

LEGAL OVERVIEW

The rule of law

The rule of law, was described by the Right Honourable Sir Ninian Stephen at the annual St James Lecture in Sydney, November 1999, as follows:

"The rule of law is, if anything, more concerned with and committed to individual liberty than to democratic governance. It forms a reliable constitutional barrier between power and people".

Lord Denning expressed a similar thought when, speaking in the context of democracy, he declared that

"the executive government must never be allowed more power than is absolutely necessary. It must always be made subject to the law."

IO Watch seeks to develop the capacity of the United Nations and all international organizations to embrace the rule of law, through ensuring that both the Tribunal system and the quasi-judicial bodies within the international system of organisations conduct adequate review of administrative decisions taken within the UN common system, in full compliance with international norms.

One side-effect of any bureaucracy is the potential for misuse or abuse of power in the workplace, leading to workplace harassment, psychological “mobbing” or bullying

One of the behaviours which appears to be prevalent within the United Nations, and which exemplifies internal labour issues which are not resolved or addressed through the UN common system, is the unfortunate behaviour of “mobbing” or “bullying”, defined by the World Health Organisation’s Occupational and Environmental Health Programme Booklet No. 4, p. 12 as

“Repeated, unreasonable behaviour directed towards an employee, or group of employees, that creates a risk to health and safety.”

Sadly, in a survey prepared at the request of the World Health Organisation Staff Association, the rate of “mobbing” or “bullying” experienced by staff in these organisations was measured at around twice the national average for public institutions throughout Europe. This unfortunate situation reflects an undercurrent of unresolved tensions which one would expect in an organisation not beholden to the rule of law,

without a sure method for dispute resolution and without a sure process for the resolution of differences between staff, where important administrative decisions are as often as not executed without proper reference to due process and where short-term contracts are the key and prevalent characteristic of conditions of staff employment, creating an understandable underlying level of tension, distress and performance anxiety in the workplace.

Currently, up to 60% of staff employed within select international organisations are on short term contracts. This situation, whilst it may hold out some short-term economic benefit, is in violation of ordinary due process in most mature employment systems. The deliberate structuring of long term-employment under guise of eleven month contracts interrupted by one month “contract breaks”, is one example of a common practice in international organisations, such as the World Health Organisation. Employees in international organisations are often placed on a series of short term contracts (lasting for periods as short as one week). This position renders them susceptible to power imbalances, more vulnerable to mobbing as well as to other forms of intimidation, including sexual harassment.

[Note: the empirical case study, by Professor Dieter Zapf of the University of Frankfurt, found a minimum prevalence of 6.9% of behaviours which satisfied the criteria for « mobbing » or severe bullying experienced by World Health Organisation employees in a study, conducted by the Johann Wolfgang Goethe-Universität in Frankfurt, and publicly presented to WHO staff in Geneva on 11 December 2003.

What is the rule of law?

What, then, do we mean by the rule of law, and how does the UN common legal system require changing to conform to the standards set out in international treaty law, as embodied in the practice of law in many of the UN’s member states and espoused by leading jurists throughout the world?

As part of an ongoing effort to provide better legal protection to both staff working for international organisations and to third parties effected by their acts, an organisation quite separate from “IO Watch”, which acts as a monitoring centre and reference point for relevant documents, the Centre for Accountability of International Organisations has been formed (see www.caio-ch.org). The Centre is comprised of leading jurists, academics and senior judges, in order to monitor and report on international organisations. The Board focuses on legal protection for both the staff of international organisations, and on the special difficulties faced by third party victims of acts of international organisations, given the complete immunity from suit enjoyed by all international organisations on behalf of third parties. This “cloak” of immunity allows international organisations to hide behind a veil in much the same way some corporate entities do, in creating shell companies, or complex corporate structures which avoids liability, raising some interesting parallels by way of comparison.

The consistent criticism raised by both the Board of CAIO, and other leading jurists such as Justice Geoffrey Robertson Q.C. of the UN's Sierra Leone War Crimes Tribunal, is the need for a just, efficient dispute resolution process, with provision made, where necessary, for the adducing of oral evidence in a public court system, staffed by appropriately qualified legal officers and completely independent from the UN's central bureaucracy. The current system is unwieldy; claims take a minimum of three years to be processed, with final judgments often offering little by way of redress - typical awards are between CHF 5,000 and CHF 20,000 even where complainants are found to have been significantly wronged. This provides the UN administration with little or no motivation for changing behaviour such as mobbing, bullying or sexual harassment, as no punitive element is involved. Perpetrators of harassment, including of sexual harassment, are able to enjoy impunity within the existing legal system due to the absence of an effective remedy for victims.

Key features of a fair legal system in compliance with the rule of law

International jurists Geoffrey Robertson Q.C., Louise Doswald-Beck and Dr Ian Seiderman have pointed out some of the flaws within the UN's internal legal system. Geoffrey Robertson Q.C. described two fundamental ways in which the ILOAT fails to conform to the requirements for a judicial body:

- The internal UN systems suffer from a lack of proper appointment procedures for the judges, who are effectively "contract judges", being appointed for periods of three years, with no prohibition on re-appointment. It would be appropriate for judges to be appointed for one term only, perhaps of five or seven years, and by an independent appointments commission. Clear rules should also be in force relating to appropriate judicial qualification, namely, that the judges be lawyers of distinction in the employment field, with some experience in human rights, and in administrative law.

- One of the fundamental defects, as agreed by senior judges and jurists from many different systems, is that the internal legal system should permit oral hearings, as indicated in the ILOAT statute, Article V of which provides:

"The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be in public or in camera", plainly and properly assuming that there will be oral proceedings, which are particularly necessary in cases where issues of fact are disputed. This is generally the case in employment law issues involving bullying, mobbing, harassment, discrimination or other (often hotly-disputed) disputes involving questions of fact, to which the law must be applied."

Why are public hearings important?

The need for public hearings has been stressed by a number of courts, but the requirement that a first instance hearing provide complainants with an opportunity to be

heard (provide a testimony to the court) and to have an opportunity to cross-examine witnesses from the other side, in conformity with the concept of the equality of arms, describes a basic standard set out in most human rights treaties.

A number of texts have been prepared both within the United Nations and within the Council of Europe which set out the basic requirements for a fair trial.

For example, Article 6 of the European Court of Human Rights – the Right to a Fair Trial:

Article 6, the right to a fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It is also useful to overview some of the texts prepared within the United Nations, including the Basic Principles on the Role of Lawyers, (1990), adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990:

Endorsed by the UN General Assembly in its resolution 45/166 of 18 December 1990

The Basic Principles on the Role of Lawyers, (1990) state:

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within the Territory and subject to the jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

One of the problems for victims of harassment and mobbing within the international system of organisations is the lack of effective remedy for such problems. International organisations need to take allegations of harassment seriously; part of that responsibility is to ensure access to legal representation, but it is also critical that international organisations implement fair procedures within their first-tier quasi-judicial bodies, including the right to a fair trial in accordance with due process. Currently, many first-tier quasi-judicial boards do not meet simple tests of conflict of interest, some try to exclude lawyers from attending and others refuse oral hearings, preventing the adducing of evidence, many refuse document discovery. All of these factors prevent complainants

from enjoying the right to equality of arms, with review to an independent appellate court. Implementation of a legal system which operates independently will help resolve problems and make the UN not only a fairer workplace for all, but a more efficient organisation to better serve the needs of its Member States.

The right to a fair hearing

Due process includes a transparent and clear document discovery process, transparency within the judicial appointments process, appropriate procedures regarding conflict of interest within quasi-judicial boards, lawyers not being excluded from attending hearings and a clear decision-making process, using agreed standards as described in international law.

As stated by Secretary-General of the International Commission of Jurists, Louise Doswald-Beck, in her legal opinion made public in October 2002: the right to a fair and public hearing is one which is set out in international treaty law, which has emphasized: that "justice must not only be done but must be seen to be done" and that the human rights treaties "guarantee not rights that are theoretical or illusory but rights that are practical and effective."

[Note: Please refer to www.ilo.org/public/english/staffun/info/iloat.]
Artico v Italy, European Court of Human Rights, case no. 6694/74).

The concept of a fair and public hearing incorporates the right to a fair trial as it is described in treaty law, including features such as an independent and impartial tribunal, which satisfies the guarantees of objective impartiality and the right to equality of arms, including the ability to contest all argument and evidence adduced by the other party.

Affirmed as a fundamental duty of the courts in the case of *Jansen-Gielen v the Netherlands*; *Aarela and Nakkalajarvi v Finland* before the United Nations Human Rights Committee.

Damages and awards

A system which provides some method of uniform quantification of damages for injuries sustained, together with a system for measuring the plaintiff's damage due to the employer's acts, where that damage is applicable, is an essential feature of a functional legal system for injured or sacked workers and bullied victims. A system of financial compensation for victims of sexual harassment, together with a system for protecting both victim (who is often treated much as whistleblowers are generally treated, that is, very poorly) and harasser (who is entitled to a fair trial in relation to the offence) is also required.

However, in instances where sexual harassment is found to have occurred, the perpetrator ought to be reprimanded, as a minimum, in the event of a transgression being

found to have taken place. The current system lacks two essentials in dealing with the problem of sexual harassment. First, there should be a process by which evidence may be adduced to determine the facts of the case. Sexual harassment cases, by nature, inevitably involve cases of “he said, she said”. It is important that oral proceedings take place, particularly in first instance hearings, in order to hear the evidence, put the allegations to proof and make findings based on the credibility and reliability of the witnesses in order to lead to determinations of fact which are systematically reliable. Both are sorely lacking in the UN’s sexual harassment grievance resolution procedures.

For more detail describing the problems with the grievance procedures within the UN, please see the report prepared by a New York law firm Chadbourne & Parke, at the UN Panel of Counsel website <http://www.un.org/staff/panelofcounsel/shrep.htm>, which criticises the lack of clarity of current procedures, the absence of protection for victims and the lack of solutions for victims through compensation or formal redress. To this list could be added the absence of formal procedures for dispute resolution and the more concerning absence of any means of preventing reoccurrence or of ensuring that such practices are not tolerated on the workplace. For example, a policy providing for dismissal of the harasser needs to be supported by a mechanism to ensure that a perpetrator of sexual harassment is not immediately re-hired by another UN agency, which happened in the case of *Claxton v. Gomez* as described by Houshang Ameri in “Fraud, Waste and Abuse”.

Sexual Harassment in the United Nations System, (1984) University Press of America, Oxford, UK, p 240

[Note: the law firm study is Chadbourne & Parke LLP, which describes the UN’s sexual harassment policies. It is available at www.un.org/staff/panelofcounsel/shrep.htm]

Houshang Ameri, Fraud, waste and abuse: Aspects of U.N. management and personnel policies, University Press of America, Lanham, MD (USA), June 2003.

The UN common legal system requires effective separation from the administration

This should be seen as a natural step forward from a legal system which, not having been revised since post WWI, needs review and upgrading. The UN common internal legal system ought to be a working model for the administration of justice, rather than one which is rightly subject to significant criticism by leading international jurists. The UN, as the source and repository of conventions, international treaties and international law, ought, in accordance with its significant international role and duties, be able to present a working model for best practice in the administration of justice in its internal legal system.

The International Commission of Jurists, a Geneva-based NGO which focuses on the rule of law, has produced a handbook for trial monitoring which describes minimum standards for fair trial monitoring, reflecting a practical means of measuring the international human rights mechanisms which form a bulwark as a final option for bringing either a communication or complaint against a state party, before either the Human Rights Committee, the European Court of Human Rights, the Inter-American Commission of Human Rights or the African Commission on Human and People's Rights.

According to these international standards, the core minimum features of a fair trial should include the right to equality before the law, the right to appeal, the right to a public hearing and the right to a fair trial incorporating the principles of equality of arms, access to all relevant information (including receiving all documents prior to the trial) and confidence in a legal system which is fair, independent and impartial at all levels, both in practice, and in appearance.

The right to a fair hearing incorporates the opportunity for an oral hearing where evidence is publicly adduced, with opportunity to review evidence on both sides in the context of equality of arms: both sides should enjoy equal opportunity to contest the argument and evidence called by the other, and to cross examine one another's witnesses. It seems strange, and rather sad, that the primary legal body within an organisation which purports to be a working model and inspiration for best practice in labour law, with a focus on standards of international law, the International Labour Organisation, does not measure up to these standards, providing neither public hearings, the right to appeal, or to equality before the law in the sense in which it is measured by international law standards, by leading jurists, and jurists bodies, including the International Commission of Jurists.

For a full overview of the work of the International Commission of Jurists, see www.icj.org.

Conclusion: The rule of law needs to be measured in terms of fairness of process

At his address at the launch of the Sierra Leone War Crimes Tribunal, Justice Robertson Q.C. said:

"The success of a Court is not measured by its rate of convictions, but by whether, at the end of the day, it can be said to have dealt fairly with every accused brought before it in a process that remains utterly independent from outside influence, whether from Governments or business or the media."

It is in that sense that my hope and belief is that this Court will succeed in the delivery of international criminal justice. To this goal we aspire, for the sake of the future peace of this region and this world."

As the proponent of international legal standards to many legal systems throughout the world, it behoves the United Nations to embrace the rule of law, as fundamental not only to a free and democratic society, but to the advancement of all human rights. Whilst the civil legal system and legal codes of the law of the international civil service do not deal with issues which touch the depths of sorrow and tragedy seen the horrors of the Rwanda genocide, cases often involve individuals whose lives are ruined through mobbing or unfair dismissal from the UN, under circumstances which are highly questionable in terms of due process, and often without anything other than token redress ever being granted.

It is important that the international organisations comply fully with that set of principles known as the rule of law, both in its dealings with its own staff and with third parties, rather than take advantage of an immunity which exempts the UN from ordinary rule of law principles. To lead by directive alone, yet not to lead by example, is a leadership flawed in moral authority and lacking in strength.