# THE UN ADMINISTRATION'S EMPLOYMENT POLICIES WITH REFERENCE TO GENDER

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## (1) **Background**

On September 21, 1999, the UN Secretariat issued an Administrative Instruction (ST/AI/1999/9, hereinafter "ST 99") setting forth new hiring and promotion changes ostensibly promulgated for the "achievement of gender equality". As partial authority for the changes contained therein, ST 99 makes reference to the assertion that "The goal as set by the General Assembly is to achieve a 50/50 gender distribution by 2000 in all posts in the Professional category and above…." [1]

Without going into an exhaustive analysis of the contents of ST 99, which is not necessary for the present article, it can be generally stated that this Administrative Instruction gives preference to: women for internal promotions (sections 1.4, 1.6, ST 99), to external female candidates (section 1.5), and additionally contains accelerated internal promotion provisions giving other and further preference to women (section 1.7). Moreover, section 1.8(d) essentially provides that, if two candidates (male and female) apply for a particular post, the woman candidate will be chosen, unless the male has "clearly superior" qualifications and experience.

In short, ST 99 is an example of what is now commonly referred to as an "affirmative action" program; all other things being equal, the female candidate will be favored over an equally qualified male candidate solely on the basis of her gender (and in fact, over any male candidate who may be "arguably" superior in qualifications to the female candidate but not "clearly" superior!).

It is not the intention of the present article to delve into the pros and cons of "affirmative action" programs concerning gender (which has been a hotly debated political and policy subject over the years in many developed countries), but rather to briefly examine the legality of such administrative changes within the framework of international law in order to arrive at an opinion as to whether said proposed changes as set forth in the subject ST 99 would be deemed void if challenged before an international administrative tribunal. Towards that end, the primary aspects of the proposals as are contained in ST 99 will be examined under International Declarations/Charters and, thereafter, under pertinent decisions of International Tribunals.

## (2) **ST 99 As Examined Under International Charters/Declarations**

### **A. <u>The Charter of the United Nations</u>**

i) In addition to referring to the goal of the General Assembly in achieving a 50/50 gender distribution in all professional category posts, ST 99 cites Articles 8 and 101 of the *Charter of the United Nations* as authority for the Administration's affirmative action policy.

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[1] This language and policy originates from a "strategic plan" endorsed by the General Assembly on December 23, 1994 and reiterated in ST/SGB/282 on January 5, 1996, a bulletin from the Secretary General Boutros Boutros-Ghali.

ii) **Article 8** states that "*The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.*" In applying the proposals of ST 99 to this Article, the most rational and logical analysis is that, giving preference to one of two or more equally qualified candidates (e.g. to a female candidate over a male candidate when the female candidate is merely arguably --as opposed to being clearly-- superior in qualifications), and solely on the basis of gender, would seem to violate this Article's requirements which requires "equality". By granting an advantage to a female candidate solely on the basis of her gender, ST 99 violates this requirement (as the candidates are no longer adjudged equally.)

iii) **Article 101** of the UN Charter states in relevant part that "*The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity."* Clearly, ST 99 is at odds with the precepts of this Article in that, in order to achieve "the highest standards of efficiency, competence, and integrity", an organization should hire the most qualified candidates, regardless of their gender. By giving preference to woman who may be (as recognized by ST 99) inferior in qualification in comparison to a male candidate who is merely not "clearly superior" to the woman candidate, the application of ST 99 would seem to clearly violate said Article 101 as it allows a woman candidate who is equal to or marginally inferior to a male candidate to receive preference and be appointed.

iv) **Article 55.** Curiously, ST 99 neglects to mention the UN Charter Article 55, which states in relevant part that "*The United Nations shall promote…(c) universal respect for, and observance of, human rights and fundamental freedoms for all* ***without distinction as to race, sex****, language, or religion.*" (emphasis added). As affirmative action programs (and ST 99) do clearly create a distinction on the basis of sex with respect to candidates for promotion, ST 99 expressly violates the precepts of this Article as well.

**B. Universal Declaration of Human Rights**

i) **Article 2**. If read correctly, it is evident that the language set forth in the Universal Declaration of Human Rights ("UDHR") is contrary to the proposed changes by the Administration as set out in ST 99. For example, Article 2 of the UDHR states that "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,* ***sex****, language, religion, political or other opinion….*" ST 99 clearly makes distinctions in selection competitions on the basis of sex, and would therefore appear to violate said Article 2 of the UDHR.

ii) **Article 7**. Along similar lines and making the same argument as i) above, Article 7 of the Universal Declaration of Human Rights states that "All are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Again, it appears that the preference contained in said ST 99 that discriminates against male candidates solely on the basis of their gender violates said Article 7.

**C. European Convention For the Protection of Human Rights and Fundamental Freedoms**

**Article 14** of this Convention states that "The enjoyment of the rights and freedoms set forth therein shall be secured without discrimination on any ground such as sex, race, colour…..". Again, the provisions of said ST 99 appear to discriminate on the basis of sex alone in violation of said convention.

(3) **Applicability of International Charters/Declarations to the internal law of UN organizations.**

International tribunals have held that international charters and declarations such as those discussed above can be applied to the internal law of United Nation organizations. For example, the tribunal in *Van Lemoen* [2] found (implicitly) that Article 14 of the European Convention on

[2] Council of Europe Appeals Board, Appeal No.100 (1984), Case-Law Digest (1985) p. 137.

Human Rights was applicable as a source of law in protecting staff members from discrimination.[3] See also UNAT cases *Khavkine* and *Cordovez* for similar propositions considering the Universal Declaration of Human Rights as a valid source of law for employment relationships. [4]

See additionally *Arzet*, wherein the Council of Europe Appeals Board also referred to the Universal Declaration of Human Rights (in addition to the European Convention on Human Rights and the European Social Charter) as support for the principal making discrimination between the sexes in employment relationships illegal.[5]

(4) **Case Law of International Tribunals**

In spite of the introduction of certain policies whose purpose is to attempt to equalize or increase opportunities for woman in international organizations, many of these policies appear to contravene international case law. See the following cases:

A. *In re Grinblatt* (UNAT Judgment 671 [1994]). In perhaps the penultimate case decided by the UNAT on this issue publicly reported to date, the Tribunal held that a prior SG Bulletin on the issue of gender promotion (ST/SGB/237) which attempted to give preference to female candidates for vacant posts if they met the requirements of the vacant post, without regard to whether there were better qualified candidates for the post, contravened UN Charter Article 101 (3), notwithstanding the provisions of Charter Article 8. The UNAT declared that the language of said Article 101 (3):

> *"...unequivocally establishes a standard under which less qualified persons are* ***not*** *entitled to preferential treatment based on gender. The fundamental principle reflected in Article 101 (3) may not be diluted by a desire, however commendable to overcome past problems."*

Clearly, the language of ST 99, which affords preferential treatment to female candidates when the qualifications of their male competitors are not "clearly superior" to the female candidate's qualifications, purports to give preference to a female candidate solely on the basis of her gender even if such candidate is less qualified than other male candidates (as ST 99 provides a preference for a female candidate so long as the other male candidates' qualifications are not "clearly superior"—i.e., if the qualifications of one or more of the male candidates are somewhat, arguably, nominally, incrementally, etc., superior, but not clearly[6] superior, the less qualified female candidate would nonetheless be given a preference on the basis of her gender alone under ST 99.) Once again, the "clearly superior" requirement of ST 99 obviously violates Charter Article 101 (3), as well as the UNAT's holding in *Grinblatt.*

B. *In re Meyler* (ILOAT Judgment 978 (1989). At issue in this case was the question of payment or non-payment of a non-resident allowance to married couples where one spouse was a national of the country of the duty station. The original text of the Staff rule in question clearly discriminated against staff members on the basis of gender because it provided that the non-resident allowance should not be paid if the husband (but not the wife) is a national of the country of the duty station. Although the details of the *Meyler* case do not relate to the present questions under review concerning administrative directives based on affirmative action precepts, in reaching its decision, the Tribunal, in deciding that this Staff rule was unlawfully discriminatory, cited "The Charter of the United Nations, the general principles of law, and the law of the international civil service, all of which condemn discrimination on the grounds of sex".

One can therefore deduce from the *Meyler* decision that, concerning issues before an administrative tribunal or other international courts of law such as entitlement of benefits, right to salaries, and other strictly monetary based considerations, where preference or unequal treatment between the sexes is shown, the offending rules or regulations will most likely be struck down.

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[3] The holdings are implicit because, in the *Van Loeman* case, it was found that the distinction made in that case between the complainant and other staff members by the provision in question was not actionable due to other valid distinctions which were held not to be discriminatory.

[4] *Khavkine*, UNAT Judgment No. 66(1956), JUNAT Nos. 1-70 p.378;
*Cordovez*, UNAT Judgment No. 337 (1984).

[5] *Arzet*, Council of Europe Appeals Board, Appeal No. 8 (1973), Case-Law Digest (1985) p.42, 47.

[6] However such term might be defined by the Administration.

B. *In Re Suprapto* ILOAT (1994). This case contains implications which tend to be contrary to affirmative action policies.

In *Suprapto*, the Complainant, a male, was a member of the Universal Postal Union. On three separate occasions, other candidates were chosen over Complainant for a vacancy as assistant head of one of UPU's technical departments, hence the Complainant objected and eventually appealed his non-selection.

In the underlying facts, during his first unsuccessful candidature, another *male* candidate was selected over Complainant for the post in question. The successful candidate for the second competition process in question was a female, and the successful candidate for the third selection process was again a male.

Although this case does not center on affirmative action policies of an administration, the language in the decision is notable for the purposes of the present article. In reviewing the reasons for the selection of other candidates over Complainant, the Tribunal states that "*As the Complainant points out, (UPU) Regulation 4.7 bars discrimination on grounds of sex in staff matters. So any promotion wholly or even mainly based on considerations of sex would unquestionably be unlawful."* The Tribunal went on to add, however: "*But the evidence* is *that the decisive factor in choosing between the first two candidates on the Appointment and Promotion Committee's list was seniority, their professional qualifications being much the same."*

Hence, the implication from this language is that gender cannot be a valid consideration in an administrative staff decision, if it is the main or decisive factor!

**(5) Conclusion**[7]

As noted from the above, a strong argument based on the international charters and the *Grinblatt and Suprapto cases* cited above can be made to challenge the legality of ST 99. Whether such arguments will be successful will to some degree probably depend upon the Tribunal's or other decision maker's political or sociological inclinations. However, it would appear that as ST 99 seems to give women candidates (even those who are marginally ***inferior*** in qualifications[8] as compared to their male competitors) an advantage in selection or appointment competitions solely on the basis of their gender, such a policy would not pass muster if challenged on the basis of the above cited international covenants and/or charters.

While it is possible that a UN selection or appointment policy which provides (when all other factors and qualifications of male and female candidates are exactly equal) that the female candidate if any should be selected over the male candidate, may even be deemed in comportment with the above cited international covenants and/charters[9], in the opinion of the undersigned, ST 99 goes well beyond what might be considered a neutral advantage, and is therefore not likely to withstand an administrative tribunal challenge.

Respectfully submitted this 13th day of April 2000.

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[7] The conclusion of this article is also corroborated by several other secondary sources: 1. The UN's own Joint Inspection Unit in its 1996 Report "Application of UN Recruitment, Placement and Promotion Policies (Part II, paragraph E, page 23)" found that the various special measures introduced by the UN to promote the recruitment and advancement of women were "flawed", that they had the effect of institutionalizing discrimination, that they were humiliating to women, concluding that all the relevant SG's bulletins should be revised to exclude therefrom discriminatory provisions (such as those contained in ST 99 requiring "males to have clearly superior qualifications); 2. The UN itself in its press release GA/AB/3400 reported the comments of the representative to the 5th Committee from the Russian Federation in which he stated that the "gradual process planned earlier" to improve the status of women within the Secretariat "was being artificially pushed ahead, having become an end in itself." He too found such measure now to be biased against male staff members and prospective candidates.

[8] Recall that ST 99 gives selection preference to women unless the male candidate is "clearly" superior to a woman candidate.

[9] As ST 99 goes beyond this position, allowing the selection or appointment of a male candidate only when his qualifications are "clearly superior" to those of a woman candidate, this article does not take a position on such a policy

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