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Privileges and immunities

Introduction

One of the classic branches of international law is the law of immunity. States, their (political) leaders and their diplomatic representatives claim, and are usually granted, privileges and immunities in their mutual relations. Diplomats cannot, generally, be sued unless their immunity is waived, and diplomatic agents are exempt from certain forms of taxation and civil duties in the state where they are accredited. Moreover, diplomatic missions and belongings are generally inviolable. As far as the privileges and immunities of diplomatic agents go, these are usually explained with the help of the theory that, without immunities and privileges, diplomats cannot freely do their work. If a diplomat risks being arrested on frivolous charges at the whim of the host state, international relations can hardly be maintained. Some observers speak therefore of a theory of 'functional necessity' as underlying the granting of privileges and immunities to diplomatic agents and others in the service, but this terminology is less than fortunate.[1]

States and their leaders can also boast some privileges and immunities, most important among these being the immunity from suit in the courts of a foreign state, at least for acts which may be qualified as governmental (*acta jure imperii*) rather than commercial (*acta jure gestionis*).[2] Here, however, a 'functional necessity' theory is already less convincing, and it would seem that sovereign immunity is largely based on the idea that states require a space for the conduct of unencumbered politics without fear of

[1] See generally, e.g., Grant V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (London, 1989), esp. pp. 27–34.

[2] The distinction between the two is not always easy to draw, and it is usually domestic legislation which prescribes what test to use: whether what matters is the purpose of the activity or rather its nature. The latter appears to be the dominant test.

legal ramifications,[3] rather than on functional necessity. Indeed, since the functions of states are rather broad, any attempt to link immunities to their functional necessity would amount to creating rather broad immunities.

In much the same way as states enjoy privileges and immunities, so too do international organizations have privileges and immunities. And in much the same ways as diplomats have immunities and privileges, so too do people working for international organizations, and people accredited to such organizations or representing such organizations on specific missions.

The theoretical basis of privileges and immunities

Privileges and immunities of international organizations generally are usually explained on one of three possible bases.[4] Traditionally, it was thought that privileges and immunities flowed from the idea that a legation abroad would continue to be the territory of the sending state: the notion, hence, of exterritoriality. Clearly, whatever its merits when it comes to explaining the position of agents of states (and those merits appear to be fairly limited), the theory cannot apply to entities such as international organizations, which have no territory to begin with, yet are by definition located on someone else's territory.

The second theory, according to which privileges and immunities somehow derive from the sovereign dignity of the entities concerned, again must remain without application, for the obvious reason that international organizations, whatever else they may possibly be, are not generally considered to be sovereign in their own right. While on occasion courts have referred to the 'sovereignty' of an organization, or its exercise of 'sovereign powers', such instances are best regarded as examples of courts struggling to come to terms with the nature of international organizations rather than as clear-cut affirmations of sovereignty.[5]

[3] See further Jan Klabbers, 'The General, the Lords, and the Possible End of State Immunity' (1999) 68 Nordic JIL, 85–95.

[4] See, e.g., Josef L. Kunz, 'Privileges and Immunities of International Organizations' (1947) 41 AJIL, 828–62, p. 837.

[5] See, e.g., *Branno* v. *Ministry of War*, decision of 14 June 1954 by the Italian Court of Cassation, in 22 ILR 756–7, holding that NATO's 'member-States cannot exercise judicial functions with regard to any public law activity of the North Atlantic Treaty Organization connected with its organization or with regard to acts performed on the basis of its sovereignty'. In *Maida* v. *Administration for International Assistance*, the Italian Court of Cassation referred to the 'sovereign functions' of an organization: decision of 27 May 1955, in 23 ILR 510–15. See also, as late as 1982, *Food and*

This implies that resort is usually had to the third contending theory on privileges and immunities, that of 'functional necessity'. The idea, then, is that organizations enjoy such immunities as are necessary for their effective functioning: international organizations enjoy what is necessary for the exercise of their functions in the fulfilment of their purposes. Moreover, this is often deemed to be a normative proposition: not only do organizations in fact enjoy privileges and immunities on the basis of functional necessity, they actually are entitled to such privileges and immunities, so the argument goes.[6]

There is some obvious, if perhaps somewhat superficial, support for the 'functional necessity' thesis when it comes to international organizations. For instance, Article 105, para. 1 of the United Nations Charter provides that the UN shall enjoy in its member-states 'such privileges and immunities as are necessary for the fulfillment of its purposes', with para. 2 adding a similar provision with respect to representatives of member-states and UN officials. Article 105 Charter is referred to in the preamble to the 1946 Convention on the UN's Privileges and Immunities, and the same thought recurs in s. 27 of the UN–US Headquarters Agreement.

Indeed, several decisions of courts and tribunals, both national and international, can be cited in support of the functional necessity thesis, although their number is surprisingly limited.[7] Moreover, the functional necessity thesis has an intuitive appeal, in that it would seem to be self-evident that the organization must be protected against outside interference; and it is of course in particular the host state that could interfere if the organization were devoid of privileges and immunities.

Agriculture Organization v. *INPDAI*, decision of the Italian Court of Cassation referring to the FAO's 'sovereign powers' (87 ILR 1–10, at 8). The EC Court, in its classic decision in case 26/62, *Van Gend & Loos* v. *Nederlandse Administratie der Belastingen*, [1963] ECR 1, held that the EC institutions are 'endowed with sovereign rights' (at 12). For an example from the literature, see Philpott, who argues that the European Union constitutes a political entity with 'formal sovereign prerogatives': Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 *Journal of International Affairs*, 353–68, p. 367.

[6] So, e.g., Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations* (Dordrecht, 1994), p. 5. But see the discussion below.

[7] Possible examples may include the decision of Italy's Tribunal of First Instance in *Porru* v. *FAO* (decision of 25 June 1969, in 71 ILR 240, p. 241), holding that FAO was deemed immune 'with regard to the activities by which it pursues its specific activities', and the decision of Italy's Court of Cassation in *Minnini* v. *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies* (decision of 4 April 1986, in 87 ILR 28). Bekker, *The Legal Position*, pays much attention to the 1990 *European Molecular Biology Laboratory* arbitration, which, at the time Bekker wrote, was still unpublished: *EMBL* v. *Federal Republic of Germany*, 105 ILR 1.

Still, the functional necessity thesis has some considerable weaknesses as well.[8] For one thing, it may well adopt too instrumentalist a view of international life and ignore that the granting of privileges and immunities is usually, quite simply, the result of negotiations between the organization and its host state rather than the application of any blueprint. To be sure, while the needs of the organization will usually be considered during such negotiations, so too will be other factors: past practice of the host state concerned or of the organization concerned if the establishment of a regional or branch office is at issue; the interests of possible third parties, et cetera.

Participating in such negotiations are also often representatives of the various relevant ministries in the host states, which may hold widely different views on the desirability of certain provisions. Tax authorities might be reluctant to grant broad tax exemptions; social security authorities might not wish to see exceptions for international civil servants from domestic security schemes in the host states; the labour ministry might have its own views on the need for work permits for spouses of international civil servants, et cetera.

Moreover, there is always the role of negotiating power and the quality of the negotiators, as well as the chemistry (or absence thereof) between negotiators. In addition, negotiators may hold widely divergent views as to what the functional needs of their proposed creation amount to.[9]

Indeed, another drawback of the functional necessity thesis (but probably also the main source of its attraction) is precisely its open texture. As Reinisch succinctly puts it: 'The fundamental problem is clearly that functional immunity means different, and indeed contradictory, things to different people or rather different judges and states.'[10] The determination of the functional needs of an organization is essentially in the eye of the beholder,[11] and as good an illustration as any is the case which arose before the US Federal Communications Commission (FCC) in 1953, *Re International Bank for Reconstruction and Development and International Monetary*

[8] See also above, chapter 2.

[9] And, as Kunz, 'Privileges and Immunities', pp. 829–30, reminds us, the idea of granting privileges and immunities to organizations to begin with remained rather exceptional until the 1940s.

[10] August Reinisch, *International Organizations before National Courts* (Cambridge, 2000), p. 206. Elsewhere in the same work, he refers to functional immunity as 'very elusive' (p. 331).

[11] Compare also Jenks's astute observation that whether any particular privilege or immunity is called for is a matter of judgment rather than of principle: C. Wilfred Jenks, *International Immunities* (London, 1961), p. 26.

Fund v. *All America Cables & Radio, Inc. and other cable companies.*[12] At issue was a claim on behalf of the World Bank and the IMF in order to lower the rates they had to pay for their official telecommunications messages. Both the organizations in question and their opponents, the cable operators, based themselves on functional necessities considerations. The World Bank and the IMF argued, as the FCC put it, that the purpose of granting privileges and immunities to organizations is 'to protect the operation of these organizations from unreasonable interference (including protection against unreasonably high rates)'. The defendant cable companies argued, on the other hand, that 'there has been no showing that the Bank and Fund need lower-than-commercial rates to carry out their functions',[13] thus arguing on the basis of a radically different conception of the needs of the organizations.

The very idea of functional necessity has occasionally also caused confusion on the conceptual level. Thus, in *United States* v. *Melekh et al.*, in which the defendant (a UN official) was charged with espionage, it was argued that since espionage is not part of the functions of the United Nations, it is not an activity to which immunity could possibly apply.[14] Yet, the activity itself may well be engaged in to further the purposes of the organization, or in the course of doing something else which would in itself clearly be defensible as an official activity. While this may, admittedly, be difficult to visualize when it comes to espionage, it is easier to imagine when it comes to words spoken or written down in an official capacity which might amount to libel or slander; surely, much of that determination is in the eye of the beholder.

The purpose of immunity then is at least partly to prevent the very classification of behaviour as libellous (or, for that matter, as espionage) from being made by people who are in a position to interfere with the organization's work. The point is not that espionage should not be an official activity; the point is that the determination of the legality of behaviour should not come before the courts of the host state because that might obstruct the organization's work. It is too simple then merely to look at the

[12] Decision of 23 March 1953, in 22 ILR 705–12.

[13] *Ibid.*, both quotations at 709. In the end, the FCC would find in favour of the Bank and Fund, but for reasons unconnected to functional necessity, which in itself should tell us something.

[14] Decision by the US District Court for the Southern District of New York, 28 November 1960, and confirmed (after proceedings had been moved) by the District Court, Northern District, Illinois, on 20 March 1961. In 32 ILR 308–34.

activity concerned and condemn it as being inexcusable and thus outside the scope of immunity from suit. This would lead, eventually, to the untenable position that immunity from suit is no longer required because only lawful behaviour qualifies.[15]

It turns out that concrete decisions relating to the scope of an organization's privileges and immunities are almost unpredictable.[16] At the one extreme, one can find a case such as *Broadbent* v. *Organization of American States*,[17] coming close to granting absolute immunity to the organization, whereas at the other end of the continuum there are decisions in which the scope of immunities is considered to be much more narrow. Indeed, even a single dispute gives rise to various conceptions, and a perfectly useful illustration thereof is the case of *Iran – United States Claims Tribunal* v. *A. S.* In this dispute involving the labour relationship between Mr S. and the Tribunal, the Local Court of The Hague initially found that translation activities performed for the Tribunal could not be captured by the notion of *acta jure imperii.* The District Court of The Hague, though, affirmed by the Dutch Supreme Court, found that Mr S.'s activities were 'so clearly connected with *acta jure imperii*' that the decision of the lower court was well-nigh incomprehensible.[18]

Yet another problem with anything like the functional necessity thesis has recently been observed to reside in the possibility that the organization can commit violations of public order, or even of human rights, under the shield of its functional necessity.[19] Thus, while it may happen that functional necessity requires that an organization's labour policies are not subject to local jurisdiction, where those labour policies condone discrimination or

[15] In addition, while it might be difficult to regard espionage as an official activity, it is also difficult to think of espionage in such circumstances as being done purely for personal gain, as a purely private activity.

[16] As also the supporters of the functional necessity thesis acknowledge. See, e.g., Niels M. Blokker & Henry G. Schermers, 'Mission Impossible? On the Immunities of Staff Members of International Organizations on Mission', in Gerhard Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (The Hague, 1998), 37–54, esp. p. 41.

[17] Decision of 28 March 1978 by the US District Court for the District of Columbia, 63 ILR 162–3. Compare also *Weidner* v. *International Telecommunications Satellite Organization*, decision of 21 September 1978 by the US Court of Appeals for the District of Columbia, in 63 ILR 191–4.

[18] The three decisions can be found in 94 ILR, 321–30. The European Commission of Human Rights would later hold in respect of the same case, in its 1988 decision in *Spaans* v. *Netherlands*, that it did not consider that a grant of immunity 'gives rise to an issue' under the European Convention on Human Rights. See 107 ILR 1, at 5.

[19] The debate was partly sparked by the decision of the US Court of Appeals for the DC Circuit in *Mendaro* v. *World Bank*, decision of 27 September 1983, in 99 ILR 92.

sexual harassment, the balance between the organization and the individual may tilt too strongly in favour of the organization.[20]

And that points to a more basic flaw in the very idea of functional necessity: it is almost by definition biased in favour of international organizations, to the possible detriment of others. At the very least, the idea that the functional needs of organizations are worthy of protection, and perhaps more so than the needs of others, requires some form of justification, yet none has so far been forthcoming. Of course, the argument may be made (and has been made[21]) that people engaging in some sort of relationship with an organization are, and should be, well aware of the organization's immunities, but that answer, if valid at all (it may be seen to ignore economic considerations), surely cannot extend to those who end up on the wrong side of, say, a traffic accident.

Finally, on a more academic note, it would seem that the idea of functional necessity would require the legal position of international organizations to remain relatively stable. After all, it is unlikely that the needs of an organization change overnight, as long as other circumstances remain constant. And while it is probably true that different observers can come up with different views of an organization's functional needs, the variety of judicial pronunciations on the scope of organizational privileges and immunities suggests that predictability remains difficult to attain.[22]

That does not mean that the idea of functional necessity is totally without value. It may serve as a useful shorthand way of describing what people may have in mind when granting privileges and immunities, and when assessing

[20] Compare Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 VaJIL, 53–165. Reinisch expresses similar concerns, and adds the argument that the host state may be under conflicting obligations: an obligation towards the organization to grant immunity, and a human rights obligation to grant access to courts. See Reinisch, *International Organizations before National Courts*, e.g. pp. 278ff. On 18 February 1999, the European Court of Human Rights decided in *Waite and Kennedy* v. *Germany* and *Beer and Regan* v. *Germany* (see 118 ILR 121) that, while an issue could arise under the European Convention on Human Rights (thus going further than the Commission had done in *Spaans* v. *Netherlands*, mentioned above in note 18), a grant of immunities is justifiable with a view to the proper functioning of international organizations and therefore does not violate the Convention's provisions relating to access to courts. See esp. paras. 72 and 62, respectively.

[21] It is a variation on the more common argument that where states engage in contractual activities, their partners are well aware of what they get themselves into. See generally Hazel Fox, 'State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts' (1989) 20 Neth YIL, 3–34.

[22] Indeed, recent case-law suggests a more narrow interpretation of functional necessity than current in earlier times. For instance, in *Food and Agriculture Organization* v. *INPDAI* (above, note 5), the Italian Court of Cassation refused to regard a contract of tenancy as functionally necessary for the FAO.

them. The problem then resides not so much in the description, but in the fact that this description has taken on normative dimensions. It is one thing to say that privileges and immunities are usually granted on the basis of what negotiators have considered to be the functional needs of an organization. Such may be descriptively accurate, albeit probably too abstract to offer much insight. But it does not follow, as is sometimes suggested,[23] that therefore the description turns, or ought to turn, into the norm.

Distinguishing rationales

Apart from the circumstances that international organizations do not, as a rule, have their own territory or population, but are always located in the midst of the territory and population of a state[24] (usually, but not invariably, a member-state of the organization concerned[25]), there are several other reasons why organizations would warrant a treatment different from that accorded to states when it comes to privileges and immunities. First, as Ahluwalia sums up,

> Unlike diplomatic agents, international officials are neither accredited to the government of a particular country nor are representatives of one. They are servants of the international organization in the true sense of the term and act in its name. Unlike diplomatic agents, they exercise their functions not in the territory of a single but several States including sometimes their own.[26]

In other words, while it is unthinkable (as a matter of law) that a state diplomat would require protection against his own state, it is by no means implausible to suggest that officials of organizations may need protection against the states of which they are nationals.[27] Indeed, the two pertinent

[23] For a rather blunt statement that necessity entails legal entitlements, see A. S. Muller, *International Organizations and their Host States* (The Hague, 1995), p. 151.

[24] And are thought to require freedom from interference by the host state. See already the Italian Court of Cassation in *International Institute of Agriculture* v. *Profili*, decision of 26 February 1931 (1929–30) 5 AD, 414–15.

[25] An exception is OPEC, having its headquarters in Austria. The UN has its European headquarters in a non-member-state, Switzerland.

[26] Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (The Hague, 1964), p. 105.

[27] As underlined by the UN's Legal Office in an Aide-Mémoire to a member-state; see UNJY (1963), pp. 188–91. There is a converse to this point: whereas diplomats of states may be immune abroad, their acts may well be scrutinized and penalized in their own states; with officials of organizations, however, there is no home authority to resort to. While a state diplomat may be prosecuted for murder back home, such is far less plausible when it comes to officials of organizations (unless immunity is waived), in particular where immunity is deemed absolute.

advisory opinions of the International Court of Justice both involved situations where the national state of the official in question was putting obstacles in his way.[28]

Another factor distinguishing the diplomatic relations of states and their representatives from those of organizations and their agents may well have to do with the far greater variety among organizations. States may be rich or poor, strong or weak, or liberal or illiberal, but will not be either universal or regional, open or closed as far as membership is concerned, functional or rather comprehensive in terms of proposed activities.

Finally, all states are both host and sending states when it comes to diplomatic relations with other states; indeed, diplomatic law is one of the branches of the law often explained by pointing to reciprocity.[29] Yet, with organizations, such is not the case. While most states will be members of several organizations (and thus be sending states), the amount of host states is relatively limited: organizations are to a considerable extent concentrated in locations such as Austria, Switzerland and the United States, creating a clear imbalance when it comes to interests between sending states and host states.

This imbalance, and its translation into treaty form, may well have been among the reasons for the failure of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, concluded in 1975 but not in force. This Convention, heavily tilted towards the interests of the sending states while mostly neglecting those of host states,[30] has failed to attract the required number of instruments of ratification; it is not likely ever to enter into force.[31]

In stark contrast to the diplomatic relations between states, which are by and large governed by a single, almost universally accepted treaty,[32]

For an implicit confirmation on the part of the UN Secretary-General (promising 'quick and effective action' by the UN), see UNJY (1985), pp. 150–2.

[28] See, below, the discussion of the Court's opinions in *Mazilu* and *Cumaraswamy*, pp. 159–61.

[29] So, classically, Stanley Hoffmann, 'International Systems and International Law', in Klaus Knorr & Sydney Verba (eds.), *The International System: Theoretical Essays* (Princeton, 1961), 205–37, p. 213.

[30] See J. G. Fennessy, 'The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character' (1976) 70 AJIL, 62–72; see also Linda Frey & Marsha Frey, 'International Officials and the Standard of Diplomatic Privilege' (1998) 9 *Diplomacy & Statecraft*, 1–17.

[31] For the argument that much of the 1975 Convention nonetheless corresponded to existing state practice, see G. E. do Nascimento e Silva, 'Privileges and Immunities of Permanent Missions to International Organizations' (1978) 21 GYIL, 9–26.

[32] The 1961 Vienna Convention on Diplomatic Relations, which in many respects codified well-settled custom.

no single document governs the diplomatic relations involving international organizations and their staff, and those representing states to those organizations.[33]

Instead, the law relating to privileges and immunities of organizations is a labyrinth of treaties and other legal instruments, including domestic legislation. Some of those instruments are of universal ambition. Thus, the 1946 Convention on the Privileges and Immunities of the United Nations has attracted an impressive number of states; its scope, however, is limited to the United Nations.[34] The 1947 Specialized Agencies Convention is, as its title indicates, limited to the Specialized agencies of the UN, and is at any rate strongly modelled on the 1946 UN Convention. Indeed, it is usually the case that each organization, or group of related organizations (such as the organizations and institutions comprising the European Union), will have its own treaty on privileges and immunities.

There exists a special bond between the organization and its host state,[35] and this bond cannot be well regulated in a convention of general scope. Consequently, in many cases there is a separate Headquarters Agreement, concluded between the organization and its host state or, alternatively (and sometimes simultaneously), relations between the host state and an organization on its territory may be regulated by domestic legislation. Thus, the sources of the law on privileges and immunities of international organizations, their staff, and members of delegations are varied, and often comprise, in addition to general conventions and headquarters agreements, national legislation as well.

The UN Convention

Perhaps the most important document is the Convention on the Privileges and Immunities of the United Nations, as it provides a model for many other similar documents and in particular for the Specialized Agencies Convention, concluded in 1947. The UN Convention starts, surprisingly, by pointing to the juridical personality of the UN, but then proceeds more

[33] Note, incidentally, that sovereign immunities are also not subject to universal agreement. In Europe, the 1972 Convention on State Immunity, sponsored by the Council of Europe, is of importance.

[34] Note that the UN itself is not a party, although often treated as one, e.g. by the UN's Legal Counsel, as indicated by a speech to the Sixth Committee (i.e., the legal committee) of the General Assembly. See UNJY (1967), pp. 311–14. For an intelligent discussion, concluding that the UN is not so much a party as rather a beneficiary, see Reinisch, *International Organizations before National Courts*, pp. 141–4.

[35] For a recent exploration, see Muller, *International Organizations and their Host States*.

or less along the lines to be expected.[36] Analytically, the Convention creates four different subjects of attention. There is, first of all, the organization itself:[37] Article II holds that the UN, its property[38] and its assets shall be immune from legal process,[39] unless immunity is waived.[40]

The premises of the UN,[41] as well as its archives and documents, are inviolable, and the UN shall be exempt from direct taxes[42] and customs duties and restrictions. Article III, moreover, accords the UN most-favoured nation status with respect to communication facilities; it also confirms that 'no censorship shall be applied'.

The second subject of attention consists of the representatives of the UN's member-states.[43] Those occupy, as Kunz already observed, a somewhat ambivalent position: they are both national organs and part of an international organ.[44]

[36] Somewhat unexpectedly, a decision by Argentina's labour tribunal (decision of 19 March 1958 of the Cámara Nacional de Apelaciones del Trabajo de la Capital Federal), in *Bergaveche* v. *United Nations Information Centre*, seems to suggest the possible retroactive force of the Convention. See 26 ILR 620.

[37] And, by extension, its organs, according to the decision of New York's Eastern District Court in *Boimah* v. *United Nations General Assembly*, decision of 24 July 1987, in 113 ILR 499.

[38] The concept of property will usually include immovables. See, e.g., with respect to the OEEC, the decision of the French Court of Cassation in *Procureur Général* v. *Syndicate of co-owners of the Alfred Dehodencq Property Company* (decision of 6 July 1954), in 21 ILR 279.

[39] Incidentally, the immunity of an organization is no bar to the institution of proceedings by the organization itself. See, e.g., *International Refugee Organization* v. *Republic S. S. Corp. et al.*, decided by the US Court of Appeals, 4th Circuit, on 11 May 1951 (in 18 ILR 447). More hesitant was the US District Court for the Northern District of California in *Balfour, Guthrie & Co., Limited et al.* v. *United States et al.*, decision of 5 May 1950, in 17 ILR 323.

[40] There is broad agreement that in general waiver must be express, for waiver 'is not to be presumed against a sovereign or an organisation that enjoys immunity. If anything, the presumption must be that there is no waiver until the evidence shows to the contrary.' Thus Nigeria's Supreme Court in *African Reinsurance Corporation* v. *Abate Fantaye*, decision of 20 June 1986, in 86 ILR 655, p. 674 (emphasis omitted). See also *Dutto* v. *UN High Commissioner for Refugees*, decision of Argentina's National Labour Court of Appeal of 31 May 1989, in 89 ILR 90. Often though, alternative means of dispute resolution (such as arbitration) are agreed upon in contracts between the organization and private parties. See, e.g., UNJY (1987), pp. 203–5.

[41] Whether these are the UN's property or merely rented or leased is not relevant for purposes of inviolability; see UNJY (1965), pp. 219–20.

[42] On the difference between direct and indirect taxes, see the useful article by A. S. Muller, 'International Organizations and their Officials: To Tax or Not to Tax?' (1993) 6 Leiden JIL, 47–72.

[43] According to the UN's Office of Legal Affairs, a position as permanent representative of a member-state cannot be reconciled with a position as that same member-state's foreign minister. See UNJY (1992), pp. 490–1.

[44] See Kunz, 'Privileges and Immunities', p. 843; see also Edvard Hambro, 'Permanent Representatives to International Organizations' (1976) 30 *Yearbook of World Affairs*, 30–41. Perhaps

Article IV creates a number of immunities (e.g., from personal arrest) and exemptions (e.g., exemption from immigration restrictions), and contains the fall-back clause that representatives of member-states shall generally enjoy the same privileges, immunities and facilities as diplomatic envoys usually enjoy, with the exception of exemptions from customs duties, excise duties or sales taxes. Importantly, freedom of speech is guaranteed, as well as immunity from suit for acts, words and writings.[45]

The UN Convention does not specifically refer to entities with observer status, yet it is generally accepted that these too can often rely on a similar degree of protection.[46] However, practice seems to make an exception for observers from liberation movements and non-governmental organizations; these are often granted less extensive privileges and immunities than other observers, presumably since the authority such entities exercise over their members is generally considered to fall short of the degree of control exercised by states over their nationals.[47]

Article IV does posit two important limitations to the privileges and immunities of representatives of member-states. First, it specifically states that the privileges and immunities are granted in order to safeguard the exercise of functions in connection with the UN.[48] It follows, Article IV continues, that member-states are under a duty to waive immunity if they feel that continued immunity would impede the course of justice, and can be waived without prejudice to the function for which the immunity was granted.

A second limitation is the explicit provision in Article IV, section 15, detailing what has sometimes been referred to as the principle of nationality

this ambivalence is most visible in those cases where permanent representatives play an institutionalized role in decision-making, an example being the role of COREPER within the EC.

[45] This may also cover the relatives of representatives. See *People* v. *Von Otter*, decision of the City Court of La Rochelle (New York) of 30 July 1952, in 19 ILR 385.

[46] See, e.g., with respect to the PLO, UNJY (1979), pp. 169–70. The circumstance that observers are not expressly mentioned in the UN–US Headquarters Agreement, however, made the US Court of Appeals for the Second Circuit decide not to grant immunity to the PLO in *Klinghoffer and others* v. *SNC Achille Lauro and others* (decision of 21 June 1991, in 91 ILR 68).

[47] R. G. Sybesma-Knol, *The Status of Observers in the United Nations* (Brussels, 1981), p. 41.

[48] A similar provision in the IAEA constitution proved decisive in the *IAEA representative immunity* case, decided by Bavaria's Supreme Court on 30 September 1971 (in 70 ILR 413). With the FAO, however, this limitation apparently does not apply to representatives of ambassadorial rank. See the decision of Italy's Court of Cassation of 10 July 1969 in *Re Pisani Balestra di Mottola*, 71 ILR 565.

discrimination:[49] if the representative of a member-state happens to be a national of the host state, then no privileges and immunities apply.[50]

The third subject demanding specific attention is the category of officials of the UN. These too are granted (in Article V) a number of privileges and immunities, including exemption from national service obligations, immunity from suit for acts performed in an official capacity,[51] and exemptions from direct taxes[52] on their salaries and emoluments.[53] The highest-ranking officials (the Secretary-General and the Assistant Secretaries-General) are elevated to the same level as diplomatic envoys.

Article V does not contain a clause relating to nationality discrimination[54] but, similar to Article IV in respect of member-states' representatives, it spells out that privileges and immunities are granted in the interest of the UN: where the course of justice would be impeded, the Secretary-General has the duty to waive immunity, and if it concerns the Secretary-General himself, this duty falls upon the Security Council. Moreover, as if to underline the limits of the perks of officials, Article V concludes by pointing out that the UN shall at all times co-operate with the authorities of its member-states 'to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse'.

[49] For instance by Ahluwalia, *The Legal Status*, e.g. p. 132.

[50] 'The provisions of sections 11, 12 and 13 are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative.' Bear in mind here that at issue is the Convention covering the UN, including all its possible regional branches.

[51] The UN's Office of Legal Affairs has confirmed that officials do not enjoy immunity for acts unrelated to their official duties. See UNJY (1963), p. 188.

[52] The concept of direct taxes does not necessarily include such things as compulsory church dues. For an example relating to an IAEA employee, see *Evangelical Church (Ausburg and Helvitic Confessions [sic]) in Austria* v. *Grezda*, decision of Austria's Supreme Court of 27 February 1962, in 38 ILR 453. Nor does it automatically entail that exempt income may not be counted as part of a family's total income; see the decision of Austria's Administrative Court in *Karl M.* v. *Provincial Revenue Office for Vienna*, decision of 20 November 1970, in 71 ILR 573.

[53] Moreover, garnishment or attachment of salary (e.g., to recover an official's debts) is null and void as far as the UN is concerned. See UNJY (1983), pp. 213–14. See also, on sequestration, the decision of New York's Family Court in *Means* v. *Means* of 6 August 1969, in 53 ILR 588. The seemingly contrasting decision of the Swiss Federal Tribunal in *In re Poncet* (decision of 12 January 1948, (1948) 15 AD, 346–8) owed much to a *modus vivendi* between Geneva and the UN on garnishment.

[54] See, e.g., UNJY (1975), pp. 183–4 and (with respect to the Specialized Agencies Convention) 184–6. Should a member-state feel reluctant to grant privileges and immunities to officials who are its nationals, a possible circumvention (particularly useful with short-term projects) may be that the nationals in question are hired by the member-state and assigned or seconded to the organization. See UNJY (1973), pp. 167–8.

What exactly constitutes abuse is open for debate. The Philippine Supreme Court suggested in *WHO and Verstuyft* v. *Aquino and others* that the determination of abuse is the province of executive discretion, and added a delightful note that, according to the Philippine State Department, the importation of 120 bottles of wine by a diplomat is 'ordinary in diplomatic practice'.[55]

The fourth and final subject of attention is the somewhat random category of experts on mission for the UN, and the Convention concludes with a number of general issues, including the United Nations *laissez-passer* which may be granted to officials,[56] an elaborate and interesting provision on dispute settlement,[57] and some provisions on the Convention's entry into force and related issues.

In several cases, the International Court of Justice has had occasion to clarify the meaning of the provision relating to experts on mission.[58] In 1989, it rendered an advisory opinion on the scope of the very notion of experts on mission,[59] whereas ten years later it gave an opinion on how to make the determination whether Section 22 applies.

In 1984, Mr Dumitru Mazilu had been recommended by his country, Romania, to be a member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, which is a subcommission of the Commission on Human Rights which itself is a subsidiary organ of the UN's ECOSOC.

Mr Mazilu was appointed as a member of the Sub-Commission for three years (until the end of 1987), and was given the task, in 1985, to report on human rights and youth. Here things started to go wrong. Apparently, Mr Mazilu started to advance some thoughts which turned out to be difficult to reconcile with Romania's official policy. Romania seemed to hinder him

[55] Decision of 29 November 1972, in 52 ILR 389, p. 392, note 2.

[56] The proposal to create a UN passport was obstructed by some states who felt that issuing passports was a prerogative of sovereigns only. See, e.g., Kunz, 'Privileges and Immunities', p. 856. Other organizations too have adopted the idea of a *laissez-passer*; compare Art. 7 of the Protocol on the Privileges and Immunities of the European Communities.

[57] For more details, see below, chapter 12.

[58] In some organizations, consultants or experts are given staff appointments, and thus benefit from the privileges and immunities of regular staff. See, e.g., with respect to the World Bank, Ibrahim Shihata, *The European Bank for Reconstruction and Development* (London, 1990), p. 93. In others, they are treated as a separate category. See, e.g., with respect to the FAO, the decision of Madagascar's Court of Appeal in *La Hausse de la Louvière* v. *Brouard*, decision of 25 May 1972, in 71 ILR 562.

[59] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu)*, advisory opinion, [1989] ICJ Reports 177.

in his work, declaring that Mr Mazilu was seriously ill and not mentally capable of finishing the report. Mr Mazilu was also stripped of his travel rights.

This provoked the question, which ECOSOC asked of the Court, whether the General Convention is applicable also to people such as Mr Mazilu (not staff of the UN, not delegates of a member-state), and also in relations with their own states. The Court answered unanimously that indeed, Section 22 of the General Convention, relating to experts on mission, was applicable in such cases. It presented a rather wide definition of experts on mission: 'The Court takes the view that Section 22 of the General Convention is applicable to persons (other than UN officials) to whom a mission has been entrusted by the organization'.[60] The Court, having noted that the Convention did not itself define 'experts on mission', and that the *travaux préparatoires* were of little help, based itself predominantly on the practice of the UN: members of peace-keeping forces, technical assistants, members of committees and commissions, all had consistently been treated as experts on mission within the meaning of Section 22.

In other words: as long as Mr Mazilu was writing his report (even after his membership of the Sub-Commission had expired) he was entitled to the privileges and immunities guaranteed by Section 22 of the General Convention, which include the immunity from personal arrest or detention and immunity from suit. Still, as experts on mission are not on the UN payroll, there are no provisions on such things as taxation.[61]

Section 22 provides for immunity for official acts only, but fails to specify when an act is to be considered as official, and does not indicate who shall make such determinations either. This may, on occasion, lead to controversy, as when Mr Cumaraswamy, the UN's special rapporteur on the independence of the judiciary, found himself confronted with libel suits in his native Malaysia. The question arose whether utterances he made during an interview were to be regarded as words spoken in the course of the performance of his mission and, most importantly, whether the Secretary-General of the UN would have the final say on such matters.[62] The UN position has

[60] *Ibid.*, para. 52.

[61] What is clear though is that experts on mission are not generally exempt from domestic taxation on their UN honorariums. See UNJY (1983), p. 217.

[62] *Difference relating to immunity from legal process of a special rapporteur of the Commission of Human Rights (Cumaraswamy)*, advisory opinion of 29 April 1999, nyr (hereinafter referred to as *Cumaraswamy* case).

traditionally been that this determination is the exclusive province of the Secretary-General, arguing that if national courts could make such determinations, then 'a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity.'[63]

The International Court of Justice agreed that the Secretary-General, 'as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required'.[64] Consequently, where a domestic court is confronted with a legal issue in which the immunity of a UN agent is involved, it should immediately be notified of the Secretary-General's opinion, for this opinion 'creates a presumption which can only be set aside for the most compelling reasons'.[65]

Still, that stops short of saying that the Secretary-General has the final say; it leaves open the possibility of rebuttal of the strong presumption created by the Secretary-General.[66] And rightly so, of course, if only because the Secretary-General will have the natural and understandable inclination to construe immunity as widely as possible.

Headquarters Agreement

A number of things were left out of the UN Convention, and consequently had to be addressed in the Headquarters Agreement, concluded in 1947 between the UN and the USA. The Headquarters Agreement, moreover, specifies that it is to be read against the background of the 1946 Convention on Privileges and Immunities.

The seat of the UN is in New York City, in an area called the Headquarters District.[67] Generally, US law (federal, state and local) continues to apply in this area,[68] and the general rule of Section 7 also provides that the US courts will have jurisdiction, except 'as otherwise provided in this agreement'. This means, generally speaking, that the privileges and immunities of the UN

[63] Thus the UN's Office of Legal Affairs, in UNJY (1976), pp. 236–9, esp. p. 238.

[64] *Cumaraswamy* case, para. 50. [65] *Ibid.*, para. 61.

[66] In a similar vein, Hazel Fox, 'The Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights: Who has the Last Word on Judicial Independence?' (1999) 12 Leiden JIL, 889–918.

[67] Premises located outside the original Headquarters District may be (and have been) included by means of supplemental agreements. See UNJY (1985), pp. 144–6.

[68] Although service of legal process within the District requires the consent of the Secretary-General, as affirmed by the US Court of Appeals for the 2nd Circuit in the Joined cases *Kadic* v. *Karadzic* and *Doe I and Doe II* v. *Karadzic*, decision of 13 October 1995, in 104 ILR 135.

are to be viewed as exceptions to US jurisdiction, and therefore warrant a restrictive interpretation.[69] The same follows, one could argue, from Section 27: 'This agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfill its purposes.' This 'primary purpose' also entails that the host state is under an obligation to protect the organization, its staff members and their families.[70] Where the host state is unable (or unwilling) to do so, the organization itself may well be under an obligation to protect its employees and their families (at least those who are not nationals of the host state), for example by providing for evacuation in situations of emergency.[71]

The Headquarters District is inviolable, according to Section 9: the US authorities may not enter except with the consent of the Secretary-General, and then only in accordance with conditions agreed upon with the Secretary-General. Still, the UN has the duty not to let the Headquarters District become a refuge for persons avoiding arrest.

Under Section 11, the USA shall not restrict the travel[72] to and from the Headquarters District of various categories of persons:

- representatives of members of the UN, its officials, representatives to or officials of specialized agencies, and their families;
- experts performing missions for the UN;
- media representatives, provided they have been accredited by the UN (in consultation with the US);
- representatives of Non-Governmental Organizations recognized by the UN;
- other persons invited, on official business with the UN. The USA shall also offer appropriate protection.[73]

[69] As much is evidenced by judicial decisions, in which the protection offered by the Agreement has been restrictively interpreted. Thus, immunity from legal process has been held by the US Court of Appeals for the 2nd Circuit to apply neither to observers nor to invitees. See, respectively, *Klinghoffer and others* v. *SNC Achille Lauro and others* (above, note 46), and the various *Karadzic* cases (above, note 68).

[70] For a suggestion that such an obligation is not dependent on a particular treaty relation between the organization and its host state, see Muller, *International Organizations and their Host States*, pp. 194–6.

[71] See, e.g., UNJY (1983), pp. 197–8. The obligation of the organization is construed as a moral obligation.

[72] This does not amount to an exemption of visa requirements, but obliges the US to grant them without charge and as speedily as possible. See UNJY (1985), pp. 147–9.

[73] The applicability of the Agreement in general was confirmed by the International Court of Justice in 1988, despite the existence of later US legislation which would on some points have

Of some historical importance is that Section 11 applies irrespective of political relations between the USA and the state to whom a person may belong (Section 12). Thus, the USA will also have to respect representatives from states which it has not recognized.[74]

Generally speaking, the representatives of member-states to the UN enjoy the same diplomatic privileges and immunities as normal diplomats, and they enjoy them throughout the whole territory of the USA (Section 15). However, representatives of member-states not recognized by the USA only enjoy privileges and immunities in the Headquarters District, at their residences and offices outside the District, and in transit, either from those residences to the District or on official business to and from overseas locations.

Other sources of law

Similar provisions to those included in the 1946 Convention on the Privileges and Immunities of the UN, or the 1947 UN–US Headquarters Agreement, surface regularly in other conventions. Differences in the level of privileges and immunities between the various organizations, then, are usually a matter of detail rather than of principle, and it would seem that the granting of privileges and immunities to any particular organization is dependent to a large extent on the prevailing political climate.

Thus, some organizations shall not be restricted by financial controls, regulations or moratoria;[75] with others, one looks in vain for such a clause. With some organizations, the staff's exemptions from taxation are so strong as to guarantee also that the member-states do not take exempt income into account when assessing the amount of tax for income from other sources;[76] with others, however, such is ruled out, and exempt income may be taken into account when calculating the taxation over income from other sources.[77]

negated the agreement. See *Applicability of the obligation to arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, advisory opinion, [1988] ICJ Reports 12. For a scathing comment (in particular on the US attitudes involved), see W. Michael Reisman, 'An International Farce: The Sad Case of the PLO Mission' (1989) 14 Yale JIL, 412–32.

74 This provision has lost much of its utility with the end of the Cold War.

75 Compare Art. 6 of the 1949 General Agreement on Privileges and Immunities of the Council of Europe, in *European Treaty Series*, no. 2.

76 This is the position upheld within the UN family. See, e.g., referring to the Specialized Agencies Convention, UNJY (1972), pp. 193–4. See also UNJY (1983), p. 216.

77 Compare Art. 53, para. 6 of the Agreement establishing the European Bank for Reconstruction and Development.

With academic institutions, it is not uncommon to guarantee specifically the organization's academic freedom.[78] Some Headquarters Agreements also lay down a duty on the host state to ensure that the premises of the organization shall be supplied with the necessary public utilities, which could sound a little facetious if it were not for the consideration that there are many subtle and not so subtle ways in which privileges and immunities may be circumvented.[79]

There is one organization where many of the pertinent cases end up before that organization's own court, and that is the EC. In a number of cases, the Court of Justice of the EC has applied and interpreted the Protocol on the Privileges and Immunities of the European Communities. Those cases have involved lots of different issues, ranging from employees with problems about the level of taxation imposed upon them,[80] to questions concerning the distinction between taxation (for which immunity would apply) and public utility charges where no immunity applies,[81] to cases involving the disclosure of documents by Community institutions and authorization to give evidence in criminal proceedings.[82]

The Protocol applies to the EC itself and its officials and the representatives of member-states, but also to members of the European Parliament and officials of the Court[83] and to an affiliated institution such as the European Investment Bank.[84] The Protocol provides, moreover, in Article 17 that missions of third countries accredited to the EC shall be accorded privileges and immunities by the EC's host state.

Apart from being provided for in numerous treaties, it is sometimes argued that there is also an obligation under customary international law to grant privileges and immunities.[85] There are so many treaties on the topic, so the argument goes, that their sheer abundance alone provides evidence

[78] So, e.g., Art. IV of the Agreement between Finland and the United Nations University regarding the World Institute for Development Economics Research.

[79] Former Finnish President Koivisto recalls that former USSR Foreign Minister Gromyko was unable to attend the 1984 meeting of the General Assembly because the US authorities would not authorize the landing of Gromyko's plane: Mauno Koivisto, *Witness to History* (London, 1997), p. 4.

[80] So, e.g., case 6/60, *Jean-E. Humblet* v. *Belgium* [1960] ECR 559.

[81] So, e.g., case C-191/94, *AGF Belgium* v. *EEC and others* [1996] ECR I-1873.

[82] See the Court's order in case 2/88, *J. J. Zwartveld and others* [1990] ECR I-4405.

[83] The Court underlined as much in its order in case C-17/98, *Emesa Sugar* v. *Aruba*, order of 4 February 2000 (nyr).

[84] As confirmed in, e.g., case 85/86, *Commission* v. *Board of Governors EIB* [1988] ECR 1281.

[85] See, e.g., the Maastricht District Court in *Eckhardt* v. *Eurocontrol (no 2.)*, holding that Eurocontrol 'is entitled to immunity from jurisdiction on the grounds of customary international law

of both state practice and the required *opinio juris*. While it may indeed be the case that there is a customary rule to grant privileges and immunities, such a rule is bound to remain fairly abstract, for what is usually at issue is not so much privileges and immunities *per se*, but rather their precise scope. It will do little good to plead privileges and immunities without being able to delimit them with some degree of precision.

The only way out is to continue the argument by stating that the precise scope need not be defined because privileges and immunities are absolute. While there was probably a time in which immunities at least (with privileges, things are less clear) were considered absolute, and occasionally courts still pay heed to such notions, such reasoning has nonetheless become increasingly problematic. With states, it is generally accepted nowadays that immunities are limited to imperial acts; in such a climate, it seems rather implausible to insist that organizations retain absolute immunities.[86]

Domestic law

There are various ways in which domestic law may play a part in the framework of an organization's privileges and immunities. One way is, obviously, by means of an act incorporating the organization and its status in domestic law. Another, and more intricate way, is to provide for a general act on international organizations in conjunction with decrees establishing which organizations shall qualify for privileges and immunities under the act. This is the system which prevails in both the United Kingdom and the United States.[87] In the UK, the government decides by Order in Council which organizations qualify; in the USA, this is done by presidential decree. It is a matter of some controversy whether such instruments are constitutive of

to the extent that it is necessary for the operation of its public service': decision of 12 January 1984, in 94 ILR 331, at 338. See also Ignaz Seidl-Hohenveldern, 'Functional Immunity of International Organizations and Human Rights', in Wolfgang Benedek *et al.* (eds.), *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday* (Frankfurt am Main, 1999), 137–49, esp. p. 138.

[86] Nonetheless, the UN's Office of Legal Affairs has stipulated that the nature of immunities of organizations is such as to render these immunities absolute. See UNJY (1984), pp. 188–9. For a defence of absolute immunity, see also Richard J. Oparil, 'Immunity of International Organizations in United States Courts: Absolute or Restrictive?' (1991) 24 Vanderbilt JTL, 689–710.

[87] For a useful discussion of the position of organizations in US domestic law, enriched with excerpts from pertinent documents and cases, see Frederick L. Kirgis, Jr, *International Organizations in their Legal Setting* (2nd edn, St Paul, MN, 1993), 19–53.

the organization's legal existence in the legal system concerned, or whether they merely serve to declare and, perhaps, specify the organization's existence in law. The view that they would be constitutive is difficult to reconcile with the oft-found provision in treaties establishing organizations that they shall have such capacity as may be necessary for their functioning within domestic systems. The better view, then, is that Orders in Council and presidential decrees mostly serve to specify the precise scope of the legal position of the organization within a state, including the scope of privileges and immunities.[88]

In some cases, where there is no Headquarters Agreement, it may well be that its place is taken by the terms of an Order in Council or a presidential decree. The most famous example perhaps was the situation of the Intergovernmental Maritime Consultative Organization (IMCO) in London.

In some cases, privileges and immunities are directly granted by domestic law, and, in some cases, domestic law may even grant privileges and immunities to non-governmental organizations (NGOs). Thus, Austria has a general law dealing with privileges and immunities of NGOs with more or less public functions,[89] as well as a few special laws dealing with specific NGOs. The classic example probably concerns the International Institute for Applied Systems Analysis (IIASA).[90] In other cases, it was precisely the desire for privileges and immunities which spurred an NGO into transforming itself into an international organization.[91]

Some domestic laws may also provide for the regular granting of privileges and immunities in case of meetings by organs of organizations. Thus, in Finland two Laws on Privileges and Immunities for International Conferences and Special Representatives routinely grant privileges and immunities with respect to meetings taking place in Finland. The first of these laws[92] spells out the privileges and immunities concerned, covering wide categories of persons, whereas the second mainly specifies the organizations and organs to which the laws apply.[93] Coverage includes most

[88] In a similar vein, Geoffrey Marston, 'The Origin of the Personality of International Organisations in United Kingdom Law' (1991) 40 ICLQ, 403–24.

[89] BGBl no. 174/1992.

[90] BGBl no. 441/1979; no. 219/1981. Similar laws are made with respect to the Unabhängige Kommission für Fragen der Abrüstung unter die Sicherheit (BGBl no. 293/1981) and the Aktionsrat Ehemaliger Regierungschefs für Internationale Zusammenarbeit (BGBl no. 531/1983).

[91] The most famous case is probably that of ICES.

[92] No. 572 of 15 June 1973, as amended in 1991. Reproduced in II *Suomen Laki* (1996), 404.

[93] No. 728 of 14 September 1973, as amended in 1991. Reproduced in II *Suomen Laki* (1996), 406.

European organizations, but also an entity such as the Customs Cooperation Council.

Concluding remarks

As in other branches of the law of international organizations, the field of privileges and immunities is rich in illustrations of the tensions between the organization and its members. For example, the view that an organization, while not a signatory to a convention on its privileges and immunities, can nevertheless be regarded as a party to that convention, is doubly illustrative of this complex relationship. On the one hand, it may signify that the organization is nothing but the vehicle for its members: if the members are bound, then so is the organization. Yet, and curiously at first sight, it can also be seen as an illustration of the separate identity of the organization: precisely because it bestows rights and privileges on the organization, it makes sense to consider it a party,[94] even in the absence of signature and ratification.

The same tension comes to the fore in connection with the functional necessity doctrine, which is arguably mostly referred to in the context of the privileges and immunities of organizations. What is functionally necessary is, however, in the beholder's eye, and the members may have rather different conceptions from the organization itself; differences of opinion will also exist among members, and perhaps even among organs of one and the same organization.

Indeed, even organizations themselves may well realize that what to their mind is functionally necessary may not always be the most practical policy to follow. While very much aware of being immune from suit, the UN for example nonetheless complies with requirements that it arguably should not be burdened with, such as a domestic law requirement to obtain export licences: 'The reason for this is pragmatic rather than legal. The United Nations wants to avoid difficulties which might hinder future projects'.[95]

Finally, there is the paradoxical consideration that, as the level of integration increases, the logic of the reason for being granted privileges and

[94] This seems to have been the opinion of the ICJ in *Reparation for injuries suffered in the service of the United Nations* (advisory opinion), [1949] ICJ Reports 174, at 179, referring to the 1946 General Convention as an example of an agreement which would indicate the legal personality of the UN.

[95] See UNJY (1983), pp. 180–1.

immunities may become less convincing. Illustrative hereof is the outbreak of much debate (at least in German legal circles[96]) upon granting privileges and immunities to Europol and its staff. For, this could mean that police officers would be able to act without even the possibility of judicial control.[97]

By the some token, the finding that practitioners working for international organizations (medical doctors, engineers, architects, lawyers) are not subject to administrative or disciplinary proceedings from professional organizations[98] might mean that their activities end up without supervision or control whatsoever. In short, as soon as the organization aims to act as more than a coordination and focus point for its members and actually develops activities of its own, its activities become indistinguishable from those of others: whether veterinary services are performed by a veterinarian on the payroll of the FAO or in private practice appears quite irrelevant for the service to be performed. In this light, there does not seem to be any particular reason why a surgeon working for the FAO should not be subject to peer group control if his colleagues working for private hospitals or even national governments would be subjected to control from within their disciplines.

[96] For a critical analysis, see Burkhard Hirsch, 'Immunität für Europol – eine Polizei über dem Gesetz?' (1998) 31 *Zeitschrift für Rechtspolitik*, 10–13. Fewer dangers are anticipated by Kay Hailbronner, 'Die Immunität von Europol-Bediensteten' (1998) 53 *Juristenzeitung*, 283–9.

[97] Compare also Ulrich Daum, 'INTERPOL – öffentliche Gewalt ohne Kontrolle' (1980) 35 *Juristenzeitung*, 798–801.

[98] See the opinion of the FAO's Legal Counsel, in UNJY (1986), pp. 330–1.