

RESEARCH ARTICLE:

Evolution of the international civil servant institution

Ladislau Levente KOBLE
Cosmin Marius IORDACHE

ABSTRACT

The juridical system of a state can contain norms which can generate obstructions for the activities of international civil servants. Thus, the international civil servant is immune to position or attitude changes made by the member state in international issues. The immunity granted for the official acts of an international civil servant continues to be valid even after the contract between the international organization and the civil servant ceases to exist).

Privileges and immunities granted to international civil servants aim to promote the interests of international organization and have a different character compared to diplomatic immunities. They ensure the independence of an international organization against member states and protect the international civil servants.

KEYWORDS: *international civil servant; U.N.; privileges; immunity; international organizations.*

1.Introduction

Even before the beginning of the XIX-th century there was an international person who did not officially obey certain political entities- having an influence which exceeded national boundaries. This international organization was the Universal Church of Rome, and the international person was the Pope's emissary.

Since the first decade of the XIX-th century, the term of „international civil servant” applies to civil servants and other personnel of international organizations.

The persons responsible for the codifying of navigation on the Rhine River (Convention sur l'octroi de navigation du Rhine – 1840) are the first international civil servants.

The Commission for the Rhine River -1840- is considered to be the first modern international permanent organization , the first institution in this domain.

After the Crimean War, on the foundation of the Paris Convention (1856), an European Commission and a permanent Riveran Commission were created in order to control traffic on the Danube river.

The European Commission had a technical character and was composed of delegates from the European powers. The Riveran Commission included delegates from the Danube states and was created as an administrative institution of the Danube River. Thus, a new type of international civil servant was created – the technical expert.

The role of the international civil servant has developed within the activities of international organizations. The administrative attributes of these international organizations were mainly exercised through their bureaus and central offices. The personnel would carry out specific administrative tasks according to the regulations and constitutive acts for these associations of states.

The institution of the civil servant has acquired a universal and well defined form through the institutions created by the Hague Convention - 1899. This Convention for solving international conflicts in a peaceful manner has stated a Permanent Court of Arbitration along with an International Bureau (which served as a records office for the Court); the Permanent Administrative Council – composed of diplomats of member states of the Convention.

The clauses from the Hague Convention -1899- have been kept and even extended for the 2-nd Hague Convention -1907- . The recognition of international civil servants became universal with the creation of the League of Nations – 1919.

2.The juridical regime of the international civil servant

The privileges and immunity of international civil servants represent an area of great complexity within the international practice, international public law and jurisdiction. In order to explain these privileges and immunity many theories have been proposed. These theories refer to

extraterritoriality, mandate and functional necessity.

According to extraterritoriality theory, it is stated that the international organization has to be placed outside the authority of the member states; privileges and immunity have been granted to the international civil servant since the beginning. Thus, the international civil servant acquires certain independence against a state's authority and jurisdiction.

The mandate theory, as a foundation for privileges and immunity, tends to diminish the influence of a state, ensuring the representative role of the international civil servant. This theory requires certain explanations (there's an issue regarding if the international civil servants act for the member state which elected them). The mandate theory is limited in its application in case of international civil servants, because they have a limited array of actions in their role, as administrators –thus they have a limited representative role.

Some officials – general secretaries, chiefs of departments/regional offices or missions, commanders of peace keeping operations etc. are agents of the organizations and, also, representatives of the member states. Judges and other clerks of international courts are juridical clerks, detached from a member state.

The theory of functional necessity represents an adequate alternative, which applies when international organizations don't have a territory and no representative statute. It is a theory which can offer

an answer to practical needs in international relations. With application within the field of privileges and immunity, this theory is based on the idea of independence of international institutions to any group of member states; the privileges and immunity granted to the personnel of international organizations have to contain the possibility to exert the main attributions as an international civil servant.

The purpose of these privileges and immunities is to protect them from the influence of a certain state. Functional immunities, granted to most of the UN clerks, are not tied to a certain person, but have more of an organizational character.

The juridical system of a state can contain norms which can generate obstructions for the activities of international civil servants. Thus, the international civil servant is immune to position or attitude changes made by the member state in international issues. The immunity granted for the official acts of an international clerk continues to be valid even after the contract between the international organization and the civil servant ceases to exist).

Privileges and immunities granted to international civil servants aim to promote the interests of international organization and have a different character compared to diplomatic immunities. They ensure the independence of an international organization against member states and protect the international civil servants.

There are more functional advantages which are granted, such as

tax deduction and less taxes, things which allow the organization to offer higher salaries for the clerks and grant a special status for the personnel.

Also, in case of tensions in the international arena, these privileges and immunities offer a safety net for the international civil servants, protecting the clerk's declarations or acts in order to ensure the organization's interests.

Privileges and immunities are important stimulants for hiring international civil servants and they are founded on their international organization's Statute – according to international law principles.

There is a profound need for international conferences to get a better understanding of the characteristics for these institutions and to create an universal Statute for the international civil servant.

The special status of an international civil servant has a very small and indirect advantage for the state which granted that status; the direct beneficiary is the international organization, with positive effects towards accomplishing the objectives set by member states.

The international civil servant does not represent the state or the government; the one who hires him cannot provide him his status by mutuality. In addition, the international civil servant is citizen of a particular state, national loyalty is not reduced by providing international privileges. The international civil servant is expected to represent a collectivity of states when they find within the jurisdiction

of his state. In this conditions, it cannot be established the mutuality nor between the two states (the organization's state of headquarter and the state which citizen is the international civil servant), neither between the state of residence and the international organization; the tridimensional report exclude the correlation that mutuality needs.

The diplomatic privileges and immunities are legally based on international law and practice; they are granted based on the treaty's specific provisions and national legislation, specific provisions which are edicted for the treaty implementation. As for the organizations within the U.N. system, the rules governing the staff status, privileges and immunities are found in the U.N. Charter and other incorporation acts of the organization, in the conventions regarding the U.N. privileges and immunities, in the conventions of specialized institutions and in various headquarter conventions, the frame-type assistance conventions of the U.N. Program.

The international privileges and immunities represent a modern institution, with issues which are to be developed. The juridical term of international privileges and immunities is found in the special treaties, which can be completed with other juridical instruments, such as judicial precedents and customary practice. The international civil servants privileged status derives from three text categories:

- the organizations
incorporation documents - which

contain an article drawn in a general manner, providing that international civil servants must benefit from privileges which can allow them the free serving of their functions (U.N. Charter - article 105 and so on);

- the general conventions regarding privileges and immunities of the organizations, in which this privileges are mentioned in a detailed manner (U.N. Convention regarding privileges and immunities - article V);

- the headquarter conventions concluded between the organizations and states where are notified the main headquarter and secondary offices, this privileges are adapted in the area specific conditions.

The special treaty instructions can result from multilateral conventions through which there were founded various organizations - the organization's incorporation document or a separate, but attached protocol to that document as a part of a entire or a separate convention or a set of regulations regarding the staff organization. The first organizations provided the civil servant status with diplomatic privileges and immunities, or with a "international status" which involves the assignment of diplomatic status.

Considering the fact that they were necessary conventions to define the status nature and the assigned status, as well as for the assigned privileges and immunities determination, this thing was accomplished through bilateral conventions concluded between the organizations and host states regarding the headquarters and offices establishment.

The headquarter states assigned the international organization a special status within the national jurisdictions, this practice being a fundament for the international practices evolution.

The national courts decisions in the treaty's implementation and interpretation accomplish a similar international common law's role. The national representatives at the international conferences where are negotiated the treaties or interpreted the incorporation documents are influenced by the national and international explicit points of view regarding the international privileges and immunities.

A fundament of the international privileges and immunities can be stated in the international courts decisions. In absence of a general convention regarding the international privileges and immunities, the courts decisions will be applied only in the particular case, to the examined organization or situation; the courts decisions will represent a general case law which it can be taken into consideration in the future issues of this nature.

The practice and usage represent another legal base of privileges and immunities; these are not well shaped and the uniformity absence in practice dictates a careful attitude in taking practice and usage as a legal base of international privileges and immunities.

The nineteenth century conventions through which were created the first international organizations didn't include detailed provisions for the international civil servants status, existing only general

texts regarding the specific privileges and immunities. During this period were developed three types of international organizations: functional commissions, riveran commissions and international public unions; while the civil servants from the last category didn't benefit from the stipulated privileges and immunities, the civil servants from the functional commissions enjoyed a special status, and the riveran commissions same developed in the same direction.

An assignment of privileges and immunities for the international civil servants is revealed in the Convention of Contingents, adopted at the Panama Congress, in 1826 (through the Convention's art. 13 and 14 was created a special commission , and through art. 15 were regulated diplomatic agent's privileges and immunities for the commission members). As for the fluvial commissions, created during the nineteenth century, it was noticed that three of the fluvial commissions assigned a special international status, which involved the benefit of privileges and immunities.

The European Danube Commission, created through the Convention from Paris (30 march 1856; the legal status of the Commission was confirmed through European Danube Commission's Public Act, signed at Galati in November 1865); through art. 21 it was provided that Commissions benefit of neutrality will extend to the technical staff instructed with the work surveillance. Through art. 7 from London's Treaty, march 1871, the neutrality protection was extended

to the entire Danube Commission ("the entire administrative and engineer staff of the Commission"), this regulation being confirmed through the Berlin Treaty from 1878 (art. 53 - "in completely independence up against the territorial authorities").

The regulations from Congo Navigation Act, from 1885 were particular (the agents were assigned with privileges and inviolability).

The representatives of functional commissions were enjoying full privileges and immunities of the diplomatic agent, no matter the place where they were having established the residence or the privileges and immunities from which were taking benefit the diplomatic agents in the country where the commission was running her activity.

The League of Nation was the first to consecrate the international civil servant institution (the Chart's art. 7 § 4 provided:" The representatives of the League members and the League's civil servants during the time they are engaged in the League's issues will take benefit from diplomatic privileges and immunities'); the reason for giving to the Nations Society's civil servants diplomatic privileges and immunities was imposed by the need to assure their prestige and independence up against the jurisdictional authority. Through that Modus Vivendi, concluded between the Nations Society and the Swiss government, was made a distinction between the League's civil servants from the first and those from the second category and, also,

between members of these two categories which enjoy extraterritoriality and the civil servants which are Swiss citizens. The first's category staff (General Secretary, his deputies and the directors) enjoyed, in principle, the same diplomatic privileges and immunities as the ones granted to the diplomatic corps from Bern; the other staff enjoyed a reduced rate of privileges and immunities.

Through the Convention from 1928 between the Dutch government and the Permanent Court of International Justice was recognized for the Court a similar position to the one that the Diplomatic Corps from Hague had.

The activity and practice of the Nations Society and the one of Permanent Court were the fundament for the development of U.N. privileges and immunities, of its specialized institutions, with the purpose of giving a convincing case law in the theory of international privileges and immunities domain for the none-representative staff.

Related to the various eras and various evolution stages of the international organizations, the international privileges and immunities were subject of the conventions and principal agreements clauses; frequently, the same incorporation documents contain, in this matter, *pacta de contrahendo* or they enounce the guiding principle to follow by consecutive agreements.

As soon as U.N. and its specialized institutions started to function, there were adopted two general conventions in the matter of privileges and immunities. The

initiative belonged to the general Assembly which tried to satisfy the requirements for saving her autonomy and its civil servants autonomy.

In the matter of U.N., the general Convention (1946) and the headquarter Agreement (1947) had the purpose to control the Organization's juridical condition, the condition of member states' representatives, civil servants condition, the civil servants abuse of privileges and immunities and the guarantees given in this matter by the international organizations.

The United Nation's proposals for normative texts in the Dumbarton Oaks Conference, did not contain provisions on privileges and immunities of the organization and its staff; however, the issue was put on the agenda of the Committee on Legal Issues at the Conference in San Francisco, where they supported the solution of providing a uniform treatment for international civil servants and avoid a multiplication of divergent functions. Although they tended to agree with these suggestions and admit the existence of the advantages of unified privileges and immunities that UN officials and various specialized institutions enjoy, the Preparatory Committee adopted a functional point of view regarding these powers; the Committee stated that not any specialized institution needs all privileges and immunities. The Preparatory Committee did not have a clear approach on the privileges and immunities that were to be granted to the UN international civil servants.

Guiding principles were: no specialized institution will require

greater privileges than the UN has; the UN privileges and immunities can be seen as a maximum within various specialized institutions shall enjoy such privileges and immunities that the proper performance of the functions may require; no privilege or immunity should be required if not essential for the UN mission; in case a specialized agency affiliated to the UN already had the privileges and immunities specified in detail, adjustments were to be made regarding the privileges and immunities previously granted, in order to bring them in line with those provided by the UN and the Preparatory Committee noticed the difference between the powers of the UN system staff and those that would have the judges and the affiliate staff of the International Court of Justice; the latter had to benefit from diplomatic immunities and privileges in the full sense of the word, when exercising the Court activities (the basis is represented by the International Criminal Court of Justice practice).

The major reason was incorporated in the recommendation that the privileges and immunities were not to be granted in one's interest but to ensure the efficient operation of international institutions.

The first recommendation concerned the creation of an international passport to be issued by the UN to facilitate travel for its employees and to identify the bearer as its international civil servant; the second recommendation indicated the task of defining the term of immunity which should be granted to

all employees and submitted the coordinates for determining the categories entitled to full diplomatic status (emphasizing that privileges and immunities are given to the international civil servants in the interests of the organization they serve and under no circumstances for their personal benefit; it was argued that all employees, regardless of their rank, shall have immunity for acts done during official missions in the country of whose citizens are either in another country; full diplomatic immunity was intended only for exceptional cases); the third recommendation concerned the issue of determining the international civil servants salaries and revenues by the state of establishment.

Regarding constitutional foundations, the UN Charter (art. 105 § 2) provides that "civil servants of the Organization shall enjoy such privileges and immunities necessary for the independent exercise of its functions related to the organization.

The Committee on legal issues - which proposed the text - did not want the provisions of this article to apply to specialized institutions that could become affiliated with the organization. Even more significant was the fact that they avoided using the term "diplomatic" to describe the nature and extent of diplomatic privileges and immunities which were to be granted. The Committee concluded that "he preferred to substitute the nearest standard, based, for the purposes of the organization, on the need to achieve its goals, and for its members, representatives and civil servants of the organization,

based on ensuring the independent exercise of their functions.

By this, the recommendations of the Preparatory Committee of the Conference in San Francisco took into consideration the experience of the United Nations; wishing to avoid similar difficulties, the Preparatory Committee formulated recommendations so as to prevent the occurrence of these difficulties. At San Francisco, it was stipulated the provision that the General Assembly has the authority to act for the definition and application of privileges and immunities needed for the UN civil servants.

Regarding specialized agencies, the UN General Assembly engaged, in a sense, even before the entry into force of the UN Charter, to recommend a general convention to the international community. In 1943, the Food and Agriculture Organization status stated that the powers granted to civil servants of a future general international organizations could affect the privileges and immunities of F.A.O staff (Article VII 4). At Chicago, when drafting the International Civil Aviation Organization Convention, in December 1944, the probability of a general convention to apply later influenced the wording of the provisions on the privileges and immunities of the International Civil Aviation Organization staff (Chapter XI - Staff, art. 60) - ICAO subordinating the statute of its staff to the early general provisions of the Convention. O.I.M. broke affiliation to the United Nations, and in October 1946, anticipating new relationship with the UN (Montreal Amendment

to its Constitution - Chapter IV, art. 40), adopted a language that was similar to the one used in art. 105 of UN Charter. A year earlier, the Constitution of UNESCO used a different technique, even more directly sending to the UN Charter (art. 12).

In February 1946, at its first session, the UN General Assembly adopted a resolution, approving a Convention concerning the privileges and immunities of the United Nations civil servants.

Analysis of the provisions of the acts of incorporation of the specialized agencies shows that there is a general consensus on strengthening the privileges and immunities system on operational bases. However, it is not yet a conclusion as for the exact nature and extent of the privileges and immunities to be granted; even more, in the text FAO and O.A.C.I. conventions a clause may noted (escape clause), which has the effect of providing members the advantage of disavowing provisions on privileges and immunities (in both documents members of organizations are required to grant privileges and immunities close to the diplomatic or international staff , but this requirement is formulated in both texts in a manner "to the extent possible under its constitutional procedure"; in this case, national courts being the ones that are interpreting the constitutional procedure, they can interpret both the Treaty and the Constitution, and by this they reach the solution of denial of privileges and immunities in question).

3. Convention on the UN Privileges and Immunities (General Convention)

Art. V of the General Convention almost totally defines the civil servants status. But, although it establishes minimum privileges and immunities enjoyed by civil servants and experts on mission for the United Nations, the Convention does not define which of the staff categories shall be granted privileges in accordance to its provisions (leaving that task to the Secretary General - Sec. 17); in addition, references are made to "civil servants of comparable rank forming part of diplomatic missions" (sec. 18 e), to "privileges and immunities, exemptions and facilities granted in accordance to the international law of diplomacy (sec. 19), "as granted foreign sent' - formulas that are not accurate enough. To compensate for these shortcomings of the Convention, it is provided that the Secretary General is empowered to specify the categories of civil servants to be covered by the Convention and to waive immunities and privileges whenever it will not prejudice the interests of the United Nations (sect. 20). Any dispute arising from the interpretation or application of the Convention is to be submitted to the International Court of Justice for an advisory opinion, and the opinion given by the Court shall be accepted as final by the parties (sec. 30).

Under the provisions of Section 18 of the Convention, UN civil servants:

a) shall enjoy sovereign immunity for all acts performed by them in their official capacity (including words spoken or written);

b) shall be exempt from any tax on wages and payments made by the UN;

c) shall be exempt from any obligation relative to national service;

d) neither he or his dependent family members will be subject of the restricting immigration and foreigner registration formalities;

e) will enjoy, as for the exchange facilities, the same privileges as the ones of civil servants of comparable rank belonging to diplomatic missions that are accredited to the government concerned

f) will enjoy, along with their dependent family members, the same repatriation facilities as a diplomat in an international crisis time

g) shall enjoy the right to import - duty-free- their personal goods when taking up the first post in that country.

According to section 18, in addition to the immunities and privileges specified in Section 18, the Secretary General, Deputy Secretary General and Under-Secretary General will be granted, along with their family members, the privileges and immunities, exemptions and facilities granted in accordance with international law of diplomacy. Formulation lends itself to different interpretations: they can have different privileges and immunities than those listed (that would mean that sovereign immunity remains functional) or will have the same immunities and privileges- but in a

different structure and purpose (so sovereign immunity is absolute).

4. Conclusions

The juridical system of a state can contain norms which can generate obstructions for the activities of international civil servants. Thus, the international civil servant is immune to position or attitude changes made by the member state in international issues. The immunity granted for the official acts of an international civil servant continues to be valid even after the contract between the international organization and the civil servant ceases to exist).

In our article we started by analysing the institution of the international civil servant from its inception, naming here the case of the Rhine River Convention from 1840.

We developed a clear understanding of the juridical regime applicable to international civil servants during part 2 of our study and presented in part 3 a short inside related to the Convention on the UN Privileges and Immunities.

We want to conclude that privileges and immunities granted to international civil servants aim to promote the interests of international organization and have a different character compared to diplomatic immunities. They ensure the independence of an international organization against member states and protect the international civil servants.

REFERENCES

1. Convention sur l'octroi de navigation du Rhine, 1840.
2. Paris Convention, 1856.
3. European Danube Commission's Public Act, 1865
4. London's Treaty, 1871.
5. Berlin Treaty, 1878
6. Congo Navigation Act, 1885.
7. Hague Convention, 1899.
8. Second Hague Convention, 1907.
9. Treaty of Versailles, 1919.
10. Convention between the Dutch government and the Permanent Court of International Justice, 1928.
11. International Civil Aviation Organization Convention, 1944.
12. U.N. Charter, 1945.
13. U.N. Convention on the Privileges and Immunities, 1946.

ABOUT THE AUTHOR

Ladislau Levente Koble, is lawyer and a member of the Alba Bar, Romania.

Cosmin Marius Iordache, is lawyer and a member of the Bucharest Bar, Romania

Email: avocatkoble@yahoo.com