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SUMMARY OF MY LEGAL ANALYSIS

A. Relevant background

The legal analysis I conduct focuses on the comparative case law on the doctrine of acquired rights at the ILOAT and the UN tribunals. This doctrine (conventionally understood) provides a restraint to the power of an international organization ('IO') to unilaterally amend the conditions of service of its staff. The recent hollowing of that doctrine at the UN has meant that the conditions of service of a vast category of international civil servants working across the UN Common System are being weakened. I first discuss this doctrine as developed by the ILOAT. I then focus on certain recent jurisprudence of the UNDT (Judgment No. UNDT/2017/098) and UNAT (Judgment No. 2018/UNAT/841), and show that due to the UNAT Decision, the doctrine of acquired rights (as conventionally understood) has suffered a collapse at the UN weakening staff rights. Consequently, there is now also an inconsistency in how staff rights are protected across the Common System.

Before setting out the relevant jurisprudence, it is useful to define the acquired rights doctrine which is one key (but not the only) check on an IO's capacity to unilaterally amend the conditions of service. 'An acquired right is one the staff member may expect to survive any amendment of the rules'.³ Which particular term of employment may form an acquired right is highly debatable, but as the ILOAT has pointed out, the doctrine is 'worth keeping'.⁴ Moreover, the doctrine constitutes a general principle of IAL.⁵ 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 Common System are concerned, the doctrine can in theory protect them from excesses in the exercise of IO power.⁶ However, the identification of a term of employment as an acquired right is a task beset with much difficulty making the law indeterminate. The ILOAT and the UNAT have taken contrary approaches to the question. Alarming, the UN has witnessed a sudden demise of the acquired rights doctrine as conventionally understood. This has meant that the extent to which staff members across the Common System are protected by the doctrine is highly inconsistent and uncertain requiring steps to better protect acquired rights.

B. The ILOAT approach

At the ILOAT, the seminal case regarding the doctrine of acquired rights is *Re Lindsey*, Judgment No. 61 decided in 1962 (*Lindsey*). *Lindsey* held that if an individual term of employment is classified as essential, it should not be susceptible to unilateral amendment, as it will give rise to an acquired right. There is unfortunately no easy way to determine in the abstract whether a term is essential or non-essential. However, some guidance exists. The ILOAT's next significant decision was rendered in 1987 in *Re Ayoub et al*, Judgment No. 832 (*Ayoub*). In *Re Ayoub*, the ILOAT added to its *Lindsey* reasoning and went on to set out three tests to determine whether a term can be classifiable as an essential term. Those tests are as follows:

³ Judgment No. 832 (*Re Ayoub et al*), ILOAT, 5 June 1987, para. 13 (*Ayoub*), para. 12.

⁴ *Ibid.*

⁵ *Ibid.*, para. 11; also see, UNDT Decision, para. 99.

⁶ 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.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?⁷

The ILOAT regularly applies the above three tests when determining whether a condition of employment is essential and thus an acquired right. The analysis of the jurisprudence shows that ultimately what becomes conclusive to determine whether a term is an acquired right are considerations pertaining to the third test (consequences (adverse impact) of the unilateral amendment on the affected staff). How grave the consequences should actually be before a term is characterised as essential or an acquired right is an issue on which there exists little clarity. It appears that where a reduction in entitlements is drastic, especially where multiple reductions in salaries or pensions is affected, a relatively modest subsequent unilateral reduction would seem to be impermissible. However, it is worth noting that recent jurisprudence suggests that blatant reductions brought about by a unilateral amendment (for example a reduction of around 40% to the amount based on which pension contributions are calculated)⁸ would be necessary to hold a particular term as essential, and therefore an acquired right.⁹ Unilateral reductions in pay remain a highly controversial issue. Overall, the ILOAT clearly seeks to reach a fair decision on the facts of each case trying to balance competing interests which of course is a difficult exercise. While the ILOAT's approach to acquired rights is inherently indeterminate, it is nevertheless doctrinally consistent.

C. The approach of the UN tribunals

Briefly, the UNDT and UNAT Decisions relate to claims brought by certain staff members suffering significant reduction to their salaries (approx. 6%) after the UN implemented a new salary regime (the Unified Salary Scale) for its professional and higher staff across the organisation. The factual background is discussed in detail in the academic publication and is not repeated here. Given the significance of the case on the acquired rights of staff, a panel of three UNDT judges determined this claim. To their credit, the UNDT analysed a significant amount of jurisprudence from other IATs, notably the ILOAT and the WBAT aiming to implement a uniform and coherent approach to the doctrine of acquired rights across IOs in general, and the Common System in particular.¹⁰ When applying those principles, on the application of the first test set out in *Ayoub* by the ILOAT (the nature of the term), the UNDT said 'a term of employment which is explicitly set out in a letter of appointment

⁷ *Re Ayoub*, supra n 3, paras. 13-14.

⁸ See for example, Judgment No. 3571 (*Mr Q. L.*), ILOAT, 3 February 2016, para. 8.

⁹ For some cases where claims of acquired rights were not upheld, see *Ms A. A. S.*, supra note 23, para. 26. In another case, where certain retired staff members of the World Health Organisation were required to pay a significantly higher health insurance premium after the organisation unilaterally amended its rules, the ILOAT said: 'Lastly, the change from the former arrangements constitutes no breach of the complainants' acquired rights...the Organization has not discriminated against them: far from it. Its purpose was to remove an unfair advantage the Rules used to confer on them. Such corrective action may not be treated as breach of acquired rights even if the advantage was enjoyed for a long time': Judgment No. 1241 (*Re Barton et al*), ILOAT, 10 February 1993, para. 24.

¹⁰ UNDT Decision, para. 102.

is presumed to be fundamental and essential'.¹¹ As the terms on salaries were included in the claimants' contracts of employment, the UNDT said that they constituted fundamental and essential terms and could not be unilaterally amended.¹² The UNDT reasoned that the right to a salary was inherently different to an allowance; it was so crucial to the balance of the contractual relationship that the amount of salary promised in a contract of employment could not be subjected to a unilateral reduction.

in reversing the UNDT Decision, undermining the attempt of coherence across the Common System which the UNDT's approach would have achieved, the UNAT conflated the acquired rights doctrine with the principle against non-retroactivity. Because the doctrine of 'acquired rights' has a particular meaning in international administrative law, the UNAT's approach is most curious. The Appeals Tribunal dismisses approximately 100 years of jurisprudence on the issue that already started to emerge since the days of the old League of Nations Administrative Tribunal. In one remarkable paragraph, the Appeals Tribunal conflated the rule against retroactivity with the doctrine, stating:

The protection of acquired rights. goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment. Amendments may not retrospectively reduce benefits already earned. In the final analysis, *the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity* (emphasis added).¹³

In fact, acquired rights were always meant to be protecting both, accrued rights, and rights into the future. Without explicitly saying so, the Appeals Tribunal has done away with a fundamental protection that international civil servants have enjoyed for a long time. Even more remarkably, following what may only be said to constitute the comprehensive rejection of the traditional understanding of the acquired rights doctrine, the Appeals Tribunal effectively allowed the UN to avoid its contractual obligations based on certain cryptic 'universal principles' which the UN may allegedly have resort to so as to pursue a so-called 'international public interest' as it sees fit.¹⁴ This issue will remain highly contested from a conceptual perspective. From a practical point of view though, on the question of acquired rights a fundamental rethink is now necessary given inherent inconsistencies across the Common System.

D. Conclusion

In the final analysis, the ILOAT's approach, while indeterminate, is nevertheless doctrinally consistent. The staff of the Common System having access to the ILOAT no doubt are much better protected from unilateral amendments to their conditions of employment. The law protects both, accrued rights, and future rights as long as a term of employment is classifiable as essential. Instead of following the deficient UNAT approach, the ILOAT ought to bolster and strengthen its own jurisprudence on acquired rights that it has developed over decades. Doing so properly safeguards staff rights, and provides for an important check on the exercise of unfettered public authority by IOs. On the other hand, the UNAT has caused a collapse of the doctrine at the UN making the protection of staff rights inconsistent across the Common System. Only legislative intervention by the UN will be able to resolve this inconsistency.

¹¹ UNDT Decision, paras. 107-112.

¹² UNDT Decision, para. 110.

¹³ UNAT Decision, para. 52, at 24-25.

¹⁴ UNAT Decision, para. 52, at 27.