

EXTERNAL EXPERTS JUSTICE REFORM

REVIEW

In two different reports in 2000, Secretary-General Annan made two very important and contradictory statements:

"The jurisdictional immunity of the [UN] Organization *legally obligates it to have just and effective internal processes* to deal with grievances and appeals by staff, and with disciplinary cases ... [as] *an indispensable aid* to maintaining staff morale, as well as *enforcing accountability*. ..."

"Accountability and responsibility: Report of the Secretary-General [Kofi Annan]", A/55/270 of **3 August 2000**, Summary, para. 39.
[emphasis added.]

"While there is currently a comprehensive system of justice in place, its highly formalized nature leads to protracted and lengthy proceedings that are in the interest of neither justice nor of the staff or management. At present, the decision makers whose administrative decisions are questioned are very rarely directly involved in defending the cases. This has resulted in the perception that the system shields managers from being held accountable for their decisions."

"Human resources management reform: Report of the Secretary-General [Kofi Annan]," UN document A/55/253 of **1 August 2000**, para. 51
[emphasis added]

Subsequently, and gradually, people at the UN are waking up once again in 2004 to the entrenched reality of a defective UN internal justice system in an organization which stands outside the national laws which govern the rest of mankind. There have been a few cosmetic changes in the past few years, mostly in providing a little training for staff volunteers in the appeals and disciplinary processes in the increasingly-complex matters which they become involved in, but no substantive change.

Meanwhile, however, the UN coasts along, as it has for decades, without management accountability, with limited oversight, and with restricted staff rights. UN staff caught in disputes with management continue to be intimidated, and suffer, in a multi-year losing game in a system controlled by the Administration at every turn, and with no right of appeal anywhere else.

In the 1970s a distinguished professor of international law, M. B. Akehurst of the University of Paris, had concluded that it was "not tenable" for an international organization to deal with its staff "outside any known legal system", and a group of UN system staff representatives met to launch their first campaign to reform the UN internal justice system. Their analysis disclosed, *inter alia*, the basic facts that:

"Social justice [to which international agencies are committed] stops short for one segment of mankind -- the international civil servant, a member of a virtually unprotected minority.

The existing system of due process suffers from an absence of important elements: it leaves out values. It ignores needs ... It pretends that the 'rule of law' can stand independent of the society in which an international civil servant lives and functions. All too often, the appeals procedure, which is conceived of as an instrument to raise a staff member's hopes, buries it instead.

... the machinery of due process is slow and ponderous, and thus fails to provide a true safeguard against administrative absolutism and arbitrariness ..."

"Appeals procedures for international civil servants," Federation of Civil Servants Associations (FICSA), FICSA Studies and Policies No. 2, of 1974, as quoted and discussed in Ozorio, Peter, "Tribunal trouble: Legal rights revisited", UN Special, October 1992, pp. 25.

The 1974 FICSA report also provided a very incisive analysis of key deficiencies in the appeals system [which remains fully applicable three decades later] *inter alia*:

"Appellant as Trouble-maker: Challenging an administrative decision, no matter what, by and large, is still regarded with suspicion ...

Weakness of Internal Boards: Probably [their] weakest point is that an executive head sits as prosecutor and judge ... [particularly] in smaller-sized duty stations ...

Pernicious doctrine: ... after all evidence is presented and weighed and abuse or misuse of power is proved -- and thus the administrative decision is not, as frequently claimed, "in the best interest of the organization" -- then it is indefensible to deprive an appellant of remedy sought. ...

Either/Or Judgement: When administrators have been found guilty ... [of misconduct] tribunals, without notable exception, give an executive head a choice -- the remedy sought ...(say reinstatement) or compensation ... appellants ... may win their cases, but still lose their jobs.

Just Handouts or Just Compensation: The tribunal's known practice of mendacity in cash settlements ... makes it easier for an administration to pay. But for most administrations, the choice is not saving money, but saving face. The choice is made easier because the 'fine' that is paid comes out of the pocket of member governments ... How are these expenses shown on an organization's books?"

"Appeals procedures for international civil servants, Federation of Civil Servants Associations (FICSA), FICSA Studies and Policies NO. 2, of 1974, as quoted and discussed in Ozorio, Peter, "Tribunal trouble: Legal rights revisited", UN Special, October 1992, pp. 25-26.

And in 1987 the UN's top manager warned of the grave consequences which continuing acceptance of the poor internal justice system could have for the UN as an organization:

"... Lamenting that 'Something has gone very wrong with our processes', [UN Under-Secretary-General for Administration and Management Martti Ahtisaari] stressed that justice was not only important in itself, but was also a basic aspect of good staff-management relations. Justice was a 'primary defense against the buildup of feelings of arbitrariness and discrimination' which, he warned, could undermine staff morale and finally destroy an international organization however high its ideals and purposes."

"Staff-management meeting to discuss justice administration reform and performance reports", Secretariat News [New York], **31 August 1987**, p. 5.
[emphasis added]

Yet in 1993, a blunt assessment by an expert on the subject showed just how little the internal justice situation had changed:

" ... it is practically impossible for staff members to secure justice in accordance with the fundamental principles of due process of law, fair play and impartiality in the administration of justice. ...

... there is no separation of executive and judicial powers in the United Nations and consequently OHRM virtually acts as 'prosecutor, judge, jury and executioner' contrary to the democratic principles and practices. ...

The [appeals secretariats] are directly under the Administrative control of the USG for DAM. Similarly, the Panel of Counsel is [also under his control] ...

The Office of Legal Affairs ... renders legal advice to OHRM on all appeals and disciplinary cases ... and is responsible for vigorously defending the arbitrary, discriminatory or prejudicial administrative decisions, right or wrong, on behalf of the Secretary-General, before [the UNAT] ...

Thus, for all purposes, the entire appeals and disciplinary procedures in the United Nations virtually constitute a 'mockery of justice.'"

Mark A. Roy, Legal Correspondent, "For a separate office for administration of justice in the United Nations, a New York staff journal, **July 1993**, pp. 2-3.

The General Assembly had long urged that this situation be corrected. In a resolution, also in 1993, on personnel questions, it regretted that a requested report on the problem had not been provided and stated clearly that it:

"Stresses the importance of a just, transparent, simple, impartial and efficient system of internal justice in the Secretariat:

Requests the Secretary-General to undertake a comprehensive review of the system of administration of justice ... [including Member State suggestions and] in consultation with the staff representatives as appropriate, and to submit a report thereon including inter alia, information on costs arising to Member States from the system ..."

"Personnel questions", General Assembly resolution 47/226 of **30 April 1993**, section II, paras. 2-3. [emphasis added.]

Eleven years later, however, the "justice reform game" is beginning all over again. The General Assembly passed another important and related resolution in early 2004, which emphasized that an independent and impartial judiciary are essential to protect human rights and should therefore be respected in all circumstances. It then reaffirmed the importance of full and

effective implementation of all UN standards on human rights in the administration of justice, and that Member States should spare no effort to ensure full implementation of those standards, using UN technical assistance to strengthen their capacities and infrastructure. In this context, as elsewhere, it is time for the UN to begin to practice internally what it preaches to others.

"Human rights in the administration of justice," General Assembly resolution 58/183 of 18 March 2004, preambular para. 2, and paras. 1,2, and 5.

There is now, once again, a growing recognition of the weak UN internal justice system, buttressed by some expert opinions, first about the severe deficiencies in the underlying UN rules by C. F. Amerasinghe in 1997, and second, conclusions on UN system internal justice processes by Geoffrey Robertson in 2002:

"The title 'Code of conduct' is inappropriate for what is essentially an amended version of the existing [UN] Staff Regulations and Rules. ...

The UN has the power of legislating for its staff ... but there are limitations on the right. The most important is that amendments must not interfere with 'acquired rights' (acquired rights are, in other words, fundamental conditions of employment.) ...

.. In light of the above factors, there are grounds for questioning the validity of the amendments. These grounds will be considered in turn:

- (a) Lack of consultation in good faith and in an appropriate fashion -- ...;
- (b) Improper motive -- ...
- (c) Inconsistency of amendments with fundamental terms of employment (acquired rights) or jus cogens (fundamental and unchangeable principles of international administrative law), or a higher law (Charter or Convention, etc.) ...

[for example] (vi) "In the Staff Regulations and Rules dealing with investigations, etc., the requirements of due process -- such as the right of defense -- which are fundamental, are not clearly indicated."

Professor C. F. Amerasinghe, "The 'Code of Conduct'", UN Staff Report (New York), **December 1997**, pp. 12-13 [13].

[Note: Professor Amerasinghe is the author of The law of the international civil service (as applied by International Administrative Tribunals), 2 vols., 2d ed., Clarendon, Oxford (UK), 1994, and Principles of the law of international organizations, Cambridge, Cambridge (UK), 1996.]

"I am asked to advise the staff union of [the ILO] as to whether the [ILOAT operation] conforms to the requirements of international human rights law. ... It serves as the final arbiter of employment issues for some 35,000 international civil servants, deprived by their occupation of recourse to domestic employment law ...

In principle, a tribunal of this potency and importance must operate, and be seen to operate, to the highest standards of transparency and fair play. ...

There are ... fundamental ways in which ILOAT fails to conform to the requirements for a judicial body ... the deficiencies in compliance with human rights standards have produced a perception of injustice, and have denied to unsuccessful complainants a proper opportunity to press their case ...[which consequences] require urgent rectification.

There are ... many other deficiencies both practical ...and jurisprudential ... that could be addressed in any overhaul ... However, in this short and necessarily broad-

brush opinion I have sought to identify the respects in which it can be said that the Tribunal is in breach of human rights rules which have a jus cogens quality, and should therefore be a defining characteristic of every international judicial body."

"Opinion," Geoffrey Robertson Q.C., **November 20, 2002**, paras. 1-2, 5, 16.

[Note: Mr. Robertson was requested in 2002 to survey whether the operation of the ILOAT (generally considered to be better than the UNAT) conforms to the requirements of international human rights law.

Mr. Robertson is the author of Crimes Against humanity: The struggle for global justice, (2d ed., Penguin Books, London, 2002), which is placed near the very top of IO Watch's list of most relevant books on UN management accountability in the Recent Developments section. Several of his highly-informed insights will be quoted at various places in this archive.]

As the above quotations (and Secretary-General Annan's own introductory observations of 2000 also cited above) suggest, the UN administration of justice process has grave fundamental flaws. The General Assembly is once again becoming concerned with this sorry situation, and the JIU has done and the OIOS is doing some work on the problem, all as detailed in this archive's subsection on Inept "Administration of Justice" System. But there is a high risk that, as in the past, several years of vigorous discussion will once again break down and fail to bring real change.

An excellent opportunity to put an end to UN "administrative injustice" was offered before the UN 50th anniversary celebration by two of its most distinguished veterans and astute observers, Erskine Childers and Brian Urquhart, in their report on renewing the UN system, but was never acted upon:

"ADMINISTRATIVE JUSTICE

The debilitating atmosphere and the rise of cronyism have sapped staff confidence in justice within secretariats. Even peer appeal boards lack full trust because no staff member seeking redress can feel confident any longer that he or she may not be intimidated. This state of affairs has been well known. ...

The independent commission ... [that they proposed to deal with strengthening the international civil service] should propose a proper resort system whereby staff can report malfeasance without fear, staff seeking redress can have proper counsel, and all staff can have the requisite measure of protection from imperious behaviour by poorly-chosen superiors. The commission should reconsider an ombuds function for staff matters which exists in many countries and organizations including some in the UN system. ...

The independent commission should recommend an entirely improved system of administrative justice for staff, providing adequate counsel and protection in due process."

Erskine Childers, with Brian Urquhart, "Renewing the United Nations System", Development Dialogue, 1994:1, Dag Hammarskjold Foundation, Uppsala, Sweden, **1994**, pp. 169, 211.

IO Watch proposes two fundamental action steps that are readily available to the UN to act on the above recommendation. FIRST, the World Bank, under pressure from its U.S. Congress

neighbor in Washington, D.C., was able to do what the UN seems perpetually unable to do: it took major action to improve its own internal justice situation in 1996-1997, as shown by the two following quotes:

" ... [The World Bank] is facing allegations from current and former employees that it fails to deal properly with accusations of mistreatment of whistle-blowers and charges of sexual discrimination and harassment.

A recent internal report commissioned by [bank President James] Wolfensohn ... found that bank employees 'feel the system is heavily weighted in favor of management' and estimated that about 95% of those with complaints never lodge them officially.

[US] Senator Patrick Leahy, who has been investigating how the bank treats women, in blistering in his criticism. ...

The problems can be traced to the bank's little-understood special legal status. As an international diplomatic body, it is immune to laws on discrimination and harassment ... around the world. ... When the bank's in-house grievance process fails, victims cannot appeal to a higher (and impartial) authority. Bank officials enjoy diplomatic immunity from U.S. courts unless the bank waives it." ...

The bank has developed a laundry list of changes for its internal procedures, many of them designed to install at least some due process. ...

Says Mr. Wolfensohn: 'I believe that with these changes we will have in place one of the best grievance systems in the world.' "

Glenn R. Simpson, "World Bank, under attack, concedes staff problems", The Wall Street Journal, **March 19, 1999.** [emphasis added.]

" ... you failed to mention that 18 months ago Jim Wolfensohn brought in a world-renowned expert, Judge Shirley Hufstедler, a former U.S. Court of Appeals judge, to review the grievance system as a whole. ... About 12 months ago, an internal task force was commissioned to review and recommend changes to the grievance system to make it more responsive to staff needs. ... Judge Hufstедler and a panel of internationally recognized experts [including ombudspersons] provided detailed reviews and comments on the work of the task force. ... [other views were also invited and] the recommended changes to the grievance system, as adjusted to take account of the views of the learned outsiders, are now being implemented."

Jamil Sopher, Chairman, World Bank Staff Association, "Here at the World Bank: Our story", The Wall Street Journal, **April 20, 1999.**

Many factors underscore the need to very seriously, professionally, and urgently reexamine the defective UN internal administration of justice system:

-- the recent General Assembly resolution stressing that "an independent and impartial judiciary are essential to protect human rights in the administration of justice" which the UN should certainly honour itself (resolution 58/183 cited above);

-- the expert opinions on the UN internal justice system's fundamental problems of 1997 and 2002 also cited above;

-- the considerable new General Assembly and other

interest in rectifying the internal system's weaknesses that have been moldering for decades; and

-- certainly the doubts expressed by UN staff in the worldwide "integrity survey" released in June 2004 about UN accountability and the legitimacy of actual UN whistleblowing and disciplinary processes.

IO Watch believes that it is essential that the Secretary-General (or, better, the General Assembly) commission an external expert panel, together with an internal working group, with full consultation with the staff this time, to follow the highly relevant effort made by the World Bank in 1996-1997, and perform a careful and professional assessment of the UN's inept internal justice system and its problems.

However, even this process will be a ponderous one and it risks collapse and inaction when it returns to the Secretariat and the General Assembly, as occurred with past major Secretariat and General Assembly reform efforts in 1985 and 1995 (and on other occasions as well.) Meanwhile, the injustices in the UN "internal justice" system will continue on and on.

A recommendation on needed reforms by the JIU in 2002, while commendable in intent, illustrates this problem of actions that will take the UN years to agree on (if ever). Drawn-out and vague improvement actions may well only ensure that the grand UN tradition of justice delayed and denied continues. The JIU cited:

" ... the desirability of establishing an ad hoc panel ... to review [the judgments of] the existing two tribunals or a single future tribunal ...

... Applications [would be] ... founded on the following criteria: ... the tribunal has exceeded its jurisdiction or competence; ... has failed to exercise jurisdiction vested in it; ... has erred on a question of law relating to the United Nations Charter; ... has committed a fundamental error in procedure which occasioned a failure of justice; and ... that the tribunal has deviated substantially from its jurisprudence."

Joint Inspection Unit, "Report of the [JIU] on reform of the administration of justice in the United Nations System: Options for higher recourse instances", UN document A/57/441 of **27 September 2002**, especially Recommendation 5.

Instead of a review process available only at some indeterminate time in the future, and only after those few stubborn UN staff who spent about five years working their way through the internal justice system realize that they have been "had", a much more swift, responsive, and independent process is needed, now.

Happily, it can be found in the UN's own judicial assistance programmes for the rest of the world (which in fact would clearly support the need to "spare no effort to ensure the full and effective implementation of human rights standards" to strengthen judicial capacities, as cited by the General Assembly 2004 resolution above.)

The UN Global Programme Against Corruption established a Judicial Group on Strengthening Judicial Integrity, which met for the first time in Vienna in 2000. It discussed a judicial integrity programme of Transparency International, and other sources such as the UN. The group developed the following initial suggestions:

"(3) Monitor: There is a need to establish in every jurisdiction an [independent] institution to receive, investigate and determine complaints of corruption allegedly involving judicial officers and court staff ...

(5) Codes of Conduct: There is a need for the adoption of judicial codes of conduct, for ... instruction in such codes in the education of new judicial officers and for information to the public ... about such codes against which the conduct of judicial officers may be measured.

(6) Adherence: There is a need to enhance requirements for newly appointed judicial officers ... to subscribe to such a judicial code of conduct ... and to agree ... in the case of proved [serious breach] ... to resign from judicial or related office.

(12) Civil society: ... To combat departures from integrity and to address the systemic causes of corruption, **it is essential to have in place means of monitoring and auditing judicial performance and of the handling of complaints about departures from high standards of integrity in the judiciary.**

"Judicial Group on Strengthening Judicial Integrity: Record of First Meeting", Global Programme Against Corruption Working Paper, UN ODCCP, Centre for International Crime Prevention, Vienna, April 2000, esp. pp. 3-5.

[emphasis added]

[Note: A second and third meeting have now taken place, and Principles of Judicial Conduct developed. They are available at

www.unodc.org/unodc/corruption_judiciary.html]

This leads to the SECOND suggestion by IO Watch to improve the UN internal justice system on a rapid and continuing basis, and independent of (but as an essential part of) the broader World-Bank type of external review suggested above.

After decades of an entrenched and unaccountable and non-transparent internal UN judicial process, there is an urgent need for the "sunshine" of transparency, through an independent expert who would monitor the UN internal justice process, certainly as much as in any country. This expert could finally provide, on an ongoing basis, a clear independent focus on the UN administration of justice process, help develop a code of conduct and serious standards, monitor the processes, propose sanctions where necessary, handle complaints, and report publicly to the General

Assembly each year on that system's actual performance.

Such a person would dramatically and immediately improve the present careless, and at times downright arrogant, judicial performance of OHRM, OLA, UNAT, and other officials. Who could perform this function? Well, the OHRM *is* the present process, so it certainly lacks the requisite "arms length" status, credibility, and fortitude needed, as does the rest of the Administration. But one, or perhaps two, people with strong judicial and human rights backgrounds could quickly and comparatively cheaply be appointed. Their work (including public reporting) could greatly streamline the performance, and hopefully greatly reduce the considerable sums paid out to wronged staff, of the present, ponderous UN internal justice machinery.)

There is also an already-existing, and quite appropriate place to locate this person or persons -- in the office of the UN ombudsman, which IO Watch believes should be expanded and made into an independent and strong Human Rights Ombudsman, as proposed in 1994 by Childers and Urquhart, and which is even more relevant now than it was then (see the very next topic which follows.)

IF the UN would undertake this action, it would be wonderful to see due process, defendant's rights, the rule of law, and democratic accountability become a part of the UN's administrative processes. It could also:

-- help demonstrate that the UN is serious about the issues of human rights principles, the rule of law, and judicial integrity that it preaches so piously to the rest of the world;

-- allow the UN to (finally) begin to act to protect its staff while the hoped-for World-Bank type internal task force and external review proceeds;

--make clear that the UN indeed has a proper system of internal justice and is seen to have it, and

-- finally enable the UN meet its legal obligations, as outlined by Secretary-General Annan in the introductory quote to this subsection, as a cornerstone element of true accountability, and as a first but central step to finally answering the question, "Where is the Rule of Law?" in the UN:

"The jurisdictional immunity of the [UN] Organization legally obligates it

to have just and effective internal processes to deal with grievances and appeals by staff, and with disciplinary cases ... **[as] an indispensable aid to maintaining staff morale, as well as enforcing accountability.** ..."

"Accountability and responsibility: Report of the Secretary-General [Kofi Annan]", A/55/270 of 3 August 2000, Summary, para. 39.

Decisive UN action would also erase the glaring impropriety of an organization attempting to establish accountability without ever having the essential element of the "rule of law."

"One of the fundamental concerns of the modern state is the manner in which power and authority are wielded by those who govern in the name of pursuing societal goals and objectives. ... It is obvious that the more society is administered, the more power is concentrated in the hands of ministers and public servants

Generally, public officials and their organizations are considered accountable only to the extent that they are legally required to answer for their actions. ...

Within [a global context of public concern and political responsibility] ... public service accountability involves the methods by which a public agency or a public official fulfills its duties and the process by which [it or he/she] is required to account for such actions. Viewed *[in this way, public accountability is] ... a [broader] strategy to secure compliance with accepted standards and as a means to minimize the abuse of power and authority.*"

Joseph G. Jabbara and O. P. Dwivedi, eds., Public service accountability: A comparative perspective, Kumarian, West Hartford, CN (USA), 1989, pp. 1, 5. [emphasis added.]