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*THE FUTURE OF INTERNATIONAL ADMINISTRATIVE LAW:
HARMONIZATION? FRAGMENTATION? DIALOGUE?*

The Relationship between the Council of Europe Administrative
Tribunal and the European Court of Human Rights

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* With the assistance of the Tribunal's Registrar (Mr Sergio Sansotta)

Ladies and Gentlemen,

1. I am delighted to be participating in this symposium today, not only because it marks the 20th anniversary of such an important institution as the one hosting us today, but also, and above all, because, in terms of the background of its participants, it represents a meeting point between theorists and practitioners of international administrative law in such a specific field as that of international civil service litigation, a field which has sometimes been neglected in favour of others.

2. It is my task today to address this third session devoted to “*international administrative law in a plural global order: competing legal communities and multiple claims to jurisdiction*”.

It is true that we live in an increasingly global world marked by increasingly rapid communication – and hence increasingly rapid exchanges and, by extension, access to knowledge. Obviously, this also applies to our tribunals, of which there has been a certain proliferation due to the increase in the number of international organisations. This needs to be seen in the light of the general theme of our symposium: *Harmonisation? Fragmentation? Dialogue? The future of international administrative law*. I will not dwell on the third of these key words because the need for dialogue is self-evident – how this dialogue should be organised is another matter – otherwise we would not be here. I will therefore focus on the other two crucial points, but, before coming to them, I would like to outline briefly the current situation regarding *international administrative law* and the relations that may exist between the different tribunals. In my opinion, these can be divided into four categories:

- those of the United Nations system;
- those of the co-ordination system (seven organisations based in Europe but including non-European members);
- the European Union system, which is faced with the establishment of a supranational system;
- and lastly, a system which I would describe as “other tribunals”, because they do not fit into the first three categories.

It is clear now that, in the application of international administrative law, account must be taken of the positive law (written or statute law) created within each of these four systems and of the case-law which is produced. However – and this complicates our work – we must also take account of what are commonly known as general principles of law, which, in our field, are a very important source of law, and of the case-law of the national courts (this is Professor Blokker’s subject), which, despite the existence of immunity from jurisdiction, have a growing influence on our system.

In addition, we also have international courts – and this brings me to the heart of my subject – whose case-law can be important for our systems: I am referring to courts such as the European and Inter-American Courts of Human Rights, the International Court of Justice and the

various international tribunals which have been set up to address specific issues. Obviously, these courts, with a few exceptions, do not deal with matters directly concerning the international civil service, but they may deal with principles – or give interpretations of them – which are important for us.

My introduction outlining the different categories of tribunals was based on this idea that they function as “communicating vessels”.

3. Now I will deal more specifically with the links between our subject and human rights. Naturally I will limit my presentation to the case-law of my tribunal and that of the European Court of Human Rights. However, I feel it is necessary to point out from the start that what I am about to say also applies to tribunals of the same type. I will therefore draw some conclusions of a more general nature.

4. As regards the case-law of my Tribunal, I would first like to remind you that, at European level, as far as fundamental rights are concerned, the European Convention on Human Rights only protects civil and political rights, while economic and social rights are protected by the European Social Charter. Parties appearing before the Tribunal – both appellants and the respondent Organisation – sometimes refer to these two instruments. However, they have used these references to interpret and assess allegations of unlawfulness with respect to an impugned decision, and never – at least not in formally submitted final pleadings – to request a finding of a violation of those instruments.

In the case of the Convention, they have relied variously on Articles 6, 8, 10, 12 and 14 guaranteeing the right to a fair hearing, the right to respect for private and family life, freedom of expression, the right to marry and, last but not least, the prohibition of discrimination. In order not to make this presentation too long and unwieldy, I will concentrate on Article 6, the right to a fair hearing, but without going into details. These can be found in a commentary published recently on the Tribunal’s website. However, I think it is interesting to note here that, where respect for private and family life is concerned, the questions that have been brought before the Tribunal concerned the payment of dependent child or household allowances and the payment of a survivor’s pension to a separated spouse or to a “registered”, not married, partner. Freedom of expression has been invoked in connection with the possibility for a staff member to express political opinions regarded as being contrary to the Organisation’s principles. The Tribunal has also been called upon to consider whether a registered partnership can be regarded as equivalent to marriage. And lastly, with regard to the prohibition of discrimination, I note that the Tribunal has drawn on the case-law of the European Court of Human Rights and has also viewed it as a general principle of law.

The right to a fair hearing has been discussed from the angle of the right of access to a court, the conduct of proceedings and the execution of previous decisions. The Tribunal has accordingly considered this right in connection with the exhaustion of the Organisation’s internal remedies, the possibility of going before the Tribunal to challenge a decision taken in the context of a recruitment procedure and the failure to execute a decision by taking positive measures to remedy *de facto* discrimination. I should add that although Article 6 of the European Convention on Human Rights relates to judicial proceedings, it has also been cited in connection with

administrative proceedings to assess the conduct of a staff member in which the staff member in question considered that he had not been informed in detail of the charges against him and had been unable to defend himself.

With regard to economic and social rights, the European Social Charter has been relied on in cases concerning the termination of employment and the relevant implementing procedures, but such instances are few in number. I should, however, point out that, a few years ago, the Council of Europe did a study on the compatibility of its rules governing staff employment with the European Social Charter and this subject was subsequently taken up on numerous occasions both in cases before the Tribunal and in the context of steps to improve the Staff Regulations. As they say in the English-speaking world, we will have to wait and see. One thing that is certain, however, is that the proposed conciliation procedure for disputes involving staff members of the Central Commission for Navigation on the Rhine – an international organisation which recently asked my Tribunal to assume jurisdiction for deciding these conflicts – provides expressly that “the rights and fundamental freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter” form an integral part of the applicable law in the same way as general principles of law, in particular those identified by international administrative tribunals.

Before concluding on this point, I would like to clarify something. I have mentioned the Administrative Tribunal of the Council of Europe and the European Court of Human Rights, but the European Convention on Human Rights is not only cited in proceedings before my Tribunal, but also in proceedings before other tribunals. A case-law search on the websites of the Administrative Tribunal of the International Labour Organisation and the Court and Tribunals of the European Union would give us the references of such citations.

5. As regards the case-law of the European Court of Human Rights relating to the international civil service, I would like to point out first of all that it is more abundant than that of my Tribunal. Here again, I will of course be focusing on questions relating to Article 6, in other words the right to a fair hearing. However, in addition to this case-law which has developed on the basis of applications brought by staff members of international organisations, we also need to consider, as a preliminary point, a certain amount of case-law arising from decisions based on Article 1 of the European Convention on Human Rights, which requires Contracting Parties to respect the human rights set forth in the Convention. Because international organisations form a distinct legal entity from the states which are members of them, the Court makes a distinction between the application of the Convention to international organisations and its application to their judicial bodies. This is because international organisations are “emanations” of the states which are responsible for them whereas their judicial bodies are set up not by states but by the organisations. This is clear from the case-law established by the *Bosphorus Airways v. Ireland* judgment (confirmed by the decisions in *Behrami v. France* and *Saramati v. Germany, France and Norway*), as read in the light of appeals relating to proceedings before the administrative tribunals of international organisations. It follows from this principle that, in a situation of immunity from jurisdiction with respect to the host state, states are responsible for setting up a judicial system, but they are not responsible to the European Court for the functioning of that system.

The Court was also required to examine very similar questions to those raised in these cases in two other cases (*Boivin v. 34 member states of the Council of Europe* (dec.) and

Connolly v. 15 member states of the European Union (dec.)), which related, as in these cases, to disputes between international civil servants and the international organisations by which they were employed. In these cases, it noted that at no time had the respondent states intervened directly or indirectly in the dispute and that there had been no action or omission of those states that could be considered to engage their responsibility under the Convention. Its conclusion was that the applicants had not been “within the jurisdiction” of the impugned states and therefore that their complaints were incompatible *ratione personae* with the provisions of the Convention.

To return to the question of the application of the principles enshrined in Article 6 of the Convention, we have to start with the famous *Waite and Kennedy v. Germany* judgment of 18 February 1999. In this judgment, the Court laid down the principle that “... Article 6 § 1 required a judicial body, but not necessarily a national court”.

However, a subsequent series of judgments and decisions concerned cases relating either to proceedings before the Court of Justice of the European Union (and hence the application of Article 6 of the Convention to its proceedings) or to applications brought by staff members of international organisations against the member states of those organisations. In both cases, the Court made a finding of incompatibility *ratione personae* with the provisions of the Convention. There has been only one case concerning the Administrative Tribunal of the Council of Europe, and here again the Court made a finding of incompatibility *ratione personae*.

For your information, the applicants in these cases complained that hearings had not been held in public and that the composition of the Tribunal and the appointment of its members infringed the principles of independence and impartiality, the adversarial principle and the principle of equality of arms.

6. We must now draw some conclusions and, for that, we need to go back to our starting-point, namely the subject of this third session: competing legal communities and multiple claims of jurisdiction. I will look at this first from the angle of the European Court of Human Rights, then from that of our tribunals.

If we try to infer certain principles from the relevant case-law, it would seem that when member states are setting up an international organisation, they must establish a system that is compatible with the Convention or otherwise their responsibility as signatories to the Convention may be brought into play. However, once the system has been set up, given that its functioning cannot be deemed to be the responsibility of states as signatories to the Convention, they cannot be held responsible. Furthermore, since it has not signed the Convention, neither can the international organisation be held to account before the Court, until— as seems to be happening with the European Union — it actually signs the Convention. The impact of the European Court of Human Rights on the civil servants of the European Union would thus become a separate issue. However that may be, where other international organisations are concerned, when such a situation arises, nothing prevents an organisation from bringing its internal regulations into line with the Convention and ensuring that its tribunal refers to or applies the Convention whenever possible.

As regards our tribunals, I think that, independently of the position of the European Court of Human Rights, which suggests that the failure of a tribunal to comply with the guarantees of Article 6 cannot be sanctioned by a finding of a violation — and I emphasise the word “tribunal”,

because the member states of an international organisation are required by the Convention to provide a judicial mechanism for settling conflicts – the fact remains that compliance with the rights guaranteed by Article 6 is necessary even if there is no possibility of sanctions. If that were not so, we would need to ask ourselves whether it is acceptable for an international organisation or court not to comply with the Convention. Is it conceivable that there should be problems of independence or impartiality in the composition of our tribunals? Is it acceptable for the length of our proceedings to be unreasonable or for proceedings not to be public? Certainly not.

It must therefore be acknowledged that the increase in the number of tribunals has two types of impact: a binding impact and an indirect impact. And in that field, we must attach paramount importance to the rights guaranteed by the European Convention on Human Rights. This instrument is so important for us that when, next year, in March 2015, we hold our symposium in Strasbourg to mark the 50th anniversary of our Tribunal, we will devote a working session to this subject, in which you will of course be invited to participate.

Thank you for your attention.