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## The 'New' Law Applicable to LGBTI International Civil Servants in the U.N. System

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## ARTICLES

# THE ‘NEW’ LAW APPLICABLE TO LGBTI INTERNATIONAL CIVIL SERVANTS IN THE U.N. SYSTEM

DANIELE GALLO\*

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## I. THE PERSONAL STATUS OF U.N. OFFICIALS PURSUANT TO THE SECRETARY-GENERAL

On June 26, 2014, U.N. Secretary-General Ban Ki Moon issued a bulletin entitled “Personal status for purposes of United Nations entitlements,” which sets out a radically new approach to recognizing personal status rights for civil servants working within the U.N.

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Secretariat and U.N. programmes and funds.<sup>1</sup> The Bulletin entered into force “on the date of its issuance”<sup>2</sup> and superseded former U.N. Secretary-General Kofi A. Annan’s Bulletin ST/SGB/2004/13 of September 24, 2004, which had itself superseded Bulletin ST/SGB/2004/4 of January 20, 2004.

Before discussing the main differences between the three documents and, most importantly, how the June 2014 Bulletin changed the approach to recognizing personal status rights, a few preliminary remarks seem necessary. Bulletins serve as sources of law that the Secretary-General issues under his authority as chief administrative officer responsible for human resources management, which aim to regulate employment relationships between the United Nations and its officials.<sup>3</sup> More specifically, compared to other normative sources that govern labour relations between an international organization and its staff, the Secretary-General’s bulletins are subordinate to the following: the organization’s charter, its headquarters agreement with the State hosting its seat, the statute

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1. U.N. Secretariat, Personal Status for Purposes of United Nations Entitlements, Secretary-General’s Bulletin, U.N. Doc. ST/SGB/2004/13/Rev. 1 (June 26, 2014) [hereinafter 2014 Personal Status for UN Entitlements]. On the notion of international civil servant within the United Nations or other organizations, see Aamir Ali, *The International Civil Service: the Idea and the Reality*, in INTERNATIONAL ADMINISTRATION: LAW AND MANAGEMENT PRACTICES IN INTERNATIONAL ORGANISATIONS 1-20 (Chris de Cooker ed., 2009); Yves Beigbeder, *Civil Service International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167-72 (Rudiger Wolfrum ed, 2d ed. 2012); Philippe Sands & Pierre Klein, BOWETT’S: LAW OF INTERNATIONAL INSTITUTIONS 303-19 (6th ed. 2009). On the structure of the UN, including its Secretariat, programmes, and funds, see Simon Chesterman, *The Secretariat, Article 97*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds, 3d. ed. 2012); Benedetto Conforti & Carlo Focarelli, LE NAZIONI UNITE 123-46 (9 ed. 2012); INTERNATIONAL INSTITUTIONAL LAW 313-19, 351-79 (Henry G. Schermers et al. eds., 5th ed. 2011); Wolfgang Stöckl, *Article 101*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 2053 (Bruno Simma et al., eds, 3d. ed. 2012).

2. 2014 Personal Status for UN Entitlements, *supra* note 1.

3. On the internal law of international organizations, see Michael Barton Akehurst, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS 29-112 (1968); Chittharanjan Felix Amerasinghe, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 271-314 (2d ed. 2005); Philippe Cahier, Le Droit Interne Des Organisations Internationales in 67 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 563-602 (1963); Clarence Wilfred Jenks, THE PROPER LAW OF INTERNATIONAL ORGANISATIONS 20-100 (1964).

of its administrative tribunal, and its Staff Regulations.<sup>4</sup> Staff Regulations are adopted by the plenary organ of the organization (in the case of the UN, the General Assembly) and complemented by Staff Rules, which, like bulletins, are usually promulgated by the organization's Secretary-General.<sup>5</sup>

The Secretary-General's bulletins typically regulate the rights and obligations attached to the legal status of staff members, including privileges arising out of personal and family status. They regulate by further specifying the organization's rules concerning employment conditions. Since economic benefits (such as severance pay, family allowance, and pension) can be granted only upon proof of family relationship. In determining the applicability of the Staff Regulations and Rules to gay couples in which one or both partners are international civil servants, a crucial issue is defining the concept of family, which also means identifying its constituent elements and delimiting its scope.<sup>6</sup> From the point of view of the law of international organizations, this is a particularly complex task, especially because concepts such as "marriage," "union," "couple," "husband," and "wife" are historically and geographically conditioned and, therefore, may—as is often the case—have different meanings in different member states. Thus, to respect the social, cultural, religious, and legal differences among States, international organizations, such the United Nations, have chosen not to opt for a horizontal, generalized recognition of the rights of lesbian, gay,

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4. Amerasinghe, *supra* note 3.

5. In general, this is also the case with organizations other than the United Nations.

6. Daniele Gallo, *International Administrative Tribunals and Their Non-Originalist Jurisprudence on Same-Sex Couples: 'Spouse' and 'Marriage' in Context Between Social Changes and the Doctrine of Renvoi in SAME SEX COUPLES BEFORE NATIONAL SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS* 511 (Daniele Gallo et al. eds. 2014) (noting that the definition of family may differ among member states and, for this reason, international organizations' regulations carefully classify the content and extent of the concept of family and do not opt for a generally recognizing same-sex couples' rights); H.U. Jessurun D'Oliveira, *How do International Organizations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-sex) Marriages in International Organization in LIBER AMICORUM FAUSTO POCAR-NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO* 505 (Bariatti S. Venturini et al. eds., 2009); Maria Chiara Vitucci, *LA TUTELA INTERNAZIONALE DELL'ORIENTAMENTO SESSUALE* 131-40 (2012).

bisexual, transgender, and intersex (“LGBTI”) staff members.<sup>7</sup> At least, this was their approach up until the recent 2014 Bulletin.<sup>8</sup> The following sections will discuss and briefly compare the three bulletins to show the shift toward a greater recognition of LGBTI officials’ rights.

#### A. JANUARY 2004 BULLETIN

Paragraph 1 of the January 2004 Bulletin provides that “family status for the purposes of entitlements under the United Nations Staff Regulations and Rules” must be determined “on the basis of the long-established principle that matters of personal status are determined by reference to the law of nationality of the staff member concerned”.<sup>9</sup> In this regard, paragraph 3 specifies that a marriage recognized as valid under said law “will qualify that staff member to receive the entitlements provided for eligible family members.”<sup>10</sup> The same principle applies to non-marital registered relationships; according to paragraph 4, a “legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality” will also qualify the staff member to receive the family member entitlements provided for by the internal law of the Organization.<sup>11</sup> In addition, paragraph 4 sets out the requirement that the Organization, before granting any benefits to said family members, must obtain confirmation of the existence and validity of the domestic partnership from the Permanent Mission to the United Nations of the staff member’s country of nationality.<sup>12</sup>

#### B. SEPTEMBER 2004 BULLETIN

The September 2004 Bulletin reiterates, although in different words, the importance of the principle of reference to national law

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7. See *infra* Section II and III.

8. 2014 Personal Status for UN Entitlements, *supra* note 1; U.N. Secretary-General, Family Status for Purposes of United Nations Entitlements, U.N. Doc. ST/SGB/2004/4 (Jan. 20, 2004) [hereinafter Family Status for UN Entitlements]; U.N. Secretariat, Personal Status for Purposes of United Nations Entitlements, Secretary-General’s Bulletin, U.N. Doc. ST/SGB/2004/13/ (Sept. 24, 2004) [hereinafter 2004 Personal Status for UN Entitlements]

9. Family Status for UN Entitlements, *supra* note 8.

10. *Id.*

11. *Id.*

12. *Id.*

(paragraph 1), as well as the requirement that the personal status of the staff member must be verified by the Permanent Mission of the country concerned.<sup>13</sup> Unlike the January 2004 Bulletin, however, this document does not mention marriage or partnerships. Nonetheless, silence on the point does not signal a shift in the practice of the United Nations; rather, silence may be the result of a political decision arising from many States in the General Assembly and in subsidiary organs objecting to the Bulletin explicitly mentioning marriages and partnerships in recognizing same-sex couples.

### C. JUNE 2014 BULLETIN

Unlike the 2004 bulletins, the June 2014 Bulletin explicitly refers to other U.N. organs and programmes that are not directly administered by the Secretariat. Indeed, its opening paragraph states that the Secretary-General acted “in consultation with the executive heads of separately administered organs and programmes of the United Nations.”<sup>14</sup> Therefore, the rules set out in this Bulletin clearly apply to said organs and programmes, which was unclear in the two 2004 bulletins.<sup>15</sup> However, no difference exists between this Bulletin and the two preceding ones with regard to U.N. specialized agencies, to which the principle of staff management autonomy continues to apply.<sup>16</sup> In other words, each specialized agency must decide whether to align itself with the Bulletin and must comply with the linking agreement that it has concluded with the United Nations.

In a striking reversal from the two 2004 bulletins, the 2014 Bulletin replaces the principle of reference to the staff member's national law *lex patriae* with that of the law of the State in which his or her marital status has been established *lex loci celebrationis*. Indeed, as stated in paragraph 1 of the Bulletin, “the personal status of staff members . . . will be determined by reference to the law of the competent authority under which the personal status has been

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13. 2004 Personal Status for UN Entitlements. *supra* note 1, ¶ 2.

14. 2014 Personal Status for UN Entitlements, *supra* note 1.

15. 2014 Personal Status for UN Entitlements, *supra* note 1; Family Status for UN Entitlements, *supra* note 8; 2004 Personal Status for UN Entitlements, *supra* note 8; *see infra* note 44 and accompanying text.

16. 2014 Personal Status for UN Entitlements, *supra* note 1; Family Status for UN Entitlements, *supra* note 8; 2004 Personal Status for UN Entitlements, *supra* note 8.

established.”<sup>17</sup> Therefore, the Permanent Mission of the country in which the marriage or civil partnership has been contracted must verify that the country’s procedure exists and is valid and communicate the outcome of this verification to the U.N. Secretariat.<sup>18</sup>

## II. THE NON-*ORIGINALIST* JURISPRUDENCE OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS

To fully grasp the extraordinary significance of the new practice introduced by the 2014 Bulletin, this article must examine the issue of same-sex couples and their treatment by analyzing the case law of international administrative tribunals, which are competent to resolve labour disputes between international organizations and their staff.<sup>19</sup> In particular, this article focuses on the case law produced by the dispute resolution systems of the United Nations and the International Labour Organization (“ILO”). Indeed, the United Nations and ILO are the two most important systems currently in place for three reasons: (1) the number of cases brought before their administrative tribunals; (2) the scope of their jurisdiction *ratione personae* and *ratione materiae*; and (3) their influence on other international administrative tribunals. With regard to the United Nations, relevant decisions date back to the period before the General Assembly established the U.N. Dispute Tribunal and U.N. Appeals Tribunal, which, on December 31, 2009, replaced the now abolished U.N. Administrative Tribunal (“UNAT”).<sup>20</sup> Thus, this

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17. 2014 Personal Status for UN Entitlements, *supra* note 1.

18. *Id.*

19. On the tribunals, see Suzanne Bastid, *Les Tribunaux Administratifs Internationaux et Leur Jurisprudence* in II RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 92, 343-419 (1969); Angela Del Vecchio, *INTERNATIONAL COURTS AND TRIBUNALS BETWEEN GLOBALISATION AND LOCALISM* 50 (2013); Olufemi Elias & Melissa Thomas, *Administrative Tribunals of International Organizations* in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 159-88 (Chiara Giorgetti ed. 2012) (commenting that international organizations warrant a *sui generis* dispute resolution system for employment disputes); Agustin Gordillo, *The Administrative Law of International Organizations: Checks and Balances in Law Making – The Case of Discrimination*, 18 EUR. REV. PUB. LAW 289, 302 (2006).

20. Yves Beigbeder, *Administrative and Structural Reform in the Organisations of the UN Family*, in *INTERNATIONAL ADMINISTRATION: LAW AND MANAGEMENT PRACTICES IN INTERNATIONAL ORGANISATIONS* 111-42 (Chris de

article must account for the case law of the UNAT.<sup>21</sup> With regard to the ILO, the Administrative Tribunal (ILOAT) currently has jurisdiction over disputes between employees and fifty-nine international organizations, including the ILO.<sup>22</sup> Some specialized agencies, such as the World Bank and the International Monetary Fund, have their own tribunals; others, such as the International Fund for Agricultural Development and the Food and Agriculture Organization, have recognized the jurisdiction of the ILOAT; still others, such as the International Maritime Organization and International Civil Aviation Organization, have recognized the jurisdiction of the U.N. dispute resolution system, but only with regard to the U.N. Appeals Tribunal, not the U.N. Dispute Tribunal.<sup>23</sup>

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Cooker ed., 2009); Matthew Happold, *The Reform of the United Nations Administrative Tribunal: An Introduction*, LES EVOLUTIONS DE LA PROTECTION JURIDICTIONNELLE DES FONCTIONNAIRES INTERNATIONAUX ET EUROPEENS 11 (Michele Giovanni Palmieri ed. 2012); Phylis Hwang *Reform of the Administration of Justice System at the United Nations*, 8 LAW & PRAC. INT'L CTS. & TRIBUNALS 181, 191 (2009); Louise Otis, *La Réforme Du Système D'Administration De La Justice Des Nations Unies: Le Tribunal D'appel Des Nations Unies Un An Après*, in LES EVOLUTIONS DE LA PROTECTION JURIDICTIONNELLE DES FONCTIONNAIRES INTERNATIONAUX ET EUROPEENS 15, 16 (Michele Giovanni Palmieri ed. 2012) (explaining that the UN General Assembly redesigned the internal justice system by creating a formal two tier system consisting of the UN Dispute Tribunal and the UN Appeals Tribunal which replaced the UN Administrative Tribunal).

21. See G.A. Res. 61/261, ¶ 4, U.N. Doc. A/RES/61/261 (Apr. 30, 2007) (establishing a "new system of administration of justice"); G.A. Res. 62/228, ¶ 60, U.N. Doc. A/RES/62/228 (Feb. 6, 2008) (imploing the Secretary-General to collaborate with organizations that participated in the UN Administrative Tribunal to transition into a new system for the administration of justice); G.A. Res. 63/253, ¶ 43, U.N. Doc. A/RES/ 253 (Mar. 17, 2009) (abolishing the United Nations Administrative Tribunal); Sir Michael Wood, *United Nations Administrative Tribunal, Applications for Review*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 209-10 (Rudiger Wolfrum ed., 2012) (explaining that the review procedure for the UNAT, which was established by the UN General assembly, was abolished on January 1, 1996).

22. See Frank Gutteridge, *The ILO Administrative Tribunal*, in INTERNATIONAL ADMINISTRATION LAW AND MANAGEMENT PRACTICES IN INTERNATIONAL ORGANISATIONS 655 (C. de Cooker ed., 1990) ("During the existence of the League of Nations, the Administrative Tribunal acted as the competent administrative jurisdiction for the ILO"); Jean-Didier Sicault, *Le TAOIT: tendances jurisprudentielles récentes en matière de compétence et de recevabilité*, in LES EVOLUTIONS DE LA PROTECTION JURIDICTIONNELLE DES FONCTIONNAIRES INTERNATIONAUX ET EUROPEENS 45 (G.M. Palmieri ed., 2012).

23. See BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 350

In examining the provisions in the Staff Regulations and Rules relating to the personal status of staff members and the benefits available to their family members, both the ILOAT and UNAT, acting as real “agents of change,”<sup>24</sup> have adopted a systematic and teleological interpretation of concepts such as “spouse,” “couple,” “marriage,” and “registered partnership.”<sup>25</sup> Rather than taking a static, formalist, and *originalist* approach,<sup>26</sup> they have relied on a flexible, strongly expansive, inclusive interpretation of the law. Various ILOAT judgments in cases concerning same-sex couples, from *Mr. R. A. O.* (3 February 2003)<sup>27</sup> to *Mr. G. P.* (8 February 2012), demonstrate this.<sup>28</sup> The reasoning of all these judgments was strongly influenced by the ILOAT’s *Geyer*<sup>29</sup> decision in January 29,

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(2005) (observing that the UN tribunals may extend their competences to UN specialized agencies although most of these agencies utilize the services of the ILO Tribunal).

24. MAURO CAPPELLETTI, *GIUDICI LEGISLATORI?* (1984) (explaining, in general, on the active role of the courts in acknowledging the socio-cultural transformations occurred in modern society and providing a legal framework for them; JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001); *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1353 (2006) (criticizing judicial activism).

25. *See* *Adrian v. Secretary-General of the United Nations*, Judgment U.N. Admin. Trib., No. 1183, ¶ (b), UN Doc. AT/DEC/1183 (2004) (stating that the term “spouse” should apply to individuals who have formed domestic partnerships recognized in their home countries, regardless of their gender); *G. P. v. World Health Organization*, Judgment I.L.O. Admin. Trib., No. 3080, ¶ 12 (2012) (“The case law of the Tribunal establishes that when the term ‘spouse’ is used in an organisation’s staff rules or regulations without being otherwise defined therein, it is not limited to individuals within a marriage but may also cover persons in other forms of union”).

26. *See, e.g.*, RUBENFELD, *supra* note 24, at 11 (comparing the opposite concepts of originalism and judicial activism); *see* Gallo, *supra* note 6, at 528 (discussing the tribunal’s former view that the status of ‘spouse’ was only available in a traditional marriage).

27. *See* *R. A.-O. v. United Nations Educational, Scientific and Cultural Organization*, Judgment I.L.O. Admin. Trib., No. 2193, ¶ 10 (2003) (determining that tribunal case law demonstrated “a link between the word ‘spouse’ and the institution of marriage, whatever form it may take.”).

28. *See* *G.P.*, I.L.O. Admin. Trib., ¶ 12 (establishing that when “spouse” is used in an organization’s regulations and rules, it does not only include persons within a marriage).

29. *See* *Geyer v. United Nations Industrial Development Organization*, Judgment I.L.O. Admin. Trib., No. 1715, ¶ 10 (1998) (“As a general rule, and in the absence of a definition of the term, the status of spouse will flow from a

1998, a case in which the Tribunal concluded that “traditional” marriages,<sup>30</sup> those between heterosexual couples, could be considered as “marriages” under the Staff Regulations and Rules of the organization in question, which was the U.N. Industrial Development Organization here, and therefore, that the wife of the staff member was entitled to the benefits attached to her status of “spouse.”<sup>31</sup> Indeed, in the judgments in question, the ILOAT accepted many of the staff members’ arguments, and generally noted that a gay/lesbian official married to a person of the same sex fell within the notion of “spouse” under the internal law of the defendant organization(s), provided that the text of the applicable Staff Regulations and Rules did not give rise to any doubts as to the literal meaning of the terms “husband” and “wife.”<sup>32</sup> Moreover, despite earlier decisions to the contrary, the Tribunal clearly held that registered partnerships can confer the same rights as marriage,<sup>33</sup> as

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marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal accepts, however, that there may be *de facto* situations, of which ‘traditional’ marriages are examples, and which some States recognise as creating the status of “spouse.”).

30. See *id.* ¶¶ 9-12 (examining the *de facto* situation in which a “traditional” marriage creates the “spouse” status, or specifically a “common-law spouse” under Austrian law); see also THE FREE DICTIONARY, *Common-Law Marriage*, <http://legal-dictionary.thefreedictionary.com/Common-Law+Marriage> (last visited Feb. 11, 2015) (defining common-law marriage as “[a] union of two people not formalized in the customary manner as prescribed by law but created by an agreement to marry followed by [c]ohabitation.”).

31. *Id.* ¶¶ 13-14 (determining that his wife was entitled any repatriation entitlements).

32. See *A. J. H. v. International Telecommunication Union*, Judgment I.L.O. Admin. Trib., No. 2643, ¶¶ C, 6 (2007) (discussing that in the tribunal recognizing domestic partnerships and accepting that same-sex marriages and other registered partnerships must be acknowledged when the legislation of staff member’s country of origin permits same-sex couples, who have entered into unions, to be recognized as “spouses”).

33. See *D. B. v. Int’l Labor Org.*, Judgment I.L.O. Admin. Trib., No. 2550, ¶ 4 (2006) (finding that Germany’s Basic Law did not bar the legislature from providing same-sex partners with rights equal to the rights that stem from marriage); *E. H. v. Food and Agriculture Organization of the United Nations*, I.L.O. Admin. Trib., No. 2860, at ¶¶ 19-21 (2009) (holding that the complainant and his Partner were required to be recognized as spouses because the provisions of French law established a legal relationship of mutual dependence between same-sex partners); *G.P.*, I.L.O. Admin. Trib., ¶ 16 (finding that States must regard same-sex registered partners as spouses even if the right to be regarded as a spouse does not confer the right to adopt).

long as the Staff Regulations do not provide otherwise and only if, following a substantive analysis of the legislation of the staff member's State,<sup>34</sup> the rules governing marriages and those governing registered partnerships can be regarded as being equivalent or relevantly similar.<sup>35</sup>

In many cases involving U.N. specialized agencies, complainants relied on the January 2004 Bulletin<sup>36</sup> and, in effect, deemed applicable to said agencies. As noted above, that Bulletin explicitly considered marriages and registered partnerships as being equivalent for the purposes of granting benefits and entitlements arising from employment with the U.N. In addition to the 2004 Bulletin, the complainants also relied on the non-discrimination principle as an enforceable, but unwritten, general principle of international civil service law, which, in their view, would be infringed if homosexual officials could not enjoy the same rights as heterosexual citizens. Moreover, the complainants maintained that they would be treated differently from their colleagues employed in other international organizations, whether those from more "progressive" States or those working in organizations that recognized same-sex marriages and partnerships.<sup>37</sup>

The ILOAT did not take a clear position on the possible application of the January 2004 Bulletin in the judgments in question partly because it was replaced by another Bulletin in September 2004. The same holds true for the status of the non-discrimination principle and its effectiveness in determining the legal treatment of

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34. See *infra* § III.

35. See *D.B.*, I.L.O. Admin. Trib., ¶ 3 (considering the circumstances under which the spousal status can be granted without marriage).

36. See *id.* ¶ A (relying on the January 2004 Bulletin to interpret the term "spouse" broadly).

37. See *A. J. H. v. Int'l Telecomm. Union*, Judgment I.L.O. Admin. Trib., No. 2643, ¶ D (2007) (discussing the complainant's argument that the International Telecommunication Union (ITU) violated his fundamental human right by treating him differently from other ITU staff members in failing to recognize his domestic partnership); *D.B.*, I.L.O. Admin. Trib., ¶ B (submitting that ILO discriminated against him because of his sexual orientation in violation of international conventions and could not form the basis for "differentiat[ing] between workers in the terms and conditions of their employment"); *R. A.-O. v. U.N. Educ., Scientific and Cultural Org.*, Judgment I.L.O. Admin. Trib., No. 2193, ¶ 5 (2003) (citing international law that prohibits discrimination on the basis of sexual orientation in complaint).

LGBTI officials. Despite this cautious approach, the Tribunal found that the rights of the complainants had been violated in many cases.

With regard to the UNAT, *Berghuys*<sup>38</sup> and *Adrian*<sup>39</sup> are relevant to this discussion. In both, the judges clearly found that both heterosexual and LGBTI couples are entitled to the benefits made available to employees. However, the two judgments differ in their approaches. In *Berghuys*, the Tribunal found that the term “spouse,” for the purposes of granting the widow’s/widower’s benefit payable to a surviving male spouse, could not include the same-sex partner of a deceased staff member who had entered into a domestic partnership under Dutch law.<sup>40</sup> In contrast, the *Adrian* Tribunal took the opposite approach with regard to the U.N. Centre for Human Settlements *staff member* in Nairobi, who was a French citizen, and his partner, who had entered into a *pacte civil de solidarité* under French law.<sup>41</sup> Indeed, in *Adrian*, UNAT concluded that registered partnerships can provide LGBTI officials with the same privileges and guarantees afforded to married same-sex and opposite-sex couples. This conclusion, however, was not merely based on an interpretation of the Staff Regulations and Staff Rules. Rather, the judges relied on the January 2004 Bulletin, which expressly placed registered partnership on an equal footing with marriage. In particular, they found that the Bulletin did not constitute “an amendment to the Staff Regulations and Rules,” but only interpreted its terms given that the Staff Regulations and Rules did not provide a clear definition of terms such as “spouse,” “couple,” or “marriage.”<sup>42</sup> This reasoning seems to imply that, had the U.N. Secretary-General not issued the Bulletin, the UNAT would not have departed from its *Berghuys* position. This may explain the marked difference between UNAT and ILOAT case law, which appears to have been more inclined to support the full legal recognition of registered partnerships. In any case, the importance of the *Adrian* judgment cannot be

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38. U.N. Admin. Trib., ¶ I (holding that the complainant was not the surviving partner was not the “spouse” of the deceased because they were not legally married under Dutch law).

39. Judgment U.N. Admin. Trib., No. 1063, § I, UN Doc. AT/DEC/1063 (2002).

40. *Id.*

41. See *Adrian*, U.N. Admin. Trib., ¶¶ XII, XIII (relying on the January 2004 Bulletin to grant a same-sex partner spousal rights).

42. *Adrian*, U.N. Admin. Trib., ¶ VII.

underestimated. Despite the fact that it relied on the 2004 Bulletin, rather than on an autonomous interpretation of the Staff Regulations and Rules, in deeming such Regulations applicable to homosexual couples in a registered partnership, the Tribunal does not account for the pre-condition that the staff member's national law must treat same-sex unions as substantively equal to same-sex marriages. In theory, the UNAT could have established that this pre-condition was necessary. However, unlike the ILOAT, the Tribunal chose not to require it.

### III. REFERENCE TO *LEX PATRIAE* ACCORDING TO ILOAT AND UNAT

Setting aside whether marriages and registered partnerships can be regarded as being equal for the purposes of granting benefits to the family members of LGBTI officials, the case law demonstrates that both the ILOAT and UNAT opted for a dynamic, evolving interpretation of the Staff Regulations and Staff Rules. At the same time, however, that same case law shows that the two tribunals were more "conservative" in choosing the applicable law.<sup>43</sup> Indeed, in all cases but one, the tribunals followed the principle of reference to the law of staff member's nationality, a principle that was in line with the 2004 bulletins.<sup>44</sup>

The rationale behind this approach is to ensure that the cultural, religious, social, and legal differences among the member states of international organizations, particularly the United Nations, are respected. Therefore, both the ILOAT and UNAT aimed to strike a balance between the need to protect LGBTI officials, on the one hand, and, on the other, the need to respect the autonomy of each

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43. On the question of the law applicable to same-sex couples from the point of view of private international law, see, among recent studies, Haris Tagaras, Questions de droit international privé dans la détermination de l'état personnel, in *LES EVOLUTIONS DE LA PROTECTION JURIDICTIONNELLE DES FONCTIONNAIRES INTERNATIONAUX ET EUROPEENS* 167 (G.M. Palmieri ed., 2012); Roberto Virzo, *The Law Applicable to the Formation of Same-Sex Partnerships and Marriages*, in *SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS* 343-44 (Gallo et. al. eds., 2014) (discussing applicable law under the Conflict of Laws Rules on Contractual Obligations).

44. See *Geyer v. U.N. Industrial Development Organization*, Judgment I.L.O. Admin. Trib., No. 1715, at ¶ 11 (1998) (following the *lex loci celebrationis* principle with regard to "traditional" marriage only).

member State to regulate particularly sensitive matters, such as recognizing the rights of homosexual citizens. Besides, a close connection between the diversity of the member states and the application of the law of nationality becomes even clearer if the article considers European Union ("EU"), an advanced regional system in which such diversity is less pronounced. In particular, the Civil Service Tribunal, which is the organ tasked with ruling on labour disputes between the EU and its staff, has preferred to interpret Staff Regulations autonomously, rather than by reference to national law.<sup>45</sup> As a result, heterosexual and homosexual EU officials enjoy equal treatment, regardless of their nationality.

#### IV. THE 2014 BULLETIN: RECOGNIZING A GENERAL PRINCIPLE OF NON-DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND REFERENCING *LEX LOCI CELEBRATIONIS* AS THE SOLE CRITERION IN DETERMINING PERSONAL STATUS

If personal status is determined by reference to national law, the LGBTI officials of an international organization who are nationals of countries where there is no legal recognition of same-sex couples, will not have access to the benefits that the organization makes available to its employees. Therefore, referencing *lex patriae* implies that the organization will treat such officials differently than other staff members who are citizens of States that have recognized same-sex relationships. In addition, there is differential treatment of staff members who are nationals of States that have granted limited rights to same-sex couples, such as countries that recognize registered unions but not marriages. Applying the *lex patriae* principle raises the question of whether officials who, despite performing the same functions in their respective organizations or within the same organization, face discrimination and enjoy different rights based on their nationality.

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45. On disputes between the EU and its LGBTI staff, see generally Massimo F. Orzan, *Employment Benefits for Same-Sex Couples: The Case-Law of the CJEU*, in *SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS* 493-95 (Gallo et. al. eds., 2014) (analyzing disputes between the EU and its LGBTI staff).

With respect to the law of the country in which personal status must be the (sole) criterion that the United Nations—such as the Secretariat and the separately administered funds, programmes, and organs—uses,<sup>46</sup> the June 2014 Bulletin marks a revolutionary change. It places all staff members, both heterosexual and LGBTI officials, on an equal footing, regardless of whether they are nationals of States that are more advanced in terms of civil rights recognition or citizens of countries where there is still no legal recognition for same-sex couples, such as Italy, or where homosexuality is illegal or even punishable by death, such as Egypt and Iran, respectively.<sup>47</sup>

The Secretary-General clearly decided to issue the Bulletin based on the principle of non-discrimination as a general principle of international civil service law,<sup>48</sup> that is, an unwritten source, within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice, aimed at regulating the status of civil servants and derived by abstraction from the internal laws (i.e., legislation and case law) of both States and international organizations.<sup>49</sup>

Under the new policy, same-sex marriages will be fully recognized for entitlement purposes. The same seems to hold true for registered unions because the U.N. Staff Regulations are hierarchically superior to the Secretary General's bulletins and do not expressly rule out the possibility of treating unions as equivalent to marriages for the purposes of granting benefits. On the other hand, however, the 2014 Bulletin—unlike the January 2004—does not expressly recognize that marriages and unions are equivalent. This suggests that an international organization may require officials in a registered partnership wishing to access the privileges set out in the Staff Regulations and Staff Rules to meet an additional requirement. In particular, officials must demonstrate that marriages and unions have

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46. See 2014 Personal Status for UN Entitlements, *supra* note 1. Only a small number of international institutions – among which the United Nations Educational, Scientific and Cultural Organization and Joint United Nations Programme on HIV/AIDS – started to apply the *lex loci celebrationis* principle before the Bulletin was issued. On this point, see the information available at <http://www.unglobe.org/>.

47. See *id.*

48. See *A. G. S. v. U.N. Indus. Dev. Org.*, I.L.O. Admin. Trib., No. 2662, ¶ 12 (2007) (citing article 6 of the European Convention on Human rights).

49. See FRANCESCO SALERNO, *DIRITTO INTERNAZIONALE* 206 (2d ed., 2012).

the same legal effects under the law of the country where the partnership was registered. If the Secretariat and/or the UNDT and UNAT chooses to follow this interpretation, the question that would arise is how to regulate the status of an official who has entered into a same-sex partnership in a country whose law does not recognize same-sex marriage and thus excludes the possibility of considering the partnership in question as equal to a marriage. However, when we consider the *spirit* of the 2014 Bulletin, another interpretation seems preferable. Namely, the organization must apply the law of the country where the LGBTI official and his or her same-sex partner have formalized their relationship, regardless of whether they have entered into a marriage or a civil union. In any case, to fully understand the implications of Secretary-General Ban Ki Moon's important step forward, we will have to wait and see what approach the Secretariat takes in interpreting the 2014 Bulletin, as well as how the specialized agencies and other non-U.N. international organizations comply with the new policy. It must be emphasized that the Secretary-General took this step in his capacity as the chief administrative officer of the United Nations, without involving the General Assembly. If the General Assembly were involved, it is unlikely that they would have reached an agreement to amend the Staff Regulations and introduce provisions recognizing the rights of LGBTI officials because many States, especially the developing countries, would likely oppose it.

## V. CONCLUSION

The June 2014 Bulletin provides a more comprehensive and effective system of protection of fundamental rights, which is capable of significantly impacting the lives of thousands of U.N. officials.<sup>50</sup> Moreover, if U.N. specialized agencies and other international organizations decide to follow the *lex celebrationis* rule, the impact of the new policy will be even greater. So far, international administrative tribunals have applied the principle of non-discrimination on a number of grounds, such as sex, age, and

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50. See UNITED NATIONS, *Secretariat*, <http://www.un.org/en/mainbodies/secretariat/> (last visited Feb. 11, 2015) (stating that the U.N. Secretariat currently employs about 43,000 staff members, as well as several thousand staff members working within the separately administered organs and programs of the U.N.).

disability.<sup>51</sup> Future case law will have to be examined to determine whether and to what extent this principle can become an established principle in the protection of sexual orientation, not only within the UN Secretariat and separately administered organs, funds and programmes of the UN, but also across the board, and within other international organizations.<sup>52</sup>

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51. See *D. B. v. Int'l Labor Org.*, Judgment I.L.O. Admin. Trib., No. 2550, ¶ D (2006) (classifying the complainants claim constituted discrimination).

52. On general principles and the case law of international administrative tribunals, especially the ILOAT, see L. Germond, *Les principes généraux selon le Tribunal administratif de l'O.I.T* (Paris: Pedone, 2009).