

One is reminded of the many cases in which arbitrary acts of immigration authorities have caused extreme hardship without recourse to the courts. Under the guise of administrative power persons claiming to be native-born citizens of the United States have been excluded after a temporary sojourn abroad without recourse to the courts on the status of their citizenship, essentially a question of law.⁴ Another effect of the new statute may be the adoption of a policy of implementing many of our treaties by the elaboration and publication of administrative regulations. It has been pointed out that this is a function too often neglected by reason of the peculiar character of our fundamental law which declares all treaties made under the authority of the United States to be "the supreme law of the land." The scope and effect of many treaties are thus left in doubt by reason of the reliance upon their self-executory character. This is particularly unfortunate with respect to some multipartite treaties.⁵

The effect of the new statute will be welcomed as a salutary reform of our procedure in the conduct of foreign affairs, as in all other branches of the Federal administration. De Tocqueville pointed out that "the true friends of liberty and the greatness of man ought constantly to be on the alert to prevent the power of government from lightly sacrificing the private rights of individuals to the general execution of its designs."⁶ The unanimous adoption of the new statute by Congress proclaims the firm intent of the American people, notwithstanding the jungle-growth of administrative regulation, to insure the maintenance of "a government of laws and not of men."

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THE LEGAL POSITION OF THE SECRETARY GENERAL OF THE UNITED NATIONS

The intervention by Secretary General Trygve Lie of the United Nations in the Iranian case, pending in the Security Council, has brought up again the problem of the range of his competence under the Charter. The problem is not only important as far as the UN is concerned but also interesting from the point of view of the development of international organization. As the makers of the Charter carefully took into consideration the law and the experience of the League of Nations it may be helpful to start with a brief sketch of the legal position of the Secretary General of that organization.

The Secretary General of the League of Nations was primarily the chief administrative officer of the League. He had, first, to organize the Secretariat, and to act as its chief. In this capacity he had broad powers. He was the superior of all the staff members. He made all appointments to the staff; the approval of the Council, under Article IV, par. 3, of the Covenant,

⁴ *United States vs. Ju Toy* (1905), 198 U.S. 253. See *Proceedings of the American Society of International Law*, 1911, pp. 210-212.

⁵ See Henry Reiff, "The Enforcement of Multipartite Administrative Treaties in the United States," this JOURNAL, Vol. 34 (1940), p. 661.

⁶ A. De Tocqueville, *Democracy in America*, Chap. VII.

was, to a large extent, a formality and was given once for all, as far as all the lower posts were concerned, at an early date. He alone was responsible to Assembly and Council for the work of the Secretariat. He had important functions concerning the budget of the League. He acted as Secretary General at all meetings of the Assembly and the Council. He had specific duties under Article I, par. 1, Article XVIII, and Article XXIV, par. 2, as well as under Article XI, par. 1 and Article XV, par. 1 of the Covenant. He had to prepare the work and to execute the resolutions of the various organs of the League. He had administrative and technical functions, specified in the Rules of Procedure of the organs of the League, under the Statute of the Permanent Court of International Justice, with regard to the International Labor Organization, and under special treaties. He represented the League to a certain extent. His emoluments were adequate and he enjoyed full diplomatic privileges and immunities.

Developments in the League caused certain difficulties however. The pressure brought by Members for the appointment to higher staff posts of their nationals handicapped his freedom of choice and the dangerous trend to regard these officials rather as the representatives of their countries than as true international civil servants threatened to compromise the international character of the Secretariat. The Secretary General also had to struggle for the adoption of his budget and the Supervisory Commission of the League rose from its original modest task of assisting the Secretary General to a role of supervising and controlling him.

The political functions of the Secretary General were severely restricted by the Covenant. This had already been suggested by the history of the drafting of the Covenant. The title originally proposed for this office, that of "Chancellor," was lowered to "Secretary General." The original "and" in Article II, putting the Secretariat on the same level as Assembly and Council, was changed into "with."¹ The fact that the Secretary General was "appointed" (*nominé*) pointed in the same direction. At the very beginning of the League the Noblemaire Report² insisted urgently that the Secretariat should not extend the sphere of its activities beyond preparing and executing the decisions of the various organs of the League, without suggesting what these decisions should be. It was the time when orators in Geneva frequently found it necessary to emphasize that the League was not a "super-State." But as late as 1930 the Report of the Committee of Thirteen³ stated emphatically that the Secretariat had no political initiative and formed only an administrative organism.

Most students of the League have, nevertheless, concluded that the Secretariat was more: Ray wrote in 1930 that the position of the Secretary

¹ Still more indicative the equally authentic French text: *Assistés d'un Secrétariat permanent*. Jean Ray, *Commentaire du Pacte de la Société des Nations*, Paris, 1930, p. 237: *Le Secrétariat apparaît ainsi, dès le début, comme un organisme subordonné.*

² League of Nations Document C.424. M.305. 1921. X.

³ Doc. A.16. 1930.

General was considerable, although badly defined juridically.⁴ Schücking-Wehberg pointed in 1931 to the permanency of the Secretariat, to the fact that it was the central point of all incoming information, the guardian of the tradition of the League and the adviser of all the delegations and concluded that it was not merely a technical, but also a political organ.⁵ And this view was shared in 1938 by Göppert.⁶ Ranshofen-Wertheimer in 1945 recognizes the limitations and restrictions put by the Covenant upon the external powers of the Secretary General but points also to the personality of the two Secretaries-General of the League: "the two Secretaries-General kept scrupulously, even over-scrupulously, within the constitutional limits and did not even avail themselves as fully as they could have done of the marginal possibilities for action and influence open to them,"⁷ e.g. to address the Assembly and the Council; "they fell short of international leadership."⁸ He suggests that a future international organization should give political powers to the Secretary General, who should be chosen rather from statesmen than civil servants.

It is against this background and experience that the legal position of the Secretary General of the UN has to be studied. The Dumbarton Oaks Proposals⁹ contained already *in nuce* the relevant provisos of the Charter of the United Nations.¹⁰ The Secretary General of the UN has also functions under the Statute of the International Court of Justice.¹¹ The Preparatory Commission of the UN, set up by the Interim Arrangements adopted at San Francisco,¹² sat in London from November 23 to December 23, 1945, and its *Report*¹³ deals in Chapter VIII with the Secretariat. The First Part of the First General Assembly of the UN met in London from January 10 to February 14, 1946, and it was its Fifth Committee¹⁴ which dealt with the problems of the Secretariat. The excellent work done by the Preparatory

⁴ Work quoted, above, n.k., pp. 231, 248-249, 250.

⁵ *Die Satzung des Völkerbundes*, Berlin, 1931 (3rd ed.), Vol. I, p. 542.

⁶ *Der Völkerbund*, Stuttgart, 1938, p. 140.

⁷ Egon F. Ranshofen-Wertheimer, *The International Secretariat*, Washington, 1945, p. 38.

⁸ Same, p. 429.

⁹ *Department of State*, Bulletin, Vol. XI, No. 276 (October 8, 1944), pp. 368-374; (Chapter IV, 1, d, and Chapter X, par. 1-3. See also the Amendments proposed by the four sponsoring Powers at the San Francisco Conference on May 5, 1945 (same, Vol. XI, No. 306, May 6, 1945), pp. 851-855).

¹⁰ The same, Vol. XII, No. 313 (June 24, 1945), pp. 1119-1134 (Art. 7, par. 1, Art. 12, par. 2, Art. 20, 97-101, 104-105). See Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents*, Boston, 1946, pp. 32-33, 90, 100-101, 114-116, 268-276.

¹¹ Same, pp. 1134-1142 (Art. 5, par. 1, Art. 7, Art. 13, pars. 2 and 4, Art. 18, par. 2, Art. 40, par. 3, Arts. 67 and 70).

¹² Same, pp. 1142-1143.

¹³ Report of the Preparatory Commission of the United Nations. P/C20, 23 December 1945. Chapter VIII (pp. 81-103).

¹⁴ Administrative and Budgetary; Chairman: Faris Al Khoury (Syria); Rapporteur: Aghnides (Greece).

Commission made it possible for the Fifth Committee to adopt, to a great extent, the proposals of the Preparatory Commission, without substantial change.¹⁵

The title of "Secretary General" was retained as in the Covenant. The word "elected" in the Dumbarton Oaks Proposals had been changed to "appointed" in the Charter. Under Art. 97 the appointment has to be made by the General Assembly, by a simple majority of votes, upon the recommendation of the Security Council. This recommendation needs seven votes, including the concurrent vote of the five permanent members, who, therefore, have the right of veto. The General Assembly is not bound to appoint the person recommended, but, if it does not, it must wait for a further recommendation by the Security Council. As determined by the General Assembly, nomination and appointment are to be made in private meetings and the vote taken by secret ballot. It further determined that the appointment of the first Secretary General should run for five years, renewable for a further five year term.

The recommendation by the Security Council was a matter of compromise between an Eastern European, sponsored by the Soviet Union, and the Canadian Ambassador in Washington, sponsored by this country and Great Britain, but whose nomination the Soviet representative threatened to veto. On January 29, 1946, the Security Council unanimously agreed on Trygve Lie for Secretary General.¹⁶ The appointment was made by the General Assembly by secret ballot, with 46 votes in favor and three against. The installation of the Secretary General took place in the 22nd Plenary Meeting on February 2, 1946,¹⁷ and he took an oath of loyalty, absolutely identical with the oath taken by the Secretary General of the League of Nations. Contrary to the practice under the League, the appointment of the Foreign Minister of Norway as Secretary General brought a statesman of a small Power, not a civil servant of a Great Power, into this office.

The Secretary General of the UN is, in first place, the "chief administrative officer of the United Nations" (Art. 97); he is the Secretary General of the General Assembly, the Security Council, the Social and Economic Council and the Trusteeship Council (Article 98). He has to present an annual report on the work of the Organization to the General Assembly (Article 98). Specific administrative and executive functions are given to him under the Provisional Rules of Procedure of the General Assembly.¹⁸ He has to prepare the agenda, convoke the sessions, provide the necessary staff, prepare the minutes and other documents of the various organs of the UN. He is the channel of communication with the UN and all of its organs. He is responsible for the preparation of the work of the various organs and for the execution of their decisions. He has wide responsibilities concerning the

¹⁵ Reports of the Fifth Committee: A/11, 23 January 1946 (3 pages); A/41, 8 February, 1946 (31 pages); A/44, 11 February 1946 (32 pages).

¹⁶ *Journal of General Assembly*, UN (London), No. 18, p. 355, No. 20, p. 369.

¹⁷ *Journal*, No. 22, February 4, 1946, p. 402.

¹⁸ A/4, 10 January 1946.

financial administration of the UN. He is the head of the Secretariat and appoints all staff members (Article 101). He alone is responsible to the other principal organs of the UN for the work of the Secretariat. His emoluments are adequate; he enjoys full diplomatic privileges and immunities. He is strictly an international officer; he may not seek or receive instructions from any authority external of the UN; each member undertakes fully to respect the exclusively international character of his responsibilities (Article 100).

The Report of the Preparatory Commission emphasized the "Key position of the Secretariat in the UN." The Report of the Fifth Committee states that it was guided by the consideration "to enable a man of eminence and high attainment to accept and maintain the position." It is fully recognized that "his choice of staff and his leadership will largely determine the character and efficiency of the Secretariat as a whole,"¹⁹ that "the manner in which the Secretariat performs its tasks will largely determine the degree in which the objectives of the Charter will be realized."²⁰

With regard to these administrative and technical functions, his position is analogous to that of the Secretary General of the League. But the Preparatory Commission and the General Assembly in London took measures to enhance the prestige of his position and to guard against the handicaps of which the Secretary General of the League became the victim. The Fifth Committee proposed, that, as the Secretary General is the confidant of many Governments, members will not offer him positions, at least immediately after his retirement, nor will he accept them, in which his confidential knowledge might be a source of embarrassment to other members. This proposal, no doubt, was inspired by the fact that the first Secretary General of the League had become British Ambassador to Fascist Italy. To prevent such happenings, the financial position of the Secretary General after retirement must be secured.

The General Assembly insisted that the Secretary General should have a completely free hand to set up and organize the Secretariat, to choose his collaborators, appoint the members of the staff, prepare the rules for the staff, set up classification schedules and salary scales. The Preparatory Commission and the General Assembly have also seen to it that the Secretary General should formulate and present the annual budget of the UN to the General Assembly and that the proposed Advisory Committee for administrative and Budgetary Questions be an assisting body and may not develop into an organ of control like the Supervisory Commission of the League.

Contrary to the Covenant, Article 99 of the Charter, under which "the Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security," certainly gives the Secretary General an important and far-reaching right of political initiative, the exercise of which is left entirely

¹⁹ P/C 20, 23 December 1945, p. 86.

²⁰ Same, p. 85.

to his discretion. The Report of the Preparatory Commission²¹ states that "the responsibility which Article 99 confers upon the Secretary General will require the exercise of the highest qualities of political judgment, tact, and integrity" and points out that Article 99 "confers a special right which goes beyond any power previously accorded to the head of an international organization"; it states at the same time that "it is impossible to foresee how this article will be applied."

Already Rule 48 of the Provisional Rules of Procedure of the General Assembly gives the Secretary General the right, at any time, upon invitation by the President, to make to the General Assembly either oral or written statements—whereas the Secretary General of the League could only "address" the Assembly—, concerning any question which is being considered by the General Assembly. But the problem of the range of Article 99 came really up in the Iranian case. This article certainly does not give the Secretary General a right to make the policy of the UN. In his first speech as Secretary General Trygve Lie had said: "Your Secretary General is not called upon to formulate the policy of the UN."²² In his letter to the Security Council²³ the Secretary General suggested that the Council may have no authority to retain the Iranian case on its agenda. We are here not concerned with the contents of this letter, but merely with the fact that it was presented, involving the problem of the Secretary General's competence under the Charter.

The motives of this intervention were differently interpreted; the press hinted even at the possibility of a desire on the part of the Secretary to be agreeable to the Soviet delegation, which had supported Trygve Lie first for President of the General Assembly, then for Secretary General. But such a motive is surely out of the question; perhaps the Secretary General wanted to make use of the first opportunity to test the range of Article 99. Gromyko (Soviet Union) and Lange (Poland)²⁴ took a strong stand in favor of this competence of the Secretary General under Article 99. On the other hand, it was reported in the press that the American representative (Stettinius) had questioned Lie's authority to intervene and that perhaps one or two more members of the Security Council were of opinion that the Secretary General had overstepped his powers in the Council. Trygve Lie defended his right to intervene under Article 99 and urged a clear and definite decision.

The Report of the Council's Committee of Experts²⁵ was unanimously adopted in the meeting of June 6, 1946 and under it "the Council recognizes that the Secretary General may make oral or written statements to the Council regarding any matter submitted to it for consideration." The Council, further, granted authority to the Secretary General to participate in the discussions of the Atomic Energy Committee, the Military Staff

²¹ P/C 20, 23 December 1945, p. 87.

²² *Journal*, No. 22, 4 February 1946, p. 404.

²³ *Journal of the Security Council*, No. 27, 18 May 1946, pp. 522–524.

²⁴ Same, p. 530.

²⁵ Same, No. 37, 12 June 1946, pp. 721–722.

Committee and any other subsidiary organ of the Council. It was, moreover, decided that the Council "could, if it and Mr. Lie chose, appoint the Secretary General as a rapporteur or mediator in any controversy in the Council." Finally, the same powers were granted to the Secretary General's deputy (Arkady Sobolev), when acting on behalf of the Secretary General.

It was reported that the Secretary General would reorganize his "Cabinet" so that it should consist of persons of highest rank, with the intention of delegating more authority to them, as far as administrative and technical functions are concerned, so that the Secretary General might devote the greater part of his time and energy to his political functions. The legal position of the Secretary General of the UN, therefore, transcends by far that of the Secretary General of the League.

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"AS DETERMINED BY THE UNITED STATES"

The reservation relating to domestic questions which was attached to the acceptance by the United States of the obligatory jurisdiction of the International Court of Justice is subject to widely varying interpretation as to the reasons for its adoption, its aim or intention, and its probable effect.¹ Although the question of the effect of the reservation may arise only at a somewhat later date, if ever, it is desirable to try to assess the consequences of the action taken while the matter is still fresh. We can then await the results with a certain amount of assurance that we know where we stand. The two questions first mentioned are not without interest and importance in connection with both the present case and similar cases which will arise in the future, but they will not be discussed here.

The decisive question is that of the probable effect of the reservation. And in estimating this effect in advance extremes must be avoided and practical realities kept closely in view. Thus there seems to be no ground for the fear that this reservation will be used to nullify completely—as it might, logically, be interpreted as doing²—the acceptance of obligatory jurisdiction. As has been noted elsewhere, it will be the Executive who will act, if anyone acts, under this reservation, and this is some assurance of greater prudence and responsibility than was manifested in the adoption of the reservation.³ What is still more to the point, the particular variety of self-determination envisaged by the reservation involves a very old and very fundamental principle of international law and relations which no brave—or are they timorous?—words can overthrow, the principle, namely, that at no point may an individual state, not even in dealing with matters left to its domestic jurisdiction, let alone in determining what those matters are, decide things for itself entirely, this either practicably or in legal principle. Political prudence, right reason, and aroused public opinion may all throw

¹ For text and interpretation see article by Francis O. Wilcox, above, p. 699.

² See article by Lawrence Preuss, above, p. 720.

³ Same.