

Towards Normative Hierarchy in International Administrative Law

International colloquy 'Common Focus and Autonomy of
International Administrative Tribunals' organised by the
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Outline

- ▶ **Common focus and autonomy**
- ▶ **The specific nature of international civil service law when compared with national law and international public law**
- ▶ **Sources of international administrative law**
- ▶ **Normativity and hierarchy of sources of international administrative law**

Mullan v the Secretary General of the United Nations (UNAT, 1972)

- ▶ According to internal rules of one international organisation only male dependants can benefit from having their nondependent spouses travel home at the organization's expense
- ▶ The organisation's rule is more specific than various human rights instruments and ILO conventions and recommendations
- ▶ The Tribunal decided that the internal rule prevails

Method of Research

- ▶ Analyzed **statutes** and other **constituent documents** of international administrative tribunals
- ▶ Analyzed **case law** of international administrative tribunals
- ▶ Particular focus on **applicable sources of law, applicability of international law** and the question of **hierarchy**

Sources and Evidence of International Administrative Law	Equivalent in the Context of International Public Law
Contract of employment	None
Internal law of organisations	Domestic law
Practice of organisations	Customary international law
Generally recognised principles	General principles of law
Decisions of other tribunals and scholarly writings	Judicial decisions and scholarly writings

Findings

- ▶ No accepted overarching principles or rules on **supremacy of international law**
- ▶ Although it deals **with employment disputes** between international civil servants and intergovernmental organisations but in the vast majority of cases **no references to international human rights law or international labour law** (even in jurisprudence of the ILO Administrative Tribunal)

Public Accountability: Domestic v International Administrative Law

- ▶ Legislative process
- ▶ Public consultations and media debates
- ▶ International administrative law lack the same level of democratic legitimacy
- ▶ No clear rules on the sources of law or hierarchy

Why Defining Sources?

- ▶ **ILA:** international administrative tribunals should refrain from adopting too restrictive approach to the sources of law at the tribunal's disposal
- ▶ But the opposite problem seems more serious – difficult to distinguish between rules of law and nonbinding arrangements, between legal and illegal conduct
- ▶ The task of international administrative tribunals is to apply the law to the disputes, not to create law

Equality of the Parties

- ▶ “All persons should be equal before the courts and tribunals” (Article 14, International Covenant and Political and Civil Rights)
- ▶ Employees (particularly non-lawyers) may lack the ability to understand previous legal decisions impacting their employment rights or even access such decisions
- ▶ No incentive to use tribunals when difficult to distinguish between law and political maneuvering

“Unconstitutionally Vague and Unenforceable”

- ▶ U.S. Law concept according to which a statute must define the prescribed conduct “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement” *Kolender v Lawson*, 461 U.S. 352, 357 (1983)
- ▶ Arbitrary enforcement violates the principle of equal protection

Hierarchy

- ▶ **ICJ Statute** establishes rules and subsidiary means for the determination of rules of law (Article 38)
- ▶ **Vienna Convention on the Law of Treaties:** “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” (Article 27)
- ▶ A similar approach in international administrative law?

Statutes of International Administrative Tribunals

- ▶ Some contain no mentioning of applicable sources of law
- ▶ Some list sources of applicable law but no hierarchy
- ▶ Some both list sources of law and establish a hierarchy

EBRD and IMF Tribunals

EBRD	IMF
EBRD Statute: the tribunal shall base its decisions on “the provisions of the Staff Member’s contract of employment, the internal law of the Bank and generally recognised principles of international law.	IMF Statute: the tribunal should apply the law of the Fund, including generally recognised principles of international administrative law.
EBRD Statute: decisions of the Board of Directors or the Board of Governors should not breach international administrative law	IMF Official Commentary: the tribunal applying general principles of international law “cannot derogate from the powers conferred on the organs of the Fund, including the Executive Board”

Towards Normative Hierarchy

- ▶ **Core general principles of international administrative law** (e.g. non-retroactivity, non-discrimination) should prevail over contract of employment and international organisations
- ▶ Should rely more on **ILO conventions, recommendations** which often serve as evidence of general principles of law in the area of employment relations
- ▶ That would offer more **coherence and predictability**
- ▶ Without **procedural regularity** there can be no justice and fair procedure

How to Achieve It

- ▶ **Tribunals** through their case law to clarify the sources of applicable law and the normative hierarchy between them.
- ▶ **Amend statutes** of international administrative tribunals to achieve the same goal (some modern statutes do list sources)
- ▶ International Organisations can become **parties to international conventions** (human rights and ILO)

How to Achieve It

- ▶ The International Law Commission could develop **principles** similar to Draft Articles on the Responsibility of International Organisations to codify general principles of international administrative law and explicitly establish their supremacy over internal law of international organisations.
- ▶ Cooperate with **scholars of international administrative law** to let them systematize and criticize jurisprudence of international administrative tribunals (a new harmonization project?)

Full paper available for download from SSRN

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<https://ssrn.com/abstract=2500040>