

ACQUIRED RIGHTS IN INTERNATIONAL ADMINISTRATIVE LAW

Rishi Gulati*

I. Introduction

The acquired rights doctrine places limits on the regulatory power of an international organisation ('IO') to unilaterally amend an international civil servant's conditions of employment.¹ As conventionally understood, the doctrine requires that IOs must not unilaterally amend the fundamental or essential conditions of employment to an employee's detriment.² Crucially, it protects staff rights retrospectively and prospectively. The acquired rights doctrine therefore goes beyond the principle of non-retroactivity which only protects accrued rights, i.e., rights accumulated based on work performed in the past.³ The acquired rights doctrine and the principle of non-retroactivity are therefore autonomous principles and perform distinct functions.

Until recently, there has been a basic consensus on the understanding of the acquired rights doctrine which is said to constitute a supreme general principle of international administrative law ('IAL') (II). In this paper, I show that this consensus painstakingly developed over decades by international administrative tribunals ('IATs') has now been broken. I chart the history of the doctrine showing how it was initially received to perform a protective function given the considerably weaker position of the employee vis-à-vis the employer IO (III). Primarily through the jurisprudence of the Administrative Tribunal of the International Labour Organisation ('ILOAT'), the doctrine's conventional understanding in IAL was then developed and refined over several decades (IV). However, in its recent jurisprudence, the United Nations Appeals Tribunal ('UNAT') has rendered the acquired rights doctrine with little work to do by collapsing it to the principle of non-retroactivity. The consensus as to the doctrine's meaning is now undermined (V). I conclude that this development is an unwelcome one (VI).

* Dr Rishi Gulati is an Assistant Professor in Law at Dublin City University. He has a PhD from King's College London, Advanced Masters in Public International Law from Leiden University, and a Bachelor of Laws (Honours) from the Australian National University. He is a member of the Victorian Bar and regularly appears before international courts and tribunals. The author thanks FICSA for partially funding the writing of this article. Of course, all views are of the author alone. Dr Rishi Gulati can be contacted at rishi.gulati@vicbar.com.au

¹ For an early analysis of the doctrine, see H.W. Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law' (1966) 15 *American Journal of Comparative Law* 1/2, at 251-300; C.F. Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, (OUP 1994), at 402-438; for a more recent analysis, see G. Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations* (Duncker & Humblot, Berlin, 2018), at 202-209; and for a brief comparative analysis, see G. Aleffi, 'Nature and scope of the contractually acquired rights of Council of Europe staff' (2000), available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9087&lang=en> accessed 20 November 2019.

² See sections III and IV of this article below.

³ *De Merode et al v. World Bank (Decision No. 1)* (World Bank Administrative Tribunal, 5 June 1981) ('*de Merode*'), at para. 46. For an analysis of this case and its significance to IAL, see generally, R. Gulati, '*de Merode and ors v World Bank, 5th June 1981 ((1981) 1 WBAT Rep 734, OXIO 229*', available at <https://opil.ouplaw.com/view/10.1093/law-oxio/e229.013.1/law-oxio-e229> accessed 20 November 2019.

II. The acquired rights doctrine: a supreme general principle of IAL?

General principles of law are regularly applied by international courts and tribunals as interpretative tools or as sources of concrete obligation.⁴ IATs, adjudicative mechanisms that are created to settle disputes between IOs and their employees, have also developed several important general principles in the sphere of IAL.⁵

IAL is a complex body of law that governs the employment relationship between an IO and its employees. As was clarified in the World Bank Administrative Tribunal's ('WBAT') landmark *de Merode*⁶ decision, IAL has several sources. Namely, the contract of employment, statutory sources, the practice of the organisation, and importantly for present purposes, the general principles of law.⁷ Such general principles may be derived from national jurisdictions,⁸ and are usually incorporated into IAL through IAT jurisprudence.⁹ As the WBAT observed, IATs refer to the jurisprudence of each other and some of these judgments 'even go so far as to speak of general principles of international civil service law'.¹⁰ Indeed, general principles of law play an especially important role in supplying the content of IAL due to gaps in the written law.¹¹

The resort to general principles to settle disputes between IOs and their staff members is thus fairly common.¹² The acquired rights doctrine is said to constitute just one such general principle.¹³ Consequently, whether or not the acquired rights doctrine is expressly enshrined in an IO's internal law, it continues to have application.¹⁴ Moreover, some commentators have

⁴ Art. 38 (1) ICJ Statute (1945) 33 UNTS 993 ('ICJ Statute'); also see generally, R. Wolfrum, 'Sources of International Law' in R. Wolfrum, *Max Planck Encyclopedia of Public International Law* (2011).

⁵ Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, at 107; also see the views of Villalpando, who has observed that at best 'international law remains present, at least as the backdrop of the law of the international civil service': S. Villalpando, 'The Law of the International Civil Service' in J. Katz Cogan, I. Hurd, and I. Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016), at 1072.

⁶ *De Merode*.

⁷ *Ibid.*, at paras. 18-23.

⁸ *Ibid.*, at para. 25. Note the similarities in how general principles are derived in IAL and how they may be derived in public international law where they may be sourced 'from municipal law, from general considerations, or, by generalizing, from a particular treaty regime': Wolfrum 'Sources of International Law', at para. 35; also see, Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations*, at 174-185.

⁹ Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, at 154-155.

¹⁰ *De Merode*, at para. 28.

¹¹ Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, at 151; also see several judgments of the United Nations Administrative Tribunal: *Howrani et al v. Secretary-General of the United Nations*, UNAT Judgment No. 17 [1951]; *Vassiliou v. Secretary-General of the United Nations*, UNAT Judgment No. 275 [1981]; *Kleckner v. Secretary-General of the United Nations*, UNAT Judgment No. 483 [1990]; *Chileshe v. Secretary-General of the United Nations*, UNAT Judgment No. 690 [1995]; and *Smith v. Secretary-General of the United Nations*, UNAT Judgment No. 249 [1979] – these judgments incorporated general principles such as equity, fairness and estoppel into IAL.

¹² Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, at 158; *de Merode*, at para. 25; Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations*, at 32-33: 'In constant case law the tribunals use the general legal principles common to member states and the principles enshrined in the international conventions and declarations on fundamental and human rights as a necessary complement to the service regulations...of all IOs'.

¹³ *De Merode*, at para. 11; also see, *Quijano-Evans Dedeyne-Amann v. Secretary-General of the United Nations* UNDT/2017/098, 29 December 2017 ('UNDT Decision'), at para. 99 and the case law cited therein.

¹⁴ The ILOAT said that while an organisation's staff may have their acquired rights protected by its own Staff Regulations, '[a]ctually the doctrine would afford them protection anyway even if there were no such provision in the Regulations': *Ayoub et al*, ILOAT Judgment No. 832 [1987] ('*Ayoub*'), at para. 12.

gone further saying that the doctrine is a fundamental general principle of law making it hierarchically superior to even the written law. Amerasinghe says that:

The reasonable conclusion seems to be that, as regards the general principles of law of a fundamental nature, they are superior hierarchically to the written law in particular and could, indeed, be the supreme source of law relating to the international civil service...The rule against discrimination or equality of treatment and the principle that a staff member has a right to be heard before a disciplinary sanction is imposed on him are examples of general principles of a fundamental nature, *as is the rule protecting acquired or essential rights* (emphasis added).¹⁵

On the same lines, Ullrich has contended that general principles of a fundamental nature, such as acquired rights, have now assumed a quasi-constitutional status.¹⁶ The doctrine of acquired rights may be understood as a supreme value system in IAL.¹⁷ As a fundamental general principle of law having a constitutional character, the doctrine places limits to the regulatory freedom of IOs over their employees. This at least has been the conventional view on the status of the doctrine. The conventional view that the acquired rights doctrine constitutes a general principle of IAL may be however questioned. For a principle to be considered as a general principle of law, it must attract a degree of consensus on the content of its common core.¹⁸ The core of the principle should be ascertained and it is that ‘shared legal corpus that may be considered for inclusion among the general principles of law, thereby promoting a fundamental and international concept’.¹⁹ General principles have often been upheld based on an intuitive presumption, as opposed to deciphering a common core based on a true comparative analysis.²⁰ It is thus important to analyse whether the acquired rights doctrine is one of IAL’s general principles or is it simply based on intuition?

I show that while the development of the doctrine since its initial reception (III) and its consolidation by the ILOAT points towards a consensus on its core meaning (IV), this consensus has now been broken by the UNAT (V). While the ILOAT understands the doctrine as protecting staff rights within its scope retrospectively and prospectively,²¹ the UNAT has held that it is synonymous with the rule against retroactivity, rendering the doctrine of little benefit for a large category of international civil servants.²² I argue that the difference in understanding by the two leading international administrative regimes is so significant that it cannot be said that the acquired rights doctrine attracts a broad agreement on its core meaning.

¹⁵ Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, at 156.

¹⁶ Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations*, at 32-33; also see the discussion at section V(2) below showing that certain IATs also have taken such an approach.

¹⁷ See, for example, *In re Niesing (No. 2) et al*, ILOAT Judgment No. 1118 [1991], at para. 10: An IO ‘must at all times, and more particularly when amending the conditions of service, abide by those general principles’.

¹⁸ C.T. Kotuby and L.A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017), at 20-23.

¹⁹ *Ibid.*, at 20.

²⁰ *Ibid.*, at 17-18.

²¹ There would be an overlap between the operation of the acquired rights doctrine and the rule against retroactivity in as far as the doctrine applies to protect accrued rights.

²² International civil servants having access to both the UNDT and UNAT are as follows: UN Secretariat; UN Funds and Programmes; International Court of Justice; and World Meteorological Organization. International civil servants having access to only the UNAT are from the UN Relief and Works Agency for Palestine; International Civil Aviation Organization; International Fund for Agricultural Development; International Maritime Organization; International Seabed Authority; and the International Tribunal for the Law of the Sea: see, UN Internal Justice System, ‘Who Can Use The System’, available at <<https://www.un.org/en/internaljustice/overview/who-can-use-the-system.shtml>> accessed 20 November 2019.

III. The acquired rights doctrine and its initial reception

The acquired rights doctrine was developed to act as a check on the power of an IO to unilaterally adversely amend a staff member's essential conditions of employment. From time to time, IOs try to make such unilateral amendments by simply making modifications to their internal employment legislation.²³ To protect employees from excesses in the exercise of such one-sided power, IATs recognised and developed the doctrine of acquired rights.²⁴ Commenting on the doctrine's initial reception in IAL, Baade observed that the doctrine of acquired rights was presumably recognised by IOs based on 'parallel theories of the acquired rights of public officials in states where those theories have assumed major importance' such as in France, Germany and Switzerland.²⁵ Following a comparative analysis of the above jurisdictions, he went on to conclude the 'only positive generalization possible on the basis of the above survey is that to the extent that acquired rights have been recognized at all, they have always included the stipulated emoluments for services already rendered'.²⁶ From a domestic perspective, the acquired rights doctrine thus protected civil servants from retroactive amendments to their pecuniary entitlements.²⁷ This was nothing more than an expression of the rule against retroactivity, an aspect of the principle of legality.²⁸

However, the acquired rights doctrine in IAL was given its own particular content and performed a distinctive protective function. As is typical for the development of general principles, while they may be inspired by municipal law, they take their own shape and form when translated into a general principle in a different legal order or regime.²⁹ The doctrine, as developed by IATs, was given specific content in light of the unique nature of the international civil service where inequality between the IOs and their employees is stark. Compared to their national counterparts, international civil servants are in a considerably weaker position vis-à-vis the employer IO. The right to strike is mostly unrealisable assuming that it exists,³⁰ the rights of staff unions or associations are limited, international civil servants lack the ability to meaningfully influence the legislative affairs of an IO, and staff cannot avail of national courts to enforce their rights due to the application of IO immunities.³¹

²³ *Re Lindsey*, ILOAT Judgment No. 61 [4 September 1962], at para. 12 ('*Lindsey*'); also see *Kaplan v. Secretary-General of the United Nations*, UNAT Judgment No. 19, Case No. 27 [21 August 1953], at para. 3 ('*Kaplan*').

²⁴ See generally, Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law'.

²⁵ *Ibid.*, at 254-255.

²⁶ *Ibid.*, at 268 and 276 (note, even in the US, vested rights of public officials were protected to an extent).

²⁷ *Ibid.*, at 277. Baade did recognise that his analysis of acquired rights did not point to the existence of a general principle of international law directly translatable to IAL due to the lack of sufficient uniformity in how acquired rights were understood in national jurisdictions.

²⁸ *Ibid.*, at 265.

²⁹ Indeed, the acquired rights doctrine is said to constitute a general principle of law in the sphere of public international law entailing a specific meaning, albeit it is a highly contentious matter: see P.A. Lalive, 'The Doctrine of Acquired Rights', (*Lalive.ch*), available at <http://www.lalive.ch/data/publications/56_-_The_Doctrine_of_Acquired_Rights_The_rights_and_duties_of_private_investors.pdf> accessed 20 November 2019, at 150-151. The author discusses the difficult debate surrounding acquired rights in public international law and points out that according to some, acquired rights are 'a kind of reinforced individual power...a right acquired permanently and immutably'.

³⁰ As the UNDT said in *Abd Al-Shakour et al v. Secretary General of the United Nations*, UNDT/2020/106 [30 June 2020] ('*Abd Al-Shakour*'), at para. 111: 'international civil servants do not participate in a democratic legislative process and in principle...have no right to strike; thus, enhanced protection is required'.

³¹ *Ibid.*; several of these issues are discussed in R. Gulati, *International Organisations and Access to Justice* (CUP 2021) (forthcoming); also see, C. Ryngaert, 'Dutch Supreme Court upholds immunity of the European Patent Organization in collective labor case', (*Ucall Blog*), available at <<http://blog.ucall.nl/index.php/2017/02/dutch-supreme-court-upholds-immunity-of-the-european-patent-organization-in-collective-labor-case/>> accessed 20 November 2020.

It is hardly surprising that the acquired rights doctrine as developed in IAL aimed to provide strong protections for staff members against unilateral legislative action. Providing such protection also assumed much significance in terms of ensuring the independence and impartiality of the international civil service which should not be left to the whims and fancies of political organs and their potential undue influence through their power of unilateral amendment to an individual's conditions of employment.³² Indeed, the first ever IATs, including the Administrative Tribunal of the League of Nations (the predecessor to the ILOAT) and the United Nations Administrative Tribunal (the predecessor to the UNAT) readily accepted the application of the doctrine as performing a protective function. It has been commented:

[I]nternational public servants need more guarantees than are afforded by [national] public service law...there appears to be little doubt that more guarantees were in fact always intended. As the League of Nations Administrative Tribunal observed in its very first decisions, *Di Palma Castiglione v. LL.O.* and its companion cases, 'the Regulations were enacted in order to meet the need of giving staff members, for the present and for the future, certain legitimate guarantees regarding the security and terms of their employment.' To be sure, respect for acquired rights is hardly as proverbial today as it was in the formative era of the League. *Still, there seems little doubt that the constant re-enactment of acquired-rights reservations in the amendment clauses of Staff Regulations is evidence of an intent to protect more than a hypothetical claim to back pay* (emphasis added).³³

Advancing this important protective function, IATs showed a clear inclination to develop the acquired rights doctrine as an autonomous general principle of IAL. The doctrine was especially developed to secure the observance of certain staff rights retrospectively and prospectively.³⁴ The rule against retroactivity is thus much narrower than the acquired rights doctrine in its operation.³⁵ As the ILOAT explained, while the doctrine of acquired rights 'looks to the future as well as to the past', the rule against retroactivity 'merely forbids altering what already belongs to the past'.³⁶ The acquired rights doctrine therefore played a distinctive role performing an important protective function over and above that performed by the rule against retroactivity. What is more, as the rule against retroactivity is a general principle of IAL in its own right,³⁷ the real value added by the acquired rights doctrine is in terms of its role in

³² Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law', at 279. As is commonly accepted, securing the independence and impartiality of the international civil service is a key underlying value in IAL which is frequently protected in constituent arrangements: see, for example, Art. 100 UN Charter (1945) 1 UNTS XVI ('UN Charter').

³³ Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law', at 281, citing *Di Palma Castiglione v. I.L.O.*, Judgment No. 1 [29 January 1929], at 3-4.

³⁴ But it should be pointed out that acquired rights and the rule against retroactivity could perform the same work according to some early IAT jurisprudence: see, for example, *Puvrez v. I.C.A.O.*, UNAT Judgment No. 82 [1961] (under the ICAO's acquired-rights clause, accrued salary claims were immune against reduction).

³⁵ A retroactive law is one which 'imposes a new obligation on past things or a law that starts from a date in the past': see Black's Law Dictionary, 'Retroactive Statute', available at <<https://thelawdictionary.org/retroactive-statute/>> accessed 20 November 2019.

³⁶ *Ayoub*, at paras. 13 and 16: '[an] international organisation should refrain from any measure which is not warranted by its normal functioning or the need for competent staff. It is bound by the general principles of law such as equality, good faith and non-retroactivity. It will act from reasonable motives and avoid causing unnecessary or undue injury'; also see, *Mr D. A. et al*, ILOAT Judgment No. 2986 [11 November 2010] ('*Mr D. A. et al.*'), at para. 14.

³⁷ As Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations*, at 179-80, notes: 'The rule against retroactivity is derived from the legitimate expectation which itself is a specific configuration of the precept of stability in law. It is recognised by...national [legal systems]...Its purpose is to protect the confidence of staff members in the retention of an acquired favourable legal position for the past. The rule against retroactivity may be viewed, therefore, as the alter ego of the general legal principle of acquired rights which safeguards a favourable legal position for the future.'

protecting staff rights prospectively. The acquired rights doctrine should thus be distinguished from other general principles creating limits to an IO's power of unilateral amendment.

While the doctrine's key function was to provide protection from unilateral adverse amendment by the IO in respect of certain rights into the future, the nature of the rights that were actually to be protected has always been a difficult question to answer. Early jurisprudence distinguished between contractual and statutory rights. The extent to which 'the relationship between IOs and their staff members might be based on or include elements of a contractual nexus pose[d] inherent limits to unilateral change'.³⁸ Broadly speaking, this means that conditions of employment of a contractual character would constitute acquired rights and cannot be unilaterally adversely amended by an IO. The United Nations Administrative Tribunal endorsed this notion in its early jurisprudence, stating:

In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements: All matters being contractual which affect the personal status of each member — e.g., nature of his contract, salary, grade: All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning — e.g., general rules that have no personal reference. While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly.³⁹

The idea being that staff rights of a contractual nature (whether found in the contract of employment or a statutory source) ought to be shielded from a unilateral adverse amendment by an IO. This meshing of sources naturally caused much confusion in determining the scope of acquired rights for no ready answer could be found to what right is actually contractual and thus protected from unilateral adverse amendments. Indeed, subsequent jurisprudence at the United Nations Administrative Tribunal pertaining to an understanding of the doctrine lacked any clarity,⁴⁰ and its refinement largely occurred at the ILOAT.

IV. The ILOAT approach: essential terms are acquired rights

The ILOAT has had a significant impact on the development and consolidation of the acquired rights doctrine given its vast personal jurisdiction.⁴¹ In particular, it has provided much clarity

³⁸ Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law', at 285.

³⁹ *Kaplan*, at para. 3.

⁴⁰ As the UNDT has recently pointed out, the UNAT's decisions on acquired rights lacked clarity. While one approach understood them as going beyond the rule against retroactivity, essentially adopting an approach not dissimilar to that taken by the ILOAT (see section IV below), the other approach limited it to the protection of accrued rights only; as the UNDT has stated in *Abd Al-Shakour*, at paras. 117-118. As the UNDT noted, '[t]he parallel jurisprudence of the former United Nations Administrative Tribunal was not entirely consistent on the question whether the acquired rights concept extends beyond prohibition of non-retroactivity. Judgment No. 1253 answered in the positive but accepted that modifications are not necessarily inconsistent with the acquired rights. The Tribunal contemplated the following criteria: the term of appointment has a statutory, and not a contractual character; amendments do not deny the right as such (in that case the right to pension) but only introduce rules that garnish it; amendments serve a legitimate objective and do not overly deplete the content of the entitlement or, as it was alternatively proposed, do not cause 'extreme grave consequences for the staff member, more serious than mere prejudice to his or her financial interest'. ...Other former United Nations Administrative Tribunal decisions remained on the position that the question of acquired rights does not arise where the modification has no retroactive effect. Instead, a fetter on legislative power to introduce modification with effect for the future was construed through the test of reasonability...'

⁴¹ As its website notes, the ILOAT is the 'heir of the Administrative Tribunal of the League of Nations, which was competent from 1927 to 1946 to hear complaints against the Secretariat of the League of Nations and against the International Labour Office...It is currently open to more than 58,000 international civil servants who are

on identifying the conditions of employment that fall within the scope of the acquired rights doctrine.

For a right to fall within the scope of the operation of the doctrine, it must be of an individual nature and it must constitute an essential term of employment which induced the staff member to join or remain in the employment of the IO (IV(1)). If a condition of employment is classified as essential, then it can only be limited if it is proportionate to do so, with the reasons for the change and the consequences for the staff member constituting relevant considerations (IV(2)). In sum, the acquired rights doctrine was especially developed to protect essential staff rights at all times into the future, but at the same time allow IOs to pursue objective and reasonable amendments to their employment legislation (IV(3)).

1. Characterising conditions of employment: the decision in Lindsey

The seminal case at the ILOAT regarding the acquired rights doctrine is *Re Lindsey*, Judgment No. 61 decided in 1962 (*'Lindsey'*).⁴² Wishing to assimilate the organisation's applicable conditions of service to those of the staff of the UN, the International Telecommunication Union amended its regulations and rules regarding its pension scheme, termination allowances, and the family allowance scheme, which were amendments that impacted the complainant personally.⁴³ As a result of such amendments the amount of pension and termination allowance due to Mr Lindsey was reduced. However, the family allowances he was entitled to did not materially change. The question before the ILOAT concerned whether the organisation was able to bring about such an adverse change to Mr Lindsey's terms of employment unilaterally. To answer this question, the ILOAT made two crucial points. First, it explained that a staff member's conditions of employment contain two kinds of provisions which must be distinguished:

[O]n the one hand provisions which appertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and subject to variation ['general' or 'impersonal' terms] and, on the other hand, provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment ['individual terms'].⁴⁴

Individual terms, wherever found, thus impact the personal status of a staff member, such as their salary and grade, impacting the bilateral relationship between an employee and their employer IO.⁴⁵ Once a term of employment is identified as individual, the next step is to determine whether that individual term is fundamental or essential. Only an essential term can constitute an acquired right. The ILOAT has said:

[Impersonal terms] are statutory in character and may be modified at any time in the interest of the service, subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them. Conversely...[*individual terms*] should to a large extent be assimilated to contractual stipulations. Hence, if the efficient functioning of the organisation in the general interest of the international community requires that the latter type of

serving or former officials of 57 international organisations...The Tribunal's case law comprises over 4,200 judgments...', see ILO, available at <<https://www.ilo.org/tribunal/lang--en/index.htm>> accessed 20 November 2019.

⁴² *Lindsey*.

⁴³ *Ibid.*, at para. 5 (it is this personal impact that made the complaint receivable, for the ILOAT did not have jurisdiction to annul the applicable staff regulations and rules).

⁴⁴ *Ibid.*, at para. 12.

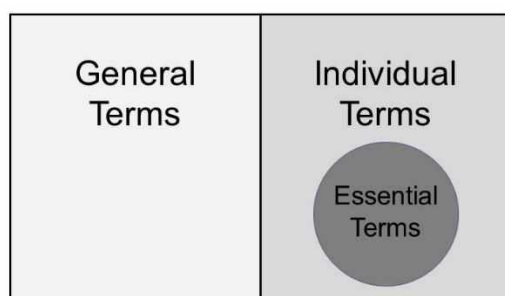
⁴⁵ The contracts of employment of international civil servants tend to be brief. See, *de Merode*, at para. 16: 'The letter of appointment conveys to the prospective staff member 'the formal offer of an appointment to the staff...It sets out certain specific details of the appointment, such as initial assignment, salary, dependency allowances, entry date, and information about benefits, visas, etc.'.

provisions should not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his consent *but only in so far as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment* (emphasis added).⁴⁶

According to the ILOAT approach, individual terms of employment must not be unilaterally amended by an IO if doing so would substantially upset the balance of the contract; or undermine an essential term of employment which objectively induced an individual to join or remain in an organisation's employment.⁴⁷ Both these things are in reality one: 'Disturbance of the structure of the contract posits impairment of a fundamental term, and the latter the former'.⁴⁸ In *Lindsey*, rejecting the organisation's contention that it was entitled to amend the conditions of service as it was pursuing a package deal for its employees, the ILOAT decided that when looked at in its totality, the significant adverse impact on Mr Lindsey's pension rights and termination allowance amounted to breach of the type of conditions which would have objectively induced an individual to join the organisation's employment.⁴⁹ Thereby essential conditions of employment were impermissibly contravened.⁵⁰ As no adverse impact to Mr Lindsey resulted in respect of the family allowance scheme, no acquired rights were breached in this respect.⁵¹

Figure 1 below illustrates that, among the conditions of employment, only essential individual terms can constitute acquired rights.

Figure 1



Conditions of Employment

Indeed, the ILOAT's approach drawing a distinction between essential and non-essential terms to determine what rights are acquired rights was also applied by other leading IATs which further bolstered the status of the doctrine as a general principle. While the WBAT avoided

⁴⁶ *Lindsey*, at para. 12.

⁴⁷ *Ayoub*, at para. 13. Several other decisions by the ILOAT also refer to the same or similar formulations: see, for example, *In re Elsen and Elsen-Drouot*, ILOAT Judgment No. 368 [1979] ('*Elsen*'), at para. 6; *Mr D. E. H.*, ILOAT Judgment No. 3074 [10 November 2011], at para. 16 ('*Mr D. E. H.*'); *Ms A. A. S.*, ILOAT Judgment No. 3135 [27 April 2012], at para. 21 ('*Ms A. A. S.*').

⁴⁸ *Ayoub*, at para. 13.

⁴⁹ *Lindsey*, at paras. 15 and 17.

⁵⁰ *Ibid.*, at paras. 18-19, the ILOAT observed: '[U]nder the old scheme the maximum amount of complainant's pension corresponded to 60 per cent of his insured earnings, whereas under the new scheme it corresponds to only 54,5 per cent. Actually, it is doubtful whether, taken in isolation, these various changes seriously impaired a right that could have induced complainant to enter the service of the Union, but taken in conjunction the changes did have this effect. Therefore by making the changes applicable to complainant the Union infringed the terms of his appointment.'

⁵¹ *Ibid.*, at paras. 26-27.

using the term acquired rights,⁵² it said that essential terms of employment cannot be unilaterally adversely amended.⁵³ Albeit, it observed that there is no easy way to determine in the abstract whether a term is essential or non-essential, saying:

[T]he Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable. Each distinction turns upon the circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination ... Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely – both principle and implementation – to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential.⁵⁴

But the mere fact that it might be difficult to distinguish essential from non-essential conditions should not prevent an IAT from specifying their nature.⁵⁵ The ILOAT has provided helpful guidance in its subsequent case law to determine this very question.

A term is highly likely to be essential if it is: (1) found in a contract or an individual decision as opposed to the rules of the organisation;⁵⁶ (2) terms that involve the exercise of discretion, involve a contingency, lack directness, or are otherwise remote, are unlikely to constitute essential terms for they objectively may not induce a staff member to join or remain in an IO's employment;⁵⁷ (3) where a term is accompanied by a specific assurance to a staff member, it is more likely to constitute an essential term;⁵⁸ (4) the right to a salary and pension, or another benefit having a basis in law,⁵⁹ is essential and cannot be unilaterally completely removed.⁶⁰

⁵² In *de Merode*, the WBAT said at para. 44: 'the Tribunal prefers not to invoke the phrase 'acquired rights' in order to describe essential rights. The content of this phrase is difficult to identify. It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls 'the doctrine of acquired rights' does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.'

⁵³ Even the amendment of non-essential terms is not allowed where such an amendment is retrospective, arbitrary, discriminatory, constitutes an abuse of discretion, breaches the principle of good faith, or is contrary to a legitimate expectation (all these constitute independent grounds of unlawfulness in any event): see *Ayoub*, at para. 16; *de Merode*, at para. 34; *Mr D. A. et al.*, at para. 35.

⁵⁴ *De Merode*, at para. 43.

⁵⁵ See the separate opinion of Judge Stern in *Ittah*, UNAT Judgment No. 1253 [30 September 2005], at s. XVII.

⁵⁶ *Mr D. A. et al.*, at para. 17; *Ms A. A. S.*, at para. 24.

⁵⁷ *Re Agoncillo et al.*, ILOAT Judgment No. 1446 [6 July 1995], at para. 17; *Mrs M. M. A. et al.*, ILOAT Judgment No. 2696 [9 November 2007], at para. 7: 'A right that is remote or contingent is less likely to survive amendment of the rules than one that is direct and immediate'; *Mr D. E. H.*, at para. 16.

⁵⁸ *Mr D. A. et al.*, at para. 17; also see, *Mortished*, UNAT Judgment No. 273 [28 April 1981], at s. VI ('*Mortished*'). Although, such cases could also attract considerations pertaining to the doctrine of legitimate expectation: *Mr J. K.*, ILOAT Judgment No. 3373 [9 July 2014], at paras. 7 and 9 (where the ILOAT found a breach of the IO's duty of care for the complainant who suffered a sharp drop in salary had a legitimate expectation that their remuneration will remain stable).

⁵⁹ *Re D*, ILOAT Judgment No. 4018 [26 June 2018], at para. 9.

⁶⁰ See *Mortished*, at s. XVI (where the organisation effectively removes an entitlement to an allowance by changing the rules on how the allowance could be obtained, it was found that acquired rights were breached); see also *Perrin et al (No 3) v. Asian Development Bank* (Asian Development Bank Administrative Tribunal, Decision No. 113) [21 July 2018], at para. 49, where it was said by another IAT: 'As the Tribunal mentioned...reasonable education assistance is an important and essential part of the compensation package for International Staff.'

However, as long as the methodology adopted for setting and adjusting staff remuneration enables ‘results to be obtained that are stable, foreseeable and clearly understood’,⁶¹ the method of calculating them is unlikely to constitute an essential term unless the reduction is drastic or unreasonable.⁶² The ILOAT has clarified, the ‘periodic adjustment of salary is within the discretion of the organisations provided that these regulations do not violate the principles of international civil service law and their application does not bring about an erosion of salary that could be regarded as substantially jeopardising the contractual balance between those organisations and their staff members’.⁶³

Evidently, IAT jurisprudence considerably refined the acquired rights doctrine by making a distinction between essential and non-essential terms. While non-essential terms can be unilaterally amended subject to other limits contained in IAL, the operation of the acquired rights doctrine meant that essential conditions of employment were the type of promises that an IO must keep. But the IO’s interests are not ignored either. In its subsequent case law, the ILOAT introduced what is essentially a proportionality analysis to safeguard the IO’s interests.

2. *Proportionality as a relevant factor in the acquired rights analysis*

Following its decision in *Lindsey*, the ILOAT’s next significant decision on acquired rights was rendered in 1987 in *Re Ayoub et al* (*‘Ayoub’*).⁶⁴ In *Ayoub*, certain professional staff at the International Labour Organisation, who were participants in the UN Joint Staff Pension Fund, suffered a reduction to the amount of pension they would have received after the organisation amended its rules and implemented a lower scale of pensionable remuneration.⁶⁵ The reason the amendment was made was due to the serious financial position of the UN Joint Staff Pension Fund at the time. The ILOAT began by endorsing its decision in *Lindsey* stating that ‘the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is

Abolition of it, for example, would touch on an essential right and would, most likely, require consent of the staff member concerned.’

⁶¹ See, for example, *Re Berthet (No. 2) et al*, ILOAT Judgment No. 1912 [3 February 2000], at para. 15; *K. and W. A. et al*, ILOAT Judgment No. 4138 [3 July 2019], at paras. 26 and 49.

⁶² See, *D. No (3) et al*, ILOAT Judgment No. 4028 [26 June 2018], at paras. 13-14. Also see, *Re Settino*, ILOAT Judgment No. 426 [11 December 1980], at para. 7: ‘The right to salary and to the well-established allowances, such as those for dependants, is essentially a fundamental right. But this does not mean that every item making up the salary or allowance and every detail of the process by which it is calculated are to be deemed inviolate; or that minor benefits - what are sometimes called ‘fringe benefits’ - are to be treated as unchangeable features of a contract’; *Mr J. W. et al.*, ILOAT Judgment No. 2633 [10 May 2007] (*‘Mr J. W. et al.’*), at para. 7: ‘whereas [the] right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation’; *Elsen*, at para. 7: ‘It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an international organisation. The question therefore arises whether the outright abolition of such allowances would in principle violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances’; *Mrs Carmen Berthet et al*, ILOAT Judgment No. 2089 [9 November 2001] (*‘Berthet et al.’*), at para. 16; *Ms A. A. S.*, at para. 22; *D. L.*, ILOAT Judgment No. 3676 [18 May 2016], at para. 10; also see *de Merode*, at paras. 77-82; *Re H (No. 4) et al.*, ILOAT Judgment No. 4195 [3 July 2019], at para. 9. Note, reductions in salaries or benefits may also be unlawful due to a lack of transparency etc.: see *K. A. and others*, ILOAT Judgement No. 4135 [13 May 2019], at para. 48, where the ILOAT said that ‘while an international organization (or a body such as the ICSC) is free to choose a methodology, system or standard of reference for determining salary adjustments, it must be a methodology which ensures that the results are stable, foreseeable and clearly understood or transparent...’. Also see, *Abd Al-Shakour*, at para. 120.

⁶³ See, for example, *Re Berthet (No. 2) et al*, ILOAT Judgment No. 1912 [3 February 2000] (*‘Re Berthet (No. 2)’*), at para. 19.

⁶⁴ *Ayoub*.

⁶⁵ *Ibid.*, at ss. (a)-(c).

impairment of any fundamental term of appointment in consideration of which the official accepted appointment'.⁶⁶

Crucially, the ILOAT went on to set out three specific tests to determine the particular rights that fell within the scope of the acquired rights doctrine:

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?⁶⁷

Applying its three tests to the facts, the ILOAT found against the complainants. On the nature of the term, it simply stated that the complainants are 'relying not on the contract or on any decision but on a rule, their right to the safeguarding of their conditions of service is not an unqualified one, and what matters especially is the reasons for and consequences of the amendments'.⁶⁸ Even though the ILOAT could have ended its analysis on the basis of the conclusion that the changes pursued did not impact any contractual promise or essential term by virtue of their very nature, it went on to apply the second and third tests. The second and third tests are nothing more than an application of a proportionality test. I.e., an intrusion into a right is considered permissible if an IO is objectively and reasonably pursuing a legitimate aim. The ILOAT seems to grant much deference to an IO. In *Ayoub*, it concluded:

[T]he Organisation did not act in breach of its obligations. One purpose of the impugned decisions was to put the Fund on a sounder financial footing; they do not create any form of discrimination that some difference of fact does not warrant; they break no promise; they do not apply retroactively to the complainants; and although they do cause financial injury the reasons are objective and, all things considered, the degree of it admissible.⁶⁹

Conversely, where a unilateral amendment is disproportionate, the ILOAT has found that acquired rights were breached. Interestingly, shortly after the amendment giving rise to the dispute in *Ayoub*, the ILO yet again amended its internal rules, further lowering the pensionable remuneration adversely impacting the complainants.⁷⁰ This time, if the cumulative impact of the reduction to the complainants' pension rights was considered, a large drop was evident.⁷¹ The ILOAT concluded that while the grounds for the decisions under challenge were objective,

all the complainants were left worse off to an extent that 'goes beyond the bounds of the ILO's discretionary authority... Moreover, before the challenged measures took effect the ILO took no decision that might have mitigated their harmful consequences.'⁷²

⁶⁶ Ibid., at para. 13.

⁶⁷ Ibid., at paras. 13-14.

⁶⁸ Ibid., at para. 15.

⁶⁹ Ibid., at paras. 15-16.

⁷⁰ *Re Ayoub (No. 2) et al*, ILOAT Judgment No. 986 [23 November 1989] ('*Ayoub No. 2*').

⁷¹ Ibid., at para. 3.

⁷² Ibid., at para. 23.

What was therefore pivotal in *Ayoub (No. 2)*'s outcome was the drastic curtailment of pension rights without the IO taking any mitigating steps. Considerations pertaining to the third test (the serious consequences on the staff member) turned the proportionality analysis in the staff members' favour. How grave the consequences must be before an intrusion into a right is held to be impermissible is an issue on which there exists little clarity.

In *Ayoub (No. 2)*, the ILOAT ordered that if the amount of the pension that the complainant 'gets when the [new] scale is taken into account proves to be at least 3 per cent lower than the amount he or she gets when it is not, compensation shall be due for any loss over and above the 3 per cent'.⁷³ While the ILOAT did not explain how it reached the figure of three percent, especially where multiple reductions in salaries or pensions are concerned, a relatively modest subsequent unilateral reduction would seem to be impermissible. Recent jurisprudence suggests that blatant reductions brought about by a unilateral amendment (for example a reduction of around 40 percent to the amount based on which pension contributions are calculated)⁷⁴ would be impermissible.⁷⁵

3. *Summing up the ILOAT approach*

The ILOAT has done much to clarify what rights are acquired rights. Essential conditions of employment must not be subjected to unilateral adverse amendments by an IO. If a term is found in a contract of employment, it is likely to constitute an essential term by virtue of its nature. If a term is contained in a statutory source, it may or may not constitute an essential term. However, even if an individual term is found in a statutory source, regardless of its inherent nature, the ILOAT tends to conduct a proportionality analysis to check whether the intrusion into the right is objective and reasonable. It specifically focuses on the reason for the change; and the consequences of the change on the relevant staff in terms of their pay and benefits.⁷⁶ As to the reasons for the change, much deference is given to an IO. On its face, the ILOAT does not second-guess an organisation's decision to unilaterally amend its rules to address financial or budgetary issues.⁷⁷

As a result, what often becomes determinative of whether a right is shielded from unilateral amendment are the consequences for the affected staff and how they fare vis-à-vis others in the organisation.⁷⁸ Important considerations here include the extent of the reduction in pay and

⁷³ *Ibid.*, at para. 24.

⁷⁴ *Mr Q. L.*, ILOAT Judgment No. 3571 [3 February 2016], at para. 8.

⁷⁵ Examples of cases where acquired rights were not upheld include: *Ms A. A. S.*, at 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': *Re Barton et al.*, ILOAT Judgment No. 1241(10 February 1993), at para. 24.

⁷⁶ The ILOAT regularly applies this approach in its case law: see, for example, *Re H (No. 4) et al.*, at para. 7.

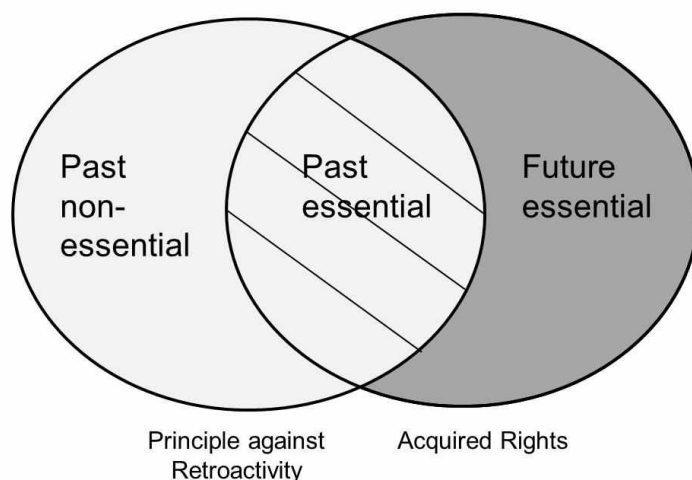
⁷⁷ *Berthet et al.*, at para. 15; also see, *Mr J. W. et al.*, at paras. 1 and 7; *Ms A. A. S.*, at para. 25; *Re H (No. 4) et al.*, at para. 9; but note *Re Berthet (No 2)*, at para. 13, where the ILOAT stated: '(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (in re Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (in re Cuvillier No. 3) in 6.' According to one approach, financial stress on an organisation does not mean that a particular right is extinguished, but that the organisation can meet its obligations at a later stage once the financial position of the organisation is on a better footing: see generally, *Jairo Torres et al* (Administrative Tribunal of the Organisation of American States, Judgment No. 124) [13 May 1994].

⁷⁸ A staff member must suffer a detriment before acquired rights may be breached: *Mr D. E. H.*, at para. 16; *Ms A. A. S.*, at para. 21.

benefits; the presence of mitigating steps;⁷⁹ and the position of the staff member vis-à-vis other staff members. In the final analysis, although it may be difficult to determine the precise scope of the acquired rights doctrine in terms of what rights are essential rights, ILOAT jurisprudence has nevertheless played a significant role in developing and refining the core understanding of the doctrine as a general principle.

The doctrine performs an important protective function in ensuring that essential promises made by IOs to staff members are kept and safeguarded from retrospective or prospective unilateral adverse amendments by IOs. In this respect, the doctrine clearly plays a distinctive role and goes beyond the principle against retroactivity. As *figure 2* below illustrates, although there are some overlaps in the operation of the acquired rights doctrine and the principle against retroactivity, the doctrine plays an important role in protecting essential rights prospectively.

Figure 2



While the doctrine, as discussed above, has been developed and refined over several decades, the UNAT collapses it to the rule against retroactivity. Therefore, the conventional view that the acquired rights doctrine is a supreme general principle of IAL may be seriously challenged due to the divergent understanding of its core meaning.

V. The collapse of the acquired rights doctrine at the UN

The IATs mandated to adjudicate employment disputes at the UN are the United Nations Dispute Tribunal ('UNDT') (the first instance tribunal) and the UNAT (the appellate tribunal). Those tribunals succeeded the United Nations Administrative Tribunal. The UNDT and UNAT only commenced operation approximately ten years ago, and the number of cases they have decided are fairly limited when compared to the ILOAT.⁸⁰ However, in perhaps the most significant litigation on the issue in recent times, the UNDT in *Quijano-Evans Dedeyne-Amann v. Secretary-General of the United Nations*⁸¹ ('UNDT Decision'), and UNAT in *Quijano-Evans et al v. Secretary-General of the United Nations*⁸² ('UNAT Decision'), reached opposite conclusions on the nature and scope of the doctrine. While the UNDT made an attempt to

⁷⁹ *Mr D. A. et al.*, at para. 21.

⁸⁰ For a background, see, R. Gulati, 'The Internal Dispute Resolution Mechanism of the United Nations', 15 Max Planck Yearbook of United Nations Law (2011), at 489-538.

⁸¹ UNDT Decision.

⁸² *Quijano-Evans et al v. Secretary-General of the United Nations*, Judgment No. 2018/UNAT/841 [29 June 2018]; Also see the UNAT's judgment in *Lloret-Alcaniz et al v. Secretary-General of the United Nations* 2018-UNAT-840 [29 June 2018]. ('UNAT Decision').

further consolidate the acquired rights doctrine in line with the jurisprudence of other IATs, the UNAT reversed the UNDT's decision. In doing so, the UNAT rendered the acquired rights doctrine of little use within the UN system by collapsing it to the rule against retroactivity. At a structural level, this has meant that the status of the acquired rights doctrine as a supreme general principle of IAL is highly questionable. Below, I set out the facts that gave rise to the UNDT and UNAT Decisions (V(1)), and then go on to analyse the decisions of the UNDT (V(2)) and the UNAT (V(3)).

1. *The relevant facts*

On 1 January 2017, the UN implemented a new salary regime, the Unified Salary Scale, for its professional and higher staff across the organisation. The new regime was implemented following a report of the International Civil Service Commission, which in 2015 had recommended 'for the introduction of one net salary scale for all staff members in the Professional and higher categories without regard to family status'.⁸³ The idea being that all professional and higher staff should receive the same net salary regardless of their family circumstances. This recommendation was adopted by the UN General Assembly causing an amendment to its Staff Regulations and Rules on 30 December 2016.⁸⁴

As a result of this unilateral amendment, a category of staff members suffered a significant reduction to their salaries. Prior to 1 January 2017, the salaries of those staff members (although they had differing individual circumstances) contained a dependent component which was removed by the new rules.⁸⁵ The eventual result was that the complainants saw reductions in their salaries.⁸⁶ As the UNDT found, the staff members lost 6% of their net salary.⁸⁷ Further, while the UN had implemented a transitional allowance for the affected staff to mitigate their losses, it did not fully compensate for the reduction.⁸⁸ Before the UNDT, the claimants challenged the decisions 'to reduce [their] contracted salary and the manner of the implementation of [a] Unified Salary Scale'.⁸⁹ In particular, the complainants argued that 'they have a contractual right and/or an acquired right to receive the amount of gross salary they received before the introduction of the Unified Salary Scale, which the Organization violated by unilaterally changing their mode of remuneration'.⁹⁰ In response, the UN contended that 'whilst the Applicants have an acquired right to receive 'a salary', they do not have a right to receive a specific amount'.⁹¹ The issue to be determined concerned whether the complainants had an acquired right to be paid the 'same amount of salary, gross or net, they received before the operation of the new rules'.⁹²

2. *The UNDT Decision: an attempt at consolidating the acquired rights doctrine*

Aiming to implement a uniform and coherent approach to the acquired rights doctrine, the UNDT engaged in a significant comparative analysis relying on ILOAT and WBAT jurisprudence.⁹³ It started by saying that acquired rights of UN staff members are protected both, under Staff Rule 12.1 (a quasi-constitutional provision for it acted as an express check on

⁸³ UNDT Decision, at para. 7.

⁸⁴ *Ibid.*, at paras. 8-9.

⁸⁵ *Ibid.*, at para. 10.

⁸⁶ *Ibid.*, at paras. 15-21.

⁸⁷ *Ibid.*, at para. 115.

⁸⁸ *Ibid.*, at para. 11.

⁸⁹ *Ibid.*, at para. 1.

⁹⁰ *Ibid.*, at para. 92.

⁹¹ *Ibid.*, at para. 92.

⁹² *Ibid.*, at para. 95.

⁹³ *Ibid.*, at para. 102.

the power of unilateral amendment) as well as constituting a well-recognised general principle of IAL.⁹⁴ After endorsing the doctrine as a general principle, the UNDT recognised and approved an understanding of the acquired rights doctrine as protecting certain promises from unilateral adverse amendments. Taking substantially the same approach as the ILOAT and the WBAT, it considered whether the conditions breached constituted essential terms of employment, stating:

Firstly, the Tribunal must determine if the modification to the rules alters a term of employment that is ‘fundamental and essential in the balance of rights and duties of the staff member’ (*de Merode et al.*, para. 42; see also *Ayoub*, para. 13). The notion of ‘fundamental term’, which is derived from the common law of contracts, is particularly well captured by Lord Upjohn of the House of Lords in the case *Suisse Atlantique Societe d’Armement Maritime v. N. V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361:

A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach.⁹⁵

A fundamental and essential term of employment may be expressed in the staff members’ letters of appointment or in the internal laws of the Organization. As the World Bank Administrative Tribunal held in *de Merode et al.*, ‘[i]n some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations’. However, a term of employment which is explicitly set out in a letter of appointment is presumed to be fundamental and essential (*Ayoub*, at paras. 14-15, *Mertens, de Merode et al.*, at para. 43).⁹⁶

Ultimately, pointing out that claimants’ terms on salaries constitute a provision expressly included in the contract of employment, the UNDT decided that such terms amounted to fundamental and essential terms and could not be unilaterally adversely amended.⁹⁷ Interesting, and worth citing are the UNDT’s reasons for holding that the right to a salary 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:

[T]he Tribunal finds that the right to salary necessarily extends to its quantum. The salary is, by definition, the consideration paid for the staff member to perform his or her duties. It is part of any contract of employment and the agreement between the parties lays in the determination of its actual level. The balance between the rights and obligations of the parties would be broken if the Organization was allowed to unilaterally modify the level of salary, as suggested by the Respondent. In line with these general principles, the Organization indeed committed not to reduce the Applicants’ salaries in

⁹⁴ *Ibid.*, at paras. 97-99: ‘[T]he obligation of an International Organization to respect its staff members’ acquired rights is a general principle of international civil service law, as acknowledged by the ILOAT in *Ayoub* (Judgment No. 832 (1987)) (see also the former United Nations Administrative Tribunal Judgment No. 273, *Mortished* (1981) and the separate opinion of Judge Stern in the former United Nations Administrative Tribunal Judgment No. 1253, *Ittah* (2005)). Indeed, this principle has generally been recognised by the principal international administrative tribunals, whether explicitly using this term or not, including by the former United Nations Administrative Tribunal (see, for example, Judgments No. 19, *Kaplan* (1953), No. 82, *Puvrez* (1961), No. 273, *Mortished* (1981), confirmed by the ICJ’s Advisory Opinion on the Application for review of Judgment No. 273 of the United Nations Administrative Tribunal; by the ILOAT (see, e.g., Judgments No. 61, *Lindsey* (1962), at para. 12; No. 365, *Lamadie* (No. 2) and *Kraanen* (1978); No. 391, *Mertens n° 2* (1979); No. 391, *Los Cobos and Wenger* (1980) and by the World Bank Administrative Tribunal (Judgment No. 1, *de Merode et al.* (1981), at para. 44). It would thus apply even if it was not formally enacted in staff regulation 12.1 (see *Ayoub*).’

⁹⁵ *Ibid.*, at paras. 107-108.

⁹⁶ *Ibid.*, at paras. 107-108.

⁹⁷ *Ibid.*, at para. 110.

specifying the initial amount in their letters of appointment and explicitly stating that this amount is 'subject to increase', making this term of employment inviolable....⁹⁸

Once the UNDT found that the breach related to the contravention of a condition that constituted an essential term based on its nature alone, it did not go on to conduct a proportionality analysis that the ILOAT tends to undertake in such cases. It concluded that because the dependency component 'made to the Applicants on account of their dependents was initially embedded in their salaries, which is a fundamental and essential term of employment, it could not be unilaterally reduced by the Organization or discontinued for that matter, irrespective of the reason for the change or its impact'.⁹⁹ Interestingly, had the organisation mitigated the losses suffered by the claimants fully, the UNDT might have reached a different decision.¹⁰⁰ Crucially for present purposes, the UNDT adopted an understanding of the acquired rights doctrine as protecting contractual promises of an essential nature from unilateral adverse amendments. Had the UNDT Decision not been reversed, a real consensus on the common core of the acquired rights doctrine would now exist. That opportunity is lost for the moment.

3. *The UNAT Decision: the collapse of the acquired rights doctrine at the UN*

The UNAT reversed the UNDT's Decision taking a diametrically opposite approach to the acquired rights doctrine as understood by IATs in general. In respect of its core understanding of the doctrine, the UNAT said:

The term 'acquired rights' [is] inherently vague and ambiguous. The very term 'acquired' implies and suggests the idea of protection and the notion that such rights may expect to survive future variation. But by the same token, all rights are acquired in one way or another, with the result that the term evades common or exact definition. Acquired rights are essentially individual or subjective rights meaning that *all existing rights are acquired right* (emphasis added).¹⁰¹

As the preceding discussion has amply demonstrated, while it may be somewhat difficult to assess which particular condition of employment is within the scope of the acquired rights doctrine, its fundamental understanding as a concept is neither vague nor ambiguous. The doctrine safeguards essential terms of employment from unilateral adverse amendments by IOs. In doing so, it performs an important protective function for individual employees who are in an inherently weaker position vis-à-vis the employer IO. Indeed, this understanding has developed over decades of jurisprudence by the leading IATs. Contrary to that understanding, the UNAT went on to put forward its own conception of acquired rights. In one remarkable paragraph, it 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).¹⁰²

By collapsing the acquired rights doctrine to the rule against retroactivity, the UNAT dismissed approximately 100 years of jurisprudence that already started to emerge since the days of the

⁹⁸ Ibid., at para. 112.

⁹⁹ Ibid., at para. 14. Recently, in *Re W*, Judgment No. 4381 (18 February 2021), paras. 22-25, the ILOAT noted that the UNDT Decision took a conventional approach to the understanding of the acquired rights doctrine, but questioned the UNDT Decision for it did not fully take into account the reasons for the change.

¹⁰⁰ Ibid., at para. 115.

¹⁰¹ UNAT Decision, at 24.

¹⁰² Ibid., at 24-25.

old League of Nations Administrative Tribunal. The UNAT renders the doctrine effectively worthless for the principle against retroactivity already is a distinct general principle of IAL, operating independently of the acquired rights doctrine. Given that the principle against retroactivity would safeguard all accrued rights anyway, the real value added to the advancement of staff rights by the doctrine is its function concerning the protection of essential rights into the future. There is now significant disunity on the core meaning of the acquired rights doctrine. In doing so, the UNAT has granted the organisation a broad space to regulate its internal employment relationships. The UNAT has even left open the possibility for an employer IO to avoid its contractual commitments. The UNAT said:

In accordance with universally accepted principles, contracts which purport to fetter in advance the future exercise of constitutional, statutory or prerogative powers are *contra bonos mores* and not valid or enforceable. It is in the public interest that public authorities retain the freedom to exercise their discretionary or legislative powers. It can never be in the international public interest to contractually fetter the General Assembly in the exercise of its powers to make policy for the Organization. A body such as the General Assembly cannot be compelled to uphold a promise not to exercise its regulatory powers so as not to interfere with its contractual arrangements. The fetter proposed by the Respondents, and accepted by the UNDT, would be wholly incompatible with the powers conferred upon the General Assembly by the Charter of the United Nations.¹⁰³

The UNAT has chosen to endorse a concept of the acquired rights doctrine that is significantly different to its conventional understanding in IAL. Whereas the conventional view is that the doctrine is a superior general principle of IAL, according to the UNAT, the statutory sources constitute a higher norm. So much so that they may also interfere with the contractual commitments the UN makes to its employees.¹⁰⁴ Significantly, this also holds true for promises on essential and fundamental terms of employment.¹⁰⁵ Such an approach may also raise important issues concerning the accountability of IOs towards third parties, an issue that is not within the scope of this work and is discussed elsewhere.¹⁰⁶

In the end, the UNAT's approach to the acquired rights doctrine rejects the reason why it was recognised, developed and refined by IATs in the first place, i.e., to perform a protective function for staff who are in a much weaker position compared to their employer IOs. The UNAT's decision is ultimately driven by carving out a very broad space for the UN to unilaterally amend its staff members' conditions of employment. This view of the doctrine will no doubt dismay the employee for it weakens staff rights. But equally, it is one that IOs would welcome for it gives them greater opportunity to regulate employment relations and the capacity to make structural adjustments to manage the perennial resource constraints IOs face. What is certain is that unilateral adverse amendments pursued by IOs will continue to trigger much litigation, with the role that other general principles of law play to restrain the exercise of public power becoming more and more important.¹⁰⁷

¹⁰³ Ibid., at 26.

¹⁰⁴ Also see the UNAT's judgment in *Lloret-Alcaniz et al v. Secretary-General of the United Nations* 2018-UNAT-840 [29 June 2018], at para. 90. The UNAT said: 'An 'acquired' right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary.'

¹⁰⁵ UNAT Decision, at 27.

¹⁰⁶ Gulati, *International Organisations and Access to Justice*.

¹⁰⁷ Indeed, the UNAT Decision is already having an impact on the operation of the acquired rights doctrine in terms of ensuring the stability of staff salaries. Where the method of calculating salaries of a particular category of personnel was unilaterally amended resulting in a 4.7% reduction to the post adjustment component of the

VI. Conclusion

Given the significant divergence in the understanding of the acquired rights doctrine by the two leading international administrative regimes, it may be concluded that the doctrine cannot be considered as an independent and distinct general principle of IAL as such. Led by the ILOAT, one version of the acquired rights doctrine understands it as protecting essential terms of employment from any unilateral adverse amendments at all. The other version, propagated by the UNAT, collapses the doctrine to an aspect of the principle against retroactivity leaving it little work to do in reality. The practical impact is that international civil servants having access to the ILOAT are much better protected from unilateral adverse amendments to their conditions of employment when compared to those international public officials whose organisations have subscribed to the jurisdiction of the UNAT. This is an unfortunate outcome and an unwelcome development for the content of substantive protections are now more dependent on the IAT approach, as opposed to a coherent development of the law. Whether or not the acquired rights doctrine will eventually regain its status as a general principle of IAL attracting a common understanding as to its core meaning remains to be seen.

salary, applying the UNAT Decision, the UNDT concluded, '[e]verything considered: the nature of the entitlement, consistency of procedure with internal rules ('approved methodology'), high complexity, multiple alternatives and absence of outright arbitrariness in the methodology, mitigation applied and, above all, the temporary character of the modification, the ICSC decision does not disclose unreasonableness in the sense of risking deterioration of the international civil service. This Tribunal concedes that the application of rights construct would pose more stringent requirements as to the quality and stability of the methodology and could have brought about a different conclusion': see, *Abd Al-Shakour*, at paras. 105 and 131; also see, *Caroline Wendy Nicholas v. Secretary-General of the United Nations* 2020-UNAT-1045 [24 November 2020], paras 54-59]. It is noteworthy that the UNAT itself seems to be finding it somewhat difficult to reconcile the UNAT Decision with a conventional understanding of the acquired rights doctrine.