Problems Relating to Promotion in the Law of the International Civil Service

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Some recent cases decided by the administrative tribunals of the UN, ILO and Council of Europe have raised and addressed certain important general problems relating to promotion in the law of the international civil service. As was pointed out by this writer in 1988, promotion is treated by international administrative law as a discretionary power of the organization which is governed by the general law relating to the exercise of discretionary powers[2]. Thus, a decision in regard to promotion can be reviewed by the tribunal only on the ground generally that there has been a *détournement de pouvoir*, a substantive irregularity or a procedural irregularity. On the other hand, while, pursuant to the general law, a tribunal will not substitute its own judgment as regards promotion for that of the administration of an organization[3], it will not leave promotion to the unfettered discretion of the administration, not only in the face of express written provisions but also by reference to the general principles of international administrative law.

Apart from the specific problems of which the recent cases have treated, there are some other general problems which may be raised conjunctively in connection with promotion in particular. The cases by and large faithfully implement the general principles already established but they are interesting because they also develop and refine these principles in relation to promotion which is a subject of primary concern to international civil servants and organizations.

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[2] C.F. Amerasinghe, The Law of the International Civil Service (1988), 913–932.

[3] *Ibid.*, 265–266.

The success and efficiency of the international civil service depends to a considerable extent on the confidence which most staff members of international organizations in general have in that they will be reasonably assured of a career in the international civil service. This requires that reasonable expectations of promotion must be protected though not necessarily guaranteed. A service that does not extend prospects of promotion based on fair and just principles, both substantive and procedural, cannot be efficient and prosper. Were promotion to be a matter left entirely to the whims and fancies of the administration of an organization it could be expected that staff morale would be extremely low, the efficient functioning of the service would be seriously affected and the advancement of the objectives of the organization would eventually be jeopardized. It is, thus, understandable that the legal principles governing promotion developed by international administrative tribunals have focused on controlling the exercise of discretion in this area by the administrations of international organizations, though even so they will not substitute their judgment for that of the administrations in the matter of promotion.

It is true that a good deal of the protection given to staff members in regard to promotion flows from the written law of the organization, which obviously reflects the concern both of the administrations and of the staff in having a system and regime of promotion which would foster a satisfied and dedicated service by providing safeguards and fairly clear guidelines. Thus, it is not surprising that most institutions have somewhat elaborate staff regulations and rules on promotion. UN Staff Regulations 4.2 and 4.4 and Staff Rule 104.14[4], Principle of Employment 5 and Staff Rule 5.05 of the World Bank[5], and Art.21 and Annex II, Arts.14–16, of the Staff Regulations of the Council of Europe[6] are good examples of such written provisions. What these provisions do is to set up a distinct framework within which promotion decisions must be taken. They establish certain basic requirements. There is, however, a great deal that is left unsaid and this is where tribunals have stepped in to fill the gaps and flesh out the legal provisions that protect both staff members and the administrations, staff members from improper treatment and administrations from the charge of arbitrariness und unfairness[7].

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[4] See *ibid.*, Appendix V, 1053, 1083ff.

[5] See The World Bank/IFC Staff Manual.

[6] See Amerasinghe (note 2), Appendix, 1147, 1166ff.

[7] Amerasinghe (note 2), 909ff.

The recent cases show an adherence to the general principles that have been held to be applicable to the implementation and interpretation of the written law. In *El Boustani (No.3)*[8] the ILOAT was confronted with arguments contesting a promotion decision adversely affecting the applicant on the grounds of error of law, misappraisal of facts, abuse of authority, absence of due process in general, failure to state reasons and prejudice. The tribunal examined each and every one of these arguments, not rejecting them as bad law but on the facts. The case is a good example of how tribunals do and should approach promotion decisions in terms of the legal grounds on which such decisions may be questioned. The issue in general always is whether there has been an abuse of discretion. In that case the ILOAT recognized the discretionary power of the administration to promote or not to promote but reaffirmed not only that it would review the exercise of the power but could apply general principles of law in so doing. It said:

> "According to the UNESCO Staff Regulations and the general principles that govern the international civil service the Director-General has wide discretion to promote staff in the interests of the Organization he heads. But his authority is not unqualified, and the Tribunal will review his decisions, short of interfering in his actual management. It will consider whether a decision shows any formal or procedural flaw or a mistake of law or fact, whether any essential fact was overlooked or any mistaken conclusion drawn from the evidence, or whether there was abuse of authority"[9].

These general statements accurately reflect how promotion decisions are treated not only by the ILOAT but in fact by all tribunals. There could be little dispute as to the validity of the general approach. Other tribunals may not usually state the applicable general principles in such terms, but these are, nevertheless, the principles that are generally followed in practice.

In *Ali-Ali*[10], while the UNAT did not contest the well recognized general principle that a staff member has in general no r i g h t to promotion, it held, that in the circumstances of the case, because a preliminary decision to promote the applicant had, unlawfully and on the basis of an Information Circular, been blocked by his department at the end of the process, the applicant should be treated as if he had had a right to be promoted and decided that the applicant was entitled to damages on the

[8] ILOAT Judgment No.958 (1989) (UNESCO).
[9] *Ibid.*, at 6, para.3.
[10] UNAT Judgment No.411 (1988), UN Doc. AT/DEC/411.

basis that he should have been promoted and had not been so promoted. The Tribunal said:

> "The Tribunal notes first that pursuant to article IV of the Staff Regulations and chapter IV of the Staff Rules, promotions are subject to the discretion of the Secretary-General. According to this principle, staff members have no automatic right to promotion, or to promotion at a particular time or a particular post.
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> While recognizing this principle, the Tribunal notes also that staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in article 104.14 of the Staff Rules and related secretariat issuances. These rules and procedures, while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member.
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> The Tribunal considers that these rules and procedures are part of the conditions of service of staff members, and therefore they should be respected, correctly interpreted and properly applied, as long as they are in force"[11].

The applicant had been included in the Principal Officer Promotion Register for 1984 after a complicated process. It was found that the applicant had more than satisfied the standards required for promotion. In April 1985 the Secretary-General of the UN decided that the applicant's promotion should be implemented, a decision taken under the Staff Regulations and Staff Rules. Subsequently, the Director of the applicant's department did not recommend the promotion of the applicant, relying on an Information Circular which referred to "departmental wishes" as being relevant. The tribunal took the view that resort to "departmental wishes" as a ground for not promoting the applicant in the circumstances at the very end of the promotion process was improper in terms of the procedure laid down by the written law. The case clearly supports the proposition that certain flagrant abuses of the procedural law could result in the staff member being treated as if he had a right to a promotion. But what this development in the law indicates is that, short of a promotion being overturned after it has been made, there may be circumstances in which the promotion process has reached a stage at which the applicant becomes entitled to be promoted and must be accorded his due rights. The circumstances may be severely limited in which this situation could arise in a given case but their existence must be noted.

There were two significant cases, both decided by the UNAT, in which promises concerning promotion made to staff members were in

[11] *Ibid.*, at 10.

issue. The cases deserve attention because the question may be raised how far a promise to a staff member could create a right to promotion, particularly where such a promise may not be as such envisaged by the written law. In neither case was there a promise clearly to promote but, nevertheless, the promises involved were held to give rise to certain rights, if not the clear right to a promotion. It would seem that such promises are regarded as giving rise to rights for staff members under general principles of law as part of their contractual entitlements. What is important is that a promise of this kind becomes actionable, if clearly made, even though the written law does not provide for this. In *Hrubant and Others*[12] the administration had entered into a written agreement with staff representatives in a certain section of the UN that promotion would be on the basis of seniority and satisfactory performance. The promotion register for 1981 did not have the names of the applicants who apparently qualified under this agreement. The UNAT held that the applicants had a right to have their names on the register for that year by virtue of the agreement and awarded them compensation for the delay caused in their promotions as a result of their names not having been on the register. Clearly in this case no promise had been made of individual or group promotions but there was an agreement as to the criteria on which promotions would be made. Failure to adhere to those criteria on the part of the administration was held to have been a violation of the rights of the staff members, though it could not be said that a right to promotion as such had been specifically violated. What had been violated was the right to be considered for promotion in competition with others. In *Banerjee*[13] a promise was made to the applicant who was hired at the level of D2 that he would be promoted to the level of Assistant Secretary-General "as soon as possible". It was proved that there was a promise, although there could not be said to have been a firm commitment to promote the applicant. The UNAT found that the promise gave the applicant certain rights though not an assurance of promotion. Because the Secretary-General had not taken concrete action diligently to implement the promise given by making an effort to promote the applicant either in his current post or by offering one of the new posts created by the General Assembly, although the applicant's Under Secretary-General had recommended his promotion on several occasions, the tribunal held that the applicant's rights had been violated. The tribunal did not hold that the

[12] UNAT Judgment No.389 (1987), UN Doc. AT/DEC/389.
[13] UNAT Judgment No.344 (1985), UN Doc. AT/DEC/344.

applicant had an absolute right to promotion, as is evidenced by the award of $ 2000 as compensation for the moral injury, rather than the damages incurred by him by not being promoted, but took the view evidently that the applicant's right to have the best efforts made to find him a vacancy to which he could have been promoted or to promote him in his position had not been respected.

A corollary of these decisions is that in circumstances in which a staff member is clearly given a promise by a competent authority that he will be promoted, this would give him a right to be promoted, because, as in the two decided cases, the UNAT would recognize that a promise of this kind does give rise to actionable rights, even though the written law did not envisage it. A direct contractual understanding could, thus, take precedence over the written law. This is certainly conceivable without creating problems where the written law is silent and is not contradicted by such a promise. However, the question does arise whether the situation would be different where the written law specifically does not permit the situation created by the promise. There would then be a conflict between the written law and a contractual arrangement. The problem concerns the wider question of the relationship between the sources of international administrative law. The opinion may be ventured that in view of the contractual nature of the employment relationship in the case of the UN and most organizations, the contractual understanding would in this case take precedence over statutory provisions. However, this is an issue which may require further analysis and consideration by tribunals.

There have been some cases decided by the ILOAT in which the issues of discrimination and inequality of treatment have been raised. In most of these cases the tribunal had held that no discrimination or inequality of treatment had taken place in the implementation of the promotion procedure which was designated by the written law because the written law made distinctions between groups which were not discriminatory or in the implementation of the promotion procedure differences had been made which were acceptable[14]. On the other hand, the same tribunal had held that a procedure which resulted in a group being discriminated against was not acceptable even though the express terms of the Staff

[14] See Wackerlin, ILOAT Judgment No.674 (1985) (EPO); West (No.3), ILOAT Judgment No.734 (1986) (EPO); Benze (No.3), ILOAT Judgment No.759 (1986) (EPO); Bertolotti, ILOAT Judgment No.870 (1987) (ILO); Hunter (No.2), ILOAT Judgment No.908 (1988) (EPO).

Rules had not been violated. In *Ilomechina*[15] the notice of a vacancy reached the field staff much later than the staff at headquarters with the result that the former had virtually no time (only one or two days) to consider whether to apply for the vacancy before the deadline for applications, whereas the latter had much longer. The ILOAT held that, while the letter of the relevant Staff Rule had been respected, the principle of equality of treatment in the light of which the Staff Rule should be interpreted overrode the express provisions of the Staff Rule, so that, since the field staff were unfairly prejudiced by the procedure adopted, their right to fair treatment in the promotion process had been violated. However, because there was no guarantee that the applicant would have been selected for promotion to the higher post, he had no right to a promotion which could have been violated. Yet, had he applied for the position properly, he might have had a better chance in future competitions. Moreover, his improper exclusion had caused him a moral injury because he had not received fair consideration for the promotion. The tribunal consequently ordered that he be compensated with the payment of $ 2000. These damages were clearly not for the deprivation of the right to promotion but to fair treatment in the promotion process.

The UNAT faced the same issue of discrimination and unfair treatment in *Upadhya*[16]. There an internal panel had found that the applicant had been discriminated against but no remedial action had been taken to consider him for promotion. The tribunal agreed that there had been discrimination but pointed out that the applicant had no guarantee that he would have been promoted, had the appropriate action been taken. Hence, he could not be compensated as if he had been deprived of a promotion to which clearly he had no right, which meant that he could not have back pay or adjustment of seniority and such remedies. He was, nevertheless, awarded a substantial sum of $ 12000 for the injury caused him.

While tribunals take seriously discrimination, prejudice and inequality of treatment in the process of promotion and are likely to find in favor of applicants where these defects are proved to exist, they will not regard the applicants as having had a right to promotion. It is rather a right to be treated fairly in the process of promotion that has been recognized. In most organizations these irregularities do not depend on the express provisions of the written law which must be read subject to the principle that

[15] ILOAT Judgment No.729 (1986) (FAO).
[16] UNAT Judgment No.401 (1987), UN Doc. AT/DEC/401.

improper motives, discrimination or inequality of treatment can in no circumstances be justified, presumably, even if the written law implicitly permits or does not prohibit such irregularities[17]. In the case of the UNAT the position is less clear as regards legislative provisions enacted by the General Assembly. This question will be discussed below.

There can be no question that procedures followed in violation of the written law would affect the rights of staff members in respect of promotion. The principle has been recognized generally in two recent cases decided by the UNAT[18]. That tribunal has awarded damages for the moral injury caused by the non-observance of the proper procedures but has not ordered specific performance, on the basis that a right to promotion had been ignored, or annulled the promotion decision. The Appeals Board of the Council of Europe has, on the other hand, while not recognizing that there is a right to promotion, annulled the decision to promote another staff member where the procedure laid down by the Staff Regulations had not been followed with the result that the applicant had not been given the promotion but someone else had[19]. Annulment in this way does not result in giving the affected staff member a right to promotion or the promotion. It requires that the decision be taken again, thus giving the affected staff member another opportunity to be considered for the promotion.

There were some important cases decided by the UNAT in the recent past which turned on error of law or violation of procedure (or even perhaps discrimination) by the administration. In *Estabial*[20] a post had been overtly reserved to be filled by a francophone African. As a result the applicant had not even been considered for the post, because he was not a francophone African, regardless of his qualifications and experience. The tribunal held that the procedure of reserving the promotion for a particular geographical group was not permitted by Art.101(3) of the UN Charter nor by Staff Regulation 4.4 which states without qualification that the fullest regard be had in filling positions to the requisite qualifications and experience of persons already in service. Art.101(3) of the Charter, while referring to geographical distribution as a consideration which may be taken into account, did not give that element priority over

[17] See Amerasinghe (note 2), 310ff.

[18] See Elle, UNAT Judgment No.375 (1986), UN Doc. AT/DEC/375, and Gross, UNAT Judgment No.412 (1988), UN Doc. AT/DEC/412.

[19] Appeals Board of the Council of Europe Decisions Nos.115–117 (1986).

[20] UNAT Judgment No.310 (1983), UN Doc. AT/DEC/310.

"the highest standards of efficiency, competence and integrity" to which also reference was made in that Article as the basis for employment. Further, Staff Regulation 4.2 required in line with the Charter that the paramount consideration in the promotion of staff should be the necessity for securing the highest standards of efficiency, competence and integrity. The tribunal said:

> "XIII. Even if the applicant's candidature had, as the Respondent maintains, been examined either formally or informally, which in the tribunal's view was not the case, the decision to rule out the Applicant's candidature would have violated the Staff Regulations, because it appears, that in filling the vacant post of Director of Division of Recruitment the Secretary-General tied his choice in advance by limiting candidatures to nationals of French-speaking African States.
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> XIV. In so doing, he believed that he was applying correctly the last sentence of Art.101, paragraph 3, of the United Nations Charter, which provides that:
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> 'Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible',
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> a provision which is reiterated in the last sentence of Staff Regulation 4.2. The tribunal attaches very great importance to these provisions. But while they allow the Secretary-General to invite candidatures in order to implement them, he cannot refuse to consider the candidatures of United Nations staff members for a vacant post"[21].

In regard to the principal provisions of Art.101(3) of the Charter and Staff Regulation 4.2 the tribunal said:

> "It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter in the interests of the service"[22].

In this case the irregularity was clearly regarded as an error of law, though the issue could also have been regarded as one of discrimination. While the administrative decision to fill the position was left untouched, the applicant was awarded two months salary as compensation for the injury caused him, it being noted once more that he had no right to promotion as such.

In *Williamson*[23] the applicant claimed that there had been no advertisement of a vacancy at the D1 level in UNCTAD which by the admission

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[21] *Ibid.*, at 7–8, paras.XII and XIV.

[22] *Ibid.*, at 8, para.XIV.

[23] UNAT Judgment No.362 (1986), UN Doc. AT/DEC/362.

of the respondent had been reserved for a national of an under-represented or non-represented country and for which the applicant, a P5 officer of British nationality, considered himself eligible. The vacancy was the Director's position in the same Division as the one in which the applicant worked as a Chief of Section. The tribunal referred to *Estabial*, Staff Regulation 4.4 and two resolutions of the General Assembly – 33/143 of December 20, 1978, and 35/210 of December 17, 1980 – which really have the same status legally as a staff regulation and which required that all vacancies should be announced as soon as they were known.

Although the respondent contended that a waiver of the announcement requirement had been sought, the tribunal held that the General Assembly had not made provision for such waivers so that a waiver could not be permitted. As a consequence, it was held that the position should have been advertised which would have given the applicant an opportunity to apply for it. The procedure adopted by the respondent in seeking candidates from a single under-represented State and appointing one of them was held to be irregular by virtue of the absence of advertisement of the post. This irregularity and the failure to consider the applicant for the post, thus, resulted in an injury to the applicant, because his statutory right to have the fullest regard paid to his candidature had not been respected. The tribunal found that in the circumstances there had been a technical violation of the applicant's rights, presumably not because he had a right to a promotion but only because his right to be considered had not been respected, and awarded $ 1000 in compensation.

While the law may have been correctly stated and applied in this case, the tribunal did advert to the fact that the applicant knew of the vacancy and could have taken measures to submit his application for the position[24], which may have affected the amount of compensation awarded. At the same time the tribunal made it clear that:

> "(S)ince the staff member has a statutory right to have 'the fullest regard' given to his candidature, the burden of establishing the Administration's failure to consider the candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honored in good faith ..."[25].

The tribunal made a third point *obiter*:

> "Moreover, the Tribunal does not consider that any vacancy announcement

[24] *Ibid.*, at 9–10, para.VI.
[25] *Ibid.*, at 10, para.VII.

would be required in the entirely different case where a post is reserved exclusively for internal promotion of a staff member who had the requisite qualifications and experience"[26].

While this holding was not necessary for the decision, its legitimacy may be questioned in view of the resolutions of the General Assembly and of the Staff Regulations.

The next case in which the issue was canvassed was *Abbas*[27]. There the applicant contended that he had not been considered for promotion to a D2 position as head of the Division in which he was the deputy head at level D1. The post had not been advertised. The tribunal reaffirmed its statements made in *Williamson* and *Estabial* that vacancies should be advertised but added that the Secretary-General had the authority to indicate how he would eventually wish to fill the vacancy – by outside recruitment, by interior promotion or transfer or on a replacement basis of staff members working on secondment[28]. It also reiterated the view that, if the applicant had received adequate consideration, the lack of advertisement would have been immaterial, but confirmed what it had said in *Williamson*, namely that the burden of proving that adequate consideration had been given to an eligible applicant was on the respondent[29]. In the outcome the tribunal found the standard of "fullest regard" in good faith required by the written law had not been met and awarded the applicant $ 5000 for the violation of these rights.

Finally, in *Dauchy*[30] the tribunal was confronted with the question whether the applicant had been fully and fairly considered for the post at level D2 of Director of the Codification Division. She was the Deputy Director of the Division at level D1 and had already had a brilliant career in the UN. The Embassy of the U.S.S.R. had submitted a list of three candidates with their curricula vitae and the Secretary-General chose one of them to fill the position which had been previously held by a Soviet national. The tribunal cited General Assembly resolution 35/210, section I, para.4, which requested the Secretary-General

«(D)e continuer à permettre de remplacer des fonctionnaires par des candidats de la même nationalité pendant une période de durée raisonnable dans le cas de postes qui étaient occupés par des fonctionnaires nommés pour une durée déterminée, lorsqu'une telle mesure se révèle nécessaire pour que la re-

[26] *Ibid.*, at 9, para.V.
[27] UNAT Judgment No.447 (1989), UN Doc. AT/DEC/447.
[28] *Ibid.*, at 9, para.VII.
[29] *Ibid.*, at 9–10, para.VII.
[30] UNAT Judgment No.492 (1990), UN Doc. AT/DEC/492.

présentation des Etats Membres dont les ressortissants servent principalement l'Organisation en vertu d'engagements de durée ne soit pas modifiée de façon défavorable»[31].

On the basis of this resolution the tribunal found that the Secretary-General was justified in appointing a Soviet national to the position, without being bound to do so[32]. Thus, this provision was regarded as being permissive rather than obligatory. Further, the tribunal noted that the Legal Counsel of the United Nations had been aware of the applicant's interest in the post and had duly considered the possibility of appointing her but had concluded that it was in the interest of the United Nations to appoint a Soviet national[33]. However, it found that the promotion of the applicant was necessarily prevented by «le jeu même du processus de sélection»[34], and concluded that

> «Dans les circonstances très particulières de l'affaire, la prise en considération très sérieuse et faite avec entière bonne foi, de la candidature de la requérante ne pouvait avoir d'efficacité. Elle ne pouvait aboutir. Tout s'est donc passé comme si la prise en considération de la candidature de la requérante n'avait pas eu lieu»[35].

In the result the tribunal found that the respondent was in breach of the principles established in the earlier cases, *Estabial*, *Williamson* and *Abbas*, and awarded the applicant $ 5000 as moral damages.

The interpretation given to the written law in these cases, the manner in which it was applied and their consequences merit deeper examination. First, of importance is the view of the UNAT that under written law what was required was not necessarily advertisement of vacancies *per se* but the recognition of the applicant's right to have the fullest regard paid to his or her candidature. This was so, although the written law apparently expressly referred to the announcement of vacancies. The administration was really under a duty only seriously to consider the applicant's candidature in good faith. Clearly, this applied only to eligible candidates. It would be unacceptable that an accountant, for instance, could claim that he was not considered for a post requiring legal qualifications just as much as it would be unimaginable to require the administration to consider a very junior legal officer for a senior legal post which required considerable professional experience. On the other hand, the express re-

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[31] *Ibid.*, at 8, para.VIII.
[32] *Ibid.*, at 9, para.IX.
[33] *Ibid.*, at 10, paras.XIII–XIV.
[34] *Ibid.*, at 9, para.XI.
[35] *Ibid.*, at 10, para.XV.

quirement of advertisement would seem to have been regarded as a means to an end and not an end in itself. It was included to facilitate the fullest consideration of eligible candidates. Its disregard did not always have the result in a material violation of the procedural law.

Second, while the UN Charter and other written law required that geographical distribution be a factor to be considered, it was not the paramount consideration or so the tribunal said. What was paramount was the efficiency and integrity of the service. But this did not lead to the conclusion, in the view of the tribunal, that certain posts could not be reserved for nationals of a particular region or for a particular category of staff member (e.g., seconded), insofar as it said that an indication could be given that the posts were in effect so reserved (*Abbas*). This view would seem to be a tortuous interpretation of the Charter and the written law. It is difficult to reconcile it with the expressed words of the Charter and the Staff Regulations. While it may be expressed and taken into account that a particular group of candidates may be preferred, it would be improper, on a proper interpretation of the Charter to imply that posts are virtually reserved for a particular group. In fact the tribunal's view in *Abbas* seems implicitly to be inconsistent with the statements made in *Estabial* and the effect of *Dauchy* which were more in line with the view expressed here. On the other hand, the purport of General Assembly resolution 35/210 which was quoted in *Dauchy* is to support the view taken in *Abbas*, insofar as it called upon the administration to consider appropriate virtually reserving posts for certain nationalities. In this respect the General Assembly resolution is in conflict with the provisions of the UN Charter which was perhaps rightly interpreted in *Estabial*. The General Assembly may amend or modify the Staff Regulations (4.2 and 4.4) but its resolutions certainly could not take precedence over the Charter.

Third, the tribunal did state *obiter* that advertisement and, therefore, consideration of other candidates was not necessary where the administration intended to promote to a vacant post a single internal candidate whose qualifications and experience were adequate (*Williamson*). This proposition is also difficult to explain in terms of the requirements of the written law, particularly the General Assembly resolutions and Staff Regulation 4.4. While it is conceivable that the administration may have a preference for such a person and in fact in the outcome appointed such a person, it would not be appropriate in view of the written law to permit an appointment without fair consideration of other eligible candidates. Strictly, it would be incumbent on the administration to give the "fullest

consideration" to any qualified candidates from within the service. The primary requirement that the efficiency of the service must be considered which is reflected both in the Staff Regulations and the UN Charter precludes the correctness of the statement in *Williamson*. There is always a duty laid on the Secretary-General and the administration to seek the best interests of the organization based on the efficiency of the service.

A more serious problem is created in terms of discrimination by the approach taken by the tribunal and the General Assembly to the "exclusive reservation" of posts for particular nationalities or groups. What the tribunal, apparently acquiescing in the resolve of the General Assembly, has said in *Abbas* (possibly contradicted by the results in *Dauchy*) is that the initial reservation of posts for particular nationalities may be lawful, provided the motions of a competition among eligible candidates, including those from within the service, had been gone through. As already pointed out, this seems to be contrary to the provisions of the Charter. In any event the view permits a discriminatory practice based on nationality or some other criterion[36]. The issue then is why should not the UNAT declare unenforceable and improper the application of the resolution of the General Assembly or the interpretation of it contrary to the Charter or, even if the Charter were silent, to a general principle of law prohibiting discrimination which is for all practical purposes *jus cogens* and must be recognized as a principle of international law which cannot be overriden by any written law. The question raised here resuscitates shades of *Mullan*[37] in which it has been said that the UNAT refused to contemplate in effect overriding the General Assembly for any reason. The present writer had discussed this case elsewhere and suggested the conclusion that the case did not have this effect[38]. Indeed, other tribunals such as the WBAT, the Appeals Board of the Council of Europe and the ILOAT have assumed jurisdiction to declare invalid the application of the acts of the highest legislative bodies of their relevant institutions on the appropriate grounds[39]. There is no reason why the UNAT could not do likewise in its capacity as a judicial tribunal with jurisdiction to apply the internal law of the UN, which includes the Charter and the peremptory norms of international law.

However, the solution to the problem may be simpler. The view could

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[36] See Amerasinghe (note 2), 306ff.
[37] UNAT Judgment No.162 (1972), JUNAT Nos.114–166, 387.
[38] Amerasinghe (note 2), 13 and 313ff.
[39] *Ibid.*, 13ff.

easily be taken by the UNAT that the past practice of the UN, as approved by it in *Abbas*, of practically reserving posts for nationalities or regions etc. does not reflect the correct interpretation of General Assembly resolution 35/210 which must be read in the light of the provisions of Art.101(3) of the Charter and the peremptory norms of international law relating to discrimination. In short that resolution while permitting a practice and not making it obligatory approved a version of the practice which would effectively endorse not the reservation of posts as such, but only an indication of a preferred modality of filling posts which could be modified in the light of considering the eligible candidates pursuant to the Charter and the Staff Regulations. This would mean that in practice there must be a serious and real competition carried out in good faith and that this would be subject to proof. The argument may be made that this is virtually the effect of *Dauchy* (and *Williamson*), though the UNAT did not articulate its conclusions in this way.

What has been said above applies to positions which are subject to the regime of promotion according to the international law of the organization. It clearly does not apply to, for instance, the highest positions which are filled by election, such as the Secretary Generalship of the UN, the Presidency of the World Bank or the Managing Directorate of the IMF. The considerations applicable to these would be different, though it is arguable that the officers or members of an organization must always act in accordance with peremptory norms of international law and the provisions of the constituent instruments of the institutions, which are to be interpreted in the light of these peremptory norms. The content of peremptory norms in this connection may, however, be slightly different from that of those which apply to other positions in an organization.