently created its own administrative tribunal.

The preoccupation of the drafters of the Statute of the League of Nations Administrative Tribunal, predecessor of ILOAT, was to define that Tribunal's jurisdiction in such terms that any interference with the League's administrative discretionary authority would constitute a transgression of jurisdiction by that Tribunal.[162] The same approach had been adopted at the time of the establishment of UNAT. Thus, when the General Assembly was considering the establishment of the UNAT at its 4th session in 1949, the United States proposed an addition to article 2 of the draft Statute:

> Nothing in this Statute shall be construed in any way as a limitation on the authority of the General Assembly or of the Secretary-General acting on instructions of the General Assembly to alter at any time the rules and regulations of the Organization including, but not limited to, the authority to reduce salaries, allowances and other benefits to which staff members may have been entitled.[163]

This amendment was eventually withdrawn because, on the basis of the debate it appeared that article 2(1) of the draft Statute was considered "broad enough to give sufficient scope to the General Assembly, and to the Secretary-General acting on its behalf, to carry out the necessary functions of the United Nations, in spite of the fact that such action might require changes and reductions in the existing benefits granted to the staff."[164] This interpretation was reflected in the Fifth Committee's

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161. Treaty of Rome, *done* Mar. 25, 1957, art. 179, 298 U.N.T.S. 11 (*entered into force* Jan. 1, 1958); Treaty Establishing the European Atomic Energy Community, *done* Mar. 25, 1957, art. 152, 298 U.N.T.S. 169 (*entered into force* Jan. 1, 1958); Treaty Instituting the European Coal and Steel Community, *done* Apr. 18, 1951, art. 43, 261 U.N.T.S. 140 (*entered into force* July 23, 1952).

162. *See* Statement for UNESCO in 1956 I.C.J. 77, 87-94; Art. II(1) of the Statute of the League of Nations Tribunal; LEAGUE OF NATIONS O.J. Spec. Supp. No. 58, at 250-57 (1927). *See* Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 359-65, paras. 67-79; Wolf, *Le Tribunal Administratif de l'O.I.T.*, R.G.D.I.P., *supra* note 156, at 60-61.

163. A/C.5/L.4/Rev. 2, *reprinted in* G.A.O.R., 4th Sess., 5th Comm., Annexes, a.i. 44, at 165.

164. A/C. 54/S.R., para. 40.

report to the Plenary Assembly as follows:

> (b) That the tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary. It was understood also that the Secretary-General would retain freedom to adjust per diem rates as a result, for example, of currency devaluations or for other valid reasons. No objection was voiced in the Committee to those interpretations, subject to the representative of Belgium expressing the view that the text of the statute would be authoritative and that it would be for the tribunal to make its own interpretations.[165]

This interpretation was declared equally valid and important by the World Bank management when proposing the establishment of the WBAT.

Despite being characterized as "international" tribunals by the International Court of Justice, administrative tribunals remain courts of limited jurisdiction.[166] The functional limitations placed upon ILOAT and UNAT are further underscored by the fact that both organizations' statutes provide for a form of appeal, a mechanism for obtaining a binding advisory opinion from the International Court of Justice. Indeed, article XII of the ILOAT statute provides that:

> 1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund 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 by the Governing Body, for an advisory opinion, to the International Court of Justice.
>
> 2. The opinion given by the Court shall be binding.

Additionally, the Annex to the Statute of the Administrative Tribunal of the International Labour Organisation, under Article XII states:

> [I]n any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal 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 Tribu-

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165. A/1127, para 9, *reproduced in* G.A.O.R., 4th plenary sess.; Annexes, a.i., 44, at 167-68. *See* Effects of Awards of Compensation made by the United Nations Administrative Tribunal, 1954 I.C.J. Pleadings 242; *see* Bastid, *Les Tribunaux Administratifs Internationaux et Leur Jurisprudence, supra* note 160, at 460.

166. *See* 1973 I.C.J. 66 at 207-08; 1956 I.C.J. 77 at 90; 1954 I.C.J. 47 at 56.

nal shall be submitted by the Executive Board concerned, for an advisory opinion to the International Court of Justice.[167]

Article II of the UNAT statute provides:

> 1. If a Member State, the Secretary-General or the person in respect of whom a judgment has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgment on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgment, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.
>
> 3. If no application is made under paragraph 1 of this article, or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgment of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgment, or give a new judgment, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgment or bring it into conformity with the opinion of the Court.
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> 4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules.
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> 5. In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment

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167. *See* B. DE VUYST, STATUTES AND RULES OF PROCEDURE OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS (2d. ed. 1981).

> to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payment shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the money to which he is entitled in accordance with the opinion of the Court.[168]

The control of the organization's discretionary authority by international administrative tribunals is therefore functionally limited. Such limitation results also from the nature of international organizations themselves. As Jenks stated:

> [T]he problem of the relationship of executive discretion to judicial control does not at the present stage of development of international administrative law involve in any significant degree the protection of the liberty of the subject against an all-powerful executive. It is not a problem of creating effective bulwarks against the new despotism and bureaucracy triumphant. Until such time as, and except in such cases as, international organizations are entrusted with executive powers directly applicable to private persons and property, the problem is limited to their relations with persons who have entered the international public service and assumed the obligations which membership of an international public service implies.
>
> One of these obligations is that of accepting executive authority within its proper sphere. While it is proper and important that the rights which accompany these obligations should be judicially safeguarded, it is no less important that the executive authority of the administration in respect of matters which are essentially an executive responsibility should remain unimpaired.[169]

The UNAT in *Howrani*,[170] while emphasizing the importance of procedural safeguards protecting the staff, expressed the essence of this matter thus:

> [T]he United Nations Secretariat is a young organization which, since its establishment, has been almost continuously confronted with new problems and programmes demanding a high degree of flexibility and adaptability in deploying its resources. There are no indications of prospective change in its operating environment. In those circumstances, it is essential that broad powers be vested in the Secretary-General to adapt the operations of the Secretariat to achieve the goals of efficient and economic operation, and to meet the requirements imposed by the General Assembly with respect to the improvement of the standards of the Secretariat. The only effective limitation upon these powers in the present circumstances of the United Nations lies

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168. *Id.*

169. C.W. JENKS, *supra* note 2, at 99. *See also* Letourneur, *Le Tribunal Administratif de l'Organisation Internationale du Travail, supra* note 156, at 208-09. *See* Dreyfus, *Les Limitations du Pouvoir Discretionaire*, in REVUE DE DROIT PUBLIC 691 (1974).

170. Howrani, Judgements U.N. Admin. Trib. No. 4.

> in the regulation of the manner of their exercise. It is also true that the exercise of broad powers without adequate procedural safeguards inevitably produces arbitrary limitation upon the exercise of any power. The maintenance of the authority of the Secretary-General to deal effectively and decisively with the work and operation of the Secretariat in conditions of flexibility and adaptability depends, in its exercise, in large measure upon the strict observance of procedural safeguards. In a very real sense, the mode must be the measure of the power.[171]

International administrative tribunals have, since the *Howrani* decision, been acknowledging the limitations imposed upon their judicial review capabilities. The Tribunal in *Reid*[172] cited approvingly the report of the Secretary-General to the General Assembly at its fourth session on the establishment of the UN Administrative Tribunal[173] quoting, inter alia, that the Secretary-General's discretionary authority "could not be effectively discharged if an independent Administrative Tribunal were given authority to reconsider the facts in such cases, in the absence of any reasonable allegation that the terms of an appointment had been violated, and to reverse the decision of the Secretary-General."[174] The Tribunal then went on asserting the general rule of recognizing the authority of the Secretary-General as final, while at the same time asserting "its competence to review such decisions under certain conditions."[175]

Likewise, in *Cardena*,[176] a case concerning job regrading, the Tribunal considered "the sovereign authority of these legislative organs [the Administrative Council and the Plenipotentiary Conference] and of the Secretary-General"[177] and stated:

> [I]n the absence of any evidence that a particular decision taken in virtue of such authority was arbitrary or in bad faith, the Tribunal cannot constitute itself as a body competent to scrutinize the classification of officials and thus to assume a hierarchical authority over the organization and its executive head.[178]

*Nowakowska*[179] concerned transfers and reassignments to another post. The Tribunal stated that it "may not substitute its own judgment for that of the Secretary-General in regard of work or conduct or qualifications of the persons concerned."[180]

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171. *Id.* at 10.
172. Reid, Judgements U.N. Admin. Trib. No. 210.
173. Report of Secretary-General to the United Nations General Assembly 4th Plenary Session, U.N. Doc. A/986.
174. Reid, Judgements U.N. Admin. Trib. No. 210 at 406-07.
175. *Id.* at 407.
176. Cardena, Judgements I.L.O. Admin. Trib. No. 39.
177. *Id.*
178. *Id.*
179. Nowakowska, Judgements I.L.O. Admin. Trib. No. 115.
180. *Id.*

In *Russell-Cobb*[181] the Tribunal declared in an abolition-of-post case that "it is for the Secretary-General, and not for the Tribunal to make the choice."[182] Likewise, in *De Pojidaeff*[183] the Tribunal indicated that it was not part of its function to indicate views on alleged weaknesses in internal administrative proceedings and that if a recommendation of the Appeals Board showed up a weakness in the machinery of the Secretariat it was for the Secretary-General to deal with the matter.[184] The Tribunal in *Ba*[185] did nothing more than confirm a line of case law stating the principle of non-reviewability of discretionary decisions by expressing the opinion that "by reason of its very nature [the decision taken at its discretion by the international authority] . . . is subject to only limited review."[186] Additionally, in *Lafuma*[187] the Appeals Board stated emphatically that its function was "to apply the Statute [of the Appeals Board] and not to amend it by interpreting it broadly."[188]

Administrative tribunals are not to intervene in the exercise of the organization's discretion in an affirmative, corrective way except under certain conditions. *Ba*[189] illustrates a line of ILOAT Judgments which give an almost identical definition of what triggers administrative tribunals to intervene.[190] International administrative tribunals will not interfere with decisions of a discretionary nature taken by international organizations unless the decisions were taken without authority, violate rules of form or procedure, were based on an error of fact or of law, failed to take essential facts into consideration, are tainted with abuse of authority, or if a clearly mistaken conclusion had been drawn from the facts.[191]

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181. Russell-Cobb v. Secretary-General, Judgements U.N. Admin. Trib. No. 55 (Dec. 14, 1954).

182. *Id.* at 280.

183. DePojidaeff, Judgements U.N. Admin. Trib. No. 17.

184. *Id.* at 63.

185. Ba v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 268 (Apr. 12, 1976).

186. *Id. See* Carter, Judgements U.N. Admin. Trib. No. 46; Reid, Judgements U.N. Admin. Trib. No. 210.

187. Lafuma v. Secretary-General, Council of Europe Appeals Board Decision No. 7. (Oct. 13, 1972).

188. *Id.*

189. Ba, Judgements I.L.O. Admin. Trib. No. 268.

190. *See* Vyle v. Food and Agriculture Organization, Judgements I.L.O. Admin. Trib. No. 462 (May 14, 1981); In re Molina, Judgements I.L.O. Admin. Trib. No. 440; In re Rosescu, Judgements I.L.O. Admin. Trib. No. 431 (Dec. 11, 1980); Joshi, Judgements I.L.O. Admin. Trib. No. 208; Frank, Judgements I.L.O. Admin. Trib. No. 154; Hermann, Judgements I.L.O. Admin. Trib. No. 133; Agarwala v. Food and Agriculture Organization, Judgements I.L.O. Admin. Trib. No. 121 (Oct. 15, 1968); Glatz-Cavin, Judgements I.L.O. Admin. Trib. No. 127; Crapon de Caprona v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 112 (Oct. 18, 1967); Terrain v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 109 (May 19, 1967); Garcia, Judgements I.L.O. Admin. Trib. No. 32 (Sept. 23, 1958); Marsch v. I.L.O., Judgements I.L.O. Admin. Trib. No. 10 (Aug. 5, 1954); McIntire, Judgements I.L.O. Admin. Trib. No. 13.

191. *See also* Reid, Judgements U.N. Admin. Trib. No. 210 at 407 ("Failure to accord due process to the effected staff member before reaching a decision or disciplinary measures

Invalidation of decisions taken in the exercise of a discretionary power are, relatively speaking, not frequent, which may reflect on the standards used by international administrative tribunals in this respect.

The *Ba* case was a termination action based on only one supervisor's report which, it is suggested, was biased against Mrs. Ba.[192] In *Ballo*,[193] the Director-General of UNESCO refused to extend a contract against the unanimous advice of Ballo's supervisors, because, during a congress, he "had seen [Ballo] . . . in action."[194] In *Glatz-Cavin*,[195] the reasons for a revocation of an assignment turned out not to be the genuine motivation for the revocation, which was effectively caused through actions of a fellow staff member with the authorities of the country of assignment. The Tribunal found in *Gausi (No. 1)* [196] that the refusal to review complainant's appointment beyond the normal retirement age was not based on Mr. Gausi's physical or intellectual capacities—or the lack thereof—but rather on certain, otherwise unproven, suspicions of irregularities.[197] The Tribunal rightly quashed the decision as a disciplinary measure in disguise.

In *Crawford*[198] the Tribunal stated that the motivation of the contested decision "must have consisted only of [the] knowledge that in 1935 [Crawford] had been, for just over a year, a member of the Communist Party."[199] The Tribunal held thereupon that "a decision based on such premises is a violation of an inalienable right of staff members and represents a misuse of power."[200]

*Dicancro*[201] provides a more recent illustration of the problem on which *Crawford* touched. Appellant had, in this case, rather actively run an "election campaign" against the WHO-PAHO director accusing the

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attracts the jurisdiction of the Tribunal."); Lindblad v. Secretary-General, Judgements U.N. Admin. Trib. No. 183 (Apr. 23, 1974); Bhattacharyya, Judgements U.N. Admin. Trib. No. 142; Roy, Judgements U.N. Admin. Trib. No. 123; Yanez, Judgements U.N. Admin. Trib. No. 112.

192. Ba, Judgements I.L.O. Admin. Trib. No. 268. *Cf.* the factual setting in Cooperman, Judgements U.N. Admin. Trib. No. 93 (Sept. 23, 1965).

193. Ballo, Judgements I.L.O. Admin. Trib. No. 191.

194. *Id.*

195. Glatz-Cavin, Judgements I.L.O. Admin. Trib. No 127.

196. Gausi (No. 1), Judgements I.L.O. Admin. Trib. No. 223.

197. *Id.*

198. Crawford v. Secretary-General, Judgements U.N. Admin. Trib. No. 18 (Aug. 21, 1953).

199. *Id.* at 69.

200. *Id.* For similar factual circumstances, see McIntire, Judgements I.L.O. Admin. Trib. No. 13; Leff, Judgements I.L.O. Admin. Trib. No. 18 (Apr. 26, 1955); Duberg, Judgements I.L.O. Admin. Trib. No. 17 (Apr. 26, 1955); Wilcox, Judgements I.L.O. Admin. Trib. No. 19 (Apr. 26, 1955); Bernstein, Judgements I.L.O. Admin. Trib. No. 21 (Oct. 29, 1955); Pankey, Judgements I.L.O. Admin. Trib. No. 23 (Oct. 29, 1955); Van Gelder, Judgements I.L.O. Admin. Trib. No. 24 (Oct. 29, 1955); Aubert, Judgements U.N. Admin. Trib. No. 2.

201. Dicancro v. World Health Organization, Judgements I.L.O. Admin. Trib. No. 427 (Dec. 11, 1980).

latter, inter alia, of mismanagement. Unfortunately for Dr. Dicancro, the PAGI director was reelected. When the time came up for the renewal of appellant's appointment, appellant was accused by the director of misconduct, and his appointment was not renewed. Upon review, ILOAT stated:

> [T]he first of them [the decisions taken by the director], the non-renewal, is a decision within the Director's discretion and subject therefore only to a limited power of review by the Tribunal. The reason for it, given in the letter of 8 December, was that the position which he is said to have taken 'precludes all possibility of the continuation of a fruitful working relationship between yourself and the management.' This reason, on the face of it conclusive, is attacked by the complainant on the ground that the decision resulted from personal prejudice on the part of the Director or from incomplete consideration by him of the facts. These grounds, which are taken from Staff Rule 130, fall within the Tribunal's limited power of review and are such, if they are established, as to authorize and require the Tribunal to quash the main decision not to renew.[202]

After a review of the facts, ILOAT concluded that the director had effectively disabled himself from making the decision on the renewal or, for that matter, on appellant's alleged misconduct:

> The tribunal concludes that he had so disabled himself. The reasonable inference to be drawn from his acts is that he strongly resented the fact that the complainant had stood against him in an election in which he, the Director, had only quite narrowly escaped defeat. What was said after the election . . . is evidence that his resentment was revealed at the time and noted. The charge of misconduct is so preposterous and the Director's eagerness, before hearing the defence to the charge, to use it as a ground for dismissal is so manifest that resentment is the only explanation. Accordingly the Tribunal cannot view the letter of 16 October as that of a man who would be able to take a detached view of the conduct of the complainant whether in relation to a disciplinary charge or to an assessment of his future usefulness to the Organization. The two decisions in the letter of 8 December are linked and are both defective as vitiated by prejudice.[203]

*Garcia*[204] concerned the refusal of an indeterminate appointment, and the Tribunal declared the Director-General's right to make a decision to grant or refuse such appointment "sovereign,"[205] professed that it could not seek for or judge his reasons for doing so, but quashed the decision because of irregularities of procedure which tainted the otherwise unreviewable decision and made intervention by the Tribunal necessary.

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202. *Id.* at 7.
203. *Id.* at 12.
204. Garcia, Judgements I.L.O. Admin. Trib. No. 32 (Sept. 23, 1958).
205. *Id.*

*Gale*[206] dealt with erroneous conclusions that were drawn from the documents of the file, which made an intervention by the Tribunal necessary. In *Ferrechia*[207] the Tribunal took a stern look at the disciplinary sanctions handed out, finding an unacceptable unproportionality between the faults committed and the disciplinary measures taken.[208]

## V. EVIDENCE OF ABUSE OF DISCRETION

Jenks maintains that "improper motive clearly cannot be presumed"[209] in international administrative decisions and, with this statement, seems to leave the burden of proof on the applicant. UNAT or ILOAT judgments reviewed do not, however, always give a clear or express answer as to which party carries the burden of proving that a decision was or was not tainted, entitling an international administrative tribunal to interfere. As Akehurst has stated, there appear to be no strict rules about onus before international administrative tribunals.[210] Still, one may squarely put it that it is the plaintiff-staff member who has to prove a decision to be tainted—or he or she has to furnish the Tribunal with enough indications of taint to the decision to have the Tribunal reverse the burden of proof.

The Tribunal declared in *Brisson*[211] that "the Director-General had acted for any purpose but to serve the Institute's interests."[212] Likewise, in *Coutsis*[213] the Tribunal did not wish to proceed to a review of certain medical grounds for the decision "merely because of the Applicant's contention that the Medical Director's findings were erroneous and conflicting with the opinions of other doctors."[214] Similarly, in the *Mauch (No. 1)*[215] case, the Tribunal held in response to a discrimination charge that there was no evidence to establish improper motivation. The Tribunal in *Kaplan*[216] held that there was no proof of improper motive on which the Appellant could rely against the organization. However, in *Robinson*[217] the Tribunal stated that "it will normally not be possible for the staff member to produce positive evidence that the reason for the non-renewal of his contract was his Staff Association activities"[218] and it expressly re-

206. Gale v. Secretary-General, Judgements U.N. Admin. Trib. No. 89 (Oct. 9, 1963).
207. Ferrechio, Judgements I.L.O. Admin. Trib. Nos. 203, 207, 210.
208. *But see* Reid, Judgements U.N. Admin. Trib. No. 210.
209. C.W. JENKS, *supra* note 2, at 95.
210. M.B. AKEHURST, *supra* note 17, at 158.
211. Brisson, Judgements I.L.O. Admin. Trib. No. 303.
212. *Id.*
213. Coutsis, Judgements U.N. Admin. Trib. No. 69.
214. *Id.* at 418.
215. Mauch, Judgements U.N. Admin. Trib. No. 54.
216. Kaplan v. Secretary-General, Judgements U.N. Admin. Trib. No. 19 (Aug. 21, 1953).
217. Robinson v. Secretary-General, Judgements U.N. Admin. Trib. No. 15 (July 3, 1952).
218. *Id.* at 50.

versed the burden of proof. As UNAT did in *Robinson*, so did ILOAT in *McIntire*.[219] The case appears in a peculiar—McCarthy era—background. The appellant in *McIntire* could point to clear indications of misuse of discretionary authority. Mr. McIntire had been promoted to Chief of Section nine days before his immediate dismissal for unsatisfactory services. It was proven that the U.S. State Department had, in the interval, written a letter about Mr. McIntire to the organization. The institution refused, however, to disclose its contents, claiming it to be "confidential." The Tribunal reacted, given the indications received and the refusal to communicate the contents of the letter, by reversing the burden of proof because too many indications of a taint to the decision had been brought forward.[220] The ILOAT in *Sacika*[221] had the opportunity to clarify its investigative powers under its Rules of Procedure. The applicant in this case had requested the Tribunal to "order an investigation into the circumstances surrounding my employment with the ILO and those leading up to my premature departure from the Organization."[222] ILOAT replied:

> [U]nder Article II.1 the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials of the International Labour Office, and of such provisions of the staff regulations as are applicable to the case; and if satisfied that the complaint is well founded to award under Article VIII to the complainant compensation for the injury caused to him. For this purpose the Tribunal may under Article III of its Rules order such measures of investigation as it considers desirable. But it will not order an investigation merely for the sake of ascertaining the facts; the investigation must be in aid of some relief, such as reinstatement or compensation, which it is within the jurisdiction of the Tribunal to grant.[223]

Consequently, ILOAT denied Appellant's request.

The ILOAT clarified also, in its Judgment No. 440, *Molina*, some aspects of its judgmental powers in regard of the production of documents by the international organization, the review thereof by the Tribunal and their communication to Applicant. In *Molina*,[224] some time after Applicant's contract was not extended, the Director-General ordered an inquiry into staff-management relations in the ISP. The complainant asked that his counsel should be given a copy of the report of the inquiry and any decisions based thereon. The Organization objected on the grounds that such evidence is immaterial.[225] The Tribunal's decision states as follows:

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219. McIntire, Judgements I.L.O. Admin. Trib. No. 13.

220. *See* the facts in Al-Abed v. I.L.O., Judgements I.L.O. Admin. Trib. No. 195, and *see* Gausi (No. 1), Judgements I.L.O. Admin. Trib. No. 223.

221. Sacika v. I.L.O., Judgements I.L.O. Admin. Trib. No. 436 (Dec. 11, 1980).

222. *Id.* at 6.

223. *Id.*

224. In re Molina, Judgements I.L.O. Admin. Trib. No. 440.

225. *Id.* at 5, 6.

> On April 2, 1980 ILOAT asked the ILO to supply the report on the inquiry. The Tribunal examined the report, found it to be confidential, and on 25 April decided not to communicate it to the complainant, at least at that stage. The Tribunal now finally confirms its decision for the following reasons.
>
> The Tribunal finds that to a large extent and with regard to the essential issues the report of the inquiry confirms the Obudsman's report which is included in the dossier and which levels serious charges against the complainant's first-level supervisor. It is therefore unnecessary to add to the dossier the report on the inquiry, drawn up at a later stage. In accordance with a general principle, the findings in reports of this nature should not be disclosed and, unless they are necessary to judicial redress, the Tribunal abstains from ordering the production of them.[226]

## VI. CONCLUSION

International administrative tribunals define the relationship in law between international organizations and their staffs in respect of matters properly referred to them. Having done so, the international administrative tribunals have fulfilled their task. They have no authority to deal with the implementation of their decisions, which do not form part of their judicial functions.[227]

It is clear from the above review of the record of certain international administrative tribunals' decisions that, due to the nature and functions of international organizations, such organizations enjoy large discretionary powers with respect to treatment of their staffs, so as to enable them to respond most flexibly to the changing needs of their functional setup and the calls for action made upon the institutions by their constituent powers. The international administrative judiciary, while not allowing the use of discretionary authority for a devious purpose or in an unreasonable fashion, is rightfully hesitant to actively substitute its decision-making for that of the international organization. To paraphrase Justice Frankfurter, it has instinctively and by training been admirably reluctant to cross the line between adjudication and legislation.[228]

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226. *Id.* at 7, 8.

227. See Artzet, Council of Europe Appeals Board Decision No. 10 (1973), which refers to the Haya de la Torre Case (Colom. v. Peru), 1951 I.C.J. 834 (Judgment of June 13).

228. *See* Cardozo Lecture on Reflections on Reading Statutes, *reprinted in* THE SUPREME COURT: VIEWS FROM THE INSIDE (A.F. Westin ed. 1961).