The Concept of International Public Services in International Law

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Abstract

"International Public Services" is not the term in positive law. It is an academic term transferred from administrative law to international public law in consideration of its essence. The reason for establishing such a category is that certain activities in our age have an objective of realizing an idea through the attainment of common interest and can be carried out only by institutionalized interstate cooperation or on the initiative of States. With the present paper, the author tries to clarify the concept of international public services by referring to the new field of international public law.

I. The Development of International Institutional Law: A Precondition for International Public Services

1. Traditional International Law as Relational Law

In international anarchical society, international public law is not the law of order and submission but the law of cooperation and coordination. From this viewpoint, Prof. C. A. Colliard said : "pendant longtemps, il (le droit internatioal) a été le droit d'un système inter-étatique ayant pour but d'assurer la coexistence des systèmes étatiques qui avaient, eux, leur propre finalité".[1] Needless to refer to Jean Bodin having written that "the absolute sovereign does not recognize no one superior to him but the God" and that "there is no prince in the world of

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1. Colliard C.A., le cours de droit international économic en DEA, 1978-79, referred in Uchuho jô no kokusai kyôryoku to shôgyôka (Commercialization and International Cooperation in Space law) written by Kunihiko TATSUZAWA, Kojinsha, 1993, p.232.

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sovereigns"[2], the traditional international law which has developed progressively since the emergence of modern States was, according to Prof. R.J. Dupuy[3], so called "relational law". It was based on the accidental and temporary cooperative relations between States who pursue their national interests and observe such principles reconfirming the anarchical structure of international society as sovereignty, independence and no invasion. According to Prof. R. J. Dupuy, it was characterized by ;

① the distribution of power (in the sense that power is distributed among States and that no subject of law other than the State can be entirely recognized in international society).

② the unconditioned nature of power (in the sense that international law rules are voluntaristic and no obligation may be imposed on a State if it does not accept any customary or treaty rules).

③ the violence of power (in the sense that only the State monopolizes legitimate power for maintaining order in a domestic society, and that only it can retain and exercise such power in international society).

However, the new international law based on the development of science and technology and developed in firm recognition of solidarity as a community of destiny resulting from the increased economic, social and technological interdependence after the 1st and 2nd World War, is, according to Prof. R. J. Dupuy, so called "institutional law", different from traditional international law.

2. Modern International Law as Institutional Law

What does "institution" mean? After pointing out that institution is a fuzzier concept than cooperation, Prof.Keohane defined it from the viewpoint of Anglo-American institutionalism as "persistent and connected sets of rules that prescribe behavioral roles, constrain activity, and shape expectations". According to Keohane, institution includes official as well as unofficial arrangements.[4] Prof.O.Young, regarded international institutions as "social institutions governing the activities of members of the international community"[5]. According to him, "social institutions" mean "identifiable practices consisting of recognized

2. Kunihiko TATSUZAWA (Ed.- in cheif), Kokusai Kankei Hô (The Law of International Relations), Maruzen Planet, 1996, p.117.

3. Dupuy R.- J., "communauté internationale et disparités de développement", Recueil des Cours de l'Académie du Droit international de la Haye, vol.165, 1979, p.46~55.

4. Keohane R.O., "International Institutions: Two Approaches", International Studies Quarterly 32, 1988.p.384.

roles linked by clusters of rules or conventions governing relations among the occupants of these roles". The definition given by Douglas North, according to which institutions are the "rules, enforcement characteristics of rules, and norms of behavior that structure repeated human interaction" is just the same.[6] Such understanding overlaps with the definition of institution in French jurisprudence represented by Prof. M. Hauriou, according to whom an institution is "a social organization created by a durable power because it contains a fundamental idea accepted by the majority of members of the group"[7]. In French institutionalism, such institutions are categorized into "institution as mechanism" and "institution as organization". The former refers to the legal framework made up by a set of legal principles, norms, rules and procedures in order to develop an element of social life. The latter to the organizational entity having a legal personality, whose status and functions are established by legal principles, norms, rules and procedures.

Institutional law establishing an institution is characterized by[8];

① the concentration of power (in the sense that, on the basis of interstate solidarity, States assume a prescribed role or give necessary jurisdiction to organs of an institution so as to attain its objective).

② the conditioning of power (in the sense that, as a result of the concentration of power, States submit to the decisions and management of organs of an institution within the framework of its power attributed by them in order to attain the common objective).

③ the repression of power (in the sense that, within an institution, the discretionary power of each State is limited and they are required to submit to given procedures of an institution).

Prof.C.A.Colliard also noted that new international law, the law of finality pursuing both direct (viz, non State-controlled) and global (viz, humanity-based) finalities substitutes not generally but in certain number of sectors to traditional international law.

According to Prof.Keohane, institutionalization requires that its legal principles, norms and rules not only constrain activities and shape expectations

5. Young O.R., International Cooperation: Building Regimes for Natural Resources and the Environment, 1989, p.5 and 6.

6. North D. C., "Institutions and Economic Growth: An Historical Introduction", 1987, p.6, referred in supra note (4), p.384.

7. Hauriou M., Précis élèmentaire de droit constitutionnel, first edition by Sirey in 1929 and second edition by CNRS in 1965 p.73.

8. Supra note (3), p.55~66

but also prescribe behavioral roles for actors.[9] Based on French institutionalism, this means that the State's jurisdiction traditionally considered under the aspect of private right and exclusively exercised for its own benefit should be reconsidered under the aspect of public rights and be exercised for the common interest of international society according to its prescribed roles within a given international institution.

In a domestic society, any administrative act must have the general interest of that society as its objective. The pursuit of the general interest of a society, with the exclusion of personal and political motives as well as unfair consideration for a third party, is, in fact, the obligation of all public authorities in a domestic society. However, in the former international society where power was not yet even partially institutionalized, or in other words, power belonged not to an institution but to the States exercising it, power has been considered under the aspect of private rights. Partial and progressive institutionalization of international society is rectifying this point, by often obliging States to exercise thir rights exclusively for the common interest of international society.[10] Prof. G. Scelle already said: "any legal act accomplished by a government in the use of its international jurisdiction may cause a State responsibility every time it was accomplished for other purposes than such State jurisdiction was recognized and attributed in the international legal order"[11]. Prof. S. Jovanović said that "by definition, the notion of jurisdiction refers to legal power recognized and attributed by the legal order so as to carry out a function and to pursue a social objective".[12]

In certain circumstances, State jurisdiction is attributed by international law in order to attain certain social objectives. For example, according to Article 3 of the Outer Space Treaty of 1967, State jurisdiction over explorative and exploitative activities of outer space must be exercised for maintaining international peace and security and encouraging international cooperation and mutual understanding. According to Article 3 of the Moon Agreement of 1979, jurisdiction over explorative and exploitative activities of the Moon and its natural resources must be carried out for the common interest of the whole of

9. Supra note (4), p.384

10. Prof.A.Cassese calles such rights "community rights" that belong to any State and that is exercised on behalf of the whole of international community to safeguard fundamental values of this community. (Cassese A., International Law, Oxford University Press, 2001, p.16.)

11. Scelle G., Précis du droit des gens, first edition by Sirey in 1934 and second editon by CNRS in 1984, Vol.II, p.38

12. Jovanovic̀ S. Restriction des compétences discrétionnaires des États en droit international, LGDC, 1988, p.179.

mankind. After defining the deep seabed as the common heritage of mankind, Article 140 of the New Law of the Sea Convention prescribes that jurisdiction in the deep seabed must be exercised for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples having not yet attained full independence or other self-governing status recognized by the UN. Also, in the 1948 advisory opinion concerning the conditions of admission of a state to UN membership, Judge Azevedo insisted that "the right (of a member of the UN to admit a new member) in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law"[13]

The concept of international public services has become possible to be argued with the development of international institutional law. It has resulted from the institutionalization of international cooperation and been recognized in the process that the State exercised the attributed power so as to uphold the common interest, according to its role prescribed within an international institution.

II. The Apparition of the Concept of International Public Services following the Domestic Model

A. The Concept and Principles of Public Services in Domestic Law

1. The Definition of Public Services in Domestic Law

The concept of international public services is established in an academic manner following the model of public services in domestic law. In the continental law system, public administration has the objective of maintaining a public order and achieving the needs of the general interest. Therefore, public services became a fundamental concept in administrative law. In French law, public services are defined as activities assumed by a public entity in order to give satisfaction to the needs of the general interest of the society.[14] Public services are essentially activities and are designed to satisfy the needs of the general interest of the society. Any activity may become a public service at any time when public powers

13. ICJ Reports of Judgements, Advisory Opinions and Orders, 1947~48, p.80.

14. See Venecia J.- C. et Gaudemet Y., Traité de droit administrative, LGDJ, 1984, p.644 as well as Dupuis G. et Guédon J., Institutions administratives Droit administrative, Arman Collin, p.399.

decide to assume them totally or partially, and, if necessary, the satisfaction of such needs is secured by a public organization. Private initiatives may give only an incomplete or intermittent satisfaction of such needs.[15] The substance of the needs of the general interest varies from needs common to the whole society such as education or national police activities, to needs concerning the minority such as handicapped or ethnical groups. It is the State who estimates such needs. Therefore public services by nature do not exist in domestic law.

2. The Categories and Principles of Public services in Domestic Law[16]

A State can entrust the mission of public services to private organizations by administrative contracts, law or administrative permission.

Public services are categorized in administrative public services and in industrial and commercial public services. The former is characterized generally by the application of public law and the submission to administrative jurisdiction. The latter is identified by the following points:

(a) Its profit-making character and objectives of services identifiable to private enterprises.

(b) Its principal financial resources covered not by subvention or tax revenues but by utilization charges for users.

The principles applied to public services are (a) the principle of equality, (b) the principle of continuity, and (c) the principle of adaptation. The first principle derives from equality before the law. The principle of equity which assures the substantial equality is also applied. The second principle is based on the continuity of a State and the regular functioning of its public power. Presupposing that the needs of the general interest progresses on a continual basis, the third principle obliges administrative organs to adapt public services to legal, economic and technological changes affecting such services.

Public services are classified in the following categories according to their functions:

① The establishment and maintenance of order as well as the regulation of private activities, such as national security, police, fire fighting, the chamber of commerce and industry, agricultural associations and other national professional organizations having the regulation of the production and the

15. Venecia et Gaudmet, supra note (13), p.646 et Dupuis et Guédon, supra note (13), p.423 and 424.

16. Supra note (13). See also Rivéro J., Droit administrative, Précis Dalloz.

stabilization of the market for its objectives.

② Social and hygienic protection including social security, the protection of aged persons and the handicapped, etc.

③ Educational and cultural mission, including sport, tourism, and mass communication

④ Economic intervention, including transport, energy, water supply and sewage, waste disposal, etc.

B. The Concept and Principles of International Public Services

1. The Definition of International Public Services

Although we distinguish the concept of international public services following the model of public services in domestic law, it is slightly different due to structural differences between societies. Their essence, however, is the same. First, international public services are activities. Second, the aim of international public services is to realize an idea through the achievement of the common interest of international society. They are activities, at the core of which an idea lies. This idea is the "peace and well-being of the whole of mankind". "Peace" is the situation in which not only security but also distributive and corrective justice is assured. "Well-being" is the circumstance in which each individual may make efflorescent his personality through the satisfaction of basic human needs and the continuing promotion of higher standards of living etc. International public services may be defined as activities carried out or managed directly by more than one State or indirectly by an international organization or other institutions such as public and private mixed partnerships or private enterprises. They mean institutionalized interstate cooperation.

"The needs of the general interest" in domestic law is considered a legal concept rather than a political one. It is applicable only within the framework of a State, because "general interest" is the abstracted interest distinguished from that of each member of a society. It is the State superior to each member which determines substantially what "the needs of the general interest" are. Such needs exist only in the form of ideas in international society, because, in the absence of a supranational State, there is no method for specifying the general interest distinguished from the specific interests of each State.[17] Our clue is the common

17. Prof.A.Wendt said: "among the different kind of ideas are some that constitute interests". According to him, "interests might be material or ideational". See Wendt A., Social Theory of International Politics, Cambridge University Press, 1999, re-ed. 2000 & 2001, p.114 and 115.

interests of members of society. International society is a complicated system constituted by relations between States, international organizations, and individuals. As Prof.G.Scelle remarked, there may not be a single but innumerable international societies, and each has its own common interest. In international society, more than one State jointly determines what the common interest is. From the viewpoint of the policy of law, such common interest prevails over the selfish interests of each State.

2. The Ctegories of International Public Services and Its Interdependence with the Common Heritage of Mankind

a. The categories of international public services

Among the activities in international society, we may enumerate with precision, the activities of the UN and its specialized agencies as international public services. International civil services carried out by international officials within the framework of their organizations are also regarded as international public services.[18] UN PKO activities as well as the activities of UNEP, UNEC or UNDRO were developed for establishing and keeping peace and order. The activities of UN, UNHCR, ILO and WHO were developed for social and hygienic protection. The UNESCO, WIPO, World Tourism Organization are given an educational and cultural mission. The ITU, INTELSAT, INMARSAT and the World Bank Group are given an economic mission. In the Romano-Germanic law system, public services are often partially or totally excluded in the hygienic or economic fields for historic or other reasons pertinent to its administration system. These reasons cannot be generalized. We do not need to take this into account.

The activities of the Authority carried out on the deep seabed, or so-called “Area”, are regarded as international public services. According to Article 140, activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and in consideration of the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the UN according to its resolution 1514 or others. Article 141 provides that the Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination. Article 153, paragraph 1 stipulates that the activities of the Authority “shall be organized,

18. International public services provided by international orgnizations may be regarded as extension of domestic public services. See Laroche J., Politique internationale, LGDJ, 2000, p125

carried out and controlled by the Authority on behalf of mankind as a whole".

Another example is space activities. Since the beginning, space activities are to be carried out for the betterment and in the interest of the whole of mankind. It is recognized that peaceful space activities shall be for the benefit of all mankind. The reason for which the principles of sovereignty and nationality were excluded from space law system was that space activities shall be the "provinces of mankind". Space activities have the nature of contributing to international cooperation and, then, to the reinforcement and promotion of mutual understanding and friendly relations among States and peoples. Although its was initiatively destined to prohibit such high political issues as the placement of weapons of mass destruction in the earth orbit, Article 4 of the Outer Space Treaty of 1967 includes the principle of the absolute peaceful uses of the Moon and other celestial bodies. Principal space powers such as the USA, Russia, Europe and Japan make the principle of peaceful uses of outer space their fundamental national policy notwithstanding the disagreement of its substance. Article 1 of the Outer Space Treaty provides that space activities shall be carried out for the benefit and in the interest of all States, on the basis of UN Charter and the Outer Space Treaty and irrespective of their degree of economic and scientific development. The UNGA Resolution 51/122 of 1996, so called "the Common Interest Declaration" clarified an aspect of the principle. Article 4, paragraph 1 of the Moon Agreement provides that due regard "shall be paid to the interest and present and future generations as well as to the need to promote higher standards of living conditions of economic and social progress and development" in accordance with the UN Charter. The space law regime is based on the identification of space activities as international public services.

b. Interdependence between International Public Services and the Common Heritage of Mankind (CHM)

International public services are intimately related to the common heritage of mankind. The term "CHM" is composed of two parts: "common heritage" and "mankind". The former is a legal term and the latter, philosophical one. It seems to me that the philosophical term "mankind" is a key word. This term has two aspects. First, mankind means an organic unity of human beings without discrimination on any ground, such as national or social origin, race, sex or other status. Under this aspect, it means to "join all people in collective ownership".[19]

19. Dupuy R.-J., "The notion of the common heritage of mankind applied to the seabed", Annales de droit aérien et spatial, Éditions A. Pédone, 1983, p.134.

Second, mankind is a unity of past, present and future generations. It slightly resembles to the concept of "nations" in French public law. We can recognize the historical continuity. The choice of the term "heritage" was correct in this sense. Under this aspect, it means the following two points:

a) Common Heritage = Common property should be a beneficial ownership for a generation, because any generation has no right to one of three prerogatives of ownership, "absus" (disposal right). The entire right belongs to Mankind, a trans-temporal concept.
b) Present generation has the responsibility to properly manage the CHM for future generations.

Management and exploitative activities of the CHM may be viewed at least apparently as international public services by nature. However the abovementioned analyses indicate that, as to the CHM concept, priority is given to the function of the organization of international relations (viz., the function to create institutions, structures and procedures), rather than to that of determination of conduct (the function to determine whether one can do an act or not). It deduces therefore that the CHM concept is a philosophical statement of exploitation policy from which the guidelines of an international regime could be led. According to the new law of the sea as well as to the Moon Agreement, we should find the expression of the CHM in the provisions of these texts because of the absence of its definition. This confirms our conclusion. Recently, international law increasingly includes fully political norms because of a great tendency to politicize the norm formation process. We can find such examples as the principle of peaceful coexistence or the human right to development. The CHM concept is one of these political norms.[20]

As a political concept, the CHM by nature does not exist. In this point, Prof. Ch.-de Visscher pointed out correctly that "the politics express the particularly intimate relation governments establish at a certain point between the State and certain goods or values they consider inseparable from its' conservation or size. The consideration of the object or matters does not provide in this respect any firm criteria; far more suggestive and only useful from the legal viewpoint is the external behavior of States concerned". In referring to the Morgenthau's idea, he said that "any question considered today political cannot have any more such character tomorrow whereas any other question, in itself not so much important, can become suddenly political question of first rate".[21] As a political concept, the

20. See TATSUZAWA K., Uchuhô system (Space Law System), 2d Ed., Maruzen Planet, 2000, p.37.

substance of the CHM is not fixed a *priori*. Any place or object such as cyberspace or technology may be regarded as CHM. Such flexibility results from the character of the CHM as a philosophical statement of exploitation policy. Consequently, international public services intimately concerning the CHM are not predetermined.[22]

3. The Principles of International Public Services

With respect to the principles applicable to International public services, we may first refer to the principle of equality of users. For example, as for the exercise of powers and functions by the Deep Seabed Authority, any discrimination shall be avoided in their exercise, including the granting of activities, except special consideration to be paid for developing States including the land-locked and

21. Charles de Visscher, Théorie et réalités en droit international public, Éditions A.Pédone, 1953, p.96-97

22. As Dr. P.B. Maurau pointed out, "the notion of CHM opposes to the idea of private management or appropriation. It means otherwise that any benefit should be used in a reasonable way; the priority of this management is to attempt to absorb the inequality of development"(Maurau P.-B., La participation du Tiers Monde à l'élaboration du droit international: Essai de qualification, p.138). Developing countries use the CHM concept strategically. They intend to nationalize their natural resources, in interpreting extensively the meaning of the concept of sovereignty, but they insist on international management of natural resources existing beyond national jurisdiction through the application of the CHM concept. There is no contradiction from the viewpoint of developing countries. The need for economic development justifies such priorities. Interdependent relations exist between developed and developing countries, and the necessity of their cooperation is recognized in consideration of importance and profitability of the role to be played by developing countries in the world economy. Consequently, developing countries insist that the problem of underdevelopment should be resolved by the cooperation of all members of international community. To that end, the management and distribution of natural resources existing beyond national jurisdiction must be done for the benefit and in the interest of all mankind, taking into consideration the necessity of reducing inequality of development.
As Prof. A. Cassese pointed out, the CHM concept incorporates five main elements: (i) the absence of the right of appropriation; (ii) the duty to exploit the resources in the interest of mankind in such a way as to benefit all, including developing countries; (iii) the obligation to explore and exploit for peaceful purposes only; (iv) the duty to pay due regard to scientific research;(v)the duty duly to protect the environment. (Cassese A., International Law, Oxford University Press, 2001, p.61.) Many developed space faring States have opposed to such CHM concept which has been identified with the common property but it gives several legal merits to space faring States. First, such CHM concept gives legal stability on the international plane, in introducing the equivalent of an exclusive privilege of the State Party or private enterprises acting under authority of a State Party to exploit the CHM. Second, in limiting the area of mining operations, it prevents a single State from excluding others from areas which are not using for such operations. (Hearings before the Subcommittee on Science, Technology and Space of the Committee on Commerce, Science and Transportation, US Senate, 96th Session on the Moon Treaty, 1980, p.61)

geographically disadvantaged among them according to Article 152, paragraph 1 and 2 of the new law of the sea. The exception concerns the application of the principle of compensative inequality aiming to realize a truly equal situation through unequal treatment.[23] In reconfirming Article 1 of the Outer Space Treaty, the common interest principle says that international space cooperation shall be conducted in accordance with international law, including the UN Charter and the Outer Space Treaty, and carried out for the benefit and in the interest of all States, irrespective of economic, social or scientific and technological development. In the field of international telecommunications, the UNGA Resolution 1721(XVI) said that "communication by means of satellites should be available to the nations of the world as soon as possible on a global and non-discriminatory basis". The Intelsat and Imarsat Agreements reconfirm this principle in their preamble. The principle of equality of users also applies to commercial space launching. Article III of the 1995 MOU between the USA and China concerning international trade in commercial launch services provides that both States pledge not to encourage unfair discrimination of international customers or suppliers by their respective providers of launch services.

We cannot yet find any traces of the principle of continuity of services, but it theoretically derives from the functional concept of State jurisdiction according to which certain State jurisdiction is attributed materially or abstractly for the purpose of attaining determined international social objectives. State jurisdiction over international public services falls under this category. This jurisdiction must be exercised in such a way as to assure regular function of services as a social objective. This principle is also needed to develop international public services.

The principle of adaptation of services cannot yet be elaborated on in the international society. However, presupposing that the common interest progressed with the development of international society, we can theoretically insist that international public services must be adapted to this progress. If no, the State cannot assure the effectiveness of services.

Conclusion

The progressive development of international public services represents the institutionalization of the international society. It is based on the recognition of the common interest of mankind and the consciousness of human society as a

23. See Colliard C. A., Institutions des relations internationales, Dalloz, 1978, p.297-298

community of destiny. On the basis of coexistent State jurisdiction attributed by international law in place of State sovereignty, institutionalized cooperation is reinforced. International public services resulted from such cooperation and the international public order composed of higher ethical rules (ex. bona fide principle, pacta sunt servanda, ex aequo et bono etc.) as well as of fundamental human rights rules started to form the international public administration which is the mechanism for administering international public affaires. The traditional concept of the international system which presupposes the choice between the model of domestic society and that of primitive and anarchical society should be overcome now. It can be said that the anarchical international society becomes more than more matured.[24]

24.The principal function of international law is not only to determine how the State conducts itself, but also to institutionalize international relations, in restricting at the maximum the resort to forces. As Professeur A. Lejbowicz pointed out, “Peace defined by international law supposes the anarchic functioning of interstate relations. Anarchy simply means that there is no authority superior to States: they remain sovereigns and independent. The guarantee of peace is therefore the preservation of the sovereignty of States and of their equality in the recognition of such sovereignty; it has any federative foundation.” According to Prof. Lejbowicz, “International logic is therefore antinomic to the idea of a world State.” (Lejbowicz A., Philosophie du droit international L'impossoible capture de l'humanité, translation from French by the present author, PUF, 1999, p.387 and 415.)