

# ON SUING THE UNITED NATIONS

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'U Thant's War' screamed the headline of *The Spectator* of London in its issue of 6 June 1967. The Six Day Middle East war had broken out a day earlier when Israel attacked Egypt, Syria and Jordan. A week or so earlier, in late May 1967, the United Nations Secretary-General U Thant had, at the insistence and demand of President Nasser of Egypt, effected the withdrawal of United Nations Emergency Forces (UNEF) stationed inside Egyptian territory. The UNEF had acted as a buffer between Egypt and Israel. The troops were deployed inside Egyptian territory at the end of the 1956 Suez canal war when the joint forces from Israel, Great Britain and France attacked Egypt after Nasser nationalised the Suez canal. As a result of the agreement between Nasser and then UN Secretary-General Dag Hammarskjold, UN troops were allowed to be deployed inside Egyptian territory. (Israel refused to allow any UN troops to be stationed inside its territory.) The agreement between Hammarskjold and Nasser included the explicit stipulation that the UNEF had to be withdrawn whenever the Egyptian government requested it.

U Thant followed the agreement his predecessor had concluded with Nasser and complied with Nasser's request and ordered the withdrawal of the UNEF in late May 1967. For this decision U Thant was savagely criticised by some Western diplomats, international lawyers and editorial writers like those of *The Spectator* above.<sup>1</sup> Even at his death in 1974, *Time* magazine stated (in one of the more charitable criticisms of U Thant over this affair) that the withdrawal of the UNEF was 'Thant's most memorable miscalculation'.<sup>2</sup>

Fast forward UN history to early 2000, and we had (according to a report in the 10 January 2000 issue of *The Age*) the *National Post* newspaper of Canada editorialising that Mr Kofi Annan, the current United Nations Secretary-General, should

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<sup>1</sup> For U Thant's own detailed narration of the circumstances leading to the withdrawal and a defence of his decision to withdraw the UNEF, see U Thant, *View from the UN* (1978) 220-52.

<sup>2</sup> 'United Nations: The Quiet Man', *Time* (Asia Edition), 5 December 1974, 36.

resign. The *National Post* editorial 'call' was made in the light of the failing of Annan when he was chief of United Nations peacekeeping forces in 1994—before he became Secretary-General—and in relation to the Rwandan genocide which took place in April and May of that year. Some circles have, citing confidential cables sent to UN Peacekeeping Headquarters, blamed Annan for not acting immediately and properly to prevent or stop the Rwandan genocide despite ample validated warnings from UN personnel in the field that mass murders of the Rwandan Tutsis were about to take place.<sup>3</sup> *The Age* news item also indicated that a suit to sue the United Nations in relation to the Rwandan genocide is currently being contemplated by two Australian lawyers. There was no indication as to when, where and how the suit against United Nations would be lodged.<sup>4</sup>

The news item raises two possible issues: (i) how much should a UN Secretary-General's (UNSG) past or past activities have a bearing on the present status and performance of duties? and (ii) what are some of the legal issues involved in suing the United Nations?

### A UNSG's Role

This is not the first time a UNSG's past has come to arguably haunt him. (All seven UN Secretaries-General, so far, have been male though the current Deputy UN Secretary-General—a new post created in early 1998—Louis Frechette of Canada, is a female.) The fourth UNSG, Kurt Waldheim's Nazi past was not a major issue when he was elected Secretary-General in 1971 nor during his ten years as 'chief administrative officer' of the World Organisation. However, it became an issue just before he was successfully elected to the Presidency of Austria in 1986. It was found that Waldheim had carefully hidden some of his activities as a Nazi officer during the Second World War and had glossed over if not lied about that part of his Nazi past.<sup>5</sup> Waldheim's past was not related to the performance of his duties as UNSG though the moral turpitude involved—not only about the past but possibly lying about the past—may have been considerable especially for one (as he himself claimed in his memoirs *In the Eye of the Storm*) who is 'in a sense a spokesman for humanity.'<sup>6</sup>

Kofi Annan's alleged failure (for which he himself has expressed 'deep remorse')<sup>7</sup> in failing to act appropriately and decisively to prevent or stop the Rwandan genocide occurred during his tenure as Under Secretary-General of the United Nations and before he became Secretary-General. In my view it is virtually out of the ques-

<sup>3</sup> See Pamela Bone, 'UN Faces Genocide Suit', *The Age* (Melbourne), 10 January 2000, 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> See, for example Stanley Meisler, *United Nations: The First Fifty Years* (1995) 185-203. The Chapter dealing with Meisler's opinion about Waldheim is entitled 'Kurt Waldheim: *The Big Lie*'.

<sup>6</sup> Kurt Waldheim, *In the Eye of the Storm* (1985) 38.

<sup>7</sup> Bone, above n 3, 2. According to the news item Kofi Annan also stated that 'All of us must bitterly regret that we did not do more to prevent [the Rwandan genocide].'

tion that Annan would follow the steps of his predecessor Trygve Lie, the first and the only UNSG to resign from office.<sup>8</sup>

Every Secretary-General has their own weakness and strengths, failures and success. Even though Annan's failure to act swiftly and appropriately during the Rwanda genocide took place during his tenure at the UN, he was not at the helm. The buck may not have stopped with Annan. It would be as wrong even metaphorically to call the Rwandan genocide as 'Kofi Annan's Genocide'—which the National Post of Canada *did not*—as equally outrageous and sensationalist as it was to call the 1967 Six Day Middle East war as 'U Thant's War'—which *The Spectator did*. But the moral responsibility may be imputable collectively to the United Nations Security Council as a whole for their inaction, apathy, and callousness during the Rwandan genocide.

## B Suits Against the UN

The lawsuit being contemplated against the United Nations for negligence and 'complicity' in the Rwandan genocide will be briefly considered here. In an advisory opinion delivered by the International Court of Justice (ICJ) in 1949 the Court unanimously held that the then newly established United Nations had 'international legal personality' and that it had the capacity 'to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining reparation due in respect of damage caused to the United Nations.'<sup>9</sup> More than 50 years after the advisory opinion was delivered, the United Nations with almost universal membership, has become even more of a 'supra-national organisation' than it was in 1949. It certainly has the capacity to sue and to be sued.

This brings in other issues, the foremost being to determine the appropriate forum to lodge the suit. The apparent answer is the ICJ. But only nation-States or the governments of those nation-States could be parties before the ICJ. However the current Rwandan government could theoretically lodge a suit against the United Nations in the ICJ and arguably in accordance with certain provisions of the Genocide Convention.

Yet it should be noted that if this suit (brought forth by the current Rwandan government) does occur then it would have been the first time in United Nations history where an 'organ of the United Nations'—the ICJ—would sit in judgment of the United Nations itself. This would not be an anomaly or conundrum as it would first appear. In domestic societies, courts which are judicial arms of governments at times sit in judgment or review the actions of the other arms of governments such as executives and the legislatures.

<sup>8</sup> For Trygve Lie's own accounts of his resignation from the office of UNSG see Trygve Lie, *In the Cause of Peace* (1954) 406-19.

<sup>9</sup> See *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 15.

However, in the international arena, such actions are almost non-existent. The closest thing that occurred was in 1992 when Libya challenged the validity of the United Nations Security Council resolutions which had imposed sanctions on Libya. The challenge was made before the ICJ on the grounds that the resolutions that had imposed sanctions on Libya violated international law. The ICJ by a majority rejected Libya's challenge. However even the majority judges appeared to have indicated that if a Security Council resolution violated *jus cogens*—peremptory norms of international law—an ICJ might well hold them to be 'unconstitutional' as per the United Nations Charter.<sup>10</sup>

The news item indicated that two Australian lawyers—one of them the British-based Geoffrey Robertson, QC—have taken preliminary steps to sue the United Nations for the actions of its peacekeeping forces which had allegedly, virtually turned a blind eye when the right to be free from genocide—a peremptory norm of international law—was violated with impunity in Rwanda.<sup>11</sup>

The Rwandan genocide was a blackmark of the 1990s. The United Nations and the international community must do all it can to prevent such abominations from taking place in this new century.<sup>12</sup> At the very least there must not be a repetition of the slackness which the UN had been accused of in any similar situations in the future. In this context, the contemplated action of bringing the United Nations not only to task but also to court could open new vistas and positive developments in international law.

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<sup>10</sup> *Lockerbie Case (Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie) (Libya v United States; Libya v United Kingdom) (Request for the Indication of Provisional Measures)* [1992] ICJ Rep 114. See also the separate opinion of Judge Lauterpacht in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) (Indication of Provisional Measures)* [1993] ILR 3, [99].

<sup>11</sup> Bone, above n 3.

<sup>12</sup> In an Article entitled 'Rights of Sovereign Souls are the Key to War-Free World', *The Age* (Melbourne), 27 December 1999, 15, Kofi Annan wrote that 'the genocide in Rwanda and the massacre at Srebrenica will define for our generation the consequences of inaction in the face of mass murder'. One of the lawyers contemplating the UN suit, Michael Hourigan, announced the intention to sue the UN on behalf of two Rwandan women whose families were murdered by Hutu militants during the 1994 genocide. In the article by Bone, above n 3, 2, he is quoted as saying that '[t]his is the first time the UN has ever been found to be complicit in genocide and crimes against humanity'. This is not, however, a 'finding' by a court and inasmuch as the alleged 'finding' was made by a UN Commission of Inquiry the more appropriate expression should have been 'a serious allegation was made by a Commission of Inquiry about UN complicity in the Rwandan genocide'. It should also be mentioned that as far as Annan's statement 'consequences of inaction in the face of mass murder' is concerned, the *National Post* editorial (above n 9) was more specific: 'A secretary-general of the United Nations cannot accept responsibility for inaction in the face of mass murder and expect to remain in office'.