Laudato Si

The Importance of The Right to a Healthy Work Environment

Child Labor, Sexual Harassment and The Role of the Legal Profession in Achieving a Healthy Work Environment

My esteemed Colleagues, I am honored today to speak on behalf of our U.S. Representative, The Honorable Tamila Ipema, to the Pan American Commission of Judges on Social Justice. I am Linda Murnane, and I am currently serving on a two-year judicial appointment in the Republic of the Marshall Islands.

On May 24, 2015, Pope Francis issued his Encyclical titled *Laudato Si.* This powerful letter was, of course, addressed to the Roman Catholic Bishops and the Catholic Christian faith community, but not only to them. This work is intended for all people.

While the positions in the encyclical are founded on theological principles, Pope Francis converts those principles into general philosophical terms that apply to every person. *Laudato Si*.

In this presentation, I will focus specifically on that portion of the encyclical which addresses the need to protect employment. The words of His Holiness Pope Francis are found in paragraphs 124 through 128 of *Laudato Si.* I have included the text of these paragraphs as an appendix to this presentation.

Referring to the Encyclical of Saint John Paul II, *Laborem Exercens,* Pope Francis recounted the biblical account of creation – noting that in Genesis 2:15, God created man and

woman and placed them in the Garden of Eden not only to preserve it, but to make it fruitful. The value of work, its interaction with the environment and the sanctity of human life are inextricably interwoven.

With these important principles as our backdrop, I will address two important areas in which judges and lawyers, as well as legislators and heads of government, may apply these solid principles to improve the right to work. I will discuss the need to end child labor, and the need to provide whistleblower protections for national and international civil servants who report both child labor as well as sexual harassment conduct in the national and international civil service fields.

In June 2022, the International Labour Organization (ILO) adopted a safe and healthy work environment as one of one of its five fundamental principles and rights at work.

The ILO stated that "This principle promotes a human-centered approach to the future of work and reflects a dynamic vision for a rapidly changing world."

The Institution of Occupational Safety and Health (IOSH) has long advocated for safety and health to be recognized as a fundamental right in the workplace, describing its inclusion as the "biggest moment for workers' rights around the world this century".

A safe and healthy working environment joins four existing areas on ILO's Declaration on Fundamental Principles and Rights at work. These are: freedom of association and the effective recognition of the right to collective bargaining

- the elimination of forced or compulsory labour
- the effective abolition of child labour

- the elimination of discrimination in respect of employment and occupation.[1]

Cardinal Peter Turkson has spoken extensively on the principles found in this section of *Laudato Si.* In his interview La Civiltà Cattolica, Cardinal Turkson said "When we talk about the dignity of work, we must take a step back and consider the dignity of the worker, who is the architect of the work itself. The social doctrine of the Church recognizes an objective component to work, defined as the labor that is brought into being, and a subjective component, constituted by the worker as a human person. The subjective dimension of work must take precedence over the objective, because it is the person who brings work into being. The subject of labor is the human person – created in God's image and likeness, in unity of body and spirit, singular and unique. Depending on whether the dignity of the working person is respected in the context of employment, we talk of work that is decent and human or, on the contrary, indecent and inhuman."[2]

In my discussion of the need for whistleblower protections for individuals in the national and international civil service sectors, I will focus on the need to create an environment free from fear of reprisal for those reporting violations of instances of child labor, as well as those reporting violations of discrimination, including sexual harassment, in employment and occupation settings.

The Effective Abolition of Child Labor

The New York Times, in September 2023, reported on investigations into child labor violations occurring in Tysons poultry plants in Virginia.[3] In their report, the New York Times

[1] https://iosh.com/about-iosh/our-influence/workplace-health-and-safety-is-a-fundamental-right/#:~:text=The%20International%20Labour%20Organization%20(ILO,for%20a%20rapidly%20changing%20world.
[2] https://www.laciviltacattolica.com/work-and-the-dignity-of-workers-an-interview-with-cardinal-peter-k-a-turkson/
[3] https://www.nytimes.com/2023/09/23/us/tyson-perdue-child-labor.html

said that Tysons is under investigation on reports that "they relied on migrant children to clean slaughterhouses, some of the most dangerous work in the country."

The news report went on to state that the U.S. Department of Labor opened the inquiries after an article in The New York Times Magazine, published this past week, found migrant children working overnight shifts for contractors in the companies' plants on the Eastern Shore of Virginia. Children as young as 13 were using acid and pressure hoses to scour blood, grease and feathers from industrial machines, according to the news report.

The New York Times went on to report that meat processing is among the nation's most hazardous industries, and U.S. Federal Law bans minors from working in slaughterhourses because of the high risk of injury.

The New York Time Magazine article gave special attention to the case of a child, Marcos Cux, whose arm was mangled in a conveyor belt in 2022 as he was sanitizing a deboning area in the Perdue plant. Marcos was in the eighth grade.

The United States is not alone, however, in its ongoing battle to elimination child labor. According to the International Labor Organization, "In Latin America and the Caribbean, 10.5 million children are involved in child labor."[4]

The ILO reports that nearly 3 of every 10 children involved in child labor in Latin America and the Caribbean are working in the informal section, often unpaid family work. They

[4] https://endchildlabour2021.org/5-facts-about-child-labour-in-latin-america-and-the-caribbean/

also report that two-thirds of adolescents between the ages of 12 and 17 are involved in hazardous work.

Three tenths of a percent of children aged 5 to 17 are currently working. Children who work are more likely to fail at school because absenteeism and fatigue interfere with their performance. Additionally, children from rural areas in Latin America and the Caribbean begin working between the ages of five and seven. This is particularly the case, the ILO says, with respect to girls.

Almost 52% of the child labor force in Latin America and the Caribbean is concentrated in the agricultural sector, according to the ILO, which they characterize as one of the most dangerous and difficult environments to work in due to the exposure to outdoor elements and chemical substances.

In the United States, efforts to curb child labor, particularly in work described as hazardous labor, are currently facing pressure seeking to weaken child labor standards.[5] In the past two years, at least 10 states within the United States have introduced legislation that would roll back protections for children in the labor and employment area. Of particular concern are proposals removing rules that bar parents from making false statements (such as misreporting a child's age) in order to procure employment that violates child labor law; eliminating the labor commissioner's authority to require work permits for children in some occupations; granting new discretion for the state to waive, reduce, or delay civil penalties if an employer violates child labor laws; and providing employer immunity from legal claims arising from the injury, illness, or death of a child while engaged in a "work-based learning program." Last year, Iowa enacted a

[5] https://www.epi.org/publication/child-labor-laws-under-attack/

law that allows 16- and 17-year-olds to care for school-age children in child care centers without supervision.

Civil servants and legislators need to be free to voice their views opposing the roll back of child labor laws without fear of reprisal – from powerful companies within these states who seek to reduce their labor costs to increase their profit.

The Right to be Free from Discrimination in the Workplace

In addition to the issues of child labor, the right to be free from discrimination in the workplace is also an area of great importance and one in which whistleblower protections for those who report such misconduct is vital.

Discrimination in the workplace includes both the refusal to employ qualified individuals based on their race, religion, gender, age and other protected classes. Discrimination in the workplace, however, also includes the treatment of those successfully selected for employment. Sexual harassment, sextortion and career advancement based upon the exchange of non-job related personal services demeans the quality of the work experience both for those who are victims and for those who observe that behavior in the workplace.

Within the United States, and even within the legal profession and even within the judiciary at local, state and federal levels, reports of discrimination in the workplace, sexual harassment and sexual assaults on individuals working within the judiciary and within the legal field generally continue to make headlines.

As with other areas of the law, access to a fair and independent judiciary, with resolution of issues in controversy in accordance with the Rule of Law lies at the core of achieving a fair, safe and harassment free workplace. Having the law available through its public inspection to assist the working populations of their rights and responsibilities with respect to their work is critical in this regard. In the United States, employers are required to post on bulletin boards or on company websites the federal and state statutes which protect workers and which are intended to ensure a fair, safe and harassment free workplace.

Equally important, however, is the perception that the judiciary which hears cases involving labor practices is itself free from discrimination.

In December 2017, Chief Justice John G. Roberts, Jr. of the United States Supreme Court convened a working group following several reports of harassment levied against a prominent federal judge, Alex Kozinski.[6] The Working Group included in its review the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers.

In its June 1, 2018 "Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States" ("Working Group Report"), the Working Group made recommendations designed to ensure a workplace environment which would reduce the

[6] See https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html

prevalence of sexual harassment and sexual assault and provide a healthier environment for those working in the courthouses throughout the United States.

In July 2018, Law Clerks for Workplace Accountability sent a letter of concern to Chief Justice Roberts responding to the Working Group Report. In its letter, the Law Clerks for Workplace Accountability noted a significant absence in the recommendations of the Working Group, which lie at the heart of why these types of events are often unreported. In their response, the authors urged that the following be added to the recommendations: "Crafting concrete solutions to address the risk of retaliation". [7]

The authors noted in their recommendation:

"Possibly the largest barrier to the reporting of harassment is the victim's fear of retaliation. The [Working Group] Report correctly recognizes this problem, noting that every employee should be able to 'seek and receive remedial action free from retaliation.'[8]. It also says that retaliation 'will not be tolerated' and 'constitutes misconduct.[9].

The Memorandum does not specify how the Judiciary should go about determining whether retaliation has occurred and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending judge.

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[7] July 20, 2018 Memorandum, Law Clerks for Judicial Accountability Memorandum.

[8] *Id.* at p. 20
[9] *Id.* at pp. 26, 31

The Need for Meaningful Whistleblower Protections

The availability of "whistleblower" protections to prevent employers from retaliating against those who report violations of labor and employment laws and regulations are vital to ensure that individuals will report violations when they are witnessed or when a person is a victim of workplace harassment or discrimination. This particular issue has been addressed in many jurisdictions, and in fact, the United Nations has been wrestling with challenges to ensure that violations by individuals sent to countries to serve as "peacekeepers" under the authority of the United Nations are held accountable for their misconduct.

Within the United Nations (UN), the Secretary General's Bulletin, ST/SGB/2017/2/Rev.1 purports to establish whistleblower protections for individuals who report misconduct and for those cooperating with investigations into misconduct, who find themselves subject to retaliation as a result of their reporting or cooperation. That bulletin begins by obliging United Nations staff members to both report misconduct and to cooperate in investigations.

The Bulletin begins by stating:

> "1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation."

The Bulletin fails, however, to detail that protection does not attach automatically from the moment a staff member reports misconduct or cooperates in an investigation. The UN Secretariat's Ethics Office receives requests for protection from staff members – meaning that a staff member must proactively seek protection. Furthermore, protection is not automatically

afforded upon request to the reporter. Rather a staff member only becomes eligible for protection once retaliation has occurred.[10] Once eligible, meaning a staff member is seeking protection from the Ethics Office on grounds that retaliation has already occurred, the Ethics Office then undertakes a review of whether there is *prima facie* evidence that the alleged retaliation has in fact occurred.[11] This creates a burden shift onto the staff member who is seeking protection. Often times, once retaliation has occurred it has brought about irreparable harm to the staff member, e.g. an employment contract is not renewed or the staff member has not been selected for a promotion. On other occasions, retaliation is in the form of verbal abuse or harm to reputation and is difficult for a staff member to produce prima facie evidence to the Ethics Office. As a result, a staff member reporting misconduct maybe left vulnerable to retaliatory acts for a considerable period of time. Victims of sexual harassment by a supervisor, for example, may continue to work under that very supervisor for the duration of the underlying misconduct investigation.

Investigations in the United Nations into misconduct take on average one to three years, and during that time, the reporting staff member may be left without protection. The risk of continuing abuse during that time is high. Additionally, in order to prevail with a complaint of sexual harassment/assault etc., the evidence must meet the "clear and convincing evidence" standard.[12] Most harassment instances tend to be verbal and are done in secrecy, in the absence

[10] http://www.un.org/en/ethics/retaliation.shtml
[11] http://www.un.org/en/ethics/misconduct.shtml
[12] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164 para 30, stating: "Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable." See also *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 27.

of witnesses. The result – fear of not having evidence to meet this heightened standard leads to under-reporting.[13]

The reality is that this results in no protection at all for the person who dutifully reports allegations of sexual harassment, sexual assault, sextortion, and like conduct, particularly with respect to superiors.

When the alleged perpetrator of the misconduct is serving as a member of the international judiciary, the circumstances are even more dire for a staff member. Judges are not United Nations staff members, but rather hold the status of appointees. Judges are therefore not subject to the United Nations' internal investigation authority and when a staff member reports an abuse, the Judge is not investigated by the UN system. This leaves a staff member without a clear investigative path to follow.

In the rare instance when there is an actual judicial code of conduct, the enforcement of that code of conduct is undertaken internally by judicial peers of the internationally appointed judges.[14] This is true within the United Nations, as UN staff members may be subject to United Nations staff rules, but achieving investigation of the alleged misconduct is, itself, a challenge, particularly where the duty to establish a *prima facie* case is placed upon the reporter. The General Assembly only adopted a reporting mechanism for complaints against Administration of Justice judges on 31 December 2015.[15] It requires complaints levied against a Judge be sent to

[13] Misconduct of this nature may warrant termination and thus in turn requires the heightened standard of "clear and convincing evidence", whereas other types of misconduct only warrant "preponderance of evidence" standard. Thus, staff members complaining of sexual harassment must meet a heightened standard of proof when the very nature of such misconduct is often "he said she said", done in secrecy, and thus often won't meet the clear and convincing standard.

[14] See for example, the Code of Judicial Conduct for the International Criminal Code: https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf

[15] General Assembly Resolution on Administration of Justice, A/RES/70/112, adopted on 31 December 2015. https://undocs.org/A/RES/70/112

the President Judge. If the President or receiving judge is "of the view that there are sufficient grounds to warrant a formal investigation," he or she shall establish a panel of outside experts to investigate the allegations and report its conclusions and recommendations to the President. Before this time there was no clear procedure apparent to a staff member who has been abused by a judge, and the Administration of Justice was established in 2009.

When a staff member reports to a member of the court staff in a U.S. court or to a United Nations staff member, the absence of meaningful and prompt whistleblower protections places the person receiving the report of misconduct in the difficult and compromising position of either maintaining the confidence of the initial reporter, or violating that confidence and taking further action. When there is no meaningful protection for the job opportunity of the initial reporter, the consequences for that reporter may be lifelong.

For example, where the person reporting the behavior is perhaps a law clerk to a judge, the probability of a positive reference for future employment is at risk. Leaving before the end of a clerkship is a significant detriment to future employment.

Within the United Nations system, failing to report is sometimes far preferable to being reassigned to work outside the preferred area, and in particular when the alleged offender is a judge, the possibility of any meaningful recourse is virtually non-existent.

Sexual harassment, like sexual assault, is most often found in situations in which the balance of power between the perpetrator and the victim lies in favor of the former. When a judge, or a superior, makes continuous unwanted advances, the person in the subordinate position is already vulnerable, at risk of loss of employment, at risk of not being believed, and at risk of long term professional implications.

For that reason, any plan to change the workplace to ensure reporting of and accountability for misconduct related to sexual assault, sextortion and sexual harassment requires effective whistleblower protections, which are immediate and which do not require the reporter to establish a *prima facie* case.

While other measures are similarly needed, such as greater specificity within judicial codes of conduct, independent reporting mechanisms, regular reporting on these issues and meaningful discipline for those perpetrators found to have committed the conduct, an important first step is meaningful whistleblower protections which make it safe to report the misconduct, and which ensure that the allegations will be investigated.

Judges engaged in hearing labor cases have a critical obligation to foster a workplace that is free from the inappropriate workplace behaviors prohibited by labor laws. Judges must conduct themselves with the highest level of decorum and ensure a workplace free from discrimination of all types, including sexual harassment, that is, unwanted sexual advances or inappropriate comments in the workplace.

Judges must also, however, be free from corruption and bribery. As is demonstrated, however, by the reports of child labor exposed in the meat packing plants discussed above, posting the law, and having access to the Courts is not enough. The smaller the economic base, the less attractive it becomes to mete out fines, and other punishments in the Courts if the judges are not operating free from corruption and bribery. The fear that a major employer will close their plant or factory and move their all-important jobs to another location is a risk that a community faces when these types of unlawful behaviors occur in the workplace.

In conclusion, consistent with the principles set out in *Laudato Si,* as judges and lawyers, legal scholars and academicians, we have an obligation to take those measures within our authority to allow access to the Courts to address violations of labor practices, to work to end child labor, and in particular child labor in dangerous occupations, and to encourage the advancement of whistle blower protections to allow workers to report violations of the law. Further, as judges, and as lawyers, we must conduct business in the legal field and in the courthouse, in a manner that is transparent and free from discrimination. It is a matter of social justice.

Thank you for the opportunity to address these important subjects.