Promoting the Rule of Law Within the United Nations†

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I. Introduction

To understand why the UN has its own administration of justice system, it is essential to recall at the outset that the United Nations and its officials are immune from legal process, absent a specific waiver. This immunity derives from Article 105 of the United Nations Charter and the 1946 Convention on the Privileges and Immunities of the UN ("General Convention"). Specifically, Article II, Section 2 of the General Convention provides that the "United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Article V, Section 18 further provides that UN officials are immune "from legal process in respect of words spoken or written and all acts performed by them in their official capacity."

The immunity of the United Nations from legal process does not, however, relieve the Organization of legal liability. Article VIII, Section 29 of the General Convention obliges the United Nations to "provide for an appropriate mode of settlement" in any case in which it maintains its immunity but bears legal liability or responsibility.1 For the settlement of private law disputes, namely disputes relating to commercial contracts, the UN’s

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1. Article VIII, Section 29 of the General Convention stipulates that the "United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."
preferred mode of dispute settlement is arbitration. All UN contracts contain a standard clause providing for UNCITRAL arbitration.

In the context of employment disputes, staff members who wish to challenge employment decisions made by the UN are therefore unable to file claims against the Organization under national laws or in national courts. The “UN administration of justice system” refers to the regime of internal mechanisms that have been established to allow UN staff members to pursue remedies for employment grievances. This system is self-regulated by the Organization. The mechanisms in the UN administration of justice system include the Joint Appeals Boards and the Joint Disciplinary Committees, which make recommendations to the Secretary-General on administrative and disciplinary matters, respectively.

Where there is an allegation of non-compliance with the terms of a staff member’s employment, a decision of the Secretary-General may then be reviewed by the United Nations Administrative Tribunal (“Tribunal”). The Tribunal was established by the General Assembly in its resolution 351 A (IV) of 24 November 1949, as the highest judicial body for the resolution of employment disputes within the United Nations.

In examining how the UN Administrative Tribunal has promoted Rule of Law within the United Nations, it is important to refer to the definition of “Rule of Law” as used within the United Nations. The Secretary-General has stated that the concept of “Rule of Law”:

"refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."\(^2\)

While this definition was introduced in the context of promoting Rule of Law in conflict and post-conflict societies, it highlights a number of principles that are relevant to the internal governance of the United Nations.

This article will focus on how the case law of the UN Administrative Tribunal has affirmed key principles that are essential to promoting Rule of Law within the United Nations, including the principles that:

- Laws should be consistent with international human rights standards
- There should be legal certainty and transparency in the implementation of laws
- Laws should be equally enforced and independently adjudicated

The article concludes with observations regarding the recent efforts to reform the administration of justice system in the United Nations, and their implications for the Rule of Law.

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II. Consistency of Law with International Human Rights Standards

The Tribunal has consistently affirmed that the laws and procedures of the Organization must be consistent with international human rights standards. In particular, the Tribunal has developed extensive case law with respect to the due process rights of staff members during investigations. In its Fernandez judgment of 2003, the Tribunal issued a resounding affirmation that due process rights are central to its proceedings:

"The right to due process of law is not merely a statutory privilege to be conferred and applied at will. It is a fundamental right which serves as the cornerstone upon which the legitimacy of any administrative Tribunal must rest. As such, the Tribunal is bound to zealously safeguard it and consequently treat with any claimed infringement of it with the utmost concern."

In the Arai case, which concerned a staff member who was dismissed for misconduct on the basis of evidence provided by another staff member who surreptitiously searched his computer, the Tribunal ruled that:

"It cannot accept that investigations could be conducted without rules and guarantees of due process and without giving due respect to inalienable rights as proclaimed by the Organization itself in the Declaration on Human Rights. This is regardless of what the internal regulations of the Organization say as to its rights to the contents of the staff's computers."

In recent years, the Tribunal has further elaborated on the component of the right to due process during investigations, ruling that the right requires informing staff members of the allegations against them, providing them with an opportunity to defend themselves before an adverse decision is taken, informing them of the identity of persons who have complained against them, and giving them a chance to cross-examine witnesses during an investigation.

III. Legal Certainty and Transparency in the Implementation of Laws

An additional component of due process is compliance with established procedures for decision-making, which is essential for ensuring legal certainty and transparency. As the Chief Administrative Officer of the Organization, under Article 97 of the United Nations Charter, the Secretary-General enjoys a broad degree of discretion in administering staff. The Tribunal has ruled that while it "does not substitute its judgment for the discretion of the Respondent, he must follow his own rules." In 1996, two staff members (Ms. Gordon and Mr. Pelanne) were denied the opportunity to be considered for vacancies, which were filled without first circulating vacancy announcements, as required in the relevant rules. These rules also required promotion decisions to be reviewed by an Appointment and Promotion Board. Instead, the Secretary-General simply informed the Appointment and Promotion Board that two other staff

8. Judgement No. 949, Yang (1999), paragraph VII.
members had already been assigned to the posts in question. The Secretary-General maintained that the "irregularities in the filling of the two D-1 posts were due to urgent exigencies of service and that the two posts had to be filled on an expedited basis." The Secretary-General accepted the recommendation of the Joint Appeals Board to pay compensation in the amount of two months' salary to the two staff members who had been denied the opportunity to be considered for promotion. The Applicants, however, considered that the compensation was insufficient and filed an application with the Tribunal.

In its judgment on Gordon and Pelanne rendered in 1998, the Tribunal found in favour of the staff members, holding that:

"Although the damage suffered by the Applicants is difficult to assess in monetary terms, clearly the Applicants should have been awarded more than two months net base salary for such a flagrant disregard of their rights by the very authority charged with protecting them. ... Moreover, the Tribunal cannot take lightly the violation of due process by the Respondent, particularly when the [rules on appointment and promotion were] enacted by him in order to prevent the very practices to which he resorted in this case."10

When determining whether to award compensation, the Tribunal normally examines the degree of harm suffered by the staff member as a result of the Organization's failure to comply with procedures. In a number of cases, however, the Tribunal has held that the violation of procedural rights in and of itself constitutes a sufficient basis to award compensation even where the staff member has suffered no injury or harm. For example, in the Helke case, a staff member was denied an education grant. When the Joint Appeals Board considered his appeal, it requested the Organization and the Swiss authorities to provide information relevant to the appeal. Contrary to its rules, however, the JAB did not share the information provided with the staff member concerned. The Tribunal ruled that

"... though [it] believes that the information, which the JAB obtained, was such that it was very readily accessible and consequently the Applicant did not suffer injury by not being given the opportunity to comment thereon. ..., formal procedures are safeguards which must be strictly complied with. The failure of the JAB to provide the Applicant with copies of the requests for clarification and to afford him the opportunity to comment thereon, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated."11

IV. Equal Enforcement and Independent Adjudication of the Law

In the context of the United Nations, the equal enforcement and independent adjudication of the law has meant, inter alia, that UN employment rules and policies should be applied equally, irrespective of the nationality of the staff members concerned and any pressures exerted by particular Member States.

10. Ibid, paragraph VIII.
11. Judgement No. 1047, Helke (2005), paragraph V.
Independence from Member States is an essential principle of the international civil service and is enshrined in Article 100(1) of the United Nations Charter which prohibits the Secretary-General and staff members from “seek[ing] or receiv[ing] instructions from any government or from any other authority external to the Organization” in the performance of their duties.

This principle was examined in the case of Qiu, Zhou and Yao, brought by three Chinese translators who had been seconded to the United Nations from the Government of the People’s Republic of China. After five years of service, the three staff members requested to be granted career appointments. The request was denied by the Secretary-General on the grounds that objections had been raised by the Chinese Government. The Tribunal held that all decisions relating to continued employment must be made independently from the wishes of the seconding Government and that “the Secretary-General could not defer to this opposition by the Chinese Mission without being in breach of his obligations under the Charter and the Staff Rules.” Moreover, the judgment contained a separate declaration concurring in the Tribunal’s decision and noting that in considering the Applicants for a career appointment, the procedure established by the Administration had failed to observe the “requirements of due process including the absence of discrimination.”

Another case also involving the exertion of pressure by a Member State was the Al Souki case in 2005. The case involved a staff member of the UNDP Country Office in the United Arab Emirates (UAE) whose fixed-term contract was not renewed after the UAE Government requested UNDP to replace a number of staff members with UAE nationals. The staff member challenged the non-renewal of his contract. In reviewing the case, the Tribunal noted the complexities of the relationship between UNDP and Member States, given that, inter alia, Member States contribute to the budget of UNDP. The Tribunal, however, ruled in favour of the staff member, emphasizing that the “independent functioning of the Organization requires that [pressures from Member States] be resisted and the fundamental tenets upon which the United Nations was founded be upheld.”

V. Reform of the Administration of Justice System in the United Nations

The recent efforts to reform the administration of justice system began in 2005 when the General Assembly, in its resolution 49/283, requested the Secretary-General to form a panel of experts to consider a redesign of the system. In its report A/61/205, the Redesign Panel concluded that the current system was outmoded, dysfunctional, ineffective, and lacked independence.

The Redesign Panel proposed a number of significant changes to the system, which were largely accepted by the Secretary-General and subsequently reviewed by the General Assembly. In 2007, the General Assembly approved the establishment of a two-tiered judicial system, comprised of the UN Dispute Tribunal and the UN Appeals Tribunal, which will replace the current Joint Appeals Board, Joint Disciplinary Committees, and the UN Administrative Tribunal. In December 2008, the General Assembly approved the Statutes of the new Tribunals, which will become operational on 1 July 2009, and

12. Judgement No. 482, Qiu, Zhou and Yao (1990), paragraphs XLI-XLII.
13. Ibid, Declaration by Mr. Jerome Ackerman.
14. Judgement No. 1275, Al Souki (2005), paragraph XI.
decided that the United Nations Administrative Tribunal would be abolished as of 31 December 2009. The General Assembly did not, however, approve a proposal to extend the jurisdiction of the new system to non-staff members, such as consultants, whose disputes with the Organization under the current system are resolved through arbitration.

One crucial element of the reform relevant to the Rule of Law is the new procedure for the nomination and appointment of judges which is intended to enhance judicial independence. At present, judges of the UN Administrative Tribunal are nominated by Member States and appointed by the General Assembly. A number of tribunals created by the United Nations—for example, the International Criminal Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court—all have judges who are nominated by Member States. While the case law of the Tribunal clearly dispels any concerns that such a process may compromise the independence of the Tribunal from the Member States, the Redesign Panel nevertheless recommended the establishment of an Internal Justice Council to compile lists of candidates for appointment as judges in the Organization's internal justice system. This mechanism is similar to that which was utilized in the appointment of judges to the European Union Civil Service Tribunal, created in 2005. A committee comprising former members of the European Court of Justice and the Court of First Instance, as well as lawyers with expertise in adjudicating disputes between the European Union and its civil servants, was established to review and identify qualified judicial candidates.

Similarly, in its resolution 62/228, the General Assembly established the Internal Justice Council to "[p]rovide its views and recommendations to the General Assembly on two or three candidates for each vacancy in the United Nations Dispute Tribunal and the United Nations Appeals Tribunal." In the new administration of justice system, the General Assembly will still have a principal role in the appointment of judges. The fact that the General Assembly will be appointing these judges from a list compiled by an independent body, the Internal Justice Council, however, will contribute to easing any perception that the appointment of the judges is politicized and dominated by the interests of Member States.

Candidates were invited to submit their applications for the vacancies on the Tribunals by July 2008, and more than 240 applications from over 50 countries were received. After meeting to review the applications at the end of July 2008, the Internal Justice Council shortlisted 40 candidates who were interviewed and required to take a written examination at the beginning of September. The Council's report containing recommendations on the judicial candidates was submitted to the General Assembly in October 2008 and formed the basis for the General Assembly's appointment of the judges to the UN Dispute Tribunal and UN Appeals Tribunal in March 2009.

VI. Conclusion

As the United Nations and its officials are immune from national laws and national courts, the administration of justice system in the United Nations is essential for ensuring that staff members have an adequate forum for the resolution of their employment-related disputes. In this context, the UN Administrative Tribunal has played a critical role in promoting the Rule of Law in the United Nations, by affirming that laws applied by the United Nations should be consistent with international human rights, that there should be
legal certainty and transparency in the implementation of laws and that laws should be equally enforced and independently adjudicated.

At this early stage, it would be premature to make any predictions about the new administration of justice system. In the author's personal view, it is regrettable that the stringent qualifications established by the General Assembly for appointment to the UN Dispute Tribunal and the Appeals Tribunal (10 and 15 years of judicial experience, respectively) may have been unduly restrictive, by excluding lawyers with relevant experience in law firms, non-governmental organizations and national civil service simply because they have not held judicial office. The establishment of the Internal Justice Council and new procedures for the election of the judges are, however, a positive development. If one of the purposes of reforming the administration of justice system is to instill greater confidence in the independence of the Tribunals, having a judicial selection process that is more transparent and less politicized will certainly contribute to enhancing the legitimacy and perceived impartiality of the Tribunals.