Rule without Law

Injustice at the United Nations ?

Running Head = Rule without Law

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and

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THE UN ENJOYS INTERNATIONAL IMMUNITY FROM SUIT

Functional immunity is an immunity from legal process in respect of words spoken or written and acts performed by officials of the United Nations in their official capacity, protecting these officials from law suits in the host nation State where they work. Its purpose

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The Centre for Accountability for International Organisations, www.caio-ch.org, was founded by Edward Patrick Flaherty and Sarah Hunt and launched by Geoffrey Robertson Q.C.

in international organizations is to enable staff to discharge their responsibilities independently.

Throughout international organization headquarters in Geneva, New York, Paris, Vienna, The Hague and around the world, international civil servants are not subject to local civil or criminal jurisdiction, as described in most host State Headquarters Agreements, unless their immunity is waived by the chief executive of the international organization. The civil liability of the UN as an employer may arise when its staff commit civil wrongs. The right and duty to waive the immunity and permit local jurisdiction to accrue rests solely with the chief executive.

THE HISTORY OF DIPLOMATIC IMMUNITY

Historically, lawyers have often encountered difficulties associated with diplomatic privileges. Napoleon himself regarded "with a very unfavourable eye diplomatic immunities, partly owing to some recent abuses of them and partly to a dislike of all exemptions from his power" during the early 19th century, as described in *The History of Diplomatic Immunity*, (1999) by Linda and Marsha Frey.

THE FUNCTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS

The theory behind the *functional immunity* enjoyed by international organizations is to protect them from the manoeuvrings

of nation States and to ensure that international organizations function independently in furtherance of specific, collaborative goals. Functional immunity evolved from sovereign immunity enjoyed by nation States. Sovereign immunity is often traced to the Treaty of the Peace of Westphalia, signed on 30 January 1648, a treaty which initiated modern diplomacy and international relations, giving rise to a number of sovereign nation States, including Switzerland, as fully independent States.

THE APPLICATION OF PUBLIC LAW TO THE UN

Professor of Public International Law and EC Law at the University of Vienna, August Reinisch is an expert in public international law who has examined in detail the legal approaches to disputes involving international organizations, most notably in his text *International Organisations before National Courts,* (2000). Reinisch emphasizes the lack of clarity surrounding the application of public law rules to the UN, that is, the branch of law that deals with the nation State or government and its relationships with individuals or other governments.

Today's nation States are subject to a set of obligations derived from human rights law, including treaty law, as incorporated into national laws. International organizations, not being beholden to State rules, are, by virtue of their functional immunity, not obliged to observe these rules in the pursuit of their organizational mandates. At the national level, problematic public law issues arise concerning

social security and taxation law, health and safety legislation, and the damages caused to third parties when international organizations enter into contracts or otherwise cause them personal injury.

Reinisch points out that at the theoretical level it is sometimes argued that the independent functioning of international organizations, one of the major rationales for jurisdictional immunity, requires exemption from national law. However, it would seem that the hardships and inequities that often arise from the application of functional immunity in the real world require a re-examination of the wisdom of maintaining a system where certain organizations and individuals are literally "above the law". Indeed, the present system of functional immunity would seem to conflict with a truism of natural justice which was elegantly restated by U.S. President Theodore Roosevelt at the turn of the 20th century:

> "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favour."

The problems with international functional immunity were not immediately evident to the founding fathers of the UN. The UN was conceived in 1945 as the successor to the League of Nations, which had been established in 1919 under the Treaty of Versailles "to promote international cooperation and to achieve peace and security". The vision was for a new world order in which international

organizations would improve the lives of many through a world mandate for peace.

Such an idealistic beginning did not anticipate "Oil for Food", senior managerial corruption, sexual abuse of refugee children and pre-dated concepts such as good corporate governance. Modern corporate governance includes a refined system of checks and balances not thought of when the UN was created, at a time when modern human rights law was in its infancy.

THE CREATION OF THE INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL

The International Labour Organisation Administrative Tribunal, or ILOAT, is the successor of the League of Nations Administrative Tribunal. It was created as a judicial system for international civil servants.

The ILOAT is older than the UN itself, being a descendant of the League of Nations Administrative Tribunal. It is the court for labour disputes, including workplace harassment, promotions difficulties, unfair dismissal and discrimination, for many international organization employees. It is the labour law court for a workforce of 40 international organizations. Its sister tribunal, the United Nations Administrative Tribunal, or UNAT, has jurisdiction over associated programs, including the staff of the International Court of Justice Registry, the UN and its internal units. Together, the system

adjudicates disputes for around 70,000 workers, over half of whom are on precarious, short-term contracts.

SPECIAL FEATURES IN THE UN'S LEGAL SYSTEM

Partly due to a failure to pursue law reform, the internal UN tribunals, the ILOAT and UNAT, neither of which have been subject to external review for several decades, have features which by today's international legal standards are quite unusual.

The unusual features of the ILOAT include:

- A refusal to take oral evidence: like the Holy Inquisition, the court generally allows only documents to be submitted as evidence; despite many requests for hearings in order to call witnesses, hearings have rarely been permitted. Despite a statute which clearly envisages public hearings and the adducing of evidence from complainants and witnesses, the Tribunal has failed to permit the calling of any expert or lay evidence in any hearing for the past 16 years;
- No avenue of appeal exists to an independent court of appeal for judicial review for error of law;
- There is a lack of formal discovery; no procedures exist for either subpoenas (a form which compels the receiving party to produce documents to the court, an enforceable procedure) or freedom of information. This means that points of law on discovery cannot be contested;

- Witnesses may depose statements, but cross examination of witnesses on their depositions is not permitted;
- The Tribunal does not formally recognize precedent: case law may be overturned without any need to provide a reason for the departure from the existing norms, thereby reducing reliability and consistency, one of the hallmarks of natural justice.
- There is a lack of independence in the appointment of judges: judges are appointed on short-term renewable contracts, with renewal at the discretion of the ILO, often one of the parties to proceedings before those very judges.

This impressive list is an overview of the limitations and restrictions imposed upon those seeking legal redress against their employers within the UN's internal dispute system, (some of whom find themselves without standing, requiring special techniques to attract jurisdiction).

This public failure to respect fundamental rights has been subject to criticism by leading international lawyers, including human rights lawyer Justice Geoffrey Robertson Q.C., who stated in an opinion delivered in Geneva at the ILO in 2004:

> "But we have this anomaly, and it really is an unacceptable anomaly, that because International Organisations truly are a law unto themselves, they are permitted, by self regulation, to avoid the direct application of the standards set out in the international covenants …

> The adversary system presupposes that oral testimony and argument can transform, or critically affect, the judicial approach to both facts and law. It is likely that some of the decisions rendered against employees would instead have been decided in their favour had they enjoyed the right (that the Statute and Rules are designed to afford them) of calling witnesses and experts, and availing themselves of the additional hearing rights referred to in Article 11 of the Rules. The unlawful practice adopted by ILOAT has deprived them both of an oral hearing—obviously vital in itself—and of having that hearing in public, which has additional advantages for justice in that it conduces to honesty on both sides and enables public scrutiny of the fairness of the Tribunal's process."

The irony is that the UN itself does not conform to the legal standards set out in the prevailing international human rights treaties. This is peculiar for an organization that serves as the repository of human rights law and as the ultimate guardian and arbiter of international human rights.

INTERNAL "ADVISORY DECISIONS" ARE IN FACT NON-LEGAL JUDGMENTS

All internal legal bodies are advisory bodies which consider cases and issue reports with recommendations to the Secretary-General, who makes a final decision based on these recommendations.

The process of determining employment disputes fairly requires developed skills, including the ability to analyse and distinguish issues of fact and law. The subtleties of legally reasoned judgment writing, particularly the application of legal reasoning to administrative review, require substantial legal competencies. The reality of international organization disputes is that they are complex, multi-factor situations, necessitating both expertise and a specific skill set to distinguish fact from fiction. However, often there are no lawyers on internal boards, noticeably affecting the quality of the recommendations rendered by these bodies to the chief executive.

DECISION-MAKING POWER IS CENTRALIZED WITH THE CHIEF EXECUTIVE

The first-instance recommendation is next sent for unilateral review by the Director or Secretary-General, who is the equivalent of an international organization's CEO. As international organizations are generally relatively small institutions, the Director or Secretary-General often has an interest in the outcome of the dispute and often a personal knowledge or involvement. This involvement is therefore not disinterested.

The system, however, is riddled with conflicts of interest. For example, at the UN Secretariat, the Department of Management has authority over most of the components of the justice system: the Secretariat of the Joint Appeals Board; the Secretariat of the Panel of Counsel; and the Administrative Law Unit, responsible for representing the Secretary-General on all internal dispute resolution

procedures at the Joint Appeals Board. This structure has been widely criticized, as the Department provides the services one would normally expect to be provided by a prosecutor, public defender and judge. It raises questions of conflicts of interest and demonstrates significant flaws when measured against ordinary standards of independence and separation of powers.

This lack of independence in the justice system is not recognized by senior UN bureaucrats as a problem but, sadly, often used to their advantage.

AN EXAMPLE OF HOW THINGS CAN GO WRONG

The CEO of an international organization has quite a clear, direct concern in the litigation, including minimizing the organization's eventual payout to the litigant. This is aside from the additional fact that he or she may also have a personal interest in seeing the action fail, as for example in the recent litigation involving Mr Ruud Lubbers, former United Nations High Commissioner for Refugees, who was accused of sexually assaulting a UNHCR staff member, who is also a staff association representative, during a meeting.

In that case, public communications were sent to staff throughout the Organization by the High Commissioner prior to his resignation denying all accusations. The complainant did not even receive the report of the investigation into her sexual harassment

complaint by the Office of Internal Oversight Services (OIOS) until a copy was *mailed anonymously to her*. Not only is this far from best practice, lacking in transparency, it illustrates the problem of centralized power with inadequate counterweights in a highly politicized bureaucracy.

Instead of such an irregular internal process, had the complaint been handled in accordance with the principles of due process, such a trial by media would never have occurred. Instead, both Mr Lubbers and the complainant would have enjoyed an impartial trial before an independent court to determine a just outcome.

DUE PROCESS INCLUDES TRANSPARENCY

A key part of due process includes communicating the result of a decision to the parties and providing the opportunity to appeal. Yet, often, decisions are not formally or clearly communicated in writing. Transparency is absent.

In the recent Lubbers' case, a systemic problem is demonstrated. It was not due to the UN's internal procedures that a resolution was reached (Mr Lubbers' resignation) but only due to external media pressure and the adverse effect it was having on the UN Secretary-General personally.

As reported by the BBC, the OIOS report found that claims made by other employees indicated a pattern of sexual harassment,

although the other women had not made official complaints. The document also accused the UN High Commissioner for Refugees of abusing his authority in trying to influence the outcome of the investigation.

The ultimate resignation of Mr Lubbers occurred largely as a response to the public pressure brought to bear once the report was leaked to the press (presumably by the OIOS). The inadequacy of the UN's internal legal system and the consequent frustration of rights of victims are illustrated by this example.

Sadly, such problems are not infrequent, particularly where senior and powerful officials are involved. It is difficult and time-consuming for litigants to prove their case in the UN's three- to seven-year internal dispute resolution system.

So, how can the UN and other international organizations enjoying functional immunity improve internal governance and transparency in their dealings?

VOLUNTARY GOOD GOVERNANCE

Ironically, it is the UN itself which has produced a number of the current voluntary principles on corporate governance, as found in its "Global Compact" program. Unfortunately, the UN does not adhere to the very standards that it exhorts private companies to abide by, particularly in the fields of corruption, labour and human

rights. Despite an express, public promise from the then Under Secretary-General for Management in June 2004 to directly incorporate the principles making up the Global Compact into the UN's own internal rules and procedures, this has not occurred to date.

Last year, in the wake of losses of at least US$ 90 billion for investors through the Enron scandal, the United States passed tough new compliance legislation for public companies in the form of the Sarbanes-Oxley Act. Part of the motivation for this legislation was to reduce cosy deals between CEOs, Chief Financial Officers and others for personal gain at the expense of shareowners and other stakeholders. The legislation called for greater accountability in management and reduced fraud in accountancy practices. The new corporate governance standards reverberated throughout Europe, triggering discussions and examinations of other national legislation emphasizing accountability, transparency and visibility of decision-making. Companies increasingly understand how compliance with corporate social responsibility goals is better for the corporate image than the negative public effect of high-profile non-compliance.

The UN currently has no such tough new regime to police acts of management misfeasance. Whistleblowers are generally ejected, not protected, and staff that complain of senior managers' wrongdoings are more likely to be rewarded with non-renewal of their contract than a pat on the back, despite rules for whistleblower protection.

Institutionally, the UN does not have checks on the power of the institution's CEO equivalent, the Secretary- or Director-General. As a result, institutionally, the UN is weakened by its lack of checks and balances with a narrow, top-down system of control.

CURRENT UN INTERNAL CHECKS AND BALANCES

The UN's internal dispute resolution system does have several features which ought to provide some internal governance checks and balances, including an Ombudsman, the OIOS and internal procedures for dealing with harassment and sexual harassment, as well as multiple guidelines on best practice. Administrative rules and procedures tend to abound, yet are often not followed correctly or, worse, honoured in the breach. The Ombudsman has the authority to receive complaints, to investigate and to make recommendations to the relevant authorities but not the authority to investigate their recommendations.

WITNESS PROBLEMS

The UN's internal dispute resolution system also has the problem of reluctant and hostile witnesses. On the one hand, an employee may be threatened by the thought of bringing an administrative complaint against a supervisor. If a staff member is asked to give evidence, many are reluctant to do so due to the possibility of future retaliation by the hierarchical bureaucracy.

Administration witnesses, including senior bureaucrats, wishing not to give evidence may avoid doing so by giving the excuse of travel or other engagements without risk that they will be forced to give evidence or otherwise penalized for their absence. In most developed national legal systems, were a chief executive to attempt to evade a hearing when subpoenaed, he or she would be served with an order for contempt of court, which could ultimately lead to his or her imprisonment.

This system of internal administration of justice includes a basic dispute resolution board where staff members give lay recommendations on complaints raised by their peers which are not binding upon the chief executive. As the head of the organization enjoys complete discretionary power over this system, he or she may unilaterally overturn an advisory board recommendation with a short justification. There is generally no mechanism within this system that requires a chief executive of an organization to step aside in case of conflict or personal interest.

PROGRESSIVE MOVE FROM WITHIN THE UN FOR LAW REFORM

Yet, now, perhaps in part due to the very public urgings of public and international lawyers combined with increasing academic debate surrounding functional immunity, the UN has announced its first internal law reform in five decades, appointing a panel of external and independent experts to explore ways to redesign the system of administration of justice at the UN.

Suggestions that significant reforms to the UN justice system are overdue have come from leading public lawyers such as Justice Geoffrey Robertson Q.C. of Doughty Street Chambers, a Justice of the UN International Criminal Court of Sierra Leone, as well as from the international professional association, the Centre for Accountability of International Organisations (www.caio-ch.org), which features as board members public lawyers Françoise Hampson, British Governor of Human Rights, and Public and EU Law Professor August Reinisch of the University of Vienna.

Key law reforms for the UN must extend beyond the recently announced internal restructure and move past mere legal tinkering into core governance issues.

The UN and its sister organizations comprise a sprawling administrative bureaucracy with 191 Member States, encompassing more than 46 international organizations employing some 70,000 odd staff who work within a highly politicized environment.

SOFT AUDITING PROCEDURES

UN agencies are subject to soft auditing procedures, which reduce accountability and transparency, as the "Oil for Food" and the new UN procurement scandals have demonstrated. Compared to prevailing corporate models, the UN falls short when measured against both transparency and reporting standards. Auditing and

reporting procedures do not meet ordinary independence standards; they are not subject to scrutiny or question by independently elected boards but reviewed by the Board of External Auditors, which is contracted by the UN Secretariat to perform annual audits of UN programs and field operations. The Board is comprised of government auditors from Member States, rather than being composed of independent auditors, and does not apply GAAP, the generally accepted accounting principles.

SEXUAL HARASSMENT

The UN is also far from being an ideal employer. Unspoken pressures whisper through troubled corridors. Women, in particular, suffer. Not only is the reality of psychological harassment ever-present, the constant threat of non-renewal of contract can sometimes take a nasty turn. Women are sometimes subjected to the age-old threat of put out or get out. Those lonely nights in the office, or that conference opportunity, can lead to inappropriate suggestions which in most modern corporations would see an executive walk the plank or, worse, result in a damaging public lawsuit. Yet, in the UN's internal system described above, it is difficult to prove sexual harassment.

A comprehensive overview of the UN's protection and procedures for discrimination and harassment by U.S. law firm Chadbourne & Parke LLP (available on the UN Panel of Counsel Website at <www.un.org/staff/panelofcounsel/shrep.htm>) found that

the "UN Sexual Harassment Policy …would quite likely fall short of current standards in the United States applicable to determining the effectiveness of an anti-sexual harassment policy". The Report noted that most employment law practitioners believe that "simply having a sexual harassment policy is not enough by itself adequately to prevent sexual harassment from occurring". It found that:

> "It is necessary to educate, educate, educate employees, particularly decision makers, managers and supervisors, about sexual harassment. An employer must be able to show that it fostered a company-wide attitude that gave employees comfort in coming forward; i.e., that they had no bona fide reason to fear retaliation, that they knew their complaints would be taken and acted upon seriously and promptly, and that the company would do whatever it took to right the wrong."

The vulnerability of all employees in short-term contracts subject to pressures from bosses who are at times political, rather than professional, appointees requires urgent remedial action. Two important problems exist. The first is that vulnerable, short-term staffers are less likely to complain, particularly if their boss is the source of the problem, for once they do, they fear, justifiably so, that they will soon be out the door. The second is that the process itself is not considered reliable by staff. The Lubbers' matter is a case in point. Why would staff lodge a complaint of sexual harassment when they may not even receive the report authenticating their complaint and it is entirely possible that the harasser will be protected by the bureaucracy and pardoned without sanction?

If the Lubbers' case were the only instance, it could perhaps be written off as a one-off, unlucky episode. Unfortunately, the UN's own internal investigation identified four (4) other women besides the original complainant whom were allegedly inappropriately treated by Mr. Lubbers during his short tenure as High Commissioner for Refugees! Notwithstanding such clear and detailed findings, the UN Secretary-General dismissed the complainant's claims as "unsustainable". This sends a message to harassers and staff that harassment doesn't matter. The inadequacy of internal regulatory mechanisms, particularly for those staff based in the field, tends to prevent adequate resolution of harassment in general.

Powerful harassers are often promoted onwards, and even upwards, without fear of reprisal. Over the years, a considerable number of cases reveal senior bureaucrats charged with harassment or sexual harassment going unpunished, shown leniency, or being paid out and promoted into another UN bureaucracy. Other systemic problems of not dealing with harassment properly include copycat harassment by subordinates, who are shown how to get on in an atmosphere of impunity. This leads directly to psychological injury and a downwards spiral. We all deserve so much better.

Much like the Catholic Church, where the problem of not dealing properly with sexual harassment has lead to promotion or transfer and protection of harassers, the UN needs to be more aware of the dangers of leaving this problem unaddressed.

ANOTHER SCOURGE OF INTERNATIONAL ORGANIZATIONS: PSYCHOLOGICAL HARASSMENT OR "MOBBING"

Psychological harassment or "mobbing" has been described by the World Health Organization as "repeated, unreasonable behaviour directed towards an employee, or group of employees, that creates a risk to health and safety". Bullying is subtle, involving a misuse of power and authority against a powerless victim.

A recent survey commissioned by the World Health Organization Staff Association and performed externally by independent expert Professor Dieter Zapf of the Johann Wolfgang Goethe University of Frankfurt measured the rate of mobbing, or psychological harassment, within the WHO at a minimum prevalence of 6.9%. That is, of all WHO employees, a minimum of 6.9% are subject to harassment or mobbing lasting for six months or more, a rate twice the national average throughout Europe. Professor Zapf concluded that the problem was poor management; his suggestion, as a partial solution, was to call for the improvement of internal dispute resolution procedures.

A CASE IN POINT: HARASSMENT GONE WRONG

The case of *In re Qin*, ILOAT Judgment No. 1752, involved a Chinese national subjected to psychological harassment by work colleagues who wrote a libellous petition in the form of a letter to the

Director of Personnel at the ILO requesting that she be transferred from the group. According to her husband, the harassment caused such an ongoing crisis for Ms Qin that on 14 December 1993 she committed suicide at home in Geneva.

Although the Swiss judicial authorities attempted to open a criminal investigation into the death, the complaint was never heard by an independent legal system. The ILO Director-General refused to permit the Swiss Procurer-General to enter the ILO grounds or to co-operate with the investigation, citing functional immunity and the finding of the UN-appointed medical panel which found that "factors connected with the official duties [of the victim] and factors external to her work" might have brought about "a serious emotional state akin to mental illness" but that "the extent of it attributable to work had not proved decisive".

The Tribunal's Judgment demonstrates an unwillingness to investigate, refusing to call witnesses, which may well have had a bearing on the question of causation:

> "12. There is a second point. Her sad death did of course alert the ILO to things that had gone awry in the Chinese unit. But there is not a whit of evidence to suggest that, by act or omission, it denied her the sort of considerate protection any organisation owes its staff."
>
> "13. *There being no need to hear the witnesses* the complainant wishes to call, all his claims, including the one to costs, must fail." (emphasis added).

The issue here is not so much whether or not the workplace harassment caused, contributed to, or had no connection with the suicide. The victim and her family were deprived of the right to an independent investigation into her harassment and its tragic results. No evidence was presented or tested, no witnesses were called.

Exclusion of the Swiss Procurer-General from any involvement in such a claim effectively precludes charges of homicide from being brought by an independent body. The Respondent-appointed and -paid medical panel *may well* have been unbiased and disinterested; however, their conclusions and the failure to call any evidence gives the appearance of bias and demonstrates a lack of functional independence in the system.

In an ordinary workplace, occupational health and safety laws would permit an independent enquiry to take place. The question of legal liability of an employer, in circumstances where responsibility for an employee's death is at issue, whether by contributory negligence, act or omission, ought to be determined by an independent body, not by an internal, employer-controlled medical panel. The rule of law, of necessity, involves an independent and impartial adjudication process.

BETTER GOVERNANCE WOULD MEAN LESS CORRUPTION, BETTER FUNCTION, GREATER EFFECTIVENESS

The flow-on effect in terms of good governance for the nation States the UN operates in would be enormous if the Organization's internal accountability could be improved through access to an independent adjudicatory system with ordinary legal powers. Law-based thinking and acting, particularly when underpinned by public international law, a natural product of international legal thinking, depend upon the rule of law, in application as well as in theory. The execution of the work of the UN deserves a better system of accountability than is currently in place. The work of the UN is desperately needed in the world, but its effectiveness and efficiency is grievously undermined when core UN functions are themselves mired in corruption and absence of due process.

During the law reform debate, it has been suggested by UN managers that justice, itself, is too costly. Paying for lawyers to participate in in-house adjudications, for example, is complained of as an extra-budgetary expense which costs too much. Yet, the UN would benefit enormously from the knock-on effect of good internal regulation through the implementation of real legal reforms. If staff could rely upon the internal system to adjudicate internal disputes fairly, responsible management would increase and counter-productive bullying and harassment would decrease.

IN THE ABSENCE OF INTERNAL DUE PROCESS, IT IS HARD TO SET AN EXAMPLE TO THE REST OF THE WORLD

For a cigarette or weapons manufacturing company, due process and best practice in internal governance are not an integral part of their message to the world. Their duty is to maximize shareholder profit and ensure legal compliance with national laws. Moreover, failure of a private company to abide by applicable legal standards runs the risk of a catastrophic public or private lawsuit brought by disgruntled staff, shareholders, or injured third parties. The incentive to abide by the rule of law is built-in and driven by self-interest.

Yet the UN and its international system of organizations has a duty to improve the world, through the international treaty system, through peacekeeping, peacemaking, judge training, nation building and creating an international criminal justice system, in execution of a specific and detailed mandate. Good internal governance is critical in order not to undermine such important international governance and law-making activities.

PROBLEMS IN THE UN'S SPRAWLING ADMINISTRATIVE BUREAUCRACY

Corruption itself is hardly a surprise in a sprawling bureaucracy such as the UN, with hundreds of different national cultures, each with its own, unique cultural definition of corruption, in the absence of recourse to an independent system of law, and with

multi-faceted ways of doing business which leave plenty of room for flexibility and … creative accounting. Part of the accounting system within the UN is that there is no incentive or easy mechanism for official investigation of either small, internal UN fraud (staff on unusual contracts, staff being paid on a contractual basis for dubious work not done) or the larger international issues, such as "Oil for Food". Lack of independence makes instigating investigations difficult, while jurisdiction and organizational responsibility are hazy.

The antidote to this is transparency, accountability and, ultimately, a mechanism for enforcing inter-governmental accountability. Transparency International defines corruption, operationally, as "the misuse of entrusted power for private gain". Misuse of power tends to happen, above all, where the perpetrators enjoy immunity or otherwise face little risk of exposure or sanction.

ETHICS, CORRUPTION AND "OIL FOR FOOD"

The UN's "Oil for Food" scandal spawned seven separate investigations into allegations that Iraqi leader Saddam Hussein smuggled oil, paid kickbacks and skimmed more than US$ 10 billion from the program. The bribes allegedly went to politicians and companies in 52 countries, including all five Permanent Members of the UN Security Council. UN staffers, including the administrator of the program, Benon Sevan, reportedly personally profited from kickbacks. All have denied wrongdoing. None will face the severe

penalties which would be triggered by such acts in national court systems.

The Independent Inquiry Committee into the United Nations Oil-for-Food Programme, headed by Paul Volcker, was criticized in the international press throughout 2005 for its lack of independence, absence of subpoena power, and lack of power to impose any penalties or sanctions. A key procedural issue is the lack of any resemblance to an ordinary court. The Commission bears no enforcement authority (such as contempt orders) to compel compliance with its requests for information and had no authority to discipline or punish any wrongdoing it discovered. This provides no disincentive for future offenders.

BUDGETARY RESPONSIBILITY

Corporate accountability standards are a useful yardstick by way of comparison. Corporate governance structures today seek to ensure a minimum number of independent directors, generally appointed for their expertise, such as financial, rather than political connections, the latter of which is more often the case in the UN.

Selection of a series of truly independent directors would exclude, for example, the appointment of a president of a company which does business with another company. An independent remunerations and nominations committee increasingly scrutinizes

payments made to company directors today. Directors also need to be independent and nominated for their skill and expertise.

THE AUSTRALIAN WHEAT BOARD COMMISSION

A good case by way of comparison to the Independent Inquiry Committee into the United Nations Oil-for-Food Programme is the Australian Wheat Board (AWB) Commission hearing held in Sydney in January 2006, a common-law Commission of Inquiry.

Lawyers at the hearing said that the AWB knowingly paid huge kickbacks to Saddam Hussein's government. Both the AWB and the Australian government have denied any wrongdoing. The AWB has consistently denied that it knew that these transportation fees—which were paid to a Jordanian firm—were ending up in the Iraqi government's hands.

The hearing was told that the actions were in direct breach of UN sanctions which were imposed on Iraq. The official Australian inquiry was requested by the UN, which released a report last October showing that the AWB had made a total of US$ 222 million in so-called "side payments" for the transportation of wheat.

Critically, the Commission can recommend that executives be prosecuted if these allegations are substantiated; ordinary national laws in both common-law and civil-law countries provide for the prosecution of senior executives involved in corruption. Had the Australian government's enquiry not been permitted subpoena or

discovery powers, or had the Commissioners been hand-appointed by the government, it is entirely foreseeable that the Commission would have been ineffective.

An exchange between Commissioner Terrence Cole and witness Andrew Lindberg, the managing director of the AWB, shows what effective cross-examination can do:

> "TERRENCE COLE QC, COMMISSIONER, OIL-FOR-FOOD INQUIRY: Mr Lindberg, this draft of the agreement is a sham, isn't it?
> ANDREW LINDBERG: I don't know.
> TERRENCE COLE QC: Well, read the document.
> ANDREW LINDBERG: Well I—that's of a different character to what I described, yes.
> TERRENCE COLE QC: None of the provisions of this draft agreement reflect the true agreement, do they? That is not reflected in any way in this draft agreement?
> ANDREW LINDBERG: I agree."

Without tough, independent cross-examination, under the pains and penalties of perjury, it is difficult to find out the truth, because the truth is complex.

The adjudication of commercial disputes and corruption allegations ranging from money in the pocket, "Oil for Food" style, to more complex allegations of irresponsible use of public funds must be met with a firm, impartial dispute adjudication system, perhaps modelled on the European Court of Auditors. A truly independent

forum is urgently needed to replace an antiquated and inadequate system for handling complaints against the UN.

Historically, the evolution of growth in the activities of States has been matched by incremental changes in law, reflecting developments in government or administrative law, nationalized industries, companies and commercial and regulatory function.

The UN's dispute resolution system is an unhappy mix of administrative and international law without the backbone crucial to a strong, functional legal system, i.e. separation of powers. This structural anomaly does mean that internal law reforms will need to be triggered by an external mechanism to ensure accountability.

Not only is the adoption of a clear, functional legal system reform package critical for the continuing improvement of the UN as a rule-of-law based institution, the beneficial flow-on effect of fair adjudication of employment disputes as a model for all Member States of the UN will be enormous.

RESPONSIBLE USE OF PUBLIC FUNDS

An appropriate system of checks and balances regulates the responsible expenditure of public funds. Penalties ordinarily applicable for cases of public-funds fraud, or corporate fraud, range from court orders for personal bankruptcy through to imprisonment for white-collar crime. Misuse of public funds is a serious issue, and

companies in national jurisdictions are held responsible for not only misuse but also for mismanagement.

Gaps in the current UN legal framework, including absence of powers of deposition, cross-examination and the discipline and rigour of independent appeal to a higher national court, remove the sting from internal legal proceedings and fail to provide a detailed trail of responsibility. Rather than individual responsibility, errors are attributed to institutional deficits. In the typical UN scenario, no one staff member is adjudged culpable because so many are found to be responsible. This was the tragic result of the UN's internal investigation into allegations that NGO workers, UN peacekeepers and UN caregivers were trading refugee aid for sex with young refugee girls in UNHCR camps in Guinea, Sierra Leone and Liberia, a scandal widely reported on in 2002 and 2003.

Such a culture does not encourage best practice. Sadly, no culture is above corruption, as any reading of a commercial court list will quickly reveal. What is unusual in internal UN procedures is the absence of appropriate checks and balances.

SOME SUGGESTIONS FOR THE WAY FORWARD

Notwithstanding the high moral and ethical mandates of the UN and its sister organizations, it must be recognized that functional immunity in these organizations can lead indirectly (and sometimes directly) to violations of basic human rights as well as to internal UN mismanagement of funds.

The ordinary practice and procedures of the UN's internal system of justice require revision to bring them into line with international best practice. Remedies themselves are in some respects inadequate—for example, the lack of document discovery or freedom of information. However, systemically, a fear of speaking out and a lack of confidence in the independence of the system prevent witnesses from giving testimony.

British Governor of Human Rights, Professor Françoise Hampson, in her report to the UN Sub-Commission on the Promotion and Protection of Human Rights, outlined the reluctant witness problem in a working paper on the accountability of international personnel taking part in peace support operations:

> "There is a need to address the problem of reluctant witnesses, especially civil servants who are requested to testify against their superior. For various reasons, including the fear of suffering adverse consequences in the workplace, they may not be willing to give evidence to the investigating authority. United Nations officials believe that is it is compulsory for all civilian staff to give testimonies when called upon to do so by a Board of Inquiry. However, there is evidence that, even whilst confirming orally that they know the allegation to be true, they are not willing to give evidence to a Board of Inquiry. This suggests that United Nations personnel have little faith in the Organisation's capacity to deal with allegations."

CONCLUSION

In order to ensure that the UN and its sister international organizations update and reform to reflect human rights norms developed only in the 20th century, the UN needs to bring its own house into compliance with international standards, as described in international law treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as numerous ILO Labour Conventions which have been accorded the status of basic human rights.

To preserve its own reputation and to ensure its long-term survival, the UN must adopt an impartial and independent system for the adjudication of internal disputes with staff for both criminal and civil matters. A neutral forum for the investigation and prosecution of corruption, ideally in the form of a court with interrogatory powers and the authority to call witnesses and make orders, is eventually required.

The UN presently fails to create an internal environment with adequate due process to ensure that best practice standards for fair trial are guaranteed. An inadequate system of checks and balances could be improved by removing the internal dispute resolution process from the control of appointed staff and transferring it to the responsibility of independent, qualified judges and mediators.

The UN needs to support rules that enable complaints to be brought properly and fairly rather than restricting access to ordinary procedures and, consequently, limiting due process. The UN's role as a prominent arbiter of justice should be used as an example to nation States without adequate or functioning internal justice procedures.

Full acceptance of the responsibility of the UN's wide-ranging mandate, from peacekeeping to nation-building, often in new nation States without advanced legal systems of their own, must be preceded by genuine internal reforms. To ensure that the international public funds the UN receives are spent with full accountability to the international community, the reforms required are significant.

Our international civil service deserves a better justice: our international community deserves a better justice model.