THE SECURITY OF LOCALLY RECRUITED UNITED NATIONS STAFF

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INTRODUCTION

For many years, international organisations and notably those of the United Nations system[1] have been confronted with issues concerning the security of their staff. Owing to the fundamental problems that exist, it is tempting to use the word "insecurity" instead. In particular, this is highlighted by the current framework that governs the treatment of locally recruited United Nations staff. This article will therefore discuss and analyse their position *vis-á-vis* their employer organisation.

THE LEGISLATIVE FRAMEWORK

After the Cold War ended in the 1970s and 1980s, several repercussions were felt,[2] including anarchy and disorder in many third world countries. This affected the international community as a whole, especially the security of its international administrative staff. In the 1980s, this issue was no longer settled exclusively within each organisation. Instead, it became an item for collective action that fell within the framework of the Administrative Coordination Committee ("ACC"). However, this body dealt with questions of principle only and the individual cases that arose were dealt with internally within their respective organisations.

Generally speaking, United Nations organs and agencies have moved to strengthen their positions on the safety and security of their staff. They have passed resolutions[3] and organised meetings to discuss the subject.[4]

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[1] Note the numerous reports of successive United Nations Secretary-Generals that deplored this situation and gave the list of the victims.

[2] Bayard T, Arrestations et enlevements de fonctionnaires des Nations Unies (1982, Rev intem De sc Adm) 9 et seq.

[3] See for example the resolution of 12 December 1997, adopting the report of the Third Committee A/52/644/Add2, A/RES/52/126 distributed on 23 February 1998. See also the resolution adopted by the ACC in Geneva on 27 March 1998.

[4] For example the New York "Summit" of 25 February 1998 and the inter-agency meeting in Montreal, 17-19 March 1998.

Non-government organisations have adopted another course of action, creating bodies such as the Federation of International Civil Servants Associations ("FICSA"), a body that plays a leading role in this cause.[5]

Additionally, United Nations organisations have adopted normative measures. For instance, the General Assembly has adopted two general conventions on privileges and immunities, the 1946 Convention on the Privileges and Immunities of the United Nations ("1946 Convention")[6] and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies ("1947 Convention"). In 1994 the General Assembly adopted a third convention, known as the Convention on the Security of United Nations Staff and Associated Personnel ("1994 Convention").[7] This Convention reflects the greater interest of states in the security of staff engaged in a United Nations "operation", be it coercive or otherwise, but in this sense, the Convention is not of general application. Pursuant to Article 1(a)(ii), the Convention applies to:

> [p]ersons engaged by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation; and other officials and experts on mission of the United Nations or its specialised agencies or the IAEA who are present in an official capacity in the area where a United Nations operation is being conducted.

Further, Article 1(b) applies to "associated personnel", persons who are assigned by a government or an inter-governmental organisation, and persons who are engaged by the Secretary-General or by a specialised agency such as the International Atomic Energy Agency.

The Conventions have not been accepted by all states, which is not unusual with regard to general multilateral conventions and diplomatic instruments.

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[5] See the 1984 Colloquium held in Aix-en-Provence by the French Society of International Law on "Les agents internationaux" (1985, Editions Pedone, Paris), especially the report by Professor P Tavernier at 325 et seq; Meron, "Protection of international civil servants" [1981] Recueil des cours de l'Académie de droit international 285-384.

[6] For the Australian position, refer [1949] Australian Treaty Series No 3; 1963 International Organisations (Privileges and Immunities) Act (Cth).

[7] For the text of the Convention, see [1995] International Legal Materials 482 et seq. For a commentary on the Convention, see Bloom, "Protecting peacekeepers: the Convention on the Safety of United Nations and Associated Personnel" [1995] American Journal of International Law 621.

For example, France is not a party to the 1947 Convention and the 1994 Convention is taking a relatively long time to enter into force. Although 43 states have signed the 1994 Convention, it has attracted approximately 14 ratifications only to date, well short of the 22 required to enter into force.[8]

There are treaty provisions that oblige a host state to protect international civil servants against any personal threat. The provisions are found in a number of instruments such as multilateral conventions and headquarters or bilateral agreements that are concluded between an organisation and a host state on whose territory the organisation functions. Sometimes they are incorporated into the national laws of states[9] when the states consider themselves to be separately obliged to provide such protection.[10] They are found in the internal laws of organisations and in some cases the organisations have introduced statutory protection within their existing legal framework. An example is the United Nations Security Handbook ("Security Handbook") published on 1 January 1995.[11]

STATE OF THE LAW

In the first instance, it is generally recognised that locally recruited staff members do not benefit from the privileges and immunities that are normally accorded to international administrative servants. This is especially so when it is shown that they are paid by the hour,[12] in accordance with General Assembly Resolution 76(I). This resolution provides that staff who are "recruited locally *and* [those] paid by the hour"[13] are not covered by the provisions of the 1946 Convention. The

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[8] It is true that in the case in question, the situation can be explained by the reluctance to accept tax immunities, which seem too broad.

[9] Note the example of the Swiss Criminal Code cited in Bedjaoui M, Fonction publique internationale et influences nationales (1958, Editions Pedone, Paris) 218. For Australia, refer (1963) International Organisations (Privileges and Immunities) Act (Cth).

[10] See the examples taken from French practice in Kiss AC, Repertoire de la pratique francaise en matiere de droit international public (1962, Centre National de la Recherche Scientifique, Paris) Nos 194, 195, 811 and 831.

[11] The subtitle of the Handbook is "System-wide Arrangements for the Protection of United Nations Personnel and Property in the Field". United Nation organisations agreed on the Handbook during a special inter-agency meeting on security held in Geneva in June 1991. The Handbook was approved by the ACC soon after. A revision, prepared in the same way, was approved by the ACC in October 1994.

[12] See [1975] United Nations Juridical Yearbook, Opinion No 23.

[13] Italics added.

provision in the Security Handbook on the right to security is detrimental to locally recruited staff. The reason being that the right is based on nationality and residence. A discriminatory effect ensues, something that was unforeseen at the time the resolution was passed. Furthermore, because this provision was made pursuant to a General Assembly resolution, the Secretary-General or a Director of an organisation cannot modify the situation created.

Section 73 of the Security Handbook stipulates that all provisions "which relate to relocation/evacuation from the host state for security reasons apply only *in the most exceptional cases to locally recruited staff members*".[14] The restrictive nature of this provision is emphasised by the use of the term "most exceptional". It is applied to locally recruited staff only in a situation "in which their security is endangered, or their property is lost or damaged as a direct consequence of their employment by United Nations organisations".[15]

The procedure involved is onerous because it presupposes not only a "recommendation" that has to be formulated by the Designated Official of the organisation but the recommendation itself has to be approved by the United Nations Security Coordinator as well as the Secretary-General. This appears to be largely arbitrary because it is not possible to give an *a priori* definition to the expression, "the most exceptional cases". In practice, this has resulted in uncertainty, a situation that has caused concern to locally recruited staff especially.[16]

THE ILLEGALITY[17]

The restrictive position described above results in decreased legal responsibilities and cost savings whenever an organisation recruits local staff. In practice, the restrictive nature of section 73 of the Security Handbook ensures that consideration will be given only to claims that fall within the meaning of *"force majeure"*. This is so despite the argument that the maxim *nemo auditur propiam turpitudinem allegens* supports the

[14] Ibid.
[15] Security Handbook Section 73.
[16] Over the years, FICSA has denounced the practice as discriminatory and illegal.
[17] This section will deal with the legal aspects and not the financial implications and logistical problems that are raised in the ACC: see Note from the Office of the United Nations Security Coordinator, ACC/1998/CCAQ-HL/3, 7 January 1998, sections 5-9.

view that organisations cannot enter into treaties that aim to set aside general principles of law governing international responsibility.[18]

On the other hand, if the *nemo auditur* argument is accepted, the attempt by the Security Handbook to vary the contractual right to repatriation under section 11 (on security) is illegal, on the basis that is has not supported or implemented the general right of functional protection under international law. At this point, a distinction should be drawn between the right to repatriation, which is given to internationally recruited staff, and the right to evacuation, which is attached to an individual staff member's right to security, an adjunct of functional protection.

RIGHT TO FUNCTIONAL PROTECTION

The right to functional protection means that civil servants should be protected by their employer organisation when they perform duties in the course of their employment. The right was recognised by the International Court of Justice in the *Reparation for Injuries case*[19] where it found expression as a general principle of law. The Court said this of the United Nations:

> Upon examination of the character of the functions entrusted to the Organisation and of the nature of the missions of its agents, it becomes clear that the capacity of the Organisation to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[20]

The right has been formally recognised by the statutes of other international organisations, such as the European Organisation for Nuclear Research,[21] the European Patent Office and the European Community. The Court recognised the principle's wider application when it deemed the

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[18] See Opinion of the Secretary-General's Legal Counsel dated 21 January 1983. It provides an opinion on section 73 and the state of the rules in force. The Opinion, referred to in the Security Handbook, suggests that if there is any responsibility, it is moral rather than legal in nature.

[19] [1949] International Court of Justice Reports 174.

[20] See ibid, and more particularly Green LC, International Law through the Cases (1978, 4th edition, Carswell Company Limited, Toronto) 151.

[21] More commonly known as CERN (Conceil Européen pour la Researche nucléaire).

principle implicitly applicable to experts on mission, as seen in the *Masilu case.*[22]

If an international legal dispute arises, the Court or an international administrative tribunal will usually determine the matter.[23] The question of functional protection will be raised if the organisation concerned defaults in its responsibilities towards its employee. Functional protection requires the organisation to exercise due diligence at all times especially when the employee's very existence is threatened. It is for this reason that the right to protection is recognised and it should be implemented so as to avoid any injury to the international civil servant.[24] It is not enough to argue that an international civil servant may eventually receive an indemnity from the organisation, because indemnity should always be deemed a last resort.[25]

This was borne out in relation to the *Reparation for Injuries case* where the Sixth Committee of the General Assembly stated:[26]

> [I]t can be that the protection provided by a State...is not sufficient ...Consequently, the United Nations should have the capability of taking provisional measures, while waiting for the interested State to act.

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[22] International Court of Justice, Applicability of Article VI(22) of the Convention on the Privileges and Immunities of the United Nations, 1989 Compendium 177; see Gill, "International Court of Justice – advisory jurisdiction" (1990) 84 American Journal of International Law 742.

[23] Refer United Nations Administrative Tribunal, Judgment Nos 579 and 759. In these two judgments, the Tribunal did not formally raise the notion of functional protection. Instead, it noted the United Nations' deficiency in enforcing respect for privileges and immunities, which includes the right to personal safety. The Tribunal's position appears more apparent in Judgment No 759, which concerned the case of a locally recruited United Nations Rwanda Appeal staff member who is not covered by the 1946 Convention. The organisation is more commonly known as UNRWA.

[24] The jurisprudence of the International Labour Organisation Administrative Tribunal ("ILOAT") and the European Court of Justice contains numerous references to the right to functional protection because it is recognised expressly by statute, or because it is considered as a general principle of law. However, the cases have not yet questioned the right to personal safety.

[25] Notably in view of the modest amount of the indemnities given, which will be mentioned at 212 below.

[26] Statement of the representative of France in Kiss AC, Repertoire de la pratique francaise en matiere de droit international public (1962, Centre National de la Recherche Scientifique, Paris) No 833.

Since the days of the League of Nations, it has been said that the authority that exercises territorial competence has "special obligations...towards agents of an international organisation in the exercise of their functions".[27] There is an obligation of vigilance that protects every agent, which was particularly strict in application when the victim was a League official exercising functions in a host state where he or she became the victim of a crime or delict.[28] Therefore, this incurs the responsibility of the host state if its agent commits a criminal or delictual act, which is attributable to it, against the agent of an international organisation. Criminal or delictual acts include threats made by the agents of the host state.

The Opinion of the Secretary-General's Legal Counsel, as noted above, does not go beyond the finding of a mere "moral obligation" on the part of the organisation. This response is more in the nature of a diplomatic response and is not a legal response. The Legal Counsel determined that the extent to which the organisation is able to grant security would depend on the special circumstances of the situation and the available resources. It is submitted that this Opinion is wrong as to the nature of the organisation's obligation and the principle underlying it. The correct position is that it is a legal obligation that is found in a general principle of law. However, with regard to its practical application, it is another issue altogether.

PROHIBITION OF DISCRIMINATION

The existing provisions that apply to locally recruited staff (be they foreigners or nationals of the host state) are discriminatory in nature because they fail to recognise the principle of equality as they apply to international civil servants. The jurisprudence from different international administrative jurisdictions on this matter is concordant and constant. They all refer to the right of equality of treatment,[29] a principle that applies to all international organisations. The principle compels organisations to treat all

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[27] For example see the French Government's written observations in the consultative opinion requested in the Reparation for Injuries case involving the assassination of Count Bernadotte when he was the United Nations Special Mediator in Palestine: ibid note 194.

[28] In 1924 a Committee of Jurist of the League of Nations raised a "duty of special vigilance": see the Legal Opinion of the United Nations Secretariat, 14 August 1974 [1974] United Nations Juridical Yearbook 155.

[29] This right can be linked to the principle formulated in Article 7 of the Universal Declaration of Human Rights.

their civil servants in the same way in law and in fact, when they are found in identical situations.[30] As a result, it would be wrong for organisations to adopt a discriminatory position especially when the right to security of their locally recruited international civil servants is at stake.

As stated above, the principle on non-discrimination requires organisations to treat their staff in the same way, whether recruited locally or internationally. The maxim *nemo auditur propriam turpitudinem allegans* applies and it is irrelevant that by acting otherwise, organisations are able to make considerable cost savings. Organisations have tendered to deliberately confuse the legal aspects of the problem with the material aspects of its solution. Occasionally, instead of providing solutions, the organisations have compounded the questions that have arisen. Such discrimination has immoral results, as highlighted in the case concerning locally recruited staff employed by the United Nations High Commission for Refugees ("UNHCR") in Bukavu, Zaire in October 1997.[31]

In this context, the 1998 document from the Office of the United Nations Security Coordinator[32] ("UNSECOORD") is extremely revealing of the position regarding the evacuation of staff. Section 14 of this document raises five questions on the legal implications if the present policy on evacuation were to change. But it appears that neither the Consultative Committee on Administrative Questions ("CCAQ"), which prepares the work of ACC, nor the ACC itself, has sought a response to the questions. The questions are as follows:[33]

1. Where will the locally recruited staff and their dependants go?
2. Which state or states will accept large numbers of United Nations locally recruited staff and their dependants for an indefinite period of time?
3. What status will the locally recruited staff and their dependants have after their evacuation by the United Nations organisation?
4. Will they be or can they be asylum seekers or refugees?
5. What will be the responsibility of the parent organisation *vis-á-vis*

[30] This assertion is particularly clear in ILOAT jurisprudence. See most recent judgment 1780, section 5.
[31] Cited in the FISCA document of 26 January 1998: FISCA/C/51/CRP.2.
[32] Certain practical proposals merit greater consideration also, including the period before the crisis.
[33] Ibid.

the subsistence of the staff and their families in their new countries?
6. For what length of time should the parent organisation assume responsibility for their staff (and families)?
7. What are the views of the host state regarding the evacuation of their nationals from their homeland?

REMEDIES

During its 51st session from 2-30 January 1998 FICSA presented six proposals to deal with the concerns raised.[34] The proposals are as follows:

1. All locally recruited staff (whether nationals or non-nationals of the host state) should be involved effectively in the design and preparation of security plans. All staff shall be kept informed of the measures to be taken in the event of a crisis.
2. All locally recruited staff members (whether nationals or non-nationals of the host state) should be provided with United Nations identification documents (*laisses-passer* and similar documents).
3. Security measures should be contained in the Security Handbook, including those concerning relocation and evacuation, and applied consistently to all staff. However, the first option for relocation would be within the host state, whenever possible.
4. The national authorities should be firm when applying the 1946 Convention to all United Nations staff, including locally recruited staff who are nationals of the host state.
5. The decision-making power concerning the relocation/evacuation of all United Nations staff should be decentralised. The Designated Official in consultation with the heads of other United Nations organisations in the host state should be responsible for making decisions in this regard.[35]
6. The resources, including human and financial, of the Office of UNSECOORD[36] should be increased to enable it to deal effectively with the growing number of security problems that arise.

In the resolution adopted by the ACC during its meeting of 27-28 March 1998, the report of a high level meeting of the CCQA to improve the security of locally recruited staff, was endorsed. This may be considered to

[34] See the FISCA document of 26 January 1998: FISCA/C/51/CRP.2.
[35] At present, the United Nations Secretary-General is responsible for the decision.
[36] United Nations Security Coordinator.

be the first step towards improving the situation[37] because pursuant to the resolution, the following occurred:

1. The ACC recommended that every organisation should create a single budget chapter/line to fund security expenditures of a foreseen nature and ensure that funds exist for unforeseen security related expenditures.
2. The ACC endorsed the proposal on mandatory security training for all staff members in high-risk duty stations and it agreed to the immediate implementation of this training by UNSECOORD. The training was to be funded on a cost-share basis by the organisations, calculated on the ACC's personnel statistics for staff at each duty station.
3. The ACC instructed the CCAQ to take necessary measures to ensure that financial resources were available to implement the decisions as expeditiously as possible, and the measures had to take place no later than June 1998.
4. The ACC approved the establishment of a security trust fund by UNSECOORD to supplement existing security funding mechanisms. It undertook to provide the terms of reference for this fund and to bring the terms to the attention of member states and solicit their contributions.
5. The ACC endorsed the recommendations on the strengthening of the security management system in the field as outlined by the high level meeting of CCAQ and the *ad hoc* inter-agency meeting on security. It endorsed also the establishment of a working group under the auspices of UNSECOORD to review the operational capabilities of field security officers.
6. Without giving any details on this point, the ACC confirmed the existing policy outlined in the Security Handbook regarding the security of local staff. It reiterated that organisations should apply and implement rules and policies consistently, including the rules on the security of locally recruited staff.
7. The ACC was more precise when it referred to the "malicious act" insurance policy, recommending that all organisations should extend its application to all locally recruited staff on a 24-hour basis.

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[37] FISCA Newsletter No 4, 1998.

8. The ACC approved in principle the criteria that are recommended by the *ad hoc* inter-agency meeting on security for the establishment of minimum operational security standards. When these standards are in operation, the host state's standards would be temporarily suspended.
9. All matters regarding the security of staff should continue to be addressed directly to the ACC through the organisational committee. Only matters of direct concern to CCAQ should continue to be referred to that body.
10. Finally, the ACC reminded member states of the United Nations of their obligations under international law to ensure the safety and security of locally recruited staff and to safeguard their privileges and immunities.

When United Nations organisations act, they should use more prudence recruiting local staff in regions hit by civil war.[38] Where there is a lack of effective preventative measures, the United Nations Administrative Tribunal ("UNAT") should be more understanding of the human and material problems confronted by locally recruited staff. For instance, the UNAT should award more substantial indemnities than currently awarded. The President of the UNAT has himself recognised that there is a divergence in the jurisprudence and practice of the UNAT and the International Labour Organisation Tribunal with regard to the average amount of damages awarded.[39]

An example of an inadequate award is the rather modest indemnity awarded in Judgment No 759. In that case, the UNAT had to consider the case of a locally recruited employee of UNRWA who had spent ten years in a Syrian prison, without charge and without trial. The UNAT eventually awarded him US$7,500 but did not reimburse the cost of the appeal.[40]

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[38] In this regard, the problems experienced by locally recruited staff members in Rwanda should have been pre-empted: FISCA Update No 12, 1997.

[39] Thierry, "Aspects de la justice administrative internationale", Le droit des organisations internationales (1997, E Bruylant, Bruxelles) 115, 117. It has been observed that these two tribunals serve a number of other organisations regarding disputes concerning staff contracts: Brownlie I, Principles of Public International Law (1998, 5th edition, Oxford University Press, Oxford) 702.

[40] The fact that the person concerned was paid during the first six months of his detention did not eliminate in any way the reprehensible aspect of this legal action.

CONCLUSION

In conclusion, it has been shown that anomalies, discrimination and inequality exist in the terms of employment of United Nations staff, depending on whether they are locally recruited or otherwise. As a result, the United Nations should adopt concrete measures as soon as possible to improve the situation of locally recruited international civil servants, especially when they are confronted by danger during the course of their employment.