CHAPTER 2

The Appointment of Judges and the Lack of Independence for the Tribunal

2.1 The Judges

Article 10 of the Human Rights Declaration highlights the need for “an independent and impartial tribunal.” This should have translated in the case of UNAT in the appointment of independent and impartial members. The vital importance of guaranteeing the independence of the judges can never be overstressed. It is not necessary to recall that independence and impartiality are intrinsic, non-dissociable qualities for a judge who must possess these qualities if he is to deserve the honour to discharge such a noble function. It is of course assumed that such members should also have the necessary relevant competence and qualifications in the legal field and the required practical training and experience as judges. This was of paramount importance if the Tribunal were to command respect for its judgements. It is, therefore, necessary to carefully analyze the Statute of UNAT and its implementation in this regard.

The Relevant Provisions in the Statute and the Issue of Independence of Judges

Article 3 of the Tribunal’s original Statute provided in particular that:

1. The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Only three shall sit in any particular case.
2. The members shall be appointed by the General Assembly for three years, and they may be re-appointed; ...
5. No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service.

The political debates which led to the adoption of the Tribunal’s statute, in particular during the drafting of article 3 which dealt with the appointment,

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36 The related issue of the budgetary and administrative independence of UNAT as such, with its Executive Secretary and other servicing staff, and its necessary separation from the Office of Legal Affairs of the Secretariat, is addressed further down in this chapter.
The Appointment of Judges and the Lack of Independence

terms of office and dismissal of judges, shed some light on the intentions of the legislator. First of all, it is important to recall that during the November 1949 debate in the Fifth Committee, the title of judge for the designation of the Tribunal’s members, as proposed by the Netherlands, had been considered but rejected by 22 votes to 9, with 7 abstentions. The independence of these members of the judiciary power vis-à-vis the political power of the General Assembly was, indeed, not universally desired. During the same debate in the Fifth Committee, the United States delegation had won a tight vote (16 in favour, 14 against, and 11 abstentions) on its proposed text for article 3, paragraph 5, which was therefore included as follows in the draft statute recommended for approval by the General Assembly: “No member of the Tribunal can be dismissed unless by a two-thirds majority the General Assembly shall rule that he is unsuited for further service.” The opponent delegations, particularly Belgium, Egypt, France, the Netherlands, Norway and Venezuela, had expressed strong objection to this amendment on two grounds. On the one hand, it would obviously give the Tribunal a political character by institutionalizing the dependence of its members vis-à-vis one of the parties at its proceedings, namely the governments or employers, and, on the other hand, it was a well-recognized principle that the independence of the judges implied that such decisions should be exclusively within the power of the judicial organ concerned. They reserved the right to raise the question again at the plenary meeting of the General Assembly. As indicated in the preceding chapter, they ultimately did so and won their case by replacing the contested text by the definitive text stated above, which required the unanimous opinion of the other members of the Tribunal for the dismissal of any of its members.

This victory did not, however, imply that these judges were totally independent from the political power. Indeed, the provision in paragraph 2 of the same article – that they would be appointed by the General Assembly for a relatively short three-year term and that they may be re-appointed – put a serious limitation to their independence, in so far as the General Assembly, or in other terms the employers, retained the right to actually dismiss at the end of each term, by not re-appointing them for another term, those members of UNAT whose judgements could be considered as being too favourable to staff members. It would seem that one way to objectively guarantee the independence of the

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37 However, in consideration of the role they are required to perform, the members of UNAT are referred to, throughout this book, as judges.

38 These concerns regarding the necessary separation of powers and the independence of the judiciary power from the political and executive power would seem to have been less acute during the preparation of the statutes of the two new UN tribunals established in 2009.