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Removal of the head of a multilateral organization— independence of international organizations and their secretariats— political interference by member states in the operation of international organizations

BUSTANI V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS. Judgment No. 2232.

At <<http://www.ilo.org/public/english/tribunal/>>.

Administrative Tribunal of the International Labour Organization, July 16, 2003.

On July 16, 2003, the Administrative Tribunal of the International Labour Organization (ILO) found that José Bustani was unlawfully dismissed from the post of director-general of the Organisation for the Prohibition of Chemical Weapons (OPCW) in April 2002. In reaching this conclusion, the Tribunal affirmed the importance of the independence of international organizations and their secretariats, and condemned political interference by member states in their workings.¹

The OPCW was established in 1997 under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC).² Pursuant to the CWC the parties undertake not to develop, produce, or otherwise acquire chemical weapons; not to use chemical weapons or assist anyone in acquiring them; and to destroy, pursuant to the terms of the CWC, chemical weapons in their possession.³ The OPCW's mission is to work toward the complete elimination of chemical weapons. It aims to achieve this objective by (1) creating a credible, transparent regime for verifying the destruction of chemical weapons by states parties to the CWC, (2) providing protection and assistance against chemical weapons, (3) encouraging international cooperation in the peaceful uses of chemistry, and (4) bringing about universal participation in the OPCW.⁴ The OPCW has three organs: the Conference of the States Parties (Conference), the Executive Council (Council), and the Technical Secretariat, headed by the director-general.⁵

Bustani was appointed as the first director-general of the OPCW in May 1997, with a four-year term. During his time at the OPCW, he and his inspectors oversaw the destruction of two million chemical weapons and two-thirds of the world's chemical weapons facilities.⁶ A year before the expiry of his term, the Conference unanimously extended it for another four years. Bustani's work was highly commended at that time, including by the U.S. government. In a February 2000 letter to Bustani, U.S. Secretary of State Colin Powell stated that "the accomplishments to date of the OPCW are very impressive. They reflect well . . . on the dedication and hard work of the staff of the Technical Secretariat under your leadership. . . . The United States actively supports your efforts to pursue universal application of the Convention. . . . The United States stands ready to work with you . . ."⁷ In March 2002, however, the United States submitted a no-confidence motion at the twenty-eighth session of the Council. Alleging mismanagement, demoralization of the Technical Secretariat, and ill-considered initiatives, the motion called for Bustani to resign.⁸ After the motion failed,⁹ the United States called a special, April 2002 session of the Conference, where the motion to dismiss narrowly carried.¹⁰

¹ See *Bustani v. Org. for the Prohibition of Chemical Weapons*, Judgment No. 2232 (ILO Admin. Trib. July 16, 2003) [hereinafter *Judgment*]. The Tribunal's Statute, Rules, and judgments are available at <<http://www.ilo.org/public/english/tribunal/>>.

² Jan. 13, 1993, 1974 UNTS 45, 32 ILM 800, available at <<http://www.opcw.org>> [hereinafter *CWC*]. Documents and information concerning the CWC and the OPCW are available at <<http://www.opcw.org>>.

³ See *CWC*, *supra* note 2, Art. 1.

⁴ See *Mission Statement of the OPCW*.

⁵ See *CWC*, *supra* note 2, Art. VIII(4).

⁶ Ian Williams, *The U.S. Hit List at the United Nations*, FOREIGN POLICY IN FOCUS, Apr. 30, 2002, at <http://www.fpiif.org/commentary/2002/0204un_body.html>.

⁷ J. M. Bustani, *I Brasil e a OPAQ: diplomacia e defesa do sistema multilateral sob ataque*, 46 ESTUDOS AVANÇADOS 71, at 79–80 (2002), available at <<http://www.usp.br/iea/revista/online/eua/bustani.pdf>>.

⁸ See *Judgment*, *supra* note 1, para. 15; see also *Statement by the Director-General to Executive Council at Its 28th Session* (Mar. 21, 2002), OPCW Doc. EC-28/DG.12 (on file with the author).

⁹ Seventeen states voted in favor, five against, and eighteen abstained. Article VIII(29) of the CWC requires that Council actions on matters of substance be taken by a two-thirds majority of its members.

¹⁰ Forty-eight states voted in favor, seven against, and forty-three abstained. Article VIII(18) of the CWC requires that, in the absence of consensus, Conference actions on matters of substance be taken by a two-thirds majority

Several months later, in July 2002, Bustani commenced proceedings before the ILO Tribunal, claiming unlawful termination of his employment contract. For the first time in its history, the Tribunal reviewed the decision of an international organization to remove its head.

The Tribunal's jurisdiction is set out in Article II of its Statute, which provides in paragraph 5 that the "Tribunal shall be competent to hear complaints alleging non-observance . . . of the terms of appointment of officials and of provisions of the Staff Regulations of any . . . international organizations . . . which ha[ve] addressed to the Director-General [of the ILO] a declaration recognizing . . . the jurisdiction of the Tribunal for this purpose."¹¹ Bustani contended that he was an OPCW official and that the organization, pursuant to its Staff Rule 11.3.01,¹² had accepted the jurisdiction of the Tribunal to hear all administrative disputes concerning its personnel. The Staff Rule provides that "[s]taff members shall have the right to appeal to the Administrative Tribunal of the [ILO] . . . against administrative decisions and disciplinary actions taken [by the OPCW]." Bustani argued that, as director-general, he fell within the definition of "staff member" since his contract of employment expressly accorded him benefits and entitlements in accordance with the Staff Regulations.

The OPCW challenged the Tribunal's jurisdiction *ratione personae* and *ratione materiae* to hear the case. With regard to the former, the OPCW argued that the director-general is not a "staff member" and that Bustani was therefore unable to appeal to the Tribunal pursuant to Staff Rule 11.3. The organization contended that a distinction must be drawn between the head of an international organization, whose appointment and role is political in nature, and staff members. It invoked Staff Rule 0.0.1 and Staff Regulation 1.2 to support its claim.¹³ The former provides that the rules apply to "staff members appointed by the Director-General," while the latter states that staff members "are subject to the authority of the Director-General." Accordingly, the OPCW argued, these provisions distinguish between the director-general and staff members, creating a right to appeal only for the latter.¹⁴

The Tribunal rejected the OPCW's interpretation, holding that Bustani was (1) an official of the OPCW under the terms of the Tribunal's own Statute and also according to the ordinary meaning of the term "official," and (2) a "staff member" of the OPCW. In rejecting the OPCW's submission concerning the latter term, the Tribunal argued that "the Director-General, as head of the Technical Secretariat, is appointed by decision of the competent authority which establishes his conditions of remuneration and defines the benefits to which he, like other senior-ranking staff members of the Technical Secretariat, is entitled pursuant to the Organisation's Staff Regulations and Interim Staff Rules."¹⁵ Article VIII(46) of the CWC—which provides that "[i]n the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government," and which also describes the director-general and others as "international officers"—lent further support to the view that the director-general was a staff member of the OPCW. The Tribunal concluded that it had jurisdiction *ratione personae*.

In opposing the Tribunal's jurisdiction *ratione materiae*, the OPCW argued that pursuant to Staff Rule 11.3 and Staff Regulation 11.3, the Tribunal had jurisdiction to review administrative decisions only. The OPCW submitted that the Conference's decision to terminate Bustani's appointment was political, not administrative, and therefore fell outside the Tribunal's jurisdiction. The Tribunal held, however, that

of all members present and voting. For a discussion of the dismissal, see Sean D. Murphy, D., *U.S. Initiative to Oust OPCW Director-General*, 96 AJIL 711 (2002).

¹¹ The Statute is available at <<http://www.ilo.org>>.

¹² The text of this rule is set forth in note 1 of the Tribunal's judgment.

¹³ Rule 0.0.1 is quoted, though not named, in paragraphs E and 8 of the Tribunal's judgment. Staff Regulation 1.2 is quoted in paragraph E and cited in paragraph 8. The text of Staff Regulations 11.1 and 11.3 is set forth in paragraph 6.

¹⁴ Judgment, *supra* note 1, para. E.

¹⁵ *Id.*, para. 8.

a decision terminating the appointment of an international civil servant prior to the expiry of his/her term of office is an administrative decision, even if it is based on political considerations. The fact that it emanates from the Organisation's highest decision-making body cannot exempt it from the necessary review applying to all individual decisions which are alleged to be in breach of the terms of an appointment or contract, or of statutory provisions.¹⁶

On the merits, Bustani's complaint presented five grounds for setting aside the termination of his appointment as unlawful and invalid. The first submission raised procedural irregularities concerning the special session of the Conference in April 2002. In particular, since the United States' request to convene the Conference was not supported by one-third of its members as required by Article VIII(12)(c) of the CWC, any decision reached by it was invalid. Bustani also noted that neither the Council's nor the Conference's procedural rules provide for the no-confidence motion that the United States submitted to the Council in March 2002.

The second submission raised the Conference's lack of authority to dismiss the director-general. Pursuant to CWC Article VIII(43), the Conference appoints, and renews the mandate of, the director-general at the recommendation of the Council. The CWC gives neither the Council nor the Conference the power to dismiss or remove. Bustani contended that this lack of an express power to dismiss or remove was intentional; it guaranteed the independence of the director-general by insulating him from political interference by member states.

Third, even if a power to remove could be implied, Bustani argued that such a power ought to be exercised by the Conference only upon the recommendation of the Council. That is, the procedure for removing the director-general should parallel that for making the appointment in the first place. By rejecting the United States' no-confidence motion in March 2002, the Council had, in effect, endorsed Bustani. Accordingly, the Conference's subsequent decision to remove him was void.

Fourth, Bustani contended that by terminating his appointment, the OPCW had breached the terms of the director-general's contract of employment. That contract accorded Bustani the right to resign from his post but did not accord the OPCW the power to dismiss him. The only reason given by the Conference for Bustani's dismissal was "a mere reference to 'lack of confidence'"¹⁷—which, Bustani contended, was not a sufficient ground for the termination of his appointment. Having noted that he had been unanimously appointed for a second four-year term and that his performance had been widely praised (including by the United States), Bustani detailed in his complaint what the Tribunal refers to as the "real motivation behind his dismissal."¹⁸ Bustani argued, in particular, that the United States demanded his removal for the following reasons: (1) his insistence that the United States be subject to the same verification inspections as other states parties to the CWC, (2) his refusal to contravene the terms of the CWC and to share with the United States and some other states the confidential information obtained by the OPCW's inspectors on the chemical weapons of certain states (specifically, Iran), and (3) his attempts to get Iraq to join the CWC at a time when the United States was seeking to wage a war in Iraq because it possessed weapons of mass destruction.¹⁹

Finally, even if there had been sufficient grounds for Bustani's removal, he argued that the "principles of due process and natural justice would have required that he be informed of the allegations against him and given the opportunity to respond to them."²⁰ Inasmuch as no such procedures were followed, the decision to revoke his appointment should be considered null and void.

¹⁶ *Id.*, para. 10.

¹⁷ *Id.*, para. B.

¹⁸ *Id.*

¹⁹ See Opening Statement by the Director General to the Executive Council at Its Twenty-Eighth Session (Mar. 19, 2002) (on file with author); see also Statement by the Director-General at the Special Session of the Conference of the States Parties, para. 24 (Apr. 21, 2001), OPCW Doc. C-SS-1/DG.7, at <http://www.opcw.org/html/global/c_series/ss1csp/css1_dg7.html>.

²⁰ Judgment, *supra* note 1, para. D.

In its reply on the merits, the OPCW argued that there were no procedural irregularities either in the way that the special session had been convened or in the Conference's exercise of its power to dismiss. The OPCW argued that states' lack of confidence in the director-general put in jeopardy "the preservation and effective functioning" of the OPCW and thus constituted an exceptional circumstance that justified the Conference's exercise of its power to terminate the director-general's appointment.²¹ It appears that the OPCW did not specifically address the issue of due process and natural justice.

In rendering its decision, the Tribunal avoided discussing Bustani's claims as to the "real motivation" for his dismissal, and it also refrained from addressing his claims based on alleged procedural irregularities. The Tribunal condemned the political interference exerted by states, and particularly the United States, in the operation of the OPCW.²² It reaffirmed that "the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations."²³ It argued that appointments for fixed terms are the means of ensuring that the heads of international organizations remain independent. If the Conference, for example, were given unfettered discretion to terminate Bustani's appointment, he and others would become "vulnerable to pressures and to political change."²⁴ The Tribunal held that only in exceptional cases involving "grave misconduct" and the like, should heads of international organizations be removed, but even then the decision to terminate such an appointment must be "taken in full compliance with the principle of due process, following a procedure enabling the individual concerned to defend his or her case effectively before an independent and impartial body."²⁵

The Tribunal went on to conclude that the OPCW had failed to offer Bustani the necessary procedural guarantees, thereby violating the terms of his employment and contravening "the general principles of the law of the international civil service."²⁶ Since Bustani had not sought reinstatement, it ordered the OPCW to pay him compensation for unlawful dismissal, including moral damages of €50,000 and "the amount he would have received in salaries and emoluments" between the date of his dismissal and the end of his second four-year term.²⁷

* * * *

The Tribunal's decision explores important new ground concerning the law of international organizations, as it is the only decision reviewing the dismissal of the head of an organization before the expiry of his or her mandate. Moreover, the case provides a rare glimpse into the actual workings of international organizations and the pressures exerted on them by states. In particular, it has been reported that the tactics used by the United States to achieve its objective included threatening to withdraw financial support from the OPCW unless Bustani was removed²⁸ and financing the attendance of representatives of certain countries at the special session of the Conference so as to ensure support for the motion to dismiss.²⁹

The ramifications of the case extend beyond questions regarding the independence of the OPCW, as it raises issues concerning the very foundation of the international legal and political framework. The fundamental premises of our present international framework are the equality

²¹ *Id.*, paras. C, 3, 15.

²² The Tribunal found that the Conference's dismissal of Bustani was an action taken at "the insistent request of the United States." *Id.*, para. 15.

²³ *Id.*, para. 16.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, para. 17.

²⁸ See Barry James, *Chief UN Chemical Weapons Inspector Hits Back at U.S. Criticism*, INT'L HERALD TRIB., Apr. 18, 2002, News, at 6; Murphy, *supra* note 10.

²⁹ See George Monbiot, *The Removal of Jose Bustani Demonstrates George Bush's Contempt for Cooperation*, GUARDIAN, Apr. 23, 2002, at <<http://www.guardian.co.uk>>.

of states, the multilateral nature of international organizations, and the functional autonomy of such organizations. The *Bustani* case, coupled with the ousting a few days earlier of Robert Watson, the chair of the United Nations' Intergovernmental Panel on Climate Change,³⁰ and the campaign against the reappointment of Mary Robertson as the UN high commissioner for human rights, reveals a disturbing trend that is undermining the fundamental pillars of our multilateral international world order. These cases highlight the urgent need to develop new procedures and mechanisms to ensure that international organizations and their staffs remain immune from such interference. Otherwise, the multilateral nature of the present international order will be reduced to being "unilateralism in a multilateral disguise."³¹

Within a broader perspective, the case is also important in charting the events leading to the war on Iraq. While acknowledging that political reasons were behind Bustani's removal, the Tribunal—perhaps not surprisingly—avoided discussing them. According to George Monbiot, U.S. actions to remove Bustani should be viewed in the context of its pursuit of a war on Iraq premised on Saddam Hussein's possession of weapons of mass destruction.³² Monbiot argues that in 2002, Bustani and Hans Blix were the key obstacles to the war because they were both proposing nonviolent methods of eliminating Saddam's alleged stockpiles of such weapons. Specifically, it would seem that Bustani was on the verge of persuading Iraq to sign the CWC and to allow UN chemical weapons inspectors to return to Iraq.³³ In this context, far more was at stake in the removal of Bustani than may initially appear. The circumstances of his removal represent yet another facet of the United States' effort to construct a justification for an "inevitable" war.

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European Community—challenge of Community fisheries regulation—admissibility of individual applications under Article 230(4)

COMMISSION OF THE EUROPEAN COMMUNITIES V. JÉGO-QUÉRÉ & CIE SA. Case C-263/02 P. At <<http://curia.eu.int/en/transitpage.htm>>.

Court of Justice of the European Communities, April 1, 2004.

The approach that the Court of Justice of the European Communities (ECJ) has taken to the standing of private parties seeking to bring actions for annulment of European Community (EC) measures in the Community courts (the ECJ and the Court of First Instance (CFI)) has been one of the most widely debated and criticized areas of EC law.¹ In *Jégo-Quééré v. Commission of the European Communities* (Commission), the CFI was required to rule on the admissibility of an action brought by an individual applicant against a Commission regulation.² In a bold move the CFI fundamentally changed the requirements for the admissibility of actions brought by natural or legal persons against EC legislation in the Community courts. The new rules did not,

³⁰ Watson, a prominent scientist, was a leading critic of the United States and called for urgent action to curb global warming. For details see Jonathan Fowler, *U.S. Scientist off Climate Change Panel*, ASSOCIATED PRESS ONLINE, Apr. 19, 2002, and Julian Borger, *US and Oil Lobby Oust Climate Change Scientist*, GUARDIAN, Apr. 20, 2002, at <<http://www.guardian.co.uk>>.

³¹ See Statement by the Director-General at the Special Session of the Conference of the States Parties, para. 24, OPCW Doc. C-SS-1/DG.7 (Apr. 21, 2001), at <http://www.opcw.org/html/global/c_series/ss1csp/css1_dg7.html>.

³² Monbiot, *supra* note 29.

³³ *Brazil Arms Control Chief Says US Interferes*, REUTERS, Mar. 26, 2002.

¹ See, e.g., Ami Barav, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court*, 11 COMMON MKT. L. REV. 191 (1974); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.B. EUR. L. 213 (1992); ALBERTINA ALBORS-LLORENS, PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES (1996); Anthony Arnall, *Private Applicants and the Action for Annulment Since Codorniu*, 38 COMMON MKT. L. REV. 7 (2001).

² Case T-177/01, *Jégo-Quééré & Cie SA v. Commission*, 2002 E.C.R. II-2365 [hereinafter CFI judgment]. See the Web site of the Court of Justice of the European Communities, <<http://www.curia.eu.int/en/index.htm>>, for its recent judgments and the opinions of the advocates general.