Address to 2017 Biennial Conference of NZ Labour Law Society: Reflections on the United Nations Dispute Tribunal 2009-2016

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Introduction

It is self-evident that a proper justice system should be independent, transparent, effective, efficient and adequately resourced.

The UN system of internal justice is its only form of administering justice for it staff members. By 1995, Secretary General Kofi Annan, in response to concerns expressed by both UN staff and management had acknowledged the need to address its inadequacies. It was 60-years-old and had been inherited from the League of Nations. It was based on a protracted peer review system that produced recommendations on staff members' employment disputes. Staff had a right to an appeal to the former UN Administrative Tribunal (former UNAT) but the Tribunal members did not need to be judges or even legally qualified. It sat irregularly and had a backlog of cases of least five years, and often more. Its decisions were non-binding so the Secretary General and management could choose to accept or reject them.

In 2006, a panel of external judicial experts reported to the General Assembly that the system was "outmoded, dysfunctional, ineffective and lacking in independence."[1]

Commentators stated that it was difficult to escape the conclusion that, by its own statute, the UNAT was more a political organ of the General Assembly than a truly independent and impartial judicial arm of the Organisation.[2]

The importance of having a proper system for the resolution of staff employment disputes in the UN cannot be underestimated. Through the Secretary General, who is effectively the CEO of the UN, the UN employs approximately 70,000 staff members across the globe (not including peacekeeping troops). These staff run the administration of the UN itself and administer and deliver UN projects in North, South and Central America, Europe, Africa and all Asia and the Pacific. As they are employed by an international organisation, rather than a

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[1] "The Redesign Panel on the United Nations system of administration of justice was established by the Secretary-General in January 2006 pursuant to resolution 59/283, in which the General Assembly requested him to establish a panel of external, independent experts to review and possibly redesign the system of administration of justice at the United Nations." (A/61/205) The members of the Redesign Panel were: Ahmed El-Kosheri, Diego Garcia-Sayan, Mary Gaudron, Kingsley C. Moghalu and Louise Otis

[2] Abdelaziz Megzari "The Internal Justice of The United Nations: A critical History 1945-2015", Blokker, N. M. (Eds.) *Legal Aspects of International Organizations, Vol 56* (Brill | Nijhoff, The Netherlands, 2015).

government or individual employer, they have no recourse to any national system of employment or labour law. Hence the need for an internal system.

It took the slow wheels of UN bureaucracy and the machinations of geo-politics amongst the UN member states until 2009 to get the system up and running. Some of the dynamics at play during that time included reluctance by some member states to pay the increased costs of a proper system and the inevitable push back by some senior UN administrators who stood to lose their monopolistic control over human resource issues.

The new internal justice system which came into being on 1 July 2009 was two tiered with a full time Dispute Tribunal and an Appeals Tribunal. The judges[3] were selected from a wide range of national jurisdictions following an extensive selection process and election by the General Assembly. We (the first judges) were all aware of the huge expectations of the staff members and their various unions.

The failings of the previous system had been well advertised. In fact, they are narrated in the preamble to the General Assembly resolution that set up the new system and subsequent relevant resolutions[4]. We were appointed to an institution that was expected to remedy these failings; in hindsight, it was naïve of us to imagine that it would be smooth sailing. I offer a couple of examples where the new UN Internal justice system was subject to wilful and blatant attack by the administration of the UN.

First, some of the decisions of the new tribunals displayed a wider interpretation of what was applicable law than the former UNAT, in particular in relation to human rights principles and modern law of employment.

One of my early judgments was a case of equal pay for equal work, in which the Secretary General's legal advisors asserted that the Universal Declaration of Human Rights did not apply to UN staff members and that classification of posts (and hence salary levels) is subject solely to management's discretion, even to the extent that internationally acknowledged human rights may be violated. My decision, which found otherwise, received harsh criticism and was unsuccessfully appealed by the Secretary General.[5]

In its first annual report to the General Assembly, in 2010, on the new system of administration of justice[6], the Secretary-General criticised at length the emerging jurisprudence of the new tribunals. It specifically mentioned my decision as an example and said:

> The Secretary-General requests the General Assembly to confirm that the exercise of judicial review by the Dispute Tribunal and the Appeals Tribunal should be undertaken

[3] First UNDT judges: Judge Vinod Boolell (Mauritius), full-time judge based in Nairobi;Judge Memooda Ebrahim-Carstens (Botswana), full-time judge based in New York; Judge Thomas Laker (Germany), full-time judge based in Geneva; Judge Goolam Hoosen Kader Meeran (United Kingdom of Great Britain and Northern Ireland), half-time judge; Judge Coral Shaw (New Zealand), half-time judge; Judge Michael Adams (Australia), ad litem judge based in New York; Judge Jean-François Cousin (France), ad litem judge based in Geneva; Judge Nkemdilim Amelia Izuako (Nigeria), ad litem judge based in Nairobi.

[4] Recognising that the current system of administration of justice at the UN is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed… General Assembly Resolution 6/261.

[5] *Chen v SG* UNDT/2010/068 22 April 2010; *SG v Chen* 2011-UNAT-107 11 March 2011

[6] Administration of justice at the United Nations
Report of the Secretary-General to GA A/65/373

> with full respect for the prerogatives of the General Assembly and for the role of the Secretary-General as the chief administrative officer of the Organization and for his prerogatives and responsibilities under the Charter of the United Nations.

In an obvious attempt to influence the Tribunals' decisions, the Secretary General proposed amendments to their statutes and rules of procedure, which would have narrowed down their statutory powers.

The second example happened in the early days of the new tribunal. The administration's steadfast refusal to comply with tribunal orders to produce documents threatened the ability of the Tribunal to properly consider cases. When the Appeals Tribunal predictably held that the Tribunal had the right to order the production of any document if it was relevant for the purposes of the fair and expeditious disposal of the proceedings, the Secretary General took great exception to this[7] and asked the General Assembly to:

> Amend the statute of the Dispute Tribunal to recognize that where the production of confidential documents would undermine significant organizational interests, such as the security of staff members or the confidentiality of communications between the Organization and Member States, the Secretary-General may decline to produce confidential documents or portions thereof and the Dispute Tribunal may then draw appropriate and reasonable inferences from any such non-production.

Fortunately, the General Assembly declined to make such amendments although it did later amend the statue to limit the power of the Tribunal to make interlocutory orders against the Secretary General such as injunctive relief.

Eight years on, there is better acceptance of the Tribunals and their decisions. The internal justice system has, at last, captured the attention of the most senior managers within the Secretariat. In 2015, for the first time since 2009, the UN Chef de Cabinet strongly and publicly endorsed the internal justice system.

I believe that the principles of independence, transparency, effectiveness, efficiency are now respected by the UN administration in a way that was unthinkable only seven years ago. It is to the credit of then Secretary General Ban Ki Moon that he personally drove the project once it was underway, and eventually became its most vocal proponent. It is clear, with hindsight, that the submissions and tactics made on his behalf were driven in large part by legal and other officials who had been in charge of the old system and felt threatened by the new regime. At a meeting with judges in New York, Secretary General Ban told us that he now felt comfortable urging member states and other international organisations to respect the rule of law now that the UN was meeting its obligations in that regard.

What I have described demonstrates that systems of law that are designed to enforce the rights of employees are very vulnerable to being undermined by forces who believe that the control of employment relationships should rest predominately in the hands of employers. It takes vigilance by academics, practising lawyers, unions and judges to ensure that the rule of law, rather than the rule of employers, prevails.

[7] Ibid A/65/373