

**INTERNATIONAL ADMINISTRATIVE TRIBUNALS
IN A CHANGING WORLD**

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POLITICAL FRAGMENTATION
AND ADMINISTRATIVE INTEGRATION:
THE ROLE OF THE INTERNATIONAL CIVIL SERVICE

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1. Political Fragmentation: Multinationalism and Functional Decentralization in the International Institutional Order

THE principle of national sovereignty has given to the international institutional order the peculiarity of political fragmentation.

Firstly, there is obviously a kind of territorial political fragmentation, which is represented by the large number of States, each one exercising its own domestic sovereignty in a certain geographical area, with no or little external interference. Such political fragmentation affects the structure of international institutions. In order to protect their sovereignty, States have established international institutions as a kind of extension of their own institutions¹. Therefore, the international institutional system is governed by the principle of "multinationalism". The decision-making power of international organizations is vested in councils or committees consisting of the representatives of the member states' governments. Those are the so-called "political" organs of the international organizations. They are political be-

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¹ See for example D. BURNS, International Administration, *Brit. Y. B. Int'l L.* 54 (1926), p. 72: "Let be imagined that the machinery of government in all the modern states became more elaborate and more extensive during the later nineteenth century. The wheels and rods of the British machine extended so far that they began to come into occasional contact with the wheels of the French machine of government (...). The wheels of the two machines, then occasionally in contact, could not function well unless the next step was made. The next step was to use cogged wheels. The Secretariat of the League are the cogs (...) which keeps the machinery of government in various states working 'in gear'. Thus, the League is not a super-State; it is the necessary *extension of each state* in the formation of a world system of government".

cause they have legitimacy. However, such legitimacy is, on the one hand, only indirectly democratic; on the other hand, it is fragmented.

The legitimacy is indirectly democratic because political organs of international organizations are legitimated by national governments. Only if and because governments are, at their time, legitimated by their respective citizens on the basis of domestic legal systems, they transfer their own legitimacy to the decision-making bodies of the international organizations.

The international decision-making bodies benefit from a democratic legitimacy which, other than being indirect, is fragmented: no member of the political bodies of the international organizations represents the international community as a whole; each of them, instead, only represents the government by which it was appointed, from which it receives directions, taking care of its interests. Then, the democratic legitimacy of the political bodies of the international organizations is solely the turnout of a plurality of legitimacies, enjoyed by the single members of the organs on the basis of domestic rights. Domestic legitimacies add one to the other but do not merge.

Secondly, there is a functional political fragmentation, other than the territorial one.

Functional fragmentation is mirrored by the large number of international organizations, that exceeds by far the number of States. Even the functional fragmentation refers to national sovereignty. In order to protect their sovereignty, States have wilfully maintained their monopoly over the general political representation, which means the power of attending to all community's interests, harmonizing and synthesizing them. Holding such powers, an international organization could turn into a kind of "super-State", which could threaten the State's sovereignty. For this reason the international institutional order, from its origins, has leaned towards fragmentation, as it consists of a large number of "self-contained" regimes, one severed from the other. Any international organization operates to protect certain interests of the international community, often disregarding how the adopted measures would affect different interests, whose protection is attributed to other international institutions. In lack of an institutional center, able to order up and rank the various interests, coordinating the institutions that take care of them, each organization resembles, as it has been said, to a man with a hammer who sees any problem as a nail². This makes

² M. KOSKENNIEMI, *International Law: Between Fragmentation and Constitutionalism*, at http://cigj.anu.edu.au/cigj/link_documents, p. 5: "a man with a hammer sees every problem as a nail. A specialised institution is bound to see every problem from the angle of its specialisation. Trade institutions see every policy as

the relations between the international institutions quite complex, similarly to what occurs between the different general and sectoral branches of international law, as enlightened by a recent report of the International Law Commission³.

In theory, the institutional center should be represented by the United Nations and the system related to it. Actually, the same organizational scheme of the United Nations and the UN System is inspired by the principle of *functional decentralization*, both within the United Nations and between the United Nations and its so-called Specialized Agencies⁴. Within the United Nations, the separation between security issues and economic and social affairs entails, under the organizational perspective, a doubling of the political executive organ: the General Assembly severally elects the Economic and Social Council, inspired by equality among States, and the Security Council, in which certain States are "more equal than others". Outside the United Nations, the Economic and Social Council exercises only a general and weak function of direction and coordination of the Specialized Agencies, which are independent international organizations, having their own membership and their own "political" bodies⁵.

a potential trade restriction. Human rights organs see everywhere human rights problems, just like environmental treaty bodies view the political landscape in terms of environmental problems and so on".

³ International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

⁴ See C. W. JENKS, Coordination, a New Problem of International Organization, *Recueils de Cours*, 1950, II, p. 172-173 (stating that "the architects of the United Nations deliberately based their work on the principle of functional decentralization, both within the central machinery of the United Nations and as the basis of the relations between the United Nations and the Specialized Agencies").

⁵ See for example N. M. BLOKKER, Proliferation of International Organizations: an Explanatory Introduction, in: N. M. BLOKKER / H. G. SCHERMERS (edited by), *Proliferation of International Organizations*, The Hague, Kluwer Law International, 2001, p. 39 (stating that "the general lack of coherence in the relationship between the UN and the specialized agencies has been deepened in practice. At the risk of overworking the metaphor, the UN family is of an anarchic nature. Its members educate themselves; there is little parental authority. At most there are loose and informal ties (...). The emphasis is on the independence of the constituent parts, not on the unity of the whole"). See also, on the general topic, E. LUARD, *International Agencies: The Emerging Framework of Interdependence*, London, Macmillan, 1979.

In the end, no international "political" body is able to express and balance all the interests of the international community, nor to ensure an effective coordination among the numerous and different institutions, that have to take care of each interest⁶.

2. Administrative Integration: The International Civil Service as a Bridge between States and between International Organizations

Such characteristics of the international institutional order are important to understand the role of the International Civil Service.

The point is simple and twofold.

On the one hand, the International Civil Service compensates, at the administrative level, for the political fragmentation of the international institutional order.

On the other hand, exactly because the International Civil Service is called upon to fill a political gap, the bureaucracy acquires, in the international organizations, a visibility and importance that, paradoxally, may cause a crisis of the International Civil Service itself.

Both issues will be briefly addressed in turn: the former in this section; the latter in the next one.

First of all, the International Civil Service partially corrects the intergovernmental and multinational feature of international institutions. As clarified by the report written by Drummond and submitted by Arthur Balfour to the Council of the *League of Nations* in 1920, "once appointed, [the members of the Secretariat] are no longer the servants of the country of which they are citizens, but become for the time being servants only of the League of Nations"⁷.

⁶ The consequences of this have been recently enlightened, among others, by the Nobel Prize winner J. Stiglitz (See J. STIGLITZ, *Making Globalization Work*, W.W. Norton & Company, New York, 2006, p. 269). According to Stiglitz, until when the ministers for trade will keep on establishing trading policies and the finance ministers will lay down the financial policies, other issues as environment and employment will be disregarded. A possible change, suggested by Stiglitz, could be involving all the interested ministers when different areas are intertwined. The matter is that, currently, there is no institutional place where the suggestion could be taken into account.

⁷ The International Civil Service is an original political and legal invention attributable to Eric Drummond, the first Secretary of the League of Nations. Drummond wished to transfer to the international organizations the idea of the neutrality of the national civil service. As national civil servants do not serve a po-

The *Drummond model* has been implemented and embodied in the United Nations Charter, as well as in the treaties establishing all the main international organizations. Such provisions attribute to the head of the Secretariat, and to the officials appointed by him, and reporting to him, the status of "international officials responsible only to the Organization". They are not allowed to accept directions by national governments. The merit criterion is identified as paramount consideration for their recruiting. Their employment relations are not governed by domestic laws. Their employment disputes are not assigned to domestic courts. International civil servants may take their claims only to special international administrative tribunals, which apply the organization's own regulations⁸.

Thus, members of political bodies of international organizations represent each member state, while the administrative officials represent the international community as a whole⁹.

Politics-wise, international organizations are the result of the addition of the member states. Administratively speaking, instead, they represent their synthesis.

Secondly, the *International Civil Service* works also as a balancing of the functional political fragmentation, which - as we have seen - keeps the international organizations severed one from the other.

Within the United Nations, the Security Council and the Economic and Social Council share the same administrative structure: the United Nations have a unique Secretariat¹⁰.

litical party or majority, so international civil servants, namely the member of international secretariats, do not serve a government or a group of governments. On the topic, see, *ex multis*, J. SIOTIS, *Essai sur le Secrétariat International*, Genève, Librairie Droz, 1963; G. LANGROD, *La fonction publique internationale*, A.W. Sytoff, Leyden, 1963; T. G. WEISS, *International Bureaucracy*, Toronto - London, Lexington Books, 1971.

⁸ See C.F. AMERASINGHE, *The Law of the International Civil Service (as Applied by International Administrative Tribunals)*, Clarendon Press, Oxford, 1988.

⁹ That is - in the words of S. Bastid Basdevant - a "*différence capitale*": "*Elle se révèle, nous semble-t-il, à un triple point de vue, tout d'abord quant aux intérêts à représenter: intérêts nationaux pour les délégués des Etats, intérêts internationaux pour les agents et fonctionnaires internationaux, puis quant à la nature des communautés représentées: d'une part l'Etat (...), d'autre part la communauté internationale, enfin quant au droit applicable: l'envoyé est soumis au droit administratif interne, le fonctionnaire international est régi par des règles que l'on doit ranger dans le droit international*" (S. BASDEVANT, *Les fonctionnaires internationaux*, Paris, Recueil Sirey, 1931, p. 8).

Outside the United Nations, but within the UN Family, the weakness of the coordination ensured, on the political side, by the Economic and Social Council is partially surrogated, on the administrative side, by the Administrative Committee on Coordination¹¹, recently become Chief Executive Board (CEB)¹². This body unifies, having as chair the UN Secretary General, the administrative heads of the Specialized Agencies, of a number of other organizations and of many programs and funds created by the United Nations. It has become the core of a complex network of institutional mechanisms of cooperation among the various administrations in the UN system: two examples are the International Civil Service Commission¹³ and the Joint Inspection Unit.

¹⁰ See UN Preparatory Commission Report, quoted by G. LANGROD, *La fonction publique internationale*, cit., p. 173 : "la principale raison qui a conduit à faire du Secrétariat un organisme unique (...) c'est que tous les organes qu'il est chargé d'assister ont une part de responsabilité dans la tâche commune qui consiste à maintenir la paix et la sécurité (...). Une autre raison a été qu'en donnant au Secrétariat non pas une organisation verticale, liant les départements exclusivement à tel ou tel organe, mais une organisation calquée sur le travail qui incombera à chacune de ses parties, on évitera les doubles emplois, les chevauchements, les pertes de temps et le désordre. Au surplus, en créant des départements rattachés exclusivement à tel ou tel organe, on susciterait des particularismes et une fâcheuse rivalité entre départements".

¹¹ See H. REYMOND, The Coordination of Personnel Policies and Administration in the United Nations System, *International Review of Administrative Sciences*, 1/1982, p. 22; Y. BEIGBEDER, *The Internal Management of United Nations Organizations*, London, Macmillan, 1997, p. 38; J. TASSIN, Administrative Co-ordination in the United Nations Family, C. DE COOKER (edited by), *International Administration*, Dordrecht, Martinus Nijhoff Publishers, UNITAR, 1990; R. McLAREN, Réforme des Nations Unies par le biais de la coordination par le CAC: l'histoire sans fin du roi et des barons, *Revue Internationale des Sciences Administratives*, 2/2001, p. 367; *Id.*, The UN System and its Quixotic Quest for Coordination, *International Organization*, 1/1980, p. 139; *Id.*, Coordination of the United Nations System, *Revue Internationale des Sciences Administratives*, 3/1987, p. 383 ss.

¹² See Joint Inspection Unit, *Review of the Administrative Committee on Coordination and its machinery* - JIU/REP/99/1, p. 4: "although it is composed of the chief administrative officers of its participating organizations, ACC has been increasingly involved over the years with policy issues. In a world of global communications where image is often the message, ACC's current name may wrongly convey the message that it deals only with the administrative aspects of coordination".

¹³ D. J. GOOSSEN, The International Civil Service Commission, C. DE COOKER (edited by), *International Administration*, II.1.

Therefore, relationships among political bodies of the international organizations are governed by the idea of functional decentralization, while those among their secretariats show a trend to unity. Under this point of view, also, the administrative integration counterbalances the political fragmentation.

The international bureaucracies compensate in this way a lack of international politics. They fill, for this reason, spaces that in national orders are reserved to bodies with political legitimacy¹⁴.

Furthermore, while the States identify themselves with the governments, that is with political organs, international organizations tend to mirror their administrative structure. They are publicly represented by the head of the Secretariat. In other words, in the international organization, the executive head is an international civil servant. He holds, at the same time, slightly ambiguously, the status of administrative official and the position of head representative of the organization as a whole. Similarly, the UN system is portrayed by the Chief Executive Board. Its members, in fact, not only represent the administration of their pertaining organizations, but also the organizations themselves, intended as a whole. That is why the Chief Executive Board has been defined as "the nearest approach to an international cabinet that exists"¹⁵.

¹⁴ The role of the Secretariat in the decision-making process of international organizations is fundamental because of the permanent nature of the administrative structure, which, once again, compensates the discontinuity of the political organs, which meet periodically. As it has been inferred, the political organ, entitled of decision-making power "in practically all cases, [...] will either approve the proposals made by the executive head, or request new proposals to be presented. It is very seldom able to modify them, since it lacks the technical expertise to do so" (J. TASSIN, *Administrative Co-ordination in the United Nations Family*, p. 12). Thus, is often the Secretariat that ends up outlining and checking the international organization's agenda. This occurs also for the unifying body of the executive heads of the UN system organizations. It was created to perform a mere *administrative co-ordination*, mainly in human resources and financial management, but, eventually, it has acquired functions of *policy coordination*. It was established as the *Administrative Committee on Coordination* and has become the *Chief Executive Board*. This reinforces the role of the Secretariat in each organization: the political organ is often called on to approve decisions already agreed upon by the *Administrative Head* at the *Chief Executive Board*. On the general topic of the influence of secretariats in the international decision-making, see R. W. COX / H. K. JACOBSON, *The anatomy of influence: decision-making in International Organizations*, New Haven, 1973.

¹⁵ A. LOVEDAY, *Reflection on International Administration*, OUP, 1956, p. 274.

Therefore, the administration of international organizations tends to become their government. Or, at least, tends to compensate for the lack of government.

3. *The International Civil Service as a Victim of its Own Success*

Such an ambiguity is, anyhow, a ground of the *International Civil Service's* crisis. The well-known *Bustani* case is a meaningful example thereof¹⁶.

In 2002, Bustani was removed from the position of Director-General of the Organization for the Prohibition of Chemical Weapons, following the submission of a "no-confidence motion". The international organization alleged before the ILO Administrative Tribunal that the Director-General performed political functions, denying to him the "international civil servant" status. Thus, the dismissal would not be an administrative but rather a political decision, which is not under the jurisdiction of the Tribunal. At any rate, the "lack of confidence" would be sufficient to justify the removal.

The Tribunal sensibly rejected such allegations, re-affirming the principles of the international civil service and the importance of its independence, also for the position of head of the Secretariat. In order to protect such independence, the dismissal of the Director-General is lawful only in exceptional cases involving "serious misconduct" and, even then, only if the decision to terminate the appointment is "taken in full compliance with the principle of due process". The judgment of the Tribunal awarded Bustani a full compensation.

The *Bustani* case is a good example of a broader and more general phenomenon. The more an international civil servant, as the head of the Secretariat, has to compensate for the lack of an independent political head of the international organization, the more his international civil servant status is put at issue and his independence and neutrality is threatened. The States tend to treat him using logics and measures typical of the relations among political organs, such as the "no-confidence motion" in the *Bustani* case.

This occurs not only to the executive head but also to the whole administrative structure, whose independence is often inversely proportional to

¹⁶ See *Bustani v. Organization for the Prohibition of Chemical Weapons*, Judgment No 2232, ILO Admin. Trib., July 16, 2003, commented by A. STANIC in 98 *Am. J. Int'l L.* 813 2004.

its weight and to his political visibility. It is a sort of physical law of the international secretariats, which was effectively clarified, in 1944, by a group of former-officials of the League of Nations: "Add political functions to the work of an international Secretariat, and it will be strange indeed if all members will not exert strong pressure for representation on its staff"¹⁷.

This physical law contributes in the explanation of the attempts performed by the States towards "re-nationalization" or "multinationalization" of the international secretariats, that betray the principles of the international civil service¹⁸.

The awareness of the influence of the Secretariat on organization policies causes, for example, the States to establish the systems of "quotas" or "desirable ranges", reserved to the officials of each member state¹⁹. Such a system, created to guarantee the geographical representation in the secretariats, has turned into a mechanism of multinationalization because, in recruiting, nationality ends up prevailing on the merit and because domestic governments consider the officials of their "quota" as their own representatives²⁰. There is a popular joke on the topic: "What are you doing at the United Nations"? "I am the Saudi Arabian"²¹.

¹⁷ Royal Institute of International Affairs, *The International Secretariat of the future - Lessons from experience by a group of former officials of the League of Nations*, London, 1944, pp. 17-1.

¹⁸ See for example T. MERON, *L'indépendance de la fonction publique internationale et son avenir*, in: *L'avenir des organisations internationales*, Institut International d'études diplomatiques - 3-ème Conférence annuelle, 8-10 juin 1983 (pessimistically predicting that "*la fonction publique internationale de l'avenir ressemblera probablement plus à un organe multinational qu'à un organe international (...). Les textes fondamentaux survivront et on s'y référera de temps en temps pour la forme. Mais en réalité, la fonction publique sera intergouvernementale. Ce n'est pas envers les organisations, mais envers leurs gouvernements que les membres du Secrétariat feront effectivement - sinon officiellement - acte d'allégeance*").

¹⁹ See a comparative overview in Joint Inspection Unit, *Comparison of methods of calculating equitable geographical distribution within the United Nations Common System*, Geneva, 1996 (JIU/REP/96/7).

²⁰ See H. REYMOND, *The Representation of Nationalities on the Secretariat of United Nations*, in: *International Review of Administrative Sciences*, n. 4/1983, p. 350 (underlining "the main danger of a system which to a greater extent serves its purpose, that of ensuring an equitable distribution of nationalities in the Secretariat, but is increasingly used by governments, not only those of totalitarian tendencies, as an instrument to control not only appointments and promotions of their nationals, but even their work and behaviour"); A. ALI, *The International Civil Ser-*

The crisis of *International Civil Service*, eventually, goes over its politicization and multinationalization. It could go up to the progressive marginalization of the same traditional model of international organization of which the existence of an independent Secretariat represents an essential feature.

²¹ The central and prominent role of the administration within the international organization contributes actually in projecting to the latter the image of a heavy, ineffective, expensive apparatus, at the same time unaccountable. International organizations have been defined as "bureaucratic, diplomatic, technocratic - everything but democratic"²². The democratic deficit of international organizations, and mostly its perception, is exacerbated because of their identification with their respective administrative structures.

Therefore, new forms and models of international organization are emerging and rapidly spreading, as for example the "regulatory networks" composed by representatives of domestic administrations. These networks operate without the support of international secretariats. For this peculiarity, they have been positively defined as "a new and attractive form of global governance, enhancing the ability of States to work together to address common problems without the centralized bureaucracy of formal international institutions"²³.

Anyway, such statements seem to forget maybe too quickly that the renouncement to a "centralized bureaucracy" would mean the renouncement to the independence and neutrality of the international organization, that is the renouncement to a relative autonomy of the latter from the will of the most influencing and powerful governments.

Such statements disregard also that the international institutional order, without the International Civil Service, would be more fragmented than what is actually. And, as more fragmented, would be less able to respond effectively to problems that, as shared by the citizens of all States and in-

vice: The Idea and the Reality, in: C. DE COOKER, *International administration*, cit., I.1. (stating that "while geographical distribution in itself is a legitimate concern of governments, interference in individual personnel actions is not. The line may not always be easy to draw but in most cases, it is - but is not drawn").

²¹ S. HAZZARD, *People in Glass Houses*, Picador, New York, 1967.

²² J. RUBENFELD, Unilateralism and Constitutionalism, *New York University Law Review*, 2004, p. 1977.

²³ A.M. SLAUGHTER, The Accountability of Government Networks, in: *Indiana Journal of Global Legal Studies*, 2001, vol. 8, p. 425.

volving the whole of their different interests, increasingly call for a more unitary and holistic approach.