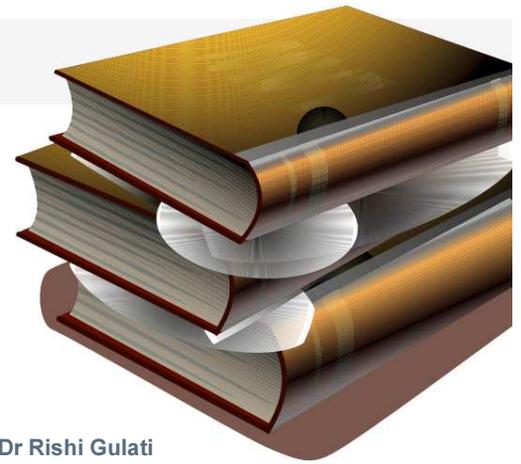


# Advancing International Administrative Law: a four-point agenda



**Dr Rishi Gulati**

Barrister, Victorian Bar; Fellow In  
Law, London School Of Economics

Thanks to the Federation of International Civil Servants ('FICSA') who have asked me to prepare this short article, I have had an opportunity to consider some key reforms that ought to be pursued to the international administrative law regime. For obvious reasons of space, the discussion here is high level and based on my work as a practicing lawyer in the field as well as academic contributions. Of course, many more reforms may be pursued. My aim is to focus on the most pressing ones. I outline a four-point agenda.

## A greater reliance on contracts of employment

As most readers of this publication would already know, international administrative law or IAL is the body of law governing the legal relationship between an international organisation ('IO') and their staff members. It is also well understood that IAL enshrines the conditions and terms of employment of staff members. These conditions and terms of employment are generally contained in the applicable Staff Regulations and Rules, administrative instructions or bulletins (howsoever named), the general principles of international administrative law, increasingly, human rights law, and also the contract of employment. More often than not, the contract of employment between IOs and its staff members is very brief and does not precisely encapsulate the mutual obligations assumed. This has meant that largely, the rules applicable to the employment relationship are governed by the IO's internal legislation and rules, which are truly vast and can be difficult to ascertain.

The question of an IO's power to unilaterally amend the conditions and terms of employment is salient. This power of unilateral amendment is conventionally subject to several limits, with a key one being the

doctrine of acquired rights. 'An acquired right is one the staff member may expect to survive any amendment of the rules'.<sup>2</sup> Which particular term of employment may form an acquired right is highly debatable. At their crux, acquired rights are those conditions and terms of employment that cannot be unilaterally amended by an employer IO for they constitute 'essential' conditions or terms of employment.<sup>3</sup> Importantly, the doctrine of acquired rights constitutes a general principle of IAL. The result being that regardless of whether or not acquired rights are expressly enshrined in an IO's internal law, it continues to have application. There is little controversy that in so far as the staff members of the UN Common System are concerned, the doctrine can in theory protect them from excesses in the exercise of IO power.<sup>4</sup>

However, following the decision in *Quijano-Evans et al v Secretary-General of the United Nations*, Judgment No. 2018/UNAT/841, 29 June 2018 ('UNAT Decision'), the acquired rights of staff members of the UN have been seriously undermined. This is because the UNAT reduced the acquired rights doctrine, which conventionally protects both past and future rights based on the classification of a condition of employment as 'essential', to the rule against retroactivity. The rule against retroactivity is narrower and only prohibits altering what already belongs to the past.<sup>5</sup> The power of the UN to thus unilaterally amend its rules that impact on staff pay and benefits has now expanded significantly. To what extent the UN makes use of this apparent enhanced legislative power over its staff members remains to be seen. It is further to be noted that the UNAT Decision reversed the well-considered decision of the UNDT in *Quijano-Evans Dedeayne-Amann v Secretary-General of the United Nations*, UNDT/2017/098, 29 December 2017 ('UNDT Decision'). The UNDT Decision sought

# Legal matters

to apply the decisions of the ILOAT developed over several decades, as well as significant jurisprudence from other international administrative tribunals.<sup>6</sup>

As a result of the UNAT Decision, now a fundamental inconsistency on the meaning and scope of acquired rights exists across the Common System. Staff members of the Common System who have access to the ILOAT appear to have their acquired rights better protected at this point in time because the ILOAT takes a broader and conventional view to the doctrine of acquired rights (which according to this author is to be preferred).

The broader picture emerging signals towards an ever-increasing power of IOs to unilaterally amend conditions and terms of employment. Therefore, issues of contract law (which are often understudied) are of much importance as a means to enhance certainty. It is important to more precisely enshrine the mutual obligations of the IO and the staff member assume towards each other. It could be thus worthwhile to create detailed model employment contracts developed in the context of IAL specifically.

## Better substantive legal protection for consultants and contractors

The number of consultants and contractors IOs now retain to perform materially the same work conventionally done by staff members as defined in the applicable staff regulations and rules is on the rise. Given that there are more than 400 IOs operational today, it is difficult to precisely state the number of consultants and contractors retained by all IOs at any given moment. The number would be in its thousands. To understand broader labour trends at IOs, it would be useful to collect precise data on how many consultants and contractors IOs retained in a given period; what roles were assigned to such individuals; and under what arrangements are such individuals retained.

Individuals retained as consultants and contractors are especially vulnerable and find themselves in precarious situations. To enhance certainty and legal protections for such individuals, it is of much importance to clarify the substantial and procedural protections (see further 4 below for procedural issues) that are put in place.

In so far as substantive protections are concerned, if the UN's Model General Conditions of Contract: Contracts for the Provision of Services are considered, it is not clear as to what is the applicable law vis-à-vis the relationship between IOs and consultants and contractors. For example, clause 16.2 states:

**ARBITRATION:** Any dispute, controversy, or claim between the Parties arising out of the Contract or the breach, termination, or invalidity thereof, unless settled amicably under Article 16.1, above, within sixty (60) days after receipt by one Party of the other Party's written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. The decisions of the arbitral tribunal shall be based on *general principles of international commercial law* (emphasis added)

The term 'general principles of international commercial law' does not capture the employment type relationship that exists between IOs and their consultants and contractors in terms of enhancing clarity on the applicable law. While much work needs to be done in this respect, it is important to clarify what precisely are the rules applicable to the relationship between IOs and the ever-increasing number of consultants and contractors? Once such clarification is forthcoming, for reasons already stated at 1 above, as much as possible, these conditions and terms ought to be provided in a relevant contract to enhance certainty, predictability and enhance substantive legal protections.

## Reforms to anti-harassment regimes

Especially following the 'MeToo' and 'Time's Up' movements, harassment at the workplace generally, and sexual harassment specifically, have rightly come into sharp focus. Based on this author's own experiences representing amongst others, victims of harassment at IOs, much reform must be undertaken. Of course, to address the wicked problem of bullying and harassment at the work place, cultural change is necessary. However, with robust legal protections in place, much can be achieved to ensure that victims of harassment can realise justice, and at the same time the due process rights of the accused can be



protected. It is presently impractical to list all the issues existing with the way in which IOs legally and factually respond to harassment. No doubt, IOs would tend to possess and adopt rules and policies encapsulating zero-tolerance to harassment at their organisation. However, this may not often be the case in reality.

It is crucial that in any harassment complaint: investigations are carried promptly and concretely; independently and impartially (this may require an external person carrying out an investigation); de jure and de facto guarantees as to the prohibition of retaliation against the victim or witnesses must exist; and once a complaint is lodged, the investigation must be carried out within set time limits. If these time limits applying to the investigation process are not followed, international administrative tribunals (or arbitral tribunals as the case may be) should conduct a full review on the merits, including engaging in a fact finding exercise. This is of as much importance to the victim who has the right to realise justice without undue delay, as it is to the accused whose right to due process is also an important factor.

In fact, the International Labour Organisation's latest convention specifically deals with such matters and must be implemented by IOs as well. Article 4 of the *Violence and Harassment Convention, 2019* (No. 190) states:

1. Each Member which ratifies this Convention shall respect, promote and realize the right of everyone to a world of work free from violence and harassment.
2. Each Member shall adopt, in accordance with national law and circumstances and in consultation with representative employers' and workers' organizations, an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work. Such an approach should take into account violence and harassment involving third parties, where applicable, and includes:
  - (a) prohibiting in law violence and harassment;
  - (b) ensuring that relevant policies address violence and harassment;

- (c) adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment;
- (d) establishing or strengthening enforcement and monitoring mechanisms;
- (e) ensuring access to remedies and support for victims;
- (f) providing for sanctions;
- (g) developing tools, guidance, education and training, and raising awareness, in accessible formats as appropriate; and
- (h) ensuring effective means of inspection and investigation of cases of violence and harassment, including through labour inspectorates or other competent bodies.

Although addressed to states, the above core principles have direct relevance and application to IOs who are subjects of international law and are required to provide a safe and healthy workplace. Consideration should also be given to expressly including provisions about anti-harassment rules and policies in applicable contractual arrangements. Bullying and harassment in all its forms is not only injurious to the victim, but is corrosive to an organisation generally. It is in every party's interest that the rules against bullying and harassment in all its forms are not only provided in the law, but practically realised for everyone at the workplace.

## Access to justice

There is little point in adopting substantive legal protections if these substantive rights cannot be practically realised. In a recent study comparing the ILOAT and the UN internal justice system, I had concluded the following as to the operation of those two justice regimes.

If the UN's internal justice system is to avoid the risk of being impugned before national and human rights courts, immediate steps to counter the independence and impartiality deficit must be undertaken. The ILOAT...is not rendering justice consistently with the right to a fair trial. Leaving

# Legal matters

alone the significant structural independence and impartiality deficits, the excessive delays in the delivery of justice on their own are egregious contraventions. The idiom 'justice delayed is justice denied' rings true for the iloat. Remarkable though it may be, unless significant changes to the iloat's law and practice are made, the individuals having access to the iloat cannot receive justice in compliance with fair trial standards. Blame for this lowly state is largely attributable to the ilo and the international organizations responsible to set up the justice machinery. So far, the broader regime provided by the iloat is being spared the ignominy of rejection at the international level not because it is compliant with the right to a fair trial, but because national and regional human rights courts have failed to examine it with the proper scrutiny that is warranted.

To make matters worse, increasingly, international organizations, including the UN and the ones subscribing to the iloat's jurisdiction, rely on temporary workers, such as consultants or contractors, to perform roles traditionally performed by fixed or permanent staff members. This category of worker does not have access to the undt and the unat; or the iloat, as the case may be. As a result, an even larger number of officials are being denied access to justice. How to enhance access to justice for this latter category of individuals, and how such mechanisms may be integrated into what I have called an international administrative procedural law of fair trial is a significant issue...<sup>7</sup>

IOs must ensure that access to justice is provided to all individuals performing work for them. Reform efforts must focus on ensuring that: existing international administrative tribunals are working effectively; inquiring whether there is a need to create an appellate mechanism to resolve international administrative disputes to avoid inconsistencies across the UN Common System specifically (or for that matter across all international administrative tribunals generally); and how can international arbitration be used to ensure efficient access to justice to all those who do not have standing before international administrative tribunals and work for IOs in some capacity.<sup>8</sup>

## Conclusion

The world of work and employer and employee expectations has changed across jurisdictions radically. IOs are not immune to these developments. It is time to rethink how international administrative law can best serve the needs of the coming decades and enact reform. Of course, reform for the sake of reform is to be avoided. What is good about the current system should be kept. However, as pointed out in this brief article, on four pressing issues at least, reforms ought to be pursued as a matter of priority.



<sup>1</sup> Rishi Gulati is an international lawyer possessing expertise in international dispute resolution, including international arbitration. He regularly appears before international courts and tribunals, such as international administrative tribunals. All views are his own and do not reflect the views of any other organisation or person. He can be contacted at [rishi.gulati@vicbar.com.au](mailto:rishi.gulati@vicbar.com.au)

<sup>2</sup> Judgment No. 832 (Re Ayoub et al), ILOAT, 5 June 1987, paras. 12-13 ('Ayoub').

<sup>3</sup> See for example, Judgment No. 61 (Re Lindsey), ILOAT, 1962; and Ayoub.

<sup>4</sup> Even where the term acquired rights is not adopted, IATs have in substance placed limits to an IO's power of unilateral amendment to the conditions of employment: see generally, *De Merode et al v World Bank* (Decision No. 1), World Bank Administrative Tribunal, 5 June 1981.

<sup>5</sup> UNAT Decision, para. 52.

<sup>6</sup> UNDT Decision, para. 102.

<sup>7</sup> Rishi Gulati, 'An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?', 21 *Max Planck Yearbook of United Nations Law* (2018) 210-270 at Pp. 265-266.

<sup>8</sup> See Rishi Gulati, 'International Arbitration in Claims against International Organisations', Vol 3, *AIIB Yearbook of International Law* (BRILL, Nijhof, 2020) (with Thomas John) (forthcoming).