

DEVELOPING STANDARDS OF WORKPLACE JUSTICE WITHIN INTERNATIONAL ORGANIZATIONS**Arnold M. Zack**

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We are all familiar with the utilization of Federal and State Courts to apply and enforce the statutes which govern and protect workers under Federal and State Law, but we pay little heed to the statutory rights of those working for international agencies or institutions established by treaties.

A little explored aspect of our growing global interdependence has been the proliferation of international organizations employing hundreds of thousands of employees who labor without access to the workplace protections provided by the national laws of their home and host countries. The expansion of such international organizations from the fledgling focus of the League of Nations on inter-government regulation of health, post, telegraph, labor standards and the like to the broader role of the United Nations, and the more recent extension into economic development and criminal prosecutions has occurred in the context of negotiated privileges and immunities treaties with member states. There are now more than 100 such independent international, multistate organizations. Their independence from national constraints places their employees beyond the protection of national legislation and judicial enforcement. It also raises questions of the adequacy of workplace standards and fairness within such organizations, and the effectiveness of the machinery created by the employer to supplant access to national law. As these organizations grow and multiply, the problems of structure and administration continue in the context of seeking to recognize a universal standard of fairness in a world where national laws and enforcement are so variable and uncertain.

Development of Administrative Tribunals

In the era after World War I, the few international organizations had small staffs and in many cases, as with the Universal Postal Union, had their administration handled by their host country, Switzerland. In 1927, the League of Nations, having a more diverse operation, established its own internal Tribunal to which employees, dissatisfied with the determinations of the executive head of the League, could appeal. The internal appellate body reviewed the legality of the League's actions in light of the laws of the League⁹. This standard of review was affirmed by the International Court of Justice, which in 1954 held that the United Nations, successor to the League of Nations, had the right to establish a Tribunal to resolve "inevitable...disputes between the Organization and staff members as to their rights and duties."¹⁰

When one appreciates the diversity of national law, and the varying and perhaps contradictory outcomes that could result from application of national law to individual staff members it is easy to see the need for a single set of rules to be applied with consistency to all staff members. At the same time it is essential to signal member states that their representatives working in such organizations are afforded workplace protections consistent with what they would receive at home. Thus the many international organizations established since the Second World War have created Administrative Tribunals, not as equal branches of government, but as courts of limited jurisdiction within the organization to provide assurance to staff and member states that they function in compliance with a set of reasonable statutes, rules and regulations.¹¹

⁹ Di Palma Castiglioni, LNT No. 1

¹⁰ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13) "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter (of the UN) to promise freedom and justice for individuals and with the constant preoccupation of the UNO to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which might arise between it and them"

¹¹ The number of such international organizations is difficult to assess. The Yearbook of International Organizations 2002/2003 (2002. Vol. 5 p.3) records 55282 "international organizations" But of that number, 232 are considered as "conventional intergovernmental organizations" (C. F. AMERASINGHE, PRINCIPLES OF THE INTERNATIONAL LAW OF INTERNATIONAL ORGANIZATIONS (Cambridge University Press, 2nd ed. 2005), p. 6.

These international organizations, of course, cannot provide a match for the laws under which their employees might have had protection in their home countries. But they have independently sought to fashion a set of internal laws and regulations by which they have agreed to adhere to the terms of the "contracts of employment" and "terms of employment" under which their staff members are hired. Adherence to the terms of those contracts is not merely acknowledgment of the organization's commitment to the law of contracts. Tribunals thus require adherence to the organization's internal policy statements and statutes as part of the staff member's contract of employment. Robert Gorman, former President of the Administrative Tribunals of the Asian Development Bank and the World Bank, wrote in referring to the World Bank's management, that obligation to adhere to internal rules and regulations also extends to "all persons and bodies making decisions on behalf of the employer as being restrained by legal principles going beyond the self proclaimed rules and regulations of the Bank".¹² Offering of employment under the organization's structure also assumes a commitment to fairness and due process in handling staff disputes over substantive rights. But in addition to requiring the organization to adhere to its written commitments, Tribunals also invoke general principles of law in their effort to ensure that the management of the organization acts fairly in handling the broader scope of workplace rights of its employees. As the WBAT held in its landmark first decision *de Merode*:¹³

"The contract may be the sine qua non of the relationships, but it remains no more than one of a number of elements which collectively establish the ensemble of considerations of employment operative between the Bank and its staff members".

Tribunals look not only at the specific language of the contract of employment, but at the rules and regulations adopted by the organization as providing the context in which such documents are to be interpreted and applied. In addition, the Judges look at the organization's written documents and unwritten practices to assess the reasonable expectations of employees. Judges of Tribunals also bring into consideration their own experiences influenced by their own national legal backgrounds. Added to this mix is also the experience of other Administrative

¹² Robert Gorman, *Development of International Employment Law*, 2004 Comp. Lab. L. & Pol'y J. 427, 429

¹³ *De Merode Case*, WBAT Decision No 1 [1981], para. 18

Tribunals in handling similar cases in other international organizations, which have developed their own set of laws.

Some twenty international organizations maintain their own Administrative Tribunals, including the United Nations, World Bank, Inter-American Development Bank, Asian Development Bank, African Development Bank, International Labor Organization, International Monetary Fund, Pan-American Union. Dozens of others use the Tribunals of either the United Nations or the International Labor Organization.

Appeal Procedures

Administrative Tribunals are created to resolve disputes arising from employment between staff members and the organization. Such claims must be in response to an action of the organization, and usually do not encompass personal disputes between or among employees and/or managerial personnel. Only full time regular staff members may usually file claims, with contract employees often being excluded from access to the machinery. Since the claim is a response to an action taken by the employing organization, it requires the organization to make its final position known before any claim may be made. Accordingly any initial claim by a staff member that an immediate supervisor violated the organization's regulations has no standing as a charge against the organization until the employee has processed that claim through the prescribed administrative review. Once the organization has given its final position, an employee may take a first step of appealing to the organization's Appeal Committee, usually a peer review committee composed of individuals appointed by the organization's head and the organization's Staff Association. That body has different names in different organizations and indeed, somewhat different functions. In the Inter-American Development Bank the body is called the Conciliation Committee, and seeks a mediated resolution of the dispute, without factual findings or rulings as to whether organization laws have been violated. At the International Monetary Fund, its Grievance Committee conducts hearings before a professional arbitrator, also appointed by the head of the organization, who issues a determination as to

whether or not there has been a violation. Most such appeals committees, including the Grievance Committee of the IMF, are viewed as dispassionate bodies established by the organization to make recommendations to the organization's head for resolving the dispute. If that recommendation to the organization head is declined, that decision constitutes the prerequisite for filing a formal appeal to the Administrative Tribunal.

Structure of Administrative Tribunals

Unlike the judiciaries of member states, Administrative Tribunals do not exist as an equal branch of government, yet the credibility of the organizations that create them requires a structure that assures the Tribunal's independence. Each Tribunal functions with administrative support of a Registrar or Executive Secretary, appointed by the organization but whose prime loyalty is to the Tribunal. The Registrar or Secretary handles the processing and scheduling of the cases, and administers the work of the Tribunal between its periodic sittings. The individual or designee may be called upon to research the documentation and citations relied on in the parties' briefs, and to draft a summary of the parties positions, the facts and relevant issues, with reference to the case law on the matters in question as garnered from the prior decisions of that and other Tribunals.

The standard for selecting judges to the Tribunals is set forth in the organizations' governing statutes. They come from various member states, with no two from the same state, and serve for fixed terms of 3 to 6 years, usually with a possibility of renewal. They cannot be employed by the organization for several years before or after serving as judges of the Tribunal. They are usually required to be persons of "high moral character"¹⁴, or of "proven impartiality"¹⁵ and are often lawyers who possess the qualifications for appointment to the highest judicial office or be jurisconsults of recognized competence¹⁶. Many have served as judges of their nations' highest courts, and several also serve as judges on more than one Administrative Tribunal. In most

¹⁴ WBAT Statute, Art IV(1)

¹⁵ OECDAT, Staff Regulations 22(d)

¹⁶ ADBAT Statute Art IV(1), AfDBAT Statute, Art IV (1), IMFAT Statute Art VII (1)(c)

cases, although appointed by the organization, their selection is made with the consultation, and usually approval of the organization's Staff Association¹⁷. English is the primary language of most Tribunals, but some also require fluency in Spanish (Inter-American Development Bank) or French (African Development Bank and Europe based organizations). The membership of the court usually consists of 5 to 7 judges who sit in staggered terms either in panels of three or en banc at their option. The judges opt for en banc sittings when they deem a pending case to be of significant importance.

Case Presentations

Some organizations such as the African Development Bank Administrative Tribunal, the Inter-American Development Bank Administrative Tribunal, The Council of Europe Administrative Tribunal, the NATO Administrative Tribunal and the OAS Administrative Tribunal also provide for oral hearings.¹⁸ They adhere to the process of adversarial hearings with the right of representation in all cases even though there may be consensus on the facts of the Applicant's case. In the case of the AfDBAT, oral hearings are viewed as being consistent with its African tradition roots. In the case of the IDBAT, the prior step of conciliation makes an oral hearing by the Tribunal essential to establishing the facts of the case. Although provision for oral Tribunal hearings may be considered as routine in many organizations, the reality is that most disputes do not focus on factual differences but rather on disputes over the interpretation or application of the law with both parties accepting a set of facts as undisputed. As noted above, in the case of the International Monetary Fund, the fact-finding function is performed at the step below, under the guidance of a professional American arbitrator who may be more experienced than staff members in ascertaining the facts of a case. Comparable arbitration has recently been introduced at the Tribunal of the European Bank for Reconstruction. But factual conflicts are inevitable and their solution may be a prerequisite to the Tribunal's disposition of a claim. Therefore even in organizations without routine adversarial hearings, the Tribunal may call for

¹⁷ In the case of the IDBAT the Board of Executive Directors appoints three judges from a list provided by the Staff Association and four judges from a list drawn up by the President of the Bank. (IDBAT Statute Article III 92)

¹⁸ PROBLEMS OF INTERNATIONAL ADMINISTRATIVE LAW (Nassib G. Ziade, ed., Martin Nijhoff Publisher, 2008), at xvi

such a hearing rather than rely merely on the written submissions of the parties. However, as a matter of practice, most Tribunals decide cases on the basis of written submissions only, consisting of an initial formal Application from the staff member, followed by an Answer from the Organization, a Reply by the Applicant and a Rejoinder by the Organization, all on a fixed statutory schedule.

Once the case is submitted, the usual practice is for a confidential employee of the Tribunal's Secretariat or Registry to research the issues and the law. Usually, the research is presented to a Rapporteur designated by the President of the Tribunal, who writes a draft opinion for discussion among the judges usually by email prior to the regularly scheduled hearing where the final judgment is hammered out. In other cases an expository draft is prepared for the Tribunal as a whole, which resolves and writes its determination on the issues of law during its meetings.

As argued by C. F. Amerasinghe in his *Principles of the Institutional Law of International Organizations*, these tribunals meet all the requirements of "real" courts: their judges are independent, impartial, competent, free of conflicts of interest and possess the requisite integrity.¹⁹

Standards of Decision Making

The controlling standard for judgments rendered by Administrative Tribunals is that management is obligated to exercise its legitimate authority and that its discretion will control unless there is proof of abuse of discretion, improper motive or arbitrary or capricious exercise of its authority. When challenged by a staff member, that exercise of discretion is subject to

¹⁹ *Ibid.*

review by the Tribunal, not for its wisdom, or soundness or unsoundness but for its legality under the statute, laws, rules and regulations of that Organization²⁰.

Although all Tribunals function independently, the evidence shows that they do appear to comply with standards similar to those exercised, not by national or member state courts, but by other Administrative Tribunals, in their rendering of judgments. This is achieved by a practice of referring and adhering to the precepts already announced, published and made available by other Tribunals. Despite the absence of any structure for routine or periodic meetings among judges from various Tribunals for common study or exchange of views on prevailing issues, the access to precedents has helped to formulate a relatively cohesive body of the law of international Tribunals.²¹ All the Tribunals adhere to similar tenets on their review responsibility. Michel Gentot, President of the ILO Administrative Tribunal reflected this in asserting the obligation of judges to censure decisions of their organizations, which were

1. Issued by an authority not competent to act in the situation,
2. Taken in violation of procedural rules,
3. Based on errors of fact or law, or
4. Which constituted an abuse of power or misuse of authority.²²

Nicolas Valticos, Former President of the Administrative Tribunal of the Council of Europe, offered the following principles governing the exercise of discretionary power by the Secretary General of the Council of Europe's Administration: it must always be exercised within the bounds of the law, with respect for due process and for procedures set forth in the organization's rules, and without any abuse of power undertaken to the detriment of the staff

²⁰ ROBERT A. GORMAN, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank* in PROBLEMS OF INTERNATIONAL ADMINISTRATIVE LAW (Nassib G. Ziade, ed., Martin Nijhoff Publisher, 2008), at 218

²¹ Ziade, at 235. The topic of managerial discretion in International Tribunals was the subject a meeting convened to celebrate the 20th Anniversary of the World Bank Administrative Tribunal held in Paris in 2000. The volume reports the complete presentations of the participants. The volume edited by Nassib G Ziade who was then the Executive Secretary of the WBAT. It is essential reading for those interested in the decision making process of Tribunals.

²² Ziade, at 24

member. In disputes arising from personnel management, he asserted, the Tribunal was obligated to ascertain not only whether the contested decision emanated from a competent body, and was taken in a competent manner but whether the procedures were properly followed, whether the administrative authority took all relevant factors into account, whether erroneous conclusions were drawn from the file, or, finally, whether there had been an abuse of power.²³

Tribunals take a somewhat stricter review of the exercise of managerial discretion in cases involving discipline, although falling short of Tribunal substituting its own judgment for that of the management. This tighter scrutiny is justified in reviewing disciplinary actions, according to Amersinghe, because in imposing discipline management is exercising a quasi judicial power to impose sanctions and its decisions are thus of greater import than the usual exercise of managerial discretion.²⁴ Judge Gorman, noted that the Tribunals have gone beyond determining whether the management has complied with its staff rules and requirements for investigation prior to imposing discipline to assure compliance with various due process requirements and have stressed the importance of proportionality in the imposition of discipline – a reasonable fit between the wrongdoing and the severity of the punishment.²⁵

Judgments are based primarily on the written statutes of the Organizations, although general principles of law of a fundamental nature, protection of due process, assurance of equality of treatment, protection against discrimination and a staff member's right to be heard may modify or even trump the written statute²⁶. In rendering their written and reasoned awards the judges have the opportunity and responsibility to assert their independence of the organization and thus uphold the goal of an independent judiciary so essential to the credibility of organization for which they are the final arbiter.

²³ Ziade, at 29-30

²⁴ Ziade, at 38-39

²⁵ Ziade, at 221

²⁶ C.F. AMERASINGHE, THE LAW OF THE INTERNATIONAL CIVIL SERVICE, Vol. 1 (Oxford University Press, 1988), at 156

Remedies, if ordered, may call for specific performance, correction of procedural faults, reinstatement or may require payment of compensation, attorney's fees, etc. as "back pay" and/or "front pay" damages. Inasmuch as the organization establishes the Tribunal, and prescribes its jurisdiction, it may also undertake to impose limits on the authority of the Tribunal to impose penalties. In the case of the Asian Development Bank, if the Administrative Tribunal orders specific performance it is required to provide for an alternative compensatory remedy in the event that the Bank opts not to implement the specific performance²⁷.

Finality of Judgments

The reasoned judgments rendered by Administrative Tribunals are considered to be final and binding. Although dissents are on occasion filed, an effort is made by judges to craft unanimous decisions to provide clear guidance to the organization as to its future conduct and to forestall dissents being exploited to stimulate further litigation. As Judge Gorman reasoned: "...all of us have given great weight to the belief that our judgments have greater force and clarity and that the Tribunal will have greater credibility, if we speak with one voice rather than several"²⁸.

The absence of any appellate body for review of Tribunal decisions places the burden on the organization to enforce the award. Compliance is the prevailing ethos, given the fact that failure to adhere to a Tribunal decision would be considered as demoralizing to staff morale and would embolden those who challenge the independence of tribunals and the concept of privilege and immunity so essential to the survival of the system. There is always an opportunity for rehearing, or indeed revision of a judgment, but it would be before the same body.

²⁷ ADBAT Statute Art X(1) "...At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case..." If the Tribunal in such cases, intends payment of more than three years basic salary it must give reasons for such award.

²⁸ Ziade, at 224

In a related matter there has been concern about excessive filing of claims by staff members both because of the time consumed and cost of processing they impose on the organization's legal offices. A number of organizations have introduced into the statutes governing the Tribunal jurisdiction language to deter vexatious or frivolous claims. Such language does not preclude such proceedings, but usually imposes costs on the applicant if the claim is found to be meritless and frivolous. Although those terms are within the jurisdiction of the Tribunal to define and apply, and although there is little evidence of costs ever being imposed on applicants, the presence of such language in the Tribunal statutes is generally considered to be a sufficient deterrent to the filing of such groundless claims. On the other hand, the mere presence of such threatening language may squelch legitimate claims of wrongdoing and thus may be a deterrent to the more fearful staff members who might well suppress a legitimate claim, out of fear, rather than exercise the rights that are the proclaimed goal of the procedure. The cost of such alleged frivolous claims, may well be the price the organization should shoulder to better protect its integrity, and Tribunals can disallow filing of a claim if they perceive the Application to be frivolous.

The Tribunal's structure has provided a viable and credible process for protecting staff members from suffering abuse or deprivation of proclaimed employment rights at the hands of the organization or its leadership. That in turn has assured staff of protection against arbitrary action as the staff implements the responsibilities of the organization. This relatively young system of international justice has for the most part garnered the respect of national courts, which are properly concerned about the welfare, and treatment of their citizens.

There has been to date relatively little challenge to the independence of the Tribunals and the host organizations are sensitive to the need to remain at arms length in dealing with them.

There have been some cases where national courts have rejected the determination of Tribunals as undeserving of their respect and which have permitted their citizens to invoke national law despite the privilege and immunity clauses through which national governments

have ceded protection of their citizens to the international bodies. The greatest threat to the independent operation of Administrative Tribunals is the potential challenge that they are not indeed "independent" of control by the organizations as the organizations loudly proclaim. Article 6 of the European Convention on Human Rights, which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law", has been used as a benchmark by which to gauge whether Administrative Tribunals do in fact provide a reasonable alternative to protections afforded citizens by their national courts. In 2005, the Labor Court of Brussels set forth the following criteria for evaluating immunity for an organization's internal dispute resolution procedures "1. The impartiality and independence of the decision-making body, 2. The adversarial nature of the judicial proceedings, 3. The authority of the body to issue a final and binding decision, 4. The right of the parties to partake in the procedures, 5. The assurance of public hearings and published awards."²⁹ In that case the Labor Court challenged the independence of the NATO Appeals Board on the grounds that its judges were appointed for a two year term and were thus susceptible to the organization's influence. As noted by then Executive Secretary Ziade at the 25th Anniversary of the WBAT:

... the question of the independence of international administrative tribunals is no longer a purely academic one, or one occasionally raised by tribunal judges and registrars seeking to avoid micromanagement of their procedures by their organizations. The involvement of national courts is now a real and even more pressing challenge to the immunity of organizations and underscores the risks that those organizations take if they neglect the independence of their tribunals³⁰

Hopefully, international organizations that are sensitive to these potential threats to the independence of Administrative Tribunals will consider such adjustments as necessary to keep national courts mounting effective challenges to their very existence. Consideration of staff

²⁹ Crown Council v. Chapman, NATO et al., Labor Court of Brussels, Judgement of 1 February 2005

³⁰ Nassib Ziade, The Independence of International Administrative Tribunals (2005) (paper delivered at the 25th anniversary celebration of the WBAT).

participation in the process of selection of judges, introduction of fixed non renewable terms of 5 to 7 years without prospects of future organization employment, assurance of access to some form of adversarial proceeding through hearings at the Tribunal level or perhaps through arbitration at the step before the Tribunal might help to thwart these challenges. But the challenges are real.

Conclusion

Being beyond the reach of national law enforcement procedures and institutions it could be reasoned that international organizations need not concern themselves with employees' objections to their actions. But recognition of the need for a system that offers opportunity to challenge rules and actions of managers and perhaps even the reasonableness of the rules themselves has led to the establishment of internal dispute resolution systems and internal judicial system to resolve disputes over the employers adherence to its own laws and rules. The appeal of unresolved disputes to the organization's Administrative Tribunal, a true judicial body, brings final and binding resolution of the dispute.

Despite the proliferation of international organizations and the existence of more than two dozen independent Administrative Tribunals, the part time role of their judges and the dearth of process for organizational coordination, they have to date been able to provide an increasingly coherent body of international jurisprudence.

As long as the status quo continues, their effectiveness is pretty secure. However a future in which there is increased scrutiny of the decisions by member states challenging the independence of Tribunals, or greater militancy by unionization of staff, or the creation of more international organizations dealing with new problems of security or criminal prosecution will certainly test the effectiveness and the credibility of an institution that is currently of minimum profile. In that light it might be appropriate to look to procedures for enhanced cooperation and coordination, and perhaps consolidation to most effectively assure that international

organizations meet their proclaimed goals of providing reasonable working conditions under the rule of law.