THE JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANISATIONS AND THEIR OFFICIALS

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THESIS SUBMITTED FOR PhD EXAMINATION
MARCH 2003

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ABSTRACT

This thesis approaches the questions of the jurisdictional immunities of international organisations and their officials as the means whereby international organisations can be accommodated within the system of international law which allocates jurisdictional competence to States.

The range of doctrinal approaches to these questions in the secondary literature is considered. However, general rules on such immunities are only of limited value in that each organisation must viewed on its own merits, and in the light of its own particular functional requirements.

The thesis therefore seeks to demonstrate this individuated approach empirically by mapping the extensive range of international practice, i.e. treaty provisions, official decisions and views of international organisations and decisions of international courts and tribunals. At the level of national law, a comparative survey is made of legislative practice of various States and the decisions of their courts.

The immunities of international officials are an extension of the immunities of their employer organisations, and also a means of ensuring institutional coherence and integrity.

This thesis concludes that there are primarily two aspects to this process of accommodation of international organisations in the system of allocation of national jurisdiction:

Firstly there is a functional aspect, which concerns the degree to which national authorities may exercise jurisdiction over the relations of international organisations with third parties. This is derived from treaty law and is specifically granted to meet functional requirements of each organisation.

Secondly there is an institutional aspect, which concerns the internal relations of an organisation, including the relations between its organs, its relations with its member States and its employment relations. The abstention of national courts on these issues might best be considered as a requirement deriving from the international status of organisations, and, therefore, of more general application as a requirement of customary international law.

CONTENTS

INTRODUCTION

The subject of this study is the jurisdictional immunities of international organisations and their officials. These immunities arise at the point at which international organisations or their officials come into contact with a municipal legal system. This maybe as a result of their relations with States in which they operate, or with private persons whose activities are subject to the jurisdiction of such States. Immunities are required by international law (though in practice their implementation will be achieved through the action of national authorities) and seek to ensure an appropriate response from that municipal local system to the entry of an international organisation into its purview.

In seeking to understand and explain international immunities, they might be seen as measures which seek to protect an organisation from unwarranted interference, or control, by any individual State, in the achievement of the functions collectively entrusted to it by its member States. This will usually require a recognition that in achieving those purposes the collectivity is a distinct actor from its member States (i.e. many of its acts will be attributable to the organisation itself, rather than constituting an aggregation of a series of similar acts by each member State).

As a common endeavour, no single State should seek to wield undue influence over an organisation or seek to derive undue benefit for itself. Thus an organisation is subject to the collective control of its member Sates, but independent of the control of any single State - it is created by and governed by international law.

However since international organisations are established under international law, law serves two important purposes in relation to international organisations. On the one hand international organisations rely upon law and legal technique as the primary means of their protection. On the other hand one of the major claims to legitimacy of international organisations is their rational-legal foundation. It is therefore important to provide a legally coherent account of the relations between international organisations and national legal systems, particularly where the rights of individuals are concerned.

This thesis will seek to examine the techniques by which these relations are managed, on a comparative basis between different organisations and in different legal systems. The approach will be empirical examining how in practice solutions have been sought at the international and national levels.

The distinctive personality of international organisations is of quite a different nature than that of States. A State represents a political community, the effective government of a population in a fixed area territory, enjoying sovereignty and equality with other States. International organisations by contrast are essentially legal constructions. In legal analysis they do not have the material attributes of States, their actions always take place on the territory of a State, and their officials are nationals of States. Under international law each State enjoys plenary jurisdiction over its territory enabling each to develop a complete legal system of its own, including both public law and private law. International organisations on the other hand tend only to have a limited system of internal law fashioned to meet their institutional needs, and must rely on the legal systems of particular States in respect of other matters. Finally

whilst States have, within the parameters of their international legal obligations, free appreciation of their own interests and how they may wish to pursue them and in that sense are omnicompetent, an international organisation only has limited competences whether express or implied, and can only act to further the achievement of its functions.

Therefore Chapter 1 considers the legal foundations of international organisations, and in particular the concept of personality by which they are empowered to act in their own names at the levels of both international and national law.

However at the same time as demonstrating the limitations on the scope of their ability to act, the derivative nature of the personality of international organisations also highlights their potential vulnerability. Organisations are heavily reliant upon their own institutional law which governs their relations with their member States. The founding instrument of an organisation, setting out its basic rights and duties, also represents a careful poised equilibrium of the rights and duties of the individual members negotiated *inter se*. Protection of the organisation as a distinct entity, including the raft of obligations relating to status, privileges and immunities, is thus the legal means of protection of that equilibrium. There is thus a collective interest shared by one and all in its maintenance, by reason of observing in good faith the obligations of membership and in the principle of sovereign equality of the members.

Chapter 2, therefore, considers the rationales which have been offered for their immunities i.e. the primary technique whereby their international status is protected within the national legal system. The functional basis of those immunities is

considered, and the diversity views put forward by academic authors as to how it should be interpreted are examined. It will be proposed that the functional explanation of immunities does not require a uniform measure of immunity to all international organisations, but rather that each organisation will be endowed the necessary degree of immunity which its member States believe is necessary for the achievement of its purposes.

Chapter 3 continues that theme considering the treaty provisions governing the immunities of a range of international organisations. It is suggested that the functional basis of immunities has always been intended to be flexible, and that this is borne out in practice. Considerable differences in the extent of immunities granted to different organisations are noted, which, it is suggested, can be explained by reference to the primary functions of each organisation. The same flexibility inherent in the functional standard of immunity can also be observed in the interpretation of relevant treaty provisions by international courts, enabling a range of different interests to be accommodated.

Chapter 4 follows the implementation of immunities in the national legal systems of the member States, and their application by national courts. In contrast to other areas of international law such as State immunity where considerable differences exist between national legal systems, there appears to be, though with some exceptions, a greater degree of homogeneity of results in respect of international organisations. This appears to be explicable largely by the treaty basis of the immunities of international organisations. The chapter also considers the approach of national

courts where there is no treaty provision granting immunity, or where the forum State is not a member of the organisation in question.

Chapter 5 then considers the jurisdictional immunities granted in respect of the officials of international organisations. Most international officials enjoy immunity *ratione materiae* in respect of their official acts, and thus their immunities are in reality the immunities of their employer organisations.

There are serious methodological problems in seeking to generalise about the law of international organisations. These arise primarily from the fact that the period since 1945 has seen a huge proliferation in the numbers of international organisations, each with their own particularities in terms of their functions and mechanisms. The conclusions are therefore necessarily somewhat broad, it being necessary in practice to consider the situation of each international organisation on its own merits.

Finally in this introduction a word needs to be said about the definition of international organisations. The organisations which this thesis considers are essentially intergovernmental organisations. Although the breadth of the field and the particularities of each organisation prevent a precise definition, the three-element definition offered by Schermers and Blokker[1] presents a minimum definition, which

[1] Schermers and Blokker *International Institutional Law* (3rd ed., Kluwer, The Hague, 1995) at §§.29-45

broadly corresponds with the suggestions by other leading writers in the field.[2] The three elements are the an organisation must:

(i) be established by States, sometimes with the participation of other international organisations as well, usually by a treaty;

(ii) have at least one organ with a will of its own; and

(iii) be established under international law.

This thesis takes a similar approach as to the defining elements of an international organisation, but noting the breadth of the definition and the very widely different forms of organisation which it covers.

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[2] see for example Reinisch *International Organisations before National Courts* (CUP, Cambridge, 2000) at pp.5-10; Muller *International Organisations and their Host States* (Kluwer, The Hague, 1995) at p.4; Bekker *The Legal Position of Intergovernmental Organisations. A functional necessity analysis of their Legal Status and Immunities* (Kulwer, The Hague, 1994) pp.39—42.

Sands and Klein introduce further elements include the possession of legal personality, and the capacity to adopt norms addressed to its members - *Bowett's Law of International Institutions* (5th ed. Sweet and Maxwell, London, 2001) at pp.16-17. This issues of personality and the development by international organizations of their own internal law, will be important aspects of this thesis.

Some authors consider similar definitional criteria in discussing the objective approach to the establishment of international personality of international organisations, see Brownlie *Principles of Public International Law*, (5th ed. Clarendon, Oxford, 1998) at pp. 679-80; Amerasinghe *Principles of the Institutional Law of International Organisations* (CUP, Cambridge, 1996) at pp. 82-4; White *The Law of International Organisations* (MUP, Manchester, 1996) at pp.27-31; Rama-Montaldo "The International Personality and Implied Powers of International Organisations" (1970) 44 BYIL 111-156 at p.112. On this issue see Chapter 1 *infra*.

CHAPTER 1
THE LEGAL STATUS OF INTERNATIONAL ORGANISATIONS

Introduction

Modern international organisations are created in international law primarily by the agreement of States (though occasionally with the involvement of other international organisations), in most cases by means of a constituent treaty.[1] The constituent instrument will set out the functions and goals of the organisation and the structures and powers through which these are to be achieved. In particular international organisations are usually endowed with organs of their own, including an assembly or council, at which the membership is represented in plenary, to determine the direction and policy of the organisation, and a permanent staff employed by the organisation which will at very least service the representative organ, but also will often carry out the policies of the organisation or assist, supervise or coordinate their execution by others. Some organisations, or course, have more sophisticated organic structures requiring more clearly defined separation of powers.

The relationship of an organisation to its member States is complex and multi-faceted. On the one hand the organisation is the servant of the member States, in that the member States as a collectivity establish the organisation, fund it and determine its direction and policy. However once the organisation is established individual members owe numerous duties to the collectivity, including not only the specific

[1] Exceptionally some international organisations are created by resolution of another international organisation. An example of an organisation founded by such an unusual route is the World Tourism Organisation, which established when a non-government organisation (the International Union of Official Travel Organisations was transformed when UN General Assembly Resolution modifying the Statute of IUOTO was subsequently approved by 51 States – see R.Wolfrum (ed.) *United Nations: Law, Policies and Practice* (Martinus Nijhoff, Dordrecht and CH Beck Verlag, Munich, 1995) at pp1501-4.

duties contained in the constituent instrument such as to contribute to the funding of the organisation, but also duties of good faith and cooperation.[2] It follows that where the membership has collectively empowered an organisation to act, each member States must respect the rights of an organisation to act accordingly, and must eschew any interference which would amount to an undue unilateral attempt to modify the collective will.

To this extent an organisation is therefore equipped in legal terms to act in its own name, and in doing so to manifest a will representing the collectivity, but distinct from that of the individual member States (*volonté dinstincte*). This *volonté distincte* is the basis of the institutional autonomy of an organisation.[3] This "autonomy" is clearly of a very different nature to the sovereignty or independence exercised by States, as it is limited both politically by the collectivity of the member States, and legally by the limits of the powers with which the organisation is endowed and more generally by the functions and goals for which it is established. The nature of that autonomy in international law will be explored in the first part of this Chapter, before considering how it is reflected in municipal law in the second part of this chapter.

A. The Status of International Organisations in International Law

1. Historical perspective

[2] For an illustration of the duties of good faith and cooperation between an international organisation and its host State see the ICJ Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* – 1980 ICJ Rep. 73 esp. pp.94-96

[3] Reuter *International Institutions* (George Allen and Unwin, London, 1958) at p. 215. See also Dufour "De l'extraterritorialité à l'autonomie internationale: à propos des relations de l'organisation intergouvernementale avec l'état-hôte", in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Pedone, Paris, 1991) p.239-256

The development of a status for organisations as entities distinct from their member States, and the degree to which they can oppose such status to States or other international persons, can be demonstrated by means of a short historical review. From this two central themes will emerge: firstly the question personality of an organisation, i.e. its capacity to be the subject of rights and duties in international law in its own name; and secondly the reflection of its international status, in the status accorded to its employees and others through whom its works.

The origins of modern international organisations are often traced back to the system of diplomacy, which developed in Europe in the period since the Treaty of Westphalia.[4] At the broad political level the development of the Concert of Europe, arising out of the Congress of Vienna of 1815, operated as a succession of *ad hoc* conferences of the major powers to ensure international order. At this time the multilateral treaty was developed as a primary means of international law-making, and thus conferences for their negotiation and review became increasingly common. With the increasing frequency of diplomatic conferences so developed the need of the services of a secretariat and, in due course, some form of permanence.

However such conferences fell short of the modern international organisation. The system operated purely by means of cooperation between the States. Conferences operated *ad hoc* and purely on the basis of consent and unanimity. A conference afforded States the chance to state their own positions and to hear those of other States, but the conference had no independent power or authority. In general during

[4] See Sands and Klein (ed,s) *Bowett's Law of International Institutions* (5th ed, Sweet and Maxwell, London, 2001) pp1-13, and Reuter *op.cit.*. note 3 *supra* at pp. 205-214

this period the secretariat was provided by the administration of the State organising the conference.[5]

Beyond the arena of high politics, the 19th Century also saw rapid growth in international communications and commerce, giving rise to the need for closer cooperation and coordination between States in various administrative matters. This in turn led to the establishment of the first international administrative bodies, established on a functional basis to meet administrative needs. However it should be noted that whilst in some of these bodies, participation was purely by governments, others allowed the participation of interested private parties as well as the representatives of States.

Among the most developed of these administrative bodies were the international river commissions. The Congress of Vienna itself, called for the establishment of an international commission to govern international navigation for the Rhine. The Central Commission for Navigation of the Rhine was established under the Mainz Convention 1831,[6] and further revised and amended under the Manhiem Convention of 1868.[7] It was composed or representatives of the riparian States and created to ensure, administer and police the regime for navigation of the Rhine contained in the treaties. To that end it was given broad regulatory power over navigation on the river, though the riparian States reserved to themselves certain powers, such as customs powers. That regulatory power over navigation was exercised by the member States voting on

[5] Though a permanent bureau was established to service the Pan-American Union on its foundation following the Washington Conference of 1889.

[6] Consolidated Treaty Series (ed. Parry) vol.81 p. 307

[7] Consolidated Treaty Series (Parry) Vol.138 p.167

resolutions within the Commission, resolutions adopted unanimously creating binding obligations to be translated into the national law of the member States, whereas those adopted by majority only had recommendatory effect (unless they related to certain internal matters of the Commission) (Art.46). It was also given an independent jurisdiction in civil and criminal matters, which allowed private persons to appeal to the Commission from a judgment at first instance of their national courts (art.45). The officials of the Commission were originally given the status neutrals in time of war, though following the installation of the Commission in France after the Treaty of Versailles (1919) the French Government endowed those officials who did not have French nationality with the privileges enjoyed by members of a foreign diplomatic mission.[8]

The European Danube Commission was established by the Paris Peace Treaty of 1856, and subsequently enhanced by the Paris Conference of 1865.[9] As originally envisaged the Commission was to carry out dredging work and improvements of the Salina navigation channel, its competence and duration were extended by Conferences of signatories of the Treaty of Paris. However by 1881[10] it had achieved a permanent, and largely independent status. Its goal was to ensure the regime of free navigation of the River, and to this end it was given extensive regulatory and police powers, powers to set and to collect dues, powers of compulsory pilotage, and, importantly, jurisdictional powers. The independence of the Commission and its officials from the territorial control of the riparian States was ensured initially by guarantees of neutrality in time of

[8] see Cahier *Étude des Accords de Siège Conclus entre les Organisations Internationales et les États où elles Résident* (Giuffre, Milan, 1959) at p.280

[9] see Consolidated Treaty Series (Parry) V.131 p.115, p.209, and p.399.

[10] see Consolidated Treaty Series (Parry) vol.158 p.245

war, and later by more extensive privileges and immunities under the Public Act of 1865 and the succeeding treaties.

By the early Twentieth Century the degree of independence exercised by the Commission was a cause for concern to Romania, which sought to limit the powers of the Commission in that part of the river which flowed through Romanian territory. When an Advisory Opinion was sought from the Permanent Court of International Justice, it differentiated between the jurisdictions of the Commission and that of the Romanian authorities in the following terms:

> "Although the European Commission exercises its functions 'in complete independence of the territorial authorities' and although it has independent means of action and prerogatives and privileges which are generally withheld from international organisations, it is not an organisation possessing exclusive territorial sovereignty. Roumania exercises power as territorial sovereign over the maritime Danube in all its respects not incompatible with the powers possessed by the European Commission under the Definitive Statute. When in one and the same area there are two independent authorities, the only way in which to differentiate their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State but an international institution with a special purpose, it only has functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent in so far as the Statute does not impose restrictions upon it."[11]

Thus the Court recognised the independence of the Commission in relation to the functions which it was established to perform. When this was juxtaposed to the independence of Romania, the Court decided in favour of the effective functioning of the Commission.[12]

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[11] *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, (1927) PCIJ Series B no.14, at pp.63-4

[12] It appears that the Commission at this time clearly had a degree of international personality as it was able to make a claim against Germany for reparations after World War I in its own name, see Cahier *op. cit* .note 8 *supra* p. 59-60.

In addition to the international river commissions, whose capacities and level of autonomy are striking, other international administrative bodies[13] were also established during this period with more limited capacities on technical (as opposed to political) areas of government activity (e.g. postal services, railways, weights and measures, intellectual property, public health etc). The States parties to these bodies, often referred to as Unions, would tend to meet regularly, in Conference in order to determine how co-ordination or uniformity might be achieved in national administration on such topics. They would often only act by unanimity and they would usually have a permanent bureau to carry out the secretariat functions of the unions. These permanent bureaus however were frequently tied very closely to the law of the State in which they were based, their members did not usually enjoy diplomatic privileges and the question of such guarantees of their independence does not appear to have arisen at this early stage of their development. To the extent that autonomous status was considered it was generally limited to their status in municipal law.[14]

During World War I the Allies had sought to coordinate national policies and resources in the prosecution of the War through the machinery of Inter-Allied Councils. This experience, together with that of the international administrative bodies (referred to

[13] Amongst these were the International Telegraph Union (whose permanent organ was the International Bureau of Telegraphic Administration in Berne) established in 1865; the Universal Postal Union established in 1874 (with an international bureau in Berne); the International Meteorological Organisation established in 1879 (though its predecessor the permanent International Meteorological Committee was established in 1873); the International Bureau of Weights and Measures established in 1875, the Bureaux Internationaux Réunis pour la Protection de la Propriété Industrielle, Littéraire et Artistique - see Cahier *op. cit.* note 8 *supra* at pp. 70-73

[14] See for example Art. 3 of the Treaty establishing the International Bureau for Weights and Measures (20.5.1875): the Treaty establishing the International Health Office (9.9.07). The Bank for International Settlements is a little different for though its constituent instrument refers to Swiss law, a "stabilisation clause" provides that changes in Swiss law subsequent to the treaty will not affect the Bank (in fact the current HQ agreement between Switzerland and the Bank recognises it as having "international personality" Art 1 of HQ Agreement of 10.2.1987 at http://www.bis.org/about/hq-ex.htm).

above), served as a source of inspiration for the establishment of the League of Nations - the first major attempt to create an international body for the promotion of peace and order in the political sphere. Smuts described in strikingly modernist terms his vision of how the League was to be the rational solution to the problems of nationalism and imperialist ambition. Nevertheless even in his view the League's purpose was not to replace the States, but rather to provide the forum by which collective solutions could be found for international problems.[15]

The machinery of the League was more sophisticated than most of the pre-existing organisations, providing for an Assembly (primarily intended as a deliberative organ in which the membership met in plenary on annual basis), and a Council (an organ of limited membership intended as more of an executive organ).[16] Though many decisions of these organs were required to be adopted by unanimity, there were some, largely relating to the internal functioning of the organisation, which could be taken by qualified or simple majority. Further under articles 15 (6) and (10) and 16 of the Covenant of the League, the requirement of unanimity was effectively limited so that a State which was involved in a dispute of which the Council or the Assembly was seised, could not vote on a resolution relating to that dispute. Furthermore the League had certain powers even in relation to disputes involving non-member States.[17]

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[15] See the Smuts Plan of 16 December 1918, reproduced in Hunter Miler *The Drafting of the Covenant* (Puttnams, New York 1928) Vol. 2 at pp.23-60

[16] The separation of powers between the organs under the Covenant was poorly defined with considerable areas of concurrent competences see Sands and Klein *op. cit.* note 4 *supra*, at pp.11-13.

[17] see Cahier *Étude des Accords de Siège Conclus entre les Organisations Internationales et les États où Elles Résident* (Giuffre, Milan, 1959) at p.100.

With establishment of a permanent Secretariat, whose members were to be appointed and supervised by the Secretary-General, the League also saw the birth of a sizeable international civil service. The establishment of a permanent international civil service in this way was a considerable departure from the pre-existing practice of conference diplomacy. During the Paris Peace Conference Sir Maurice Hankey had proposed that the League be staffed from national civil services paid for by their respective governments, and coordinated by the Secretary-General. However that proposal was rejected in favour of an international service appointed by the Secretary-General with the approval of the Council, whose expenses should be apportioned between the members of the League.[18] Beyond this the Covenant made little reference to the role or status of the staff of the Secretariat, but importantly included a provision that members of the staff were to enjoy diplomatic privileges and immunities when engaged on official business. [19]

It was the first Secretary General of the League Sir Eric Drummond and the first Director of the ILO, Albert Thomas, who quickly established the enduring principles of an international civil service.[20] Both believed that for the their respective organisations to function effectively they needed to carry the confidence of the member States, and that this would be impossible unless they were "visibly independent of national pressures and prejudices".[21] In other words international civil servants had to serve not their national interests but the international interest

[18] Art.6 Covenant of the League of Nations

[19] *ibid.* Art.7 (4) – on which see chapter 5 *infra.*

[20] see Lemoine *The International Civil Servant – an endangered species* (Kluwer, The Hague, 1995) esp at pp.29-33

[21] See A Ali "The International Civil Service: the idea and the reality" in C.de Cooker ed. *International Administration* at I.1/4. See also Lemoine *op cit.* note 20 *supra* at ch.3

embodied in the respective organisations. Drummond, familiar with the traditions of permanence and political neutrality of the British civil service, envisaged a discrete and restrained role for the Secretariat to carry out the essential preparatory work to enable the decision-making organs of the League in which the member States were represented, and once such decisions were duly made, to execute them faithfully. Lemoine suggests that this role was intentionally set out in self-effacing terms, in order to reassure the concerns of the member States.[22] However Drummond was uncompromising in requiring members of the Secretariat pledge their loyalty to the sole authority of the League during their service.[23] This tradition of independence of members of the international civil service from national control, and loyalty to the organisation has been an enduring legacy of the League.

As to the status of the League itself, the Covenant makes no mention of its personality either in international law or municipal law. However it soon started exercising capacities which suggest that it enjoyed international personality, so for example in 1926 the Swiss Government concluded the *modus vivendi*[24] with the League which served as its headquarters agreement. In its first article the agreement stated that the Swiss Federal Government recognised that the League had "international personality and juridical capacity".[25] These words in this agreement, made between the League

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[22] *ibid.* at p.34

[23] Staff regulations prohibited members of staff from seeking or receiving instructions from any government or any authority external to the authority of the League. Furthermore an oath of loyalty was introduced by Drummond, on which the current oath of loyalty made by UN staff is based.

[24] See *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organisations* (UN Doc. ST/LEG/SER.B/11) Vol. II at p.134

[25] However some Member States were more cautious about the League's international personality. The UK Government for example was keen to point out that the League was not a super-State - see for example Fischer Williams "The Status of the League of Nations in International Law" *Chapters on Current International Law and the League of Nations* (1929) p.477-500

and a non-member State, and against the context in which the League had already undertaken action as an entity in its own right, can only be considered declaratory of its existing status in international law. In municipal law, personality was also quickly assumed by the League, simply in order to carry on its daily existence. It was able to register its ownership of property and to enter into contracts in its own name. This was a result of practical necessity since the alternative would have been to insist on the member States all being party to each transaction of the League.

Finally in this short historical review of the pre-1945 development of the international status of organisations, mention should be made of the Italian Court of Cassation case of *International Institute of Agriculture v. Profili.*[26] The Court found that the Institute was an international person, and this being so "its power of self-determination or autonomy, which includes that of arranging its own organisation and controlling the relations of the organisation" gave it immunity from suit before the municipal courts. The Court's conclusion that the autonomy of the organisation resulted in immunity will be examined in Chapter 4 (*infra*), but for now it is the Court's premise that the organisation was an international legal person, which is of greater significance. This was based on a consideration that, at the time two types of international administrative union existed under "international practice": one in which the organisation was entrusted to one of the member States; the other in which "the organisation remains autonomous and removed from the interference of any one State of the Union".[27] It was the finding that the International Institute of Agriculture fell into the second category which enabled the Court to conclude that it had international personality.

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[26] 1 February 1930, 5 ILR 413

[27] *ibid.*

2. The United Nations

The experience of the League clearly informed the negotiations for the establishment of the United Nations in many areas, including the provisions on the Secretariat. In addition to enhanced powers of the Secretary General, the Charter of the UN includes more detailed and specific obligations to ensure the independence of the Secretariat. In particular the first paragraph Article 100 provides:

> "In the performance of their duties the Secretary General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organisation. They shall refrain from action which might reflect upon their position as international officials responsible only to the Organisation."

Thus the duties of the Secretariat in this respect are not simply a matter of the staff Regulations as they had been in the League, but are now "constitutionalised" in the Charter.[28] Article 100(2) imposes the corollary obligation on the member States to respect the "international character" of the member of the Secretariat and not to seek to influence them in the discharge of their responsibilities. In addition, under Article 105(2) the staff are to enjoy such "privileges and immunities as are necessary for the independent exercise of their functions".[29]

The Charter also provides that, in the territory of each of its members, the Organisation shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes (Art.104). As will be discussed below this is usually

[28] discussed further at Chapter 5 *infra.*

[29] for more detailed discussion see Chapter 3 *infra.*

interpreted as requiring the grant of legal personality to the UN in municipal law[30] to enable it to contract, hold and dispose of property and to be party to legal proceedings. However the Charter says nothing about the international legal personality of the Organisation, although the question was raised during the drafting of the Charter at the San Francisco Conference on International Organisation. A Belgian proposal to include express provision by which the Member States recognised that the Organisation "possesses international status, together with the rights that this involves", was rejected on the basis that it was "superfluous" as it would be "determined implicitly from the provisions of the Charter taken as a whole".[31] The US delegation reported back to Washington that the omission of a provision relating to the international personality of the organisation, was based on the following political considerations:

> "The Committee which discussed this matter was anxious to avoid any implication that the United Nations was a 'super-state'. So far as the power to enter into agreements with States is concerned, the answer is given by Article 43 which provides that the Security Council is to be a party to the agreements concerning the availability of armed forces. International practice, while limited, supports the idea of such a body being a party to agreements. No other issue of 'international personality' requires mention in the Charter. Practice will bring about the evolution of appropriate rules as far as necessary." [32]

In any event the question was soon to be decided by the International Court of Justice in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations.*[33] The request essentially arose out of the murder in 1948 in Israel of the UN Mediator for Palestine, Count Bernadotte, and other UN agents. The Secretary-General

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[30] see for example the *Reparation* case (discussed *infra* at note 33 ff), as well as Article 1 of the 1946General Convention on the Privileges and Immunities of the United Nations.

[31] See (UNCIO CDoc.933, IV/2/42(2) p.8)

[32]The *Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, June 26 1945,* Department of State publication 2349, Conference 71, 1945, pp.157-158

[33] ICJ Reports 1949, p.174

put the question before the General Assembly as to whether in cases such as this, the international responsibility of a State was engaged by the injuries caused to the UN, and if so how the UN should proceed with such a claim. In the Assembly's Sixth Committee various positions were taken, some clearly felt that the UN currently did not have sufficient status in international law to make such a claim, and recommended that the question be referred to the International Law Commission with a view to it drafting an international convention on the issue.[34] Others felt that the Secretary-General might immediately be authorised to present the claims of the Organisation,[35] and the socialist States suggested that he pursue redress through the national courts of the relevant State.[36] However after full discussions the majority favoured requesting an Advisory Opinion of the International Court of Justice. The questions drafted by the Sixth Committee were contained in the Assembly's Request for an Advisory Opinion, which the Assembly adopted unanimously and without abstention.

The Court unanimously held that the Organisation had the capacity to bring an international claim against both a government (*de jure* or *de facto*) of a Member State and of a non-Member State, responsible for injuries to an agent of the Organisation in the performance of his duties, with a view to obtaining reparation in respect of damage caused to the Organisation. Where the Court divided was on the question of the Organisation's capacity to bring claims against States with view to obtaining reparation for damage caused to the victim or persons entitled through him.

[34] UN Doc. A/C.6/276

[35] UN Doc. A/C.6/279

[36] UN Doc. A/C.6/284

Before reaching its decisions on the first issue, the majority found it necessary to decide whether the Organisation had international personality, which it considered in terms of whether the UN was "an entity capable of availing itself of obligations incumbent upon its members".[37] It is interesting to note the question of personality was not expressly raised in the General Assembly's Request to the Court, though some of States in making observations to the Court made affirmative comments.[38] The Court based its affirmative finding on the provisions of the Charter. It held that the Organisation was more than just a centre for the coordination of national action, but that it was equipped with organs and given special tasks. It took into consideration: (a) the position of the member States in relation to the Organisation as spelt out in various provisions of the Charter; (b) the provision legal capacity, privileges and immunities in national law of the member States; and (c) the treaty-making powers of the Organisation under the Charter. The Court also took account of the practice of the Organisation, the politically important tasks of the organisation and the means available to achieve them. Finally the Court also singled out the position of the Organisation in contradistinction from its members under the General Convention on the Privileges and Immunities of the United Nations (1946).

The Court concluded the review of the capacities and status of the organisation, in the following terms:

> "... the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane ... it could not carry out the intentions of its founders if it was devoid of international personality. It must

[37] ibid, at p.178

[38] See for example Statements of Belgium, France and the UK, as well the statement made to the Court by counsel for the UN (ICJ Pleadings Series, 1949).

> be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."[39]

For the Court therefore personality could be implied by virtue of the principle of effectiveness from the intentions of the founders as encapsulated in the Charter, in its provision of functions, rights and duties.

However the Court was less clear as to the consequences of a finding of personality. It held that its finding of international personality meant that the Organisation "is a subject of international law capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims". Earlier the Court had made clear that "competence to bring an international claim is, for those possessing it, the capacity to resort to the *customary* methods recognised by international law for the establishment, the presentation and the settlement of claims" [emphasis added].[40] Thus it would appear that personality, once established, gives rise to rights subsisting in customary international law, rather than being solely reliant upon the capacities contained, either expressly or by implication, in the constituent instrument.

Finally in relation to this decision, the majority also appeared to have little difficulty with the notion objective character of the Organisation's international personality. Objective international personality in the court's view could be established in an organisation comprising "the vast majority of the members of the international

[39] ibid at p.179

[40] ibid. at p.177

community", and thus the organisation could bring its claims for reparations for injuries against non-member States, which, at that time, included Israel.[41]

3. International personality in practice

The Court's historical importance of the decision obviously was that it settled authoritatively that, in certain circumstances, an international organisation enjoy a measure of international personality. Despite the varying interpretations of the Court's decision which have been made in subsequent academic writings, this point has not been challenged. A restrictive view of the case might suggest that this finding might not easily be applied to other organisations, given the unique position of the United Nations and its central role in the maintenance of international peace and security, or , alternatively, that it might give rise to differentiation in the measure of personality accorded to the various organisations. However it would seem that most international organisations are now accepted as enjoying some degree of international personality, and few major problems arise on this issue in practice.[42]

It is true that whilst constitutive treaties of international organisations will quite frequently make reference to the personality of the organisation within municipal law, an express provision on international personality is comparatively rare.[43] However it is

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[41] see p.185. It should also be noted that the part of the decision concerning the capacity of the Organisation to bring an international claim against either a member State, or a non-member State, for damage caused to itself, was unanimous and the separate opinions provide little alternative reasoning in this respect.

[42] In this respect it is interesting to note in the question of the international personality of the European Union (as opposed to that of the European Communities) some fundamental issues as to the nature of European integration have been raised. – for an introduction see Macleod, Hendry and Hyett *The External Relations of the European Communities* (Clarendon, Oxford, 1996) at pp. 29-36

[43]For examples of organisations whose constituent treaties expressly provide for their international personality see ICSID, IFAD, and the AfDB. Most recently under Article 2 of the Agreement on the Privileges and Immunities of the International Criminal Court of 9 September 2002, the States parties recognize the international legal personality of the Court, see http://www.un.org/law/icc/apic/apic(e).pdf.

submitted that where such express provisions exist, they are declaratory rather than constitutive, since the constituent instruments of most of the larger and most significant organisations do not contain express provisions on international personality - *a contrario* interpretations drawn from the absence of an express provision would clearly be inappropriate (being contrary to the finding of the ICJ in the *Reparation* case).

Discussion of international personality by international organisations in practice tends to centre on the enjoyment of three main capacities international law: (i) the capacity to enter into treaties in their own name; (ii) the capacity to conduct diplomatic relations; and (iii) the capacity to make international claims for violation of their rights.

(a) Treaty-making powers

In practice international organisations have been able to enter into agreements governed by international law, and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between Organisations,[44] though not yet in force suggests that there is widespread acceptance of the treaty-

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Under the "modus vivendi" agreements between Switzerland and a number of the organisations whose headquarters are established on its territory, Switzerland expressly recognises the international personality of the latter.

It might also be pointed out that international organisations have on occasion interpreted the ambiguous phrases such as "legal personality" , or "juridical personality" as intending international personality rather than personality in municipal or private law - see Morgenstern *Legal Problems of International Organisations* (Grotius, Cambridge, 1986) at p.20, where she quotes the opinion of the UN Office of Legal Affairs in relation to the UN Demographic Centre in Bucharest see [1975] UNJYB p.159.

[44] 25 (1986) ILM 543. See Zemanek "The United Nations Conference on the Law of Treaties between States and International Organisations: the unrecorded history of its 'general agreement'." in Bocksteigel *et al.* (ed.s) *Festschrift für Ignaz Seidl-Hoheveldern* (1988) 665

making capacity of international organisations.[45] Most organisations demonstrate such capacity at least by entering into a Host State Agreement, and many organisations will enter into other agreements governed by international law in the course of their performance of their functions. Thus, for example, the European Communities have a highly developed practice on treaty-making, and have entered into substantial numbers of treaties, on the broad range of subjects in which they have competence.[46]

(b) Powers of legation

In relation to the capacity of international organisations to enter into "diplomatic" relations, many of the larger organisations demonstrate a capacity of passive legation in receiving representatives from member and non-member States, as well as from other international organisations. What is interesting is that such powers are not usually specified in the constituent instruments of organisations, though recognition can sometimes be implied in provisions in the HQ agreements of international organisations.[47] The more general question arises therefore as to whether the powers of legation of an international organisations are implied from express treaty provisions, or whether they derive from customary international law.

The 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character was intended to codify and make uniform the law relating to privileges and immunities of permanent missions to the

[45] This might be compared with restrictive the positions on this question previously taken by Kunz "Privileges and Immunities of International Organizations" (1947, 41 AJIL 828) and by Kelsen *The Law of the United Nations* (Stevens, London, 1950) at p.

[46] See *The External Relations of the European Communities* I.MacLeod, I.Hendry and S.Hyett (Oxford, 1996) at pp.39-74

[47] Such provisions are of course only declaratory as the HQ agreement could not be constitutive of such capacities of the organisation.

universal organisations. However in the absence of the agreement of the host States of the larger organisations to its terms, it seems unlikely to realise this aim. Interestingly the Convention appears to take the view that powers of legation of international organisations derive from customary international law.[48]

As Morgenstern points out, the fundamental difference between the powers of legation of international organisations, as opposed to those of States, is that the relations of organisations with States must to some extent involve coordination and cooperation with the host State.[49] This may require an accommodation between the rights of the organisation to conduct its relations with other States independently, and the rights of the host State to protect its own interests, the chief of which appears to be national security.[50] In contrast to diplomatic relations between States, the host State's remedies are less explicitly established, though there is a recognition that the host State is entitled to take measures necessary for its own protection.[51] Practice suggests that where a host State can establish that a mission or members of a mission to an international organisation constitute a genuine threat to its national security, it should be entitled to insist on the withdrawal of the persons or missions in question.[52] Thus as

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[48] The last preambular paragraph states "the rules of customary international law continue to govern questions not expressly regulated by the provisions of the present Convention" - for text see (1975) 69 AJIL 730. For commentary see "La Conférence et la Représentation des Etats dans leurs Relations avec les Organisations Internationales" A. El-Erian 1975 AFDI 445.

[49] *op. cit.* note 43 *supra*, at pp.10-13

[50] In relation to the United Nations, some US measures for the protection of national security at UN HQ in New York have proved controversial - see Zoller "The National Security of the United States as the Host State of the United Nations" (1989) 1 Pace YIL 127. See also Reismann, M., "The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion" (1989) 83 AJIL 519.

[51] See article 77(4) of the 1975 Vienna Convention

[52] Note the absence of contradiction of the US assertion of its right to invoke national security in relations with the UN as host State, before the Committee on Relations with the Host Country 42 UN GAOR Supp. (No.26) at para.31 UN Doc. A/42/26 (1987). In contrast to the 1963 Vienna Convention on Diplomatic Relations provisions, the 1975 Convention contains no provisions whereby the host State can make a declaration of *persona non grata*. This was one of the reasons for its rejection by the major host

the international organisation is an international person, but without the material attributes of a State (i.e. territory and population), the system of bilateral diplomatic relations based upon reciprocity between sovereign States, has required modification, to reflect the tri-partite, or indeed multi-partite, relationships between the international persons involved, not all of which are equal.[53]

(c) powers to make or receive international claims

The capacity of international organisations to make international claims was of course the basis of the Advisory Opinion in the *Reparation* case,[54] as has been said was found to be a consequence of personality. The capacity of international organisations to make claims and to be involved in international arbitral and even judicial proceedings is broadly accepted. However the question of the converse international responsibility of international organisations in relation to their international legal obligations is more controversial and the law on this topic remains underdeveloped in many respects.[55]

States see JG Fenessy "The 1975 Vienna Convention on the Representation of States in their relations with International Organisations of a Universal Character" (70 (1976) AJIL 62, at pp.67-8). Zoller states that the difference in the position of a host State, when compared with that of a receiving State in relation to the members of a foreign diplomatic mission, is that when national security is at stake, the host State must justify its position by invoking cogent and relevant facts, i.e. the individual State must account to the collectivity for its actions (cf Art.9 Vienna Convention on Diplomatic Relatrions) (*op. cit.* note 50 *supra* at p.155).

[53] It was the failure fully to consider the complexities of such relations which led to the failure of the 1975 Convention to attract its widespread acceptance, particularly by the major host States - see Ritter 1975 AFDI 471, and Fenessy *op cit* at n.52 *supra*. In this respect note the limited place of reciprocity in diplomatic relations of international organisations see Zoller *op.cit.* note 50 *supra* at p.154

[54] For details of the claims by the UN in relation to this case and other missions see "The practice of the UN, specialised agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: Study prepared by the Secretariat" 1967 vol II YBILC p.155, at p.218 para.52. The practice of the UN in this respect is not extensive, but the widespread acceptance of the *Reparation* Opinion suggests that the capacity of the UN to present an international claim would not in itself be challenged. The same Study indicates that of the Specialised Agencies only UNESCO has made such a claim, at that time (see p.302 para.23).

[55] See for example Wickremasinghe and Verdirame "Responsibility and Liability for Violations of Human Rights in the course of UN Field Operations" in C.Scott (ed.) *Torture as Tort* (Hart, Oxford,2001) p. 465.

Whilst some practice of the United Nations is available,[56] the topic is generally under-researched though it might be noted that the ILC has recently taken up work on this topic.

A particularly problematic aspect of the topic is the opposability of the organisation's personality to third parties, and in particular the question as to whether it shields the member States from individual liability for acts or omissions of the organisation. The problem is particularly apparent in relation to parties who are not members of the organisation. As has been observed most international organisations are established by treaty, and it is of course a well established rule that "a treaty does not either create obligation or rights for a third State without its consent".[57] As noted above, the objective character of the United Nations was the subject of a specific and unanimous finding by the International Court of Justice.[58] Nevertheless in practice where private persons have sought to recover from the member States of an international organisation for losses that they claim to have incurred by default of an international organisations, they have tended to be unsuccessful.[59] On the other hand States have

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[56] For example the UN settled claims presented by the governments of Belgium, Greece, Luxembourg, Italy and Switzerland (a non-Member State) for damage suffered by their nationals during the UN operations in the Congo in 1965/6, recorded in various Exchanges of Letters: 535 UTS 191, 565 UNTS 3, 585 UNTS 147, 588 UNTS 197 and UNTS 564 UNTS 193. See Salmon "LesAccords Spaak-U Thant du février 1965" (1965) 11 AFDI 468.

[57] Article 34 Vienna Convention on the Law of Treaties

[58] The reason given for this finding appears to be the number of States which established it (at p.185 – "fifty States, representing the vast majority of the members of the international community had the power, in conformity with international law, to bring into being an entity possessing objective international personality"). If this fact alone is decisive it may be that all universal, or almost all universal, organisations should have objective international personality. However it is also clear that since that time regional organisations have also conducted considerable external relations.

[59] See the *International Tin Council* cases in the UK Courts (culminating in the House of Lords judgment at [1989] 3 All ER 523) and the ECJ ([1990] ECR I –1797), and also the cases *Westland Helicopters* dispute with the Arab Organisation for Industrialisation, see 80 ILR 595, 622, and 657, also note 118 *infra*. For comments see R. Higgins "The Legal Consequences for Member States of the Non-Fulfillment by International Organisations toward Third Parties" (1995) 66 Ann. IDI 249-89 and 373-420.

occasionally sought to bring claims against the member States of international organisation for activities carried out within the organisations, but so far these efforts have proved inconclusive. [60]

4. Doctrinal writings on international personality

Since the *Reparations* case most doctrinal writing on the international personality of international organisations has been devoted to establishing the source of personality and the consequences which flow from there. Broadly speaking the writers divide into two camps. For the first group personality is to be implied from the constituent instrument of an organisation, whilst for others personality is derived from customary international law. For the former grouping, personality can only be derived from interpretation of the constitutive instrument and is a formal rather than a substantial quality which does not, in itself, increase the rights and duties of the organisation. Whereas for the latter grouping the quality of being an international person brings with it a variety of rights and duties, which are attributable to all international organisations but may be limited by the terms of their constitutive instruments or by their factual circumstances. An important practical issue for this latter group is the opposability of the personality of the organisation to non-member States.

(a) The "delegated powers" approach

The most restrictive approach to this question is sometimes called the "delegated powers" approach, since it insists that the powers of international organisation derive solely from their constitutive texts, and that these are primarily provided express

[60] See for example the *Lockerbie* cases brought by Libya against the UK and USA in the International Court of Justice; also the *Use of Force* cases brought by the Federal Republic of Yugoslavia against the member States of NATO in relation to the use of force in connection with the Kosovo campaign.

provision. Other powers may only be implied where they are strictly "necessary ... for filling lacunae in specific grants of power".[61] Kelsen, writing in 1950, considered the powers of the UN primarily through analysis of the express provisions of the Charter. Through this method he established that the UN itself (rather than its member States individually) may be the subject of international rights and duties. The UN could therefore make international claims and be responsible for unlawful acts which it commits, provided that the organisation has organs competent to carry out the duties and exercise the rights and competences of the organisation.[62] However apart from this procedural capacity in relation to the bringing of international claims, Kelsen appears less confident about the legality of any further content of the concept of international personality.[63]

Such a restrictive approach may be criticised for not offering sufficient explanation of the reality of the practice of international organisations. International organisations have frequently exercised powers which are not expressly contained in their

[61] See the partly Dissenting Opinion of Judge Hackworth in *Reparation* (1949 ICJ Rep. 198). Judge Hackworth deduced that the right of the UN to make claims for damage it had suffered, against States, on the ground that such a power was necessary and consistent with the specified powers of the Organisation. However when it came to the Organisation espousing claims in respect of damage caused to one of its agents (as opposed to making claim in its own right), Judge Hackworth found that the necessity for such power could not be established, since the victim's State of nationality would be in a position to exercise diplomatic protection in respect of the victim (notwithstanding the international nature of his employment). Judge Hackworth therefore held that there was no need to grant additional powers to the Organisation in this respect.

[62] See Kelsen *The Law of the United Nations* (1951) p.329.

[63] For example he takes a very restrictive view in relation to the treaty-making capacities of the UN, stating that it only has such treaty making powers as are expressly provided in the Charter, p.330, though he recognises that the Organisation has in fact entered into a number of international agreements that do not have specific authorisation. Kelsen also suggests that the UN may have the right of active and passive legation as a result of its international personality, emphasising that the Charter does not provide for this, although it appears to have developed in the practice of the organisation. Cf. Rama-Montaldo "International Legal Personality and Implied Powers of International Organisations" ((1970) 44 BYIL 111 at p.114 n.5) interprets Kelsen's as an essentially "material" view of personality, but that the extent of personality for him is less than for others who take a "material" view. Muller too states that Kelsen holds a material view, and categorises him with Seyersted (*International Organisations and their Hosts States*(Kluwer, The Hague 1996) at p82.

constitutive instruments and which could hardly be said to arise by any strict test of necessary implication.[64]

(b) The "implied powers" approach

The "implied powers" approach also sees the text as the basis of all powers of an organisation, but takes a more liberal attitude in relation to implied powers. For Seidl-Hohenveldern, a proponent of this approach, all powers and capacities exercised by international organisations which are not expressly provided by their constituent instruments, are explained as implied powers, rather than powers inherent in international personality. On this view therefore personality may be established by the exercise by an organisation of certain powers, such as treaty-making, legation and so on rather than *vice versa*.[65]

Further, powers may be implied where they can be derived by means of an extensive interpretation of the constituent instrument, in order to give it *effet utile* in accordance with the purposes of the organisation. As an alternative he suggests that, by analogy with national constitutional interpretation, which may go beyond the written text of the "constitution", they may be exercised by reference to the "customary international

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[64] See for example the ICJ Advisory Opinions on *Status of SW Africa* 1950 ICJ Rep. 128 at p.137; *Effect of Awards of Compensation made the UNAT* 1954 ICJ Rep. 47 at p.56-61; *Certain Expenses of the UN* 1962 ICJ Rep. 151 at p.163. See also Sands and Klein *op. cit.* note 4 *supra*, at pp.470-475; and Weissberg *The International Status of the United Nations* (1961) at p.25.

[65] Though he restricts the endowment of international personality to those organisations of an *iure imperii* quality (see *Corporations in and under International Law* (Grotius, Cambridge, 1987) at p.72), thus precluding inter-State enterprises from possessing the status of international persons. This view though it has initial attraction in explaining the personality and immunities of international organisations, has not been widely accepted, largely because the distinction of an *actum jure imperii* from an *actum iure gestionis* is not itself an easy distinction. Thus it tends to create or at least transfer problems rather than provide solutions. (see Higgins *op.cit* note 59 *supra* esp. the responses to questionnaire (esp. to q.4) at pp. 301-371.

law" of the organisation in question.[66] This "customary international law" he suggests may be established by the practice of an organisation in its actual exercise of such powers coupled with their conviction that such acts are a legitimate exercise of their rights. It is therefore not clear precisely in what sense Seidl-Hohenveldern uses the term "customary international law". Whilst the term may suggest a source of law independent of the constitutive instrument, it may be that in fact what he referring to is the interpretation of the written instrument in the light of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[67] In any event the organisation is thereby enabled to exercise a potentially broad degree of *compétence de la compétence.*

For Seidl-Hohenveldern the only limitation to such implied powers, and even those exercised under the "customary international law" of the organisation, is that they are justified by reference to the aims of the organisation, though these are interpreted broadly for this purpose. Therefore he concludes that an international organisation is entitled "to act without specific authorisation to that effect, unless the constituent instruments of an organisation declare *expressis verbis* that the organisation shall not act in a certain manner or unless the act cannot be justified as necessary to fulfil the aims of the organisation".[68] Despite the breadth of these conclusions it should be observed that the actual powers of the organisation appear not to be increased by virtue of the fact of personality, but rather by virtue of interpretation of the constituent

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[66] See "The Legal Personality of International and Supranational Organisations" 21 (1964) Rev. E.D.I. 35 at p.39

[67] Article 31(3)(b) of the Vienna Convention on the Law of Treaties which has an important role in the law of all organisations. This may provide a link back to the constitutive treaty, which in keeping with the "implied powers approach" to international personality.

[68] *op. cit.* note 66 *supra*, at p. 40

instrument, over which, as with any other treaty between States, the States Parties firmly remain the masters.[69]

A slightly different version of the implied powers approach is taken by Weissberg.[70] He finds that theoretically an international organisation cannot take on new functions, and it can only use powers not expressly provided for under the constitutive instrument in order to administer its original functions. However he concedes that in practice this distinction is not realistic. He suggests that in fact what occurs when an express provision is interpreted or applied in a specific situation is that additional or unforeseen functions are assumed by the organisation, although they are derived from the original functions. He finds support for such an approach by analogy with the development of national constitutional law. He thus sees a division of the functions of an international organisation, between the "primary functions" specifically delegated to the organisation and enumerated in the constitutive instrument, and the derivative or secondary functions, of an implied nature and auxiliary in scope. These derivative functions follow from the existence of the primary functions and the possession of international legal personality.[71]

However he does not identify in terms the secondary functions to which he is referring at this point. He later identifies the following as contributing to the development of international personality: the capacity to bring international claims; implied treaty-making powers (which may even be delegated to subsidiary organs of the UN); the

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[69] see *Corporations in and under International Law* (Grotius, Cambridge, 1987) at pp.75-81

[70] *The Legal Status of the United Nations* (New York and London, 1961), Chapters 1 and 2

[71] *ibid.* at p.24

operation by the United Nations of military forces, in both enforcement action and peacekeeping activities; the capacity to administer territory; the rights of active and passive legation; the use of a flag; the registration of treaties; and the ability to possess and register vessels. There is perhaps a danger here of the type of circular reasoning against which Sands and Klein warn,[72] e.g. identifying the existence of personality from limited treaty-making powers, and then implying a full treaty-making power from the finding of international personality. It may be however that what Weissberg intended was that the process is evolutive, with the various elements interacting and developing in the light of changing circumstances.

(c) The "inherent powers" approach

The best known proponent of the "inherent powers" approach is Syersted, who is also the author for whom the content of international personality is the broadest.[73] Seyersted practically equates the position of international organisations endowed international personality, to that of States, suggesting that the full range of sovereign powers is inherent in international personality.[74] The only legal limitations on the exercise of such powers by an international organisation are those matters which it is precluded from performing by its the constitutive instrument or under general international law. Whilst specific prohibitions on particular acts by organisations in their constitutive instruments are not common, there may be restrictions on the purposes which an international organisation can pursue, or on the competences vested in its organs. Further, Seyersted holds whilst an international organisation has an

[72] *op. cit* note 4 *supra* at p.474

[73] See "International personality of international organisations - do their capacities really depend upon their Constitutions?" (1964) 4 Ind JIL 1, and "Is the international personality of intergovernmental organisations valid *vis à vis* non-members?" (1964) 4 Ind JIL 233

[74] For Seyersted such differences as exist are differences of fact and degree rather than law

"organic jurisdiction" over its organs and membership, beyond this jurisdiction it cannot impose obligations upon its Member States (or non-Member States), without a specific legal basis either in the constitutive instrument or by some other authorisation by the States concerned. Other limitations on the organisation's powers to perform sovereign or international acts are purely limitations in factual circumstances and/or resources.

Seyersted claims that these rather radical conclusions are based on and required by the practice of organisations, and rather than legal theory. It is this which leads him to reject both the delegated powers and the implied powers approaches. However it must be remarked that few other writers go so far, in drawing conclusions from the practice. Though others may agree that the international personality has an objective character and a material content, the main criticism of his position is simply that he claims too much. To claim the totality of the rights and duties of sovereign States for every international organisation as being a necessary consequence of personality, results in "an arbitrary and artificial transfer of concepts from one sphere to the other, and not least, the concept of sovereignty".[75] Seyersted's examination is largely based on the UN and League of Nations, and whilst this may be understandable given the importance of these organisations, it is an insufficient base on which to generalise for all international organisations, the variety of which is vast. Furthermore it does not accord with the specific distinction drawn by the ICJ in the *Reparation* case, between the position of States and that enjoyed by international organisations, nor with its finding that all international persons did not necessarily have the same capacities.

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[75] Rama-Montaldo "International Legal Personality and Implied Powers of International Organisations" (1970) 44 BYIL 111 at p.120

A further criticism leading from this is that Seyersted does not take into account the functional nature of the international organisation. He acknowledges that the organisation is not in the position of a sovereign State, in that it does not have free choice in relation to the purposes it may pursue as these are defined by its constitution. However he claims that the organisation then has available to it complete freedom of choice as to what means it will adopt to achieve those purposes.[76] Rama-Montaldo illustrates the rather different approach of the International Court of Justice in *Certain Expenses* which justified the legality of the operation of UN forces, not by reference to powers inherent in personality but by reference to the functions of the organisation, given its purposes and the "not unlimited" powers available to the organisation by which these purposes could be effected.[77]

However whilst the claims for inherent powers made by Seyersted may be too large, there remains the possibility that a more limited selection of rights and duties are inherent in international personality. Rama-Montaldo finds them to be limited those necessary for the recognition of organisations as distinct entities from their member States:

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[76] *op. cit.* note 73 *supra* at pp.48-50

[77] Further questions are raised in the debate concerning the possibility of judicial review of Security Council actions, in relation to the *Lockerbie* case before the ICJ. Bedjaoui for example maintains that there is legitimate scope for the International Court of Justice to review the means which the Council adopts in order to restore or maintain international peace and security, though not determinations of the Security Council under Article 39 (- See Bedjaoui *The New World Order and the Security Council - Testing the Legality of its Acts* (1994) at p.53). On the other side of that debate there are few who would suggest that the range of activities open to the Security Council is unlimited, the question concerns, instead, what organ has or should have the power of appreciation or review.

> "(a) This right to express its will through the different legal ways found in the international order for producing legal effects on the international plane. This right constitutes the capacity of international organisations to perform international acts, understanding by these the different legal ways of manifesting the will of the organisation, which manifestation is capable of producing particular legal effects and aims at creating, modifying, conserving or extinguishing international legal relations. Thus international organisations bilateral acts (treaties) and unilateral acts, whatever their form, as for example, promise, notification, recognition, renunciation or claim ...
> (b) Rights which enable the organisation to manifest itself as a distinct entity and make possible relations with other international persons. Within this group are to be included: active and passive *jus legationis*; recognition of other subjects of international law and their governments; and the right to use distinctive signs, flags, etc."[78]

It is submitted that the views of Rama-Montaldo on this subject represent a doctrinal approach which conforms with the practice of organisations.[79] It seems unlikely that the notion of personality in itself has no legal consequences. If this were true one might ask why in the *Reparation* case the ICJ, and those who made representations before the Court, felt that it was necessary to raise the issue of personality at all since it was not one of the questions put to it by the General Assembly. They might simply have relied on a strict doctrine of delegated powers, as Judge Hackworth did. As Higgins says the objective view of personality (i.e. that it exists by virtue of rules of customary international law on the establishment of organs not subject to the jurisdiction of one State) accords with the "objective reality" of the existence of international

[78] Rama Montaldo *op. cit.* at pp.139-140

[79] In relation to the treaty-making power of international organisations, see Zemanek *op.cit.* note 44 *supra* at p.671. He states that article 6 of the *1986 Vienna Convention on the law of treaties between States and International Organisations or between International Organisations*, which states that "The capacity of an international organisation to conclude treaties is governed by the rules of that organisation", must be read in the light of the 11th preambular paragraph which notes "that international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes". He concludes that the most plausible interpretation of the two provisions, is that the treaty-making capacity of international organisations recognised in the preambular paragraph is inherent in customary international law, whereas article 6 merely provides a limit on that inherent power.

organisations as actors on the international scene.[80] This view provides an affirmative (and realistic) answer to the question of whether the personality of international organisations can be opposable to third parties (i.e. both non-member States and private parties). However it does not pre-judge questions responsibility, since on this view the rights inherent in personality are simply those procedural capacities which enable relations between States and international organisations to take place, rather than imposing on the substance of those relations.

B. The Status of International Organisations in Municipal Law

1. The relationship of international personality and legal personality in municipal law

In contrast to the wealth of doctrinal writing on the nature of the international personality of international organisations, the status of organisations in municipal law has attracted far less comment. It is widely accepted that personality must operate at different levels if an international organisation is to perform activities on levels other than that of public international law. Thus for example an organisation will need to employ staff, to occupy premises from which to operate, and, at a minimum, to purchase basic goods and services. That an organisation should be able to carry out such activities for itself, without having to obtain the agreement of each member State for each such activity, has long been recognised as necessary for the effective achievement by the organisation of its functions.[81]

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[80] Higgins *op.cit.* note 59 *supra*, at p.386

[81] As an example of the quotidian necessity of a degree of personality in municipal law, Cahier notes that the League of Nations was registered as the proprietor of the site of the Palais des Nations even before a formal agreement had been reached between the League and the Swiss Federal Council, recognising the legal personality of the League. *op cit.* note 17 *supra* at p.91

In the constitutive texts of international organisations established since 1945, it is quite usual for a provision declaring that an international organisation shall have personality in municipal law, and requiring member States to give effect to such personality. Although such provisions may put the matter beyond doubt, given that the international personality of organisations is broadly accepted, it may be questioned whether such provisions are strictly necessary. It might be said that international personality merely requires its own reflection in municipal law, and that these provisions are, therefore, simply declaratory rather than constitutive of legal personality.[82] Such provisions appear to be included in constitutive treaties *ex abundante cautela*.[83] It follows also that the non-inclusion of such a provision should not necessarily be taken (*a contrario*) as a denial of legal personality, but rather that this will have to be determined from the circumstances of each case.

2. Legal Personality in municipal law

(a) Where the forum State is a member of the organisation

The mechanics of the translation of this international requirement on member States to accord an international organisation legal personality in their municipal law, will depend upon the means of reception of international law into the local system. If, as has been submitted, the international personality of international organisations exists in

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[82] see J.-F. Lalive "L'immunité des juridiction des états et des organisations internationales" (1953) 84 *Rec. des Cours* 205, at pp.306-312: also Dominicé "L'imunité de juridiction et d'exécution des organisations internationales" (1984) 187 *Rec. des Cours* 145 at p .165: and Duffar *Contribution a l'étude des privilèges et immunités des organisations internationales* (LGJD, Paris, 1982) at p.16

[83] See Yuen-li Liang "The Legal Status of the United Nations in the United States" 2 (1948) ILQ 577, at p.584, who finds that "...the concept of legal personality of international organisations should be written into international instruments, not because of theoretical or doctrinal soundness, but because it has substance in the context of municipal law. A few words may thus be used to supply a wealth of meaning which would otherwise be very difficult to convey."

customary international law, then this should be reflected in the municipal legal systems of most States, since customary international law forms part of the body of municipal law in most legal orders, without any special mechanism for incorporation into municipal law.[84] If on the other hand personality only existed by virtue of a treaty provision, then in dualist States, before an international organisation could avail itself of personality in the domestic sphere the treaty would have to be incorporated into the municipal legal system by means of legislation.[85] In any event, however, it is essential, as Jenks points out, that the international law basis of the organisation is recognised, and that municipal law is not considered in any way as constitutive of the organisation. He counsels:

> "... it is as inherently fantastic as it is destructive of any international legal order to regard the existence and extent of legal personality provided for in the constituent instrument of an international organisation as being derived from, dependent upon and limited by, the constitution and laws of its individual member States."[86]

In practice the constitutive instruments of international organisations, will usually choose one of two main formulations to require the enjoyment of personality in municipal law, either:

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[84] See Dominicé and Voeffray "L'application du droit international général dans l'order juridique interne" in Eisemann (ed.) *L'intégration du droit international et communautaire dans l'ordre juridique national* (Kluwer, The Hague, 1996) at 51-63

[85] As will be shown later an alternative to this may be that provided an organisation has been accepted as a legal person in the legal system of State which the forum State recognises, then by principles of private international law, the personality of the organisation may be recognised by the forum. It is however submitted that this is a somewhat artificial approach, it being preferable to consider an international organisation on its own terms i.e. as a question of international law. The variation of this approach applied by the House of Lords in the *AMF v. Hashim (No.3)* case (see below), by which the Court recognised an international organisation as a foreign corporation (in a manner similar to that of a foreign private law corporation), shows the dangers of this whole approach if not very carefully reasoned.

[86] Jenks "The Legal Personality of International Organisations" XXII (1945) BYIL 267 at pp. 270-1. It should be noted that though he speaks here of "personality provided for in the constituent instrument", in the earlier part of the sentence quoted he refers to the attribution of personality by the constituent instrument or by customary international law.

(i) in the mode of Article 104 of the UN Charter, that the organisation in question "shall enjoy such capacity in municipal law as is necessary for the exercise of its functions and the fulfilment of its purposes";[87] or

(ii) that the organisation "shall possess full legal or juridical personality, including the capacities (a) to contract, (b) to acquire and dispose of moveable and immoveable property, and (c) to institute legal proceedings".[88]

However despite their differences, and the apparently more limited formulation relating to functional necessity, in practice there appears to be little to difference between them.[89]

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[87] See for example the ITU (art.17 International Telecommunication Convention 1982, 33 UKTS(1985)); WHO (artXV (WHO Constitution 1945 (as amended 1976) 14 UNTS 185); WIPO (art.12 Convention establishing the World Intellectual Property Organisation 1967, 828 UNTS 3); WMO (art. 27 of the WMO Constitution 1947 (as amended 1979 and 1983) 77 UNTS 143); OAS (art. 139 Charter of the OAS 1948 (as amended), 119 UNTS 4); International Institute of Refrigeration (art.XXIX of the Agreement concerng the International Institute of Refrigeration 1954, 826 UNTS 191). The status of ICAO has a variation in its wording (see art.47 of the Convention on Civil Aviation 1944, 84, UNTS 389), personality necessary for the performance of its functions is recognised, but full juridical personality is granted wherever this is compatible with the constitution and laws of the State concerned. However Jenks suggests that no conclusion can be drawn from the inclusion of the additional words, and that they were added to overcome certain difficulties within US law on multiple incorporations (*op.cit.* note 80 *supra* at p. 271).

[88] See eg. African Development Bank (art.51 Agreement establishing the African Development Bank 1963, for consolidated amended text, see UKTS 58 (1990)); Asian Development Bank (art. 49 Agreement establishing the Asian Development Bank 1965, 571 UNTS 123; Caribbean Development Bank (art. 23 Agreement establishing the Caribbean Development Bank 1969, 712 UNTS 217); Council of Europe (art.1 of the General Agreement of the Privileges and Immunities of the Council of Europe, 250 UNTS 12); Inter-American Development Bank (art.XI s.2 I-ADB Agreement 1959 (as amended), 389 UNTS 69); IBRD (art.VII s.2 Articles of Association of the IBRD, 2 UNTS 134); IDA (art.VIII s.2 Articles of Agreement of IDA, 439 UNTS 249); IFC (art.6 s.2 Articles of Agreement of the IFC, 264 UNTS 117; ILO (see art 39 of the Constitution of the ILO 1919 (as amended), UKTS 47 (1948)); IMF (art.IX s.2 Articles of Agreement (as amended), 1 UNTS 39); International Coffee Organisation (art 23(1), International Coffee Organisation 1983, 1333 UNTS 119).

[89] Thus Article 104 of the UN Charter provides that "the Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". However in seeking to give more flesh to this provision, Article I section 1 the General Convention on the Privileges and Immunities of the United Nations 1946 states that the organisation shall have "juridical personality and the capacity (a) to contract, (b) to acquire and dispose of immoveable and moveable property and (c) to institute legal proceedings: 1 UNTS 15.

The different provisions of national law concerning the juridical status of international organisations have in general not caused difficulties in the legal systems of their member States. In monist States treaty provisions of the type considered in the preceding paragraph (whether derived from constitutive treaties, multilateral treaties on privileges and immunities, or host State agreements) may be applied directly in the municipal legal system.[90] A number of the Northern European dualist systems re-enact the text of the relevant treaty provisions in their incorporating legislation.[91]

In the United States the federal International Organisations Immunities Act[92] enables the President by Executive Order to provide *inter alia* that an international organisations in which the US participates has the powers to contract, to acquire and dispose of real and personal property and to institute legal proceedings. In the case of the UN, the Executive Order is probably simply declaratory in this respect, since as Article 104 of the Charter has been found to be self-executing.[93]

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[90] For a description of how this question is dealt with in the Dutch legal system in respect of organisation of which the Netherlands is a host State, see Muller *International Organisations and their Host States* (Kluwer, Dordrecht, 1995) at pp.111-116. Though Dutch treaty practice shows some variation as to the formulation, there appears to have been no major difficulties in giving effect to personality in local law. In relation to France, Duffar notes how host State agreements have changed from recognition of "personalité civile", which apparently limited the scope of personality in local law only to capacities to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings, to a recognition in more recent agreements of a fuller notion of personality of international organisation, reflecting also its international character, in formulations such as "l'agence jouit de la *personalité juridique* et possède *en particulier* la capacité a) de contracter, b) d'acquérir des biens immobiliers et mobiliers et d'en disposer, c) d'ester en justice", see Duffar *op.cit.* note 82 *supra* at p.15.

[91] In this respect see the German Act of 22 June 1954 (as amended) (for English translation see *UN Legislative Series, vol. II* at p.25 (ST/LEG/SER.B/11); Norwegian Act of 19 June 1947 (*UN Legislative Series, vol. I*, at p.72, ST/LEG/SER.B/10); Swedish Act of 10 July 1947 (as amended) (*UN Legislative Series, vol. I*, at p.72, ST/LEG/SER.B/10).

[92] 22 USC 288

[93] See *Curran* v. *City of New York*, (Supreme Court of Queen's County) 77 NYS 2d 206; *Balfour, Guthrie and Co Ltd v. United States* (US District Court, Northern California) 90 F.Supp. 831, 17 ILR 323.

The International Organisations Act 1968 of the United Kingdom provides that an international organisation of which the UK is a member may have conferred upon it, by secondary legislation, "the legal capacities of a body corporate". Similar terminology is used by a number of Commonwealth States.[94] This phrase has been criticised as being ambiguous or tending to ignore the intergovernmental nature of international organisations,[95] and as it has been so widely used further consideration is merited.

The phrase was adopted for the first time in this context in the Diplomatic Privileges Extension Act 1944 (a predecessor to the 1968 Act), which was introduced primarily in order to give effect to UNRRA resolutions calling for the jurisdictional and fiscal immunities to be granted to UNRRA officials. Marston, detailing the legislative history of this provision,[96] suggests that from the very first there was a division of opinion as to whether the common law (of which, of course customary international law forms a part)[97] might consider an international organisation as a legal person, or whether legislation was necessary in order to give it personality in English law. In fact when it

[94] Including the following: Barbados - s.6(2)(a) Diplomatic Immunities and Privileges Act 1967 (1967 UNJYB); Canada - s.5 Foreign Missions and International Organisations Act 1991 (c.41 1991); Fiji - s.6(2)(a) Diplomatic Privileges and Immunities Act 1971 (1971 UNJYB 7); Guyana - ss.10(2)(a) and 12(2)(a) Privileges and Immunities (Diplomatic, Consular and International Organisations) Act 1970 (1970 UNJYB 12); Jamaica - s.6(2)(a) Diplomatic Immunities and Privileges Act 1964 (1964 UNJYB 5); Kenya - s.9(2)(a)Privileges and Immunities Act 1970 (1970 UNJYB 18); Malawi s.691)(a) Immunities and Privileges (Extension and Miscellaneous Provisions) Ordinance 1964 (1964 UNJYB 13); Malta - s.5(2)(a) Diplomatic Immunities and privileges Act 1966 (1966 UNJYB p.6); New Zealand - s.9 Diplomatic Privileges and Immunities Act 1968 (1969 UNJYB 4); Seychelles - s.12(2)(a) Privileges and immunities (Diplomatic, Consular and International Organisations) Act 1980 (1980 UNJYB 8); Singapore - s.2(2)(a) International Organisations (Privileges and Immunities Act (1985 ed Statutes c.145); Trinidad and Tobago - s.7(2)(a) and 8(2)(a) Privileges and Immunities (Diplomatic, Consular and International Organisation) Act 1965 (1965 UNJYB 10); and Zambia - s.4(2)(a) Diplomatic Privileges and Immunities Act 1965 (1965 UNJYB 15).

[95] see Duffar *op.cit.* note 82 *supra* at p. 17

[96] G.Marston "The Origin of the Personality of International Organisations in United Kingdom Law" 40 (1991) ICLQ 403-424

[97] See for example *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 3 All ER 437, and *Pinochet No.3*, [1999] 2 All ER 97

was being introduced in the House of Commons, the Attorney-General stated that an organisation would, under the common law, have the same status, privileges and immunities as the member States would enjoy individually.[98] Marston notes that the phrase "legal capacities of a body corporate" did not appear in the earlier drafts of the legislation, and explains its effect as follows:

> "The use as a reference datum of the capacities of a body corporate may initially have been made by Parliamentary Counsel simply to provide a domestic law yardstick less potentially productive of uncertainty that the use of the 'capacities of the government of a foreign sovereign Power'. With the removal during the Bill's second reading of the reference in clause 1(2)(a) to the 'capacities of the government of a foreign sovereign Power' and the reinstatement of the yardstick of 'the legal capacities of the a body corporate' it became less likely that an international organisation would be perceived as being domestically equivalent to an association or partnership of foreign States or governments, although Somervell [the Attorney General] would presumably not have welcomed such a shift of view."[99]

The phrase was considered in great detail during the *International Tin Council* litigation in the English courts.[100] In this case it was found that an international

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[98] See Editor's Note "The Relationship of International Organisations to Municipal Law and their Immunities and Privileges", XXII (1945) BYBIL 249 at p.250

[99] See Marston *op. cit.* note 96 *supra* at p.422

[100] [1989] 3 All ER 523. This arose out of the failure of the ITC during its unsuccessful attempts to support the price of tin on world markets but in particular on the London Metal Exchange. Though numerous cases arose out of this failure of the ITC (the combined claims by the creditors added up to over $1 billion), there were three broad questions which reached the appellate courts. First whether the creditors had a direct claim against the member States; second whether the English courts had jurisdiction under the Companies Act 1985 to wind up the ITC (though this appears to have been dropped before the House of Lords); and thirdly whether the Court had jurisdiction to appoint a receiver, by way of equitable execution, to pursue claims which the ITC might have against its member States. Though there were questions as to the status of the ITC in English law in relations to all three actions, it was in the direct actions that the question of personality was dealt within greatest detail. The direct actions were, in turn, based three alternative submissions:

(A) that the ITC had no personality in English law. Although the Order in Council, made under the International Organisations Act 1968, gave it the legal capacities of body corporate it was argued that it had no distinct status. Thus the member States, though they had been able to enter into contracts in the collective name of the ITC, themselves remained jointly and severally liable for debts arising thereunder.

(B) That though the ITC had legal personality, this did not exclude a concurrent or secondary liability of the member States (i) either through interpretation of the Order in Council, or (ii) through the nature of the organisation in international law.

organisation which enjoyed the capacities of a body corporate by virtue of an Order in Council made under the International Organisations Act, was for that reason a separate person in English law from its member States, and thus responsible for its own debts. The conclusion that the ITC enjoyed legal personality separate from its member States is sound in law (despite the hardship caused to plaintiffs in this litigation). However the treatment of the issue as primarily a question of English law, rather than international law, has caused concern.[101]

It was common ground that the ITC was an international organisation established by treaty, and was therefore not a municipal corporation by virtue of having "the capacities of a body corporate" in the law of the UK under the relevant Order in Council. However in the House of Lords, Lord Oliver took the position that "the effect of the 1972 order was to create the ITC (which, as an international legal *persona*, had no status under the laws of the United Kingdom) a legal person in its own right, independent of its members".[102] Considering the ITC simply in terms of its constitutive

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(C) that the ITC acted as agent for the member States, either (i) as a question of fact, or (ii) by implication from its constitution.

In the decisions at all instances the personality of the organisation, even if only as a matter of English law, was upheld, and submission (A) failed. Similarly submission (C) as to agency failed, some judges finding that this raised a non-justiciable issue, whereas others, though finding it justiciable, rejected the claim on the principle derived from *Salomon v. Salomon*, ie the basis of the separate personality of corporations in English company law, which makes clear that the relationship between a corporation and its members in respect of contracts of the corporation was not one of agency. (As to the appropriateness of using English company law in relation to any international organisation see text *infra*).

The submissions under B(i) also failed, at all instances as a question of construction of the Order in Council. The arguments under submission B(ii) were also rejected (though in Court of Appeal Nourse LJ, who was incidentally one of the judges who dealt with the issues of international law most convincingly, dissented).

[101] See for example R.Higgins *Problems and Process: International Law and How We Use It* (Oxford, 1994) at p.48. Also Jennings "An internatioal lawyer takes stock" (1990) 39 ICLQ 513, at pp.524-6

[102] [1989] 3 All ER 523, at p.549. See also his Lordship's comments at p.552 "Whilst it is of course not inaccurate to describe art.4 of the 1972 Order as one which 'recognises' the ITC as an international organisation, such 'recognition' is of no consequence in domestic law unless and until it is accompanied by the *creation* of a legal persona. Without the 1972 order the ITC had no legal existence in the law of the United Kingdom and no significance save as the name of an international body created by a treaty

treaty, Lord Oliver's concern was the question of justiciability. His starting point was that under the doctrine of non-justiciability, treaty provisions which are not incorporated into UK law by legislation can not give rise to rights in favour of individuals nor can they deprive an individual of rights.[103]

It is submitted that it would have been open to the Court to find that the international personality of international organisations arises in customary international law, and that as customary international law forms part of the common law (at least to the extent that there is no legislative act or binding authority to the contrary), it could have considered the organisation more appropriately as the created and governed by international law. If this approach were taken, the words of the Order in Council endowing the Organisation with "the capacities of a body corporate" would have had little constitutive value. This both accords with the reality,[104] and, it is submitted, reflects more closely the views of the Attorney General who introduced the 1944 Act to Parliament.

(b) Legal personality of international organisations in the courts of third States

The question about the source of personality in international law becomes important when the court of non-member State is seised with a dispute involving an international

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between sovereign States which was not justiciable by municipal courts. What brought it into being in English law was the 1972 Order and it is the 1972 Order, a purely domestic measure, in which the constitution of the legal persona is to be found and in which there has to be sought the liability of the members which the appellants seek to establish, for that is the act of the ITC's creation in the United Kingdom."

[103] The UK dualist approach to treaties is based upon the constitutional position that treaty-making power is part of the Prerogative exercised by the Executive, whereas any modification of the UK law must be done by the Executive. In contrast it might be noted that in the Court of Appeal Kerr LJ [1988] 3 All ER 257 at p292, had found that it was both permissible and necessary to consider the treaties 'against the background of international law' in order that the court could inform itself about the nature of the ITC, and secondly in order to be able to interpret the 1972 Order.

[104] See R.Higgins *op. cit* note 101 *supra* at pp.47-8.

organisation. Where the State of the forum is a member of the international organisation in question it will be under an obligation to observe its treaty commitments in good faith,[105] as well as a more general obligation of cooperation with the organisation However where the forum State is not a member of the organisation a different approach is required. There may be a treaty between the organisation and the forum State which sets out the terms of the relationship,[106] and if this treaty forms or is incorporated into domestic law, the personality of the organisation in question is unlikely to be problematic. However where there is no such defining instrument the question arises as to what are the guiding principles. If objective international personality – i.e. personality which is opposable to member States and to non-member States alike - is vested in an organisation by virtue of customary international law, and given that customary international law forms part of most municipal legal systems, international personality may be given recognition in municipal law. However it must be said that this approach has not been expressly adopted by any municipal court faced with an international organisation, of which the forum State was not a member. In most cases in which international organisations have appeared before national courts of non-member States the personality of those organisations has not been challenged, and the courts have simply accepted the organisation as a party., without further explanation[107]

However this issue has been litigated more extensively in the English Courts. It was suggested above that the result reached in the House of Lords decision on the

[105] See eg Art2(2) of the UN Charter

[106] Thus before Switzerland was a member of the UN it entered into an Agreement on Privileges and Immunities with the UN in 1946, see UN Doc. ST/LEG/Ser.B/10 at p.196

[107] see for example the US case of *ITC v. Amalgamet* 80.ILR 30, and the French case *CEDAO v. BCCI,* 1993 JDI 353, notes 122-123 *infra*

personality of the *International Tin Council* was acceptable in so far as the personality of the organisation as distinct from its members was upheld. [108] However the difficulties with the approach of the House of Lords become clear in the case of an organisation of which the UK is not a member and for which there is no legislative act recognising its legal capacities, but which nevertheless seeks to litigate in the UK courts.[109] The case of *Arab Monetary Fund v. Hashim (No.3)*[110] provides a clear example. In that case the Arab Monetary Fund, an international organisation of which the UK was not a member sought recovery of assets which had allegedly been embezzled by its former Director General, the first defendant. The defendants sought to strike out the proceedings, on the basis that the AMF had no capacity to bring proceedings in the English courts, since there was no statutory instrument to "create" it as a person in English law. The AMF had been created under a treaty which provided that "the Fund shall have an independent juridical personality and shall have, in particular the right to own, contract and litigate". In other respects the Fund had its own organs, its own functions, and a measure of financial, technical and administrative autonomy. It is very likely therefore that if the Court had been able to consider whether the Fund had international personality, it would have answered the

[108] see text at note 100ff *supra*

[109] Prior to the *Tin Council* case, the Foreign and Commonwealth Office had appeared to accept that international organisations of which the UK was not a member, might nevertheless "be acknowledged" as possessing legal personality. In reply to a Parliamentary question it was indicated that the English courts might be able to find in favour of the legal personality and capacity of an international financial organisation "in same way and to the same extent as any other banking, commercial or other trading organisation established in a country other than the United Kingdom and enjoying legal personality and capacity in that country". In answer to the question as to whether the FCO would be prepared to make a statement to the court as to the Executive's attitude to the matters of personality and capacity of an organisation, the reply continued "on the assumption that the entity concerned enjoys, under its constitutive instrument or instruments and under the law of one or more member States or the State wherein it has its seat or permanent location, legal personality and capacity to engage in [banking] transactions ... governed by a the law of a non-member State, the Foreign and Commonwealth Office, as the branch of the Executive responsible for the conduct of foreign relations, would be willing officially to acknowledge that the entity concerned enjoyed such legal personality and capacity, and to state this." See XLIX (1978) BYBIL 346, at p.347-8.

[110] [1991] 1 All ER 871

question in the affirmative. However following the House of Lords judgment in the ITC cases, such arguments were abandoned. The issue was instead couched in terms of private international law. It was argued that the Federal Decree of the UAE (a State recognised by the UK), which recognised the Fund as having personality in UAE law, should be treated as creating a person which might be recognised in the English courts, by analogy with the conflicts rules on foreign corporations. Lord Templeman, giving the leading judgment in the House of Lords,[111] largely agreed with such reasoning, relying on "comity"[112] rather than explicitly upon private international law.

This form of reasoning was expedient in the instant case, but it seems simply not to accord with the reality of the situation.[113] Although it may be permissible to take a private international law approach to question of the recognition of the personality of international organisations,[114] it is unnecessary to say that the foreign municipal law creates the organisation, for this is to ignore international character of the legal person.

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[111] [1991] 1 All ER 871. This was also the reasoning of Hoffman J. at first instance ([1990] 1 All ER 685), who clearly felt that this was a less attractive route than recognising the Fund an international entity, but that following the House of Lords judgment in the *ITC* cases, he had no choice but to recognise it as an Abu Dhabi entity (p.691). The majority of the Court of Appeal (Lord Donaldson and Nourse LJ) found that, following the ITC case, the AMF, as an international entity, had no personality in English law without some form of legislative enactment. The tone of Lord Donaldson's remarks suggests that he was clearly unhappy with the conclusion he was forced to reach, but plainly felt unable to regularise the position of English law with that of both international law and objective fact. Lord Lowry in his dissenting speech in the House of Lords calls explicitly for legislation.to be introduced

Of particular note is Bingham LJ's dissenting judgment in the Court of Appeal ([1990] 2 All ER 769, at pp.779-83), in which he accepts that the UAE decree only gave recognition in the local legal system to the personality of the organisation, but did not create a local corporation.

[112] ibid at p.878. The use of the term "comity" in the English courts is ambiguous; it can mean more than *courtoisie internationale*, and in fact can be used to refer to rules of private or public international law, or even public policy see Mann *Foreign Affairs in the English Courts* (Oxford, 1986) Ch.7.

[113] It should be noted that the House of Lords had little option but to follow the private international law route, as this was the route which the representatives of the Fund chose to place before the court. They were in fact given the opportunity to put their appeal to the House of Lords on other grounds but declined (see Marston *op cit* note 96 *supra* at p.424).

[114] Schermers and Blokker *International Institutional Law* (Kluwer, Dordrecht,1994) at para.1598, also suggest this as an alternative to the route of finding that legal personality exists in general international.

To suggest that this foreign law has a constitutive (rather than declaratory) function may lead to the absurd result there exist a number of different "emanations of the [organisation] under the laws of other member States and even the possibility of suit by one against the other in an English Court".[115]

That danger was subsequently brought out in the *Westland Helicopters v. AOI*,[116] in which there was an underlying dispute between the member States as to the status of the AOI, which was reflected in their municipal legal systems. However Coleman J effectively found that the House of Lords judgment in the *AMF* case was limited, by holding that where a foreign municipal law gives effect to the personality of an international organisation, that serves only to enable the English court to recognise that same personality. He found no necessary implication in either the *AMF* decision or English conflicts rules that such a foreign law was in any way constitutive of the organisation, which was created by treaty and whose proper law was therefore public international law. The principle of non-justiciability did not prevent a court from looking at the constitutive treaty where it was a part of the foreign municipal law under consideration, in order to assist in establishing the nature of the organisation. However

[115] per Bingham LJ [1990] 2 All ER 782. The other judges who took the private international law approach, also noted this argument but did not provide convincing solutions to it - see per Lord Templeman [1991] 1 All ER 871 at p.877 and 881; also Hoffmann J. [1990] 1 All ER 6685 at p.692.

[116] *Westland Helicopters v. AOI* [1995] 2 All ER 387. Westland had been through extensive arbitration proceedings in a dispute with an international organisation, the Arab Organisation for Industrialisation (AOI). After eventually obtaining an award in its favour, and successfully enforcing it in part against AOI assets in New York, Westland applied for garnishee orders in respect of various deposits held in the name of the AOI in six banks with offices in London. However the AOI had ceased to exist and an organisation established under Egyptian law, the EAOI, claimed that it was a continuation of the AOI and sought to intervene in the garnishee proceedings, on the basis that the bank accounts belonged to it, and seeking that the arbitral award be set aside. The EAOI claimed *inter alia* that in English law an international organisation was subject to the national law of the State in which it had its seat by analogy with the conflicts rule concerning foreign corporations, in this case Egyptian law, and cited Lord Templeman's speech in the *AMF* case as authority.

the question of whether or not there has been any breach of that treaty would be non-justiciable in the English courts.[117]

Though this issue has taken considerable working through in the English courts, it does not appear to have caused similar problems elsewhere. In the United States the International Organisations Immunities Act only allows Executive Orders providing for the status, privileges and immunities of international organisations, to be made in relation to organisations of which the US is a member.[118] Preuss states that the general practice of the US before the passage of the International Organisations Immunities Act was to recognise the legal capacity of international organisations including those of which the US was not a party (eg the League of Nations) but to deny them privileges and immunities.[119] As the Act does not apply to organisations of which the US is not party, its enactment would not affect practice in relation to them. However where the issue has arisen before the US courts their attitude is not entirely easy to elicit as none of the judgments address the issue squarely.[120]

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[117] ibid at p.412

[118] Note that the Foreign Relations Authorization Act was amended in 1987 to enable the Executive to extend diplomatic privileges and immunities to the Mission of the European Communities and its members. However no mention of the status of the EC in US law is mentioned.

[119] See L. Preuss "The International Organisations Immunities Act" (1946) 40 AJIL 332, at p.333.

[120] In *International Association of Machinists v. OPEC* 477 ((1981) F. Supp553, CA (9th Cir.) 649 F2d 1354), the issue was avoided as OPEC was found to be immune from service. Similarly in *Rios v. Marshall* the British West Indies Central Labour Organisation moved for and was granted dismissal on the basis of immunity. In *Steinberg v. Interpol* ((1981) CA 672 F2d 927) (the defendant organisation being one of which the US was a member, though not one which was the subject of an Executive Order as to status privileges and immunities) the Court of Appeals (DC Circuit) treated Interpol as if it were capable of being a defendant in legal proceedings and ordered it to answer the proceedings. Dellapenna concludes that the issue is one of recognition, where the US is not a member of the organisation, that organisation will not be considered as having status in US law, whereas where the US has recognised the organisation in some way, for example by joining it as a member State, the US courts will treat it as having capacity to sue and be sued (see *Suing Foreign Governments and their Corporations* (BNA, Washington,1988) at p.25-29). It is submitted that the cases he cites are insufficient evidence for this conclusion, in none of them is recognition mentioned by the courts as an issue.

In any event since Dellapenna wrote there has been a further case which arose in relation to the International Tin Council litigation (*ITC v. Amalgamet Inc.*, 80 ILR 30). The ITC brought a suit in the

The paucity of caselaw on the point outside the UK suggests that in general few problems have arisen in this respect.[121] However where such questions arise the approach of Dutch law is instructive. Muller shows how the Dutch courts have been willing to refer to customary international law in establishing the legal status of international organisations,[122] and cites the advice given by the Legal Advisers of the Foreign Ministry to the Amsterdam Court of Appeal in relation to an international non-governmental organisation:

> "if an international organisation operating independently in a legal capacity ... appears before the courts to answer for its actions or omissions, it is undesirable to deem the organisation incompetent to put forward a defence at law on grounds of its not possessing legal personality."[123]

Practice suggests therefore that separate personality of an international organisation should generally be acknowledged whether the forum State is a member or not, though

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New York courts to seeking a order to stay arbitration proceedings brought by creditor, on the basis of the its immunity by virtue of its "sovereign status". The Supreme Court of New York County held that the ITC had no immunity in US law, and even if it had such immunity had been waived. However the Court did not doubt that the Council was a legal person for the purposes of bringing proceedings.

[121] In the French case of *CEDAO c. BCCI*, the claimant organisation that it had objective international personality and therefore also immunity from the jurisdiction of the courts of non-member States. The French court rejected the claim to immunity but made no comment on the question of personality in the courts of non-member States. However the fact that CEDAO (in English ECOWAS) was able to make the claim at all suggests that the court recognised that it had the capacity to bring proceedings in France.

Malaysian law appears to take a similar attitude to that shown by the New York Supreme Court in *ITC v. Amalgamet* (see note 123 *supra*). In *Bank Bumiputara Malaysia Bhd v. International Tin Council*, 80 ILR 24, (though this is a case involving an international organisation of which Malaysia was in a fact a member) the Malaysian High Court found that the immunity enjoyed by the ITC in the UK courts did not affect its position in Malaysia. There Court found without difficulty that the ITC could be joined as a party to the Malay proceedings.

[122] *UNRRA v. Daan* (ILR 337) in which UNRRA sought recovery of an overpayment to an official, who sought to defend the action on the basis that the organisation was not a person in Dutch law, which he claimed recognised associations of individuals, but not associations of States. The Supreme court rejected this argument apparently on the basis of its personality as constituted in international law. See also *Spaans v. Iran-US Claims Tribunal*, [1987] Neths YBIL 357 which found that an international organisation had the benefit of immunity defences by virtue of "unwritten international law". In this respect see also the Belgian case of the *UN v. B* (Brussels tribunal civil; Pasicrisie belge 1953 pt 3 at p.66) where, on the basis of facts similar to the *Daan* case, a similar decision was reached.

[123] A.S.Muller *op.cit* note 90 *supra* at p.115.

there may be differences of approach in different national legal systems as to the means by which this achieved.

3. Capacities attendant on legal personality

As has been shown practice suggests that international organisations will require the municipal legal capacities to contract, to hold and dispose of movable and immovable property and to participate in legal proceedings. It is also important to note that such capacities can be enjoyed by entities which have less than full international personality. Practice of subsidiary bodies of the UN, which do not have full international personality in their own right, may still enjoy the capacity to contract[124] and to hold property[125]. When it comes to their position in legal proceedings, they are able to protect their rights in relation to such transactions by the commencement of legal proceedings, to the extent to which this is authorised by the Secretary-General of the UN.[126] However in relation to claims made against them, they will usually claim the jurisdictional immunities of the United Nations under the General Convention on the Privileges and Immunities of the UN. As Morgenstern points out the appears here to be an element of these bodies "having their cake and eating it too".[127] Nevertheless this probably explained by practical considerations. For instance it must make practical

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[124] see Memorandum of the Office of Legal affairs of 24 March 1969, reproduced in the UN Secretariat's study to the ILC, "The Practice of the United Nations, the specialised agencies and the International Atomic Energy Agency concerning their status, privileges and immunities", 1985 YBLIC Vol.II pt.1, 145, at p.152. See also the express grants of contractual capacity contained in the Regulations of various UN peacekeeping forces including UNEF, UNFICYP, .see Higgins *UN Peacekeeping 1946-67, Documents and Commentary Vol.s I-IV* (OUP, Oxford, 1969-1981) esp Vol.1 pp. 374-81, and Vol IV, pp. 211-220.

[125] See "Legal Opinion of the Secretariat of the UN on the Legal Status of the UNDP - the Question whether the UNDP has the Capacity to Acquire Real Property" 1990 UNJY at p.276-7, which concludes that the UNDP had the capacity to acquire real property, though the reasoning is somewhat elliptical.

[126] See for example "Legal Opinion of the Secretariat of the UN on the Authority of UNEP to take direct legal action against private entities of States Members of the UN" 1995 UNJY at p.411

[127] Morgernstern *op.cit* note 43 *supra* at p.25

sense that some activities of the subsidiary organs have to be devolved to them without direct reference to the central Secretariat. Whereas the conduct of litigation will usually require the assistance or advice of the Office of Legal Affairs (OLA), and thus commencement of proceedings should only be dome after proper consultation with OLA.[128]

(a) The capacity to contract

The capacity to contract is clearly essential for international organisations in order to carry on their daily existence, and it appears not to have caused major problems in practice for the majority of organisations. In practice the question of an international organisation's capacity to contract appears to have given rise to few problems in itself.[129] However it must be borne in mind that the capacity of an international organisation, even when recognised in municipal law of a State, does not imply the application of the law of that State to the contracts of the organisation. In its contractual practice, for example, the United Nations and many of its specialised agencies will generally prefer not to specify a national system of law as governing their contracts, but opt instead for general principles of law.[130] Further, in addition to the presence in most cases of jurisdictional immunities, such contracts will usually contain an arbitration clause. It is thereby intended that the connecting factors between the contract and the local legal system should be cut, in relation to both choice of law and

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[128] *op cit* note 126 *supra*

[129] See the UN Secretariat's study to the ILC, "The Practice of the United Nations, the specialised agencies and the International Atomic Energy Agency concerning their status, privileges and immunities", [1985] Vol.II pt.1 YBILC 145 at pp.152-160 and 182-4.

[130] ibid. at pp.153-4.

jurisdiction.[131] In the UN Headquarters Agreement with the US, there is provision that the federal, State and local law of the US shall apply in the headquarters district, except to the extent that the agreement provides otherwise.[132] However this has never been interpreted by the organisation as imposing local law on its contracts. The reason given for this is that as the Organisation contracts in a number of different countries as well as from Headquarters, and the result would be that some of its contracts were governed by general principles, whereas those made at Headquarters would be governed by US or New York law. It is said that the possible resulting difficulties or confusion would not be consonant with the proper and efficient functioning of the Organisation.[133]

In relation to contracts of employment there is a growing body of international administrative law[134] which often governs these relationships, and to which specialised international procedures apply. As will be discussed in the next chapter, the existence of a system of international administrative law coupled with their jurisdictional immunities, results in many international organisations enjoying a complete independence from any system of municipal law, in respect of their employment relations.

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[131] This underlined further by those who hold that arbitrations arising out of such contracts should not be subject to the supervisory jurisdiction of the local courts. See the award of Battiffol quoted at [1985] YBILC Vol.II pt1 157, and the Swiss case *Groupement d'entreprisesFougerolle v. CERN* (1992) 102 ILR 209: for further discussion, see chapter 4 below.

[132] Art/III, section 7 (b) see UN Doc ST/LEG/SER.B/10 at p.204

[133] See "The Practice of the United Nations, the Specialised Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities" [1985] Vol.II pt1 YBILC 145, at p.153

[134] See Amerasinghe *The Law of the International Civil Service* (2nd ed. 1994). To speak generally of an international administrative law, should not obscure the nature of that body of law. The relationship of each organisation with its employees will in most cases be governed by its own internal law. The sources of the internal law of an organisation are not formally recorded, but include Staff Regulations and Staff Rules, Statutes of tribunals and constitutive instruments, decisions of tribunals and courts.

(ii) The capacity to own property

The capacity to acquire and dispose of property both movable and immovable, is obviously a capacity which international organisations, are likely to require in any State in which they wish to carry out any operations. Thus for example, the UN owns the headquarters site it was given by John D. Rockerfeller, Jr, and the City of New York, and its capacity to own property is recognised both in federal and State law.[135] Whereas in Geneva under the Ariana Site Agreement,[136] the UN has an exclusive right of user (*servitude personelle*) over the site (including the right to build), property in the soil however remains in the ownership of the Canton of Geneva.

Though capacity to acquire and dispose of immovable property is seldom denied,[137] a number of organisations have not availed themselves of it, entering instead into agreements with a host State for use of property owned by that State. The very beneficial terms of these arrangements for the organisations appear to make this a more attractive option than, albeit potentially less secure and more dependent position than if it were the owner of property in its own name.[138]

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[135] See 22 USC 288a *Executive Order No. 8698*, and *McKinneys Laws of New York*, Bk 56 para 59 (1) and (j).

[136] 11 UNTS 11

[137] Mexico has entered a reservation to the General Convention on the Privileges and Immunities of the UN, in accordance with Art. 27(1) of its Constitution which limits the rights of foreigners to own property - though interestingly foreign States may with permission of the Ministry of Foreign Affairs own property for the direct service of their embassies or legations. Mexico is not a party to the Convention on the Privileges and Immunities of the Specialised Agencies, and it is reported to have declined to permit UNESCO to purchase premises for a regional basic education centre on Mexican territory (see [1967] YBILC Vol.II, 154, at p. 301 para. 9).

[138] See for example the terms of FAO-Italy Host Agreement (including a rent of $1 p.a.) ; also the UNIDO-Austria Agreement for which the rent is 1 Schilling p.a – see 1967 UNJY 144 and 1986 UNJY 191

As Jenks[139] points out, for those organisations which have either acquired freehold or leasehold titles in property, in common with the widely accepted principle of private international law, the law applicable to such immovable property is the *lex situs*. To insist otherwise would be a derogation from the sovereignty of the territorial State.[140] The property rights of international organisations are therefore generally created under local law and thus are often subject to necessary formalities such as registration of title, though such acquisitions may well be exempt from land registry fees, stamp duty and other dues.[141] However as will be shown below, the privileges and immunities of international organisations may put them in a different position to that of other landowners, in case of dispute or litigation.[142]

For those organisations which rely on rights of user over land owned by the host State rather than outright ownership, their respective HQ Agreements will usually provide

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[139] See Jenks *The Proper Law of International Organisations* (1962) at p. 135

[140] A number of authors (including Cahier *op cit* note 8 *supra* pp.207-211, and Jenks *The Headquarters of International Institutions: a study of their location and status* (RIIA, London, 1945)) have considered the establishment of an international district, in which all of the universal organisations might have their headquarters, rather along the same lines as the District of Columbia in the US, there is no sign that this is even a possibility in the immediate future.

However it is worth noting that in this respect there have been certain property rights created in international law. Jenks shows how the ILO has certain rights of user of the Palais des Nations stemming from its establishment alongside the League, and the subsequent agreements for the dissolution of the League and redistribution of its property. He also notes that the lease which the UN granted to the WMO in 1950, prior to its conclusion of a headquarters agreement with Switzerland and the Canton of Geneva in 1960, appears to have been governed by international law (see Chapter 12 of *The Proper Law of International Organisations*(Stevens London, 1962)

[141] see 1967 YBILC Vol .II at p.301 at para13

[142] See *Procureur Général of the Court of Cassation v. Syndicate of the Co-owners of the Alfred Dehodencq Property Co.*, 21 ILR 279, where a neighbouring land owner was unable to bring a claim against the OECD in relation to an infringement of an easement it enjoyed in respect of the Organisation's land,. However cf the case *INPDAI v. FAO* (87 ILR 1)where the landlord of premises leased by the FAO was allowed to bring proceedings to have a rent set by the Italian Court, on the basis that the lease was in the nature of act *jure gestionis* (for comment on this case see Chapter 4 *infra*).

for the settlement of any disputes by arbitration, and may even specify that it should be interpreted at least secondarily in the light of the general principles of law.[143]

(iii) The Capacity to participate in legal proceedings

The capacity of international organisations to participate in legal proceedings before municipal courts has been considered above. In general international organisations are more likely to participate in proceedings, which they have brought, rather than proceedings they defend. The reason for this is of course that often international organisations are able to raise defences based on their privileges and immunities (though even here if such privileges and immunities are limited, or if they are waived, then the question of capacity must clearly be addressed before an action can proceed).

It appears that municipal courts have not had difficulties in practice in the recognition of the UN or its specialised agencies to bring proceedings. In many matters the UN has preferred to use arbitration rather than the local courts,[144] but nonetheless there have been a number of occasions on which both it and its specialised agencies have instituted proceedings in municipal courts.[145] However in relation to the organisations of which the forum State is not a party, it has been suggested that national courts may require some form of recognition by their own government before they can be a party

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[143] See Jenks *op.cit.* .note 139 *supra* at pp.140-4

[144] see above concerning the contractual practice of inclusion of arbitration clauses.

[145] *UNRRA v. Daan,* 16 ILR 337; *UN v. B* 19 ILR 490; *UN v. Canada Asiatic Lines* 26 ILR 622; *Balfour Guthrie and Co v. US* 17 ILR 323; *IBRD and IMF v. All America Cables and Radio Inc. and others, in the Matter of,* 22 ILR 705; *WHO and Verstuyft v. Aquino* and other 52 ILR 389; *IRO v. Rep. SS Corp.* 189 F2d 858.

to litigation,[146] however there is no formal practice of recognition equivalent to recognition of States, and no case can be found which has raised this as an issue.

Where an international organisation commences proceedings in municipal courts, it is *prima facie* subject to the same procedural law as any other litigant[147]. Basing himself on authorities relating to State immunity, Jenks suggests, that where an international organisation commences an action before municipal court, it will no longer be able to raise an immunity defence in relation to a counter-claim or set-off which relates to the same transaction as the organisation's claim[148]. Nevertheless rules on disclosure or discovery of evidence may have to amended in the light of the inviolability of the archives of international organisations, [149]and/or the immunities of the officials of the organisation when giving evidence to the court.[150]

International organisations do not exercise criminal jurisdiction in respect of their headquarters sites. Even the UN which has a power under section 8 of its Headquarters

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[146] See above as to the position in the UK. In the USA the decision in *Amalgamet v. ITC* (80 ILR 30) has been considered, though the US *Restatement of Foreign Relations Law (Third)* is more cautious suggesting that the US takes the position that it is not obliged to recognise small or regional organisations in which does not participate, but may well do so (see para 223 Reporter's Note 4); however no authority is cited for this proposition.

[147] See *UNKRA v. Glass Production Methods*, 23 ILR 515 The UN was found to be subject to same venue requirements in establishing the jurisdiction of the federal courts as any other litigant (including the US government).

[148] Jenks *op cit* note 139 *supra* at p.230

[149] *Maclaine Watson v. ITC (No.2)* 77 ILR 160 and 80 ILR 211; also *Shearson Lehman v. Maclaine Watson* 77 ILR 107

[150] Keeney v. US 218 F 2d 843

Agreement[151] to make regulations, has not done so, instead relying on the local police, prosecution and courts.[152]

Conclusions

To summarise, it is clear that as the degree of institutionalisation of co-operation between States developed for the achievement of certain functions in their common interest, it became increasingly necessary to recognize that activities undertaken in pursuance of those functions are not simply an aggregate of identical acts by each of the individual member States. Rather they are acts of the collectivity of the membership as a whole. In legal terms international organisations have developed a capacity to act in their own names, in accordance with the international tasks entrusted to them and the structures formulated for this purpose in their constituent instruments. Thus they enjoy personality in international law, which is in turn reflected in national law. Indeed it is difficult to see how as a matter of practical necessity, such capacity could be denied.

The separateness of international organisations from their member States, as serving an international interest as opposed to the national interest, suggests therefore that they enjoy a degree of institutional autonomy from the individual member States. The organisation and its employees must be neutral, in that they serve the international interest rather than the interests of any one of their member States.

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[151] This provision which gives primacy to UN regulations over local law would presumably give a defence to persons accused of criminal offences when acting in accordance with these regulations.

[152] see *People v. Carcel*, Mag.s Court (150 NYS 2d 436), and Court of Appeals (165 NYS 2d 113); see also *People v. Coumatos* 224 NYS 2d 507

However it is necessary to emphasise that this degree of autonomy of international organizations is of a quite a different nature from the sovereignty of States.

Whilst international organizations the international personality of international organisations may mean that the have the necessary legal *capacities* to undertake activities in their own names, they are only entitled to exercise such capacities in accordance with the powers or competences with which their member States have endowed them. These competences and their limits are established by the constituent instrument of each international organisation.

CHAPTER 2

TOWARDS A GENERAL APPROACH TO THE JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANISATIONS

Introduction

There are a number of regimes of immunity under international law including those relating to foreign States, foreign Heads of State, diplomats, consuls, members of special missions and visiting foreign forces as well as international organisations and their officials, all of which require some degree of derogation from the jurisdiction of States over their territory.[1] The otherwise plenary powers of States over persons, property and events within their territory, to make and enforce law, is thus limited by international law in relation to these categories of persons. Furthermore the immunities of officials of international officials may derogate from State jurisdiction exercised on the basis of nationality. Therefore as exceptions to the firmly established rules of jurisdiction based on territoriality[2] or nationality,[3] immunities must be broadly accepted and clear in their scope if they are to be effective.

The immunities of international organisations have their own distinctive basis, derived primarily from treaty law.[4] Such treaty provisions may appear in the constitutive instrument of the organisation, and/or a further treaty between the

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[1] For a broad, if now somewhat dated, introduction to, and some comparisons of, these various regimes of immunity, see K.Ahluwalia *The Legal Status, Privileges and Immunities of the Specialized Agenices of the United Nations and Certain other International Organizations* (Martinus Nijhoff, The Hague, 1964) esp pp 1-47

[2] See *The Lotus case* 1927 PCIJ Rep. Ser.A No.10

[3] See for example the Harvard Research Draft convention on Jurisdiction with respect to Crime, (1935) 29 AJIL Supp. 443

[4] Dominicé suggests that they are wholly derived from treaty – "La nature et l'étendue d l'immunité de jurisdiction des organisations internationales" in Bockstiegel et al. (ed.s) *Festschrift für Ignaz Seidl-Hohenvledern* (Carl Heymans, Cologne, 1988) 77-93, at p. 86. See also Zacklin "Diplomatic relations: status, privileges and immunities" Dupuy (ed) *Handbbok on International Organizations* (Martnus Nijhoff, Dodrecht, 1988) at p 181-3

member States more specifically defining immunities and privileges and/or in the Headquarters Agreement between the organisation and its host State. At the level of positive law these treaty provisions are usually in themselves a sufficient explanation of the immunities of international organisations, and they will be examined in more detail in the next chapter. The purpose of this chapter is to consider the underlying rationale of such provisions and, in the light of that, to examine various approaches to the question of their proper extent.

A. The Nature of Jurisdictional Immunities

Jurisdiction is a broad concept including both powers of prescription aspects (i.e. law- making) as well as powers of enforcement (by which law is given effect in particular circumstances).[5] In democratic States all three branches of government, that is the legislature, the judiciary and the executive, are given separate responsibilities in these processes. The legislature is obviously primarily involved in the prescriptive process of legislation, whilst the executive role in relation to enforcement of the law is similarly clear. Characterising the role of the judiciary in terms of the international law of jurisdiction is more complex as it can be seen as involving elements of both prescription and enforcement. F.A.Mann includes the role of the judiciary as part of the broad jurisdiction to prescribe – he uses the term regulatory jurisdiction.[6] Clearly the role of the courts in common law systems can be seen in this light, but more generally courts in all legal systems have the power to determine authoritatively how the law applies to the parties to any given dispute.

[5] The distinction between prescriptive and enforcement jurisdiction has traditionally been drawn – see for example O'Connell *International Law* (Stevens, London, 1970) at p.602; also F.A Mann "The Doctrine of Jurisdiction in International Law" (1964) 111 *Rec. des Cours* 9 and "The Doctrine of Jurisdiction in International Law after Twenty Years" (1984) 186 Rec. des Cours 9

[6] *ibid.* (1984) at p.21

However it might also be observed that where the courts apply legislation, they usually describe their role as one of giving effect to the wishes of the legislature, which appears to be closer to an enforcement role.[7] Interestingly the *American Restatement of the Law on Foreign Relations(Third)* adopts a third term - "adjudicative jurisdiction" - to describe this mixed role of the courts.[8] In other words the courts have an intermediary, but pivotal, role, in the application of the law, determining how the law affects a particular situation, and sanctioning the executive action necessary for it to be given effect. Without the possibility of the intervention of the courts laws may be of limited practical effect.

Immunities of many of the larger international organisations are often contained in treaty provisions which make broad reference to "immunity from jurisdiction", or "immunity from every from of legal process". In much of the writing on the subject, immunities are portrayed as procedural bars to the jurisdiction of national courts, rather than exemptions from substantive law. This might suggest that, substantively, local law remains the applicable law, but simply that the local court is the wrong forum to apply it. This is underlined by the fact that modern diplomatic law has sought to avoid the logical and practical problems which arose from the concept of "extraterritoriality", relying increasingly instead upon functional explanations.[9]

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[7] Brownlie appears to take this view, characterising the well-known controversies relating to extra-territorial jurisdiction in antitrust law in the US and the EC as primarily problems of enforcement jurisdiction see *Principles of Public International Law* at pp.310-312. However it might be noted that he later suggests that "[there] is... no essential difference between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is the function of the other." *ibid.* at p.313

[8] See also Akehurst "Jurisdiction in International Law" (1972/3) XLVI BYIL 145, who writes of "executive jurisdiction", "judicial jurisdiction" and "legislative jurisdiction"

[9] In relation to diplomatic relations see the preamble to the 1961 Vienna Convention on Diplomatic Relations which states that the purpose of immunities is "to ensure the efficient performance of the functions of diplomatic functions of diplomatic missions as representing States" – Denza suggest that

Nevertheless in seeking to rationalise State immunity in international law, certain authors have suggested that many cases in which courts have referred to immunity are in fact better explained by a more fundamental lack of competence on their part. These authors suggest that what is in fact operating is not a simple procedural bar preventing the courts from exercising the adjudicative jurisdiction which they would otherwise enjoy, but rather that certain national laws, the application of which is the basis of the local courts' jurisdiction, are not applicable to foreign States.[10] It is therefore an incompetence *ratione materiae*, by which certain acts of foreign States fall outside the local legal system entirely, excepting them from all aspects of jurisdiction - prescriptive, adjudicative and enforcement.

As will be considered in more depth later in this chapter, Reinisch has recently proposed the adoption of this approach in respect of international organisations.[11] He suggests that where such exemptions from local law are established, they constitute a more rational approach in that they overcome the perceived unfairness of procedural

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the lack of reference to the extraterritoriality suggests that it may finally have been discredited (*Diplomatic Law* (2nd ed., OUP, Oxford 1998) at p.12

Similarly it appears that in the few instances where extraterritoriality is mentioned in relation to international organisations (eg s.6 of the FAO-Italy HQ Agreement of 1950 and s.7 of the IAEA-Austria HQ Agreement of 1957 ST/LEG/SER.B/11 at p.187 and p.327 respectively), such references are now considered to be anachronistic, and to add little to the immunities and inviolability, which these organisations enjoy under other provisions – see J-M Dufour "De l'extra territorialité à l'autonomie internationale: à propos des relations de l'organisation intergouvernementale avec l'état-hôte" in *Mélanges Michel Virally* (1991) 239 at pp.240-2

[10] A number of authors have identified this lack of competence in relation to State immunity, e.g. Niboyet "Immunité de jurisdiction et incompétence d'attribution" (1950) 39 RCDIP 139-58; Brownlie's work on "Contemporary problems concerning the jurisdictional immunity of States" for the Institut de Droit International, Preliminary Report and Definitive Report (1987) 62-I Ann IDI 1-42 and 45-98 respectively, Supplementary Report (1989) 63-I Ann. IDI 13-28. Also Brownlie *Principles of Public International Law* (OUP, Oxford, 1998) at pp326-339. See too Schroer "De l'application de l'immunité juridictionelle des états étrangers aux organistions internationales" (1971) 75 RGDIP 712.

[11] Reinisch *International Organizations before National Courts* (CUP, Cambridge, 2000) at p.369 f

immunities under which local law is applicable but the courts are prevented from applying it. Certainly there are instances in which exemptions from substantive law are expressly required, as for example with fiscal immunities, though these are often the subject of specific treaty provisions.[12] Further as will be shown in this and subsequent chapters, the international status of international organisations suggests that in respect of questions such as their internal governance and administration, as well as their external operations on the international plane, national law is inapplicable. Therefore in many cases running alongside the question of immunity as a procedural bar, there may also be deeper questions as to the competence of a national court to determine the issue in hand.

B. Rationalising the Immunities of International Organisations

As has been observed the question of jurisdictional immunity arises at the point where an international organisation comes into contact with a municipal legal system, usually that of one of its member States. That contact may arise directly in the relationship between the organisation and the forum State,[13] or as a result of the relationship between the organisation and a third party, which, in some respect, is claimed to be governed by the law of the forum State. In order to gain general acceptance, a stable regime of immunities is therefore likely to have to accommodate a broad range of interests, including those of the organisation, those of the forum State and those of third parties who come into contact with the organisation. Whilst, as will be shown, the balance struck in respect of different organisations may vary, in

[12] See for example Muller "International Organizations and their Officials: to tax or not to tax?" (1993) 6 Leiden JIL 47-72 See also the *European Molecular Biology Laboratory v. Germany* Arbitration (1990) 105 ILR 1

[13] For example exemptions from taxation discussed in the *EMBL Award, cit.* note 12 *supra.*

most cases a similar set of basic factors will have to be weighed against each other. It is thus necessary to start by setting out the parameters of the discussion.

1. The functional basis of the immunities of international organisations

(a) International status and functional necessity

International organisations often claim their immunities are necessary for the achievement of their functions in accordance with their international character. As discussed in the previous chapter, the collective will of the member States creates an organisation and entrusts to it the achievement of certain functions. It is the achievement of those functions which is the overriding concern of all organisations and which both explains their existence and also the extent of their legal competences. As we have seen the organisation represents the collective will of the membership, distinct from its individual member States, and is recognised as enjoying its own international status in international law. Dufour describes this institutional autonomy as underlying jurisdictional immunities international organisations.[14]

International organisations are in a potentially vulnerable or dependent position, since, unlike States, they do not have their own territory or population. They can, therefore, only act on territory over which a State exercises jurisdiction, and through persons who are tied to States through the bonds of nationality.[15] Immunity is a legal technique by which the proper accommodation of an international organisation is guaranteed within an international system which otherwise allocates jurisdiction to

[14] *op. cit* note 9 *supra* esp. at pp.249-51

[15] See for example the "*amicus* brief" of the UN in the case of *Broadbent v. OAS* (1980) reproduced in 1980 UNJY 227-238 at pp 229-30

States primarily on the basis of territoriality and nationality. It is through such accommodation within the jurisdictional system that the genuinely international status of an international organisation can be guaranteed. Without immunity an organisation would potentially be vulnerable to interference by the authorities of any State in which it operated, or even any State whose nationals were in its employment.

This vulnerability of international organisations certainly explains the importance and sensitivity for them of questions of immunity. However it would be wrong to suppose that the proper maintenance of immunities is solely a concern of international organisations themselves, since it is also important to their member States for reasons of reciprocity. The concept of reciprocity lies at the heart of other regimes of immunity involving direct relations between States. For example diplomatic immunities can be defined and guaranteed, at least in part, because every receiving State has an incentive to ensure appropriate treatment of foreign diplomats, in that it will expect similar treatment for the diplomatic representatives whom it sends to other States. [16] Clearly the same rationale cannot be directly applied to the immunities of international organisations, since international organisations are much more limited subjects of international law than States.[17]

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[16] E.g. diplomatic relations - see Denza *op cit* note 9 *supra* at p.2 and thereafter specific references to reciprocal treatment are made throughout her commentaries on many particular provisions of the Vienna Convention, as for example in relation to aspects of the establishment of missions, tax and customs treatment.

[17] Jenks note three respects in which the immunities of international officials differ from those of diplomats: (i) international officials can oppose their immunities to their own State of nationality (though in the light of Art 38 of the Vienna Convention on Diplomatic Relations, this may be of lesser significance than Jenks considered when he was writing); (ii) the diplomatic agent though immune from the jurisdiction of the receiving State, is not immune from the jurisdiction of the sending State, for which very often there will be no equivalent in the case of international officials; and (iii) the effective sanctions which secure diplomatic immunities are reciprocity and the danger of retaliation by the aggrieved State, and international organisations do not have similar protection - see *International Immunities* (Stevens, London, 1961) Introduction at p.xxxvii and also at pp. 40-41

However, it is submitted that reciprocity, albeit in a more tempered form, is nevertheless important in understanding the immunities of international organisations – namely that there is a mutual interest of all member States in the maintenance of immunities. At the heart of each international organisation is a constitutive agreement made between the member States, setting out (i) the goals/functions of their cooperative enterprise, (ii) the structures and processes of the international organisation by which those goals/functions are to be achieved, and (iii) the distribution of the associated costs and benefits of the enterprise. As such the agreement establishes an equilibrium of the rights and duties of each member *vis à vis* the organisation and *vis à vis* the other member States. In agreeing to the immunity of an organisation each State undertakes not to seek any undue influence or obtain any undue benefit from the organisation, by refraining from the exercise of jurisdiction over it.[18] A violation of this undertaking is therefore not only a violation of the principle of *pacta sunt servanda* (to the extent it involves a breach of treaty), but also, as an infringement of the jurisdictional rules which reserve a genuinely independent place for the organisation, it is analogous to an exorbitant jurisdiction. It might thus be portrayed as a violation of the principle of sovereign equality of States operating between the members.[19]

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[18] A concrete example of this is relation to the fiscal immunities of international organisations. In its arbitration with it host State Germany, the European Molecular Biology Laboratory claimed that to subject certain of its activities to local VAT regulations, would infringe the principle that no single State should derive undue benefit from "common funds", i.e. those of the organisation. However the arbitration tribunal declined to base its findings on this principle, and simply applied the relevant treaty provisions – *cit.* note 12 *supra.*

[19] Schermers and Blokker find that the principle of sovereign equality of States explains much of the institutional law of international organisations *International Institutional Law* (Martnius Nijhoff, The Hague, 1995) §1895. It might further be noted the importance of the principles of sovereign equality and the fulfillment of the rights and duties of membership in good faith appear as the first principles of the UN mentioned in Art 2 of the UN Charter.

The primary explanation of the immunities of international organisations is thus as a guarantee of the international status that they require in order to fulfil their functions. In following this through into the practical sphere two further factors appear as offshoots of this rationale.

(b) Ensuring institutional efficiency

It is sometimes said that international organisations require immunity because otherwise, given their international vocation, there may be a possibility of an organisation being subject to the jurisdiction of any State in which it is in any way operational.[20] There may thus be a large number of States in whose courts proceedings would have to be defended separately, calling for the retention of a full range of expert local lawyers resulting in expense, duplication of tasks and inefficiencies.[21] Further, requiring an organisation to seek settlement of its disputes in a wide variety national legal systems would be likely to lead to varying and inconsistent results and leading to the organisation having to adopt different policies and practices, according to the different States in which it was operational. This might lead to the organisation being faced with invidious choices as to where and how it conducts its operations, and, in any event, would be likely to involve increased expenditure to the organisation.

It has therefore been argued that immunity from the local courts enables consensual solutions to be reached, with the possibility, if that fails, of international arbitration

[20] See for example Lalive "L'immunité de jurisiction des états et des organisations internationales" (1953) 84 *Rec. des Cours* 205 at p 299.

[21] See Jenks *International Immunities* (Stevens, London, 1961) at p.41; also the views of the UN Secretariat 1985 YBILC vol II Pt 1 at p.153

under a more suitable body of law, for example general principles of law.[22] Immunity is therefore further justified on the basis of organisational efficiencies, saving on common resources, which can thus be devoted to the achievement of the common goods/functions for which the organisation was established.

On the other hand it might be objected that this is not truly an argument of principle, but one of pragmatism. Any person or organisation involved in cross-border activities is faced with similar problems but few are offered the solution of immunity.[23] In any event arguments of efficiency will be shown to cut both ways (see below security of transactions).

(c) Equity and equality within the organisation

A related argument is that as a body created by virtue of the collective will of the member States, an international organisation must itself show even-handedness in its relations with its various members States. It might be argued that without immunity this would be made considerably more difficult, since the most obvious way to achieve uniformity of treatment would be to operate under a single legal regime.[24] A clear example relates to the refusal of some States to recognise the fiscal or other immunities of members of staff of an international organisation of their own

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[22] See 1996, UNJY 453-4. For a further statement of the approach of the UN to issues of applicable and dispute settlement in its contractual practice, see 1985 YBILC Vol.II Pt.1.at p. 152-60. This statement was a contribution to the survey of the general topic by Valticos "Les contrats conclus par les organisations internationales avec des personnes privées", for his Reports see 1977 An IDI 1. and 132.

[23] In this respect it might be noted that primary amongst the techniques for de-localising disputes in relation to international trade or investment are also the choice of a system of law other than a pure national system of law to govern contracts and the choice of international arbitration for the settlement of disputes – for a detailed examination see Delaume (Stewart ed.) *Transnational Contracts* (Oceana, Dobbs Ferry New York 1998)

[24] See the of *Mendaro v. IBRD*, (1983 US Court of Appeal (DC Circ) in which the Court noted the necessity of consistency in the Bank's internal management and employment relations, given that it had missions in 36 States and was active in some way or another in 140 States: 99 ILR 92 at pp.97-98 and 100.

nationality.[25] Thus, for example, the insistence of the US to subject US employees of the United Nations employed in the territory of the US to income tax resulted in the introduction of a system of a staff assessment for all employees to ensure that equity was maintained amongst the Organisation's employees as a whole.[26]

2. Countervailing pressures favouring the assertion of local jurisdiction

The immunities of an international organisation and its officials represent a considerable derogation from the sovereignty of a State over its territory or nationals, and will be particularly onerous for States in whose territory the headquarters or some significant level of activity of an international organisation is situated. This derogation from national jurisdiction therefore has sometimes been seen as contrary to the values promoted by the national legal system.[27]

(a) Maintenance of the rule of law

Perhaps the chief value embodied in any developed national legal system is the maintenance of the rule of law. The rule of law is admittedly a nebulous concept,[28] but it certainly includes the notion that the making of governmental decisions must be in accordance with law. Those exercising governmental power must be subject to

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[25] For further examples see Chapter 5 below.

[26] See Schermers and Blokker *op. cit.* note 20 *supra*, at §§1070-1072

[27] For a striking example see the language adopted by the Judge in the case of *Westchester County v. Ranallo* (1946) 13 ILR 168

[28] The classic statement of the English common law tradition is by Dicey "it means in the first place, the absolute supremacy of regular law as opposed to the influence of arbitrary power... It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals." *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan London 1959) at pp202-3. Obviously his views have required refinement over the years as legal technique and greater understanding of other legal cultures have developed, nevertheless they stand in striking juxtaposition to the notion of immunity discussed here.

the law, since the law embodies the values of the local political community on whose behalf the government acts. Whilst substantive law of course differs between legal systems, a common link between them is the acknowledgment of the need to provide procedures by which government may be held accountable for its actions through law. [29] In modern legal systems have therefore developed effective judicial protection of individuals against arbitrariness in Government decision–making.

However just as it is wrong to suppose that member States of international organisations are somehow naturally antithetical to the immunities of international organisations, so too it is wrong to consider international organisations as naturally antithetical to the rule of law. Indeed as we have seen in the previous chapter, international organisations have from their inception relied upon notions of rational/legal authority for their legitimacy, in seeking to establish themselves *vis à vis* a world made up of sovereign States. In the words of Arsanjani,

> "Because [International Organisations] are created to promote public order, it would be perverse, even destructive to postulate a community expectation that [International Organisations] need not conform to the principles of public order."[30]

(b) Human rights – access to justice

Closely related to the establishment of the rule of law has been the development of the law of human rights.[31] The emphasis here is obviously on fundamental

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[29] A Brewer-Carias *Judicial review in a comparative perspective* (CUP, Cambridge, 1989), see alsoCappeletti, M *The Judicial Process in Comparative Perspective* (Clarendon, Oxford, 1989).

[30] See M. Arsanjani "Claims Against International Organisations: *Quis custodiet ipsos custodes*" 7 Yale Journal of World Public Order 131, at p.134. See also the ICJ Advisory Opinion on *Effect of Awards* 1954 ICJ Rep. 47 esp. at p.57

[31] See for example the preamble of the European Convention on Human Rights, and the central conception of the rule of law in the caselaw of the European Court of Human Rights see for example *Golder v. UK* (1975) Ser A 18

guarantees to the individual in relation to State activity. Of particular importance to the present inquiry into the question of jurisdictional immunities, is the individual right of access to fair and impartial tribunal for the determination of his or her rights and obligations,[32] though other human rights questions might also arise.[33] Whilst this is essentially a procedural right, its importance should not be underestimated for that reason. The centrality of the rights of due process to international human rights law is shown by the frequency with which these rights are raised in before the various international and regional human rights protections mechanisms.[34] Indeed the development of the protection of human rights in international law has frequently focused upon the development of procedural protections of substantive rights.[35]

However in seeking to reconcile jurisdictional immunities with the individual right of access to a court, it is interesting to note that whilst international human rights law has led to more careful scrutiny of the regimes of jurisdictional immunity in international law, so far there has not been any international decision in which the right of access to a court has overridden such immunities, whether State immunity,[36] diplomatic immunity[37] or the immunity of international organisations.[38] The right of access to a court is not unlimited and provided that immunity is accompanied by

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[32] See *Golder, cit. supra*

[33] See Singer "Jurisdictional Immunity of International Organisations: Human Rights and functional necessity concerns" (1995) VaJIL 53: also Wickremasinghe and Verdirame "Responsibility and Liability for Violations of Human Rights in the Course UN Field Operations" in C.Scott (ed.) *Torture as Tort* (2001 Oxford, Hart), pp.465-489.

[34] Thus for example Article 6 is the most litigated of all of the rights contained in the ECHR.

[35] In relation to the caselaw under the European Convention on Human Rights, see Gardner and Wickremasinghe "England and Wales and the European Convention" in Dickson (ed.) *Human Rights and the European Convention* (1997,Sweet and Maxwell, London) pp. 47-112

[36] eg *Al-Adsani v. UK*, *Fogarty v. UK* and *McElhinney v.Ireland* all decided 21 November 2001

[37] *N.,C, F., and A.G. v Italy* ((Appl. No. 24236/94) 4.12.95, 84 D&R 84

[38] *Beer and Regan v. Germany*, *Waite and Kennedy v. Germany*, both 18 February 1999

appropriate safeguards, for example the availability of alternative remedies for the claimant, it may be justified.

(c) Security of transactions

An economic analysis might also suggest that there are material advantages also to the maintenance of the rule of law, and perhaps also to the restriction of jurisdictional immunities. Under such analysis the establshment of legally binding rights and obligations, which can in the final resort be enforced, enables a complex fabric of social and economic relatons to be woven, to the mutual advantage of all members of a society. The fact that each person may rely on the fulfilment by the others of their legal obligations, enables him or her to use his/her resources more efficiently. If the jurisdictional immunity of one party to a transaction were to mean that other parties might not be able to rely on enforceabe legal rights and obligations then they might have to take other seps to insure themselves against risk, thus raising the costs of the transaction, and inefficiencies in the use of resources.[39] Thus the availability of a reliable and cost-effecive jurisdiction for the effective resolution of disputes should have important economic benefits for all parties to a transaction and, in the case of international organisations, should result in more efficient use of public resources.

(d) National security

A fundamental interest and, indeed, an obligation of governments is to ensure national security. This will inevitably involve the exercise of both law-making and law enforcement powers. Thus a State might view the operations of an international

[39] C.Schreuer makes this argument in favour of the restiction on State immunity – See *State Immunity: some recent developments* (Grotius, Cambrilge 1988) at p.125-6

organisation on its territory but which are not subject to its jurisdiction, as potentially of concern in this respect. Since immunity from jurisdiction applies not only to the organisation itself, but also to its officials (in respect of their official acts) and to the representatives of its member States, it is perhaps unsurprising that many host States have sought to insert into the HQ Agreements to which they are party, provisions reserving the right to protect their national security interests.[40] In fact Zoller finds that in the case of the UN Headquarters in New York, the right of the US to protect its national security derives both from its reservation to the Headquarters Agreement, and from the established practice of the Organisation.[41] However she also finds that the scope of such a right is constrained by a "hard core of necessary privileges and immunities [of the UN] which are non-derogable".[42] Since in her a view a host State is unable to limit this hard core of necessary privileges and immunities on grounds of national security, it may ultimately be left only with the option of requiring the organisation to remove itself from national territory.

UN practice suggests that there have been a small number of controversies in which the US has sought to oppose its national security interests to decisions of the UN.[43]

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[40] See Art.25 of the 1946 Agreement on the Juridical Status of the ILO in Switzerland, (ST/LEG/SER.B/11 at p138); Art.25 of the 1948 Agreement on the Juridical Status of the WHO in Switzerland, (*ibid.* at p.254); Art.24 of the 1948 Agreement on the Juridical Status of the WMO in Switzerland, (*ibid.* at p.309); s.31 of the 1953 agreement between ICAO and Egypt (*ibid.* at p.170); s.30 of the 1949 Agreement between the WHO and India (*ibid.* at p.265); s.31 of the 1951 Agreement between the WHO and Egypt (*ibid.* at p.265); s47 of the 1957 Agreement between the IAEA and Austria (*ibid.* at p.327); and s.32 of the 1953 Convention on the Privileges and Immunities of the Arab League (*ibid.* at p.414).

[41] E.Zoller, "The National Security of the United States as the Host State for the United Nations" (1989) 1 Pace Yearbook of International Law p.127

[42] *ibid.* at p.160

[43] See for example M.Reisman " The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion" (1989) 83 AJIL519; also regarding the attempted closure of the of the PLO observer mission to the UN see D.Rosenberg "États-Unis contre Nations Unies: l'affaire de la mission d'observation de l'OLP à New York" (11988 Rev Belge DI 451-95; see also *Advisory Opinion*

In the cases in which resolution was possible, it was usually achieved by the recognition by each party of the legitimate concerns of the other, and making the necessary mutual accommodations. Moreover many of the most direct threats to national security, have been from activities of members of the permanent missions of member States or international officials acting outside their official capacity, by for example taking part in espionage on behalf of their State of nationality. It is now well established that where a member of the UN staff takes part in such activities they are subject to local jurisdiction, since in general their immunities only extend to acts performed in their official capacity, of which clearly espionage is not one.[44]

C. Doctrinal Approaches to the Proper Extent of Immunity

In the light of these various factors which are likely to bear upon decisions concerning the immunities of international organisations, it is necessary to consider the general approaches to the extent of the immunities of international organisations which have been suggested by commentators. Historically the period of greatest growth in the numbers of international organisations established has been the period since the end of World War II (though in recent years some industrialised States have urged caution in the establishment of new organisations). Interestingly the same post-War period has seen a more general move towards rationalising other regimes of immunities in international law, to ensure that immunities are granted where they are strictly necessary in order to protect the proper discharge of governmental

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concerning the Obligation to Arbitrate under s.21 of the UN HQ Agreement 1988 ICJ Rep. 12 and *US v. PLO* (1988) 27 ILM 1055.

[44] See below Chapter V

functions. At the multilateral level the results of these efforts may be seen in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and, less widely accepted, the 1969 UN Convention on Special Missions, in all of which immunities are granted to differing extents but are based the concept of functional necessity – i.e. that immunities granted are those that are necessary to enable these officials to carry out their functions on the international plane.

During the same period and principally for similar reasons, a large number of States have adopted the restrictive doctrine of immunity in relation to foreign States, in preference to the absolute doctrine.[45] Under this doctrine a foreign State enjoys immunity only in relation to its public acts (*acta iure imperii*) but not in relation to activities of a private law nature (*acta iure gestionis*). The category of acts *iure imperii*, typically concerns the organisation and governance of the political community that is the State, and the distribution of public goods and burdens within it. Such acts are immune from the courts of other States by virtue of the principles of independence and equality which underpin the international system of sovereign States.[46] On the other hand in relation to acts *iure gestionis* a foreign State has no functional need for immunity, but rather in choosing to trade in the market-place it must be treated like any other trader.[47]

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[45] See for example the Australian Law Reform Commission Report no24 on *Foreign State Immunity Law* (1984) esp. pp.6-28

[46] see for example the well known case of *The Schooner 'Exchange' v. McFadden* 7 Cranch 116 (1812)

[47] see for example the Judgment of Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529, and of the speech of Lord Wilberforce in *I Congreso del Partido* [1983] 1 AC 244

It is against this background that many authors have sought to draw conclusions about the proper scope of the immunities of international organisations. In the legal literature that deals with the immunities of international organisations, there is widespread agreement on the functional basis of immunity but considerable debate as to the proper extent of that immunity. As to the latter three broad positions can be identified: (1) that international organisations should enjoy absolute immunity from local jurisdiction; or (2) that the restrictive doctrine of State immunity be applied to international organisations, and in particular the exception from immunity of commercial activities; or (3) that immunity be limited in some way by reference to the functional standard. A fourth more radical position that immunity should be progressively abandoned in favour of a limited number of substantive exemptions from national law, is examined at greater length in the following section.

1. Absolute immunity

The majority viewpoint is that the jurisdictional immunities of international organisations are absolute. Writers such Lalive,[48] Cahier,[49] Jenks,[50] Dominicé[51] and Seidl-Hohenveldern[52] have all sought to distinguish the position of international organisations from the position of States. They tend to point to treaty provisions

[48] *op cit* note 20 *supra* at pp. 296-9

[49] *Étude des accords de siège conclus entre les organisations internationales et les état où elles résident* (Giuffre, Milan, 1959) esp. pp.231-41

[50] *op cit* note 21 *supra* at pp. 40-1

[51] "L'immunité de jurisdiction et d'exécution des organisations internationales" (1984) 187 *Rec. des Cours* 145 at pp 178-82; also "La nature et l'étendue de l'immunité de juridiction des organisations internationales" Böckstiegel et al. (ed.s) *Festschrift für Ignaz Seidl Hohenveldern* (1988), 77- 93

[52] *Corporations in and under International Law* (Grotius, Cambridge,1987) at pp81-2; "Piercing the corporate veil of international organizations: the *International Tin Council case* in the English Court of Appeals" (1989) 32 GYIL 43 at pp. 52-3; also "Failure of controls in the Sixth International Tin Agreement", Blokker and Muller (ed.s) *Towrds More effective supervision by International Organizations* 255 at pp.271-3

providing that international organisations enjoy "immunity from every from of legal process",[53] and stress the comparative weakness of the position of international organisations which do not have their own territory or population.[54] Thus for example, in contrast with a State the majority of whose activity is focussed within its own territory and therefore clearly subject to its own jurisdiction, practically all activities of international organisations take place on territory over which a State has jurisdiction. It is therefore argued that their need for wider immunities corresponds to the relative weakness of their position *vis à vis* States.[55]

Nevertheless the absolute immunity of international organisations is likely to be increasingly called into question, in the light of the general increase in legal scrutiny of the exercise of public authority whether through developments in public law at the national level or in human rights law at the international level.[56] Further as the UN itself points out "the changing doctrine of State immunity will inevitably have an effect on the way national courts view the activities of international organisations."[57]

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[53] e.g. the Convention on the Privileges and Immunities of the UN, though it might be noted that the French text only requires "immunité de juridiction".

[54] The views of Seidl Hohenveldern might be excepted from this in that he considers that since international organisations enjoy only limited competences i.e. to their public international (iure imperii) functions, their private law acts are always closely linked to the achievement of those *iure imperii* purposes that they usually enjoy absolute immunity see e.g. *Corporations in and under International Law* (Grotius, Cambridge,1987) at pp.81-2;

[55] Perhaps unsurprisingly a number of international organisations, including the UN, take a similar approach for example (1980) UNJY pp.227-242.

In parenthesis it might be observed that these arguments for that international organisations require absolute immunity are made in rather formal terms, which do not necessarily reflect the political realities of every conceivable situation. It may be, for example, that a large and powerful international organisation can exercise significant political or economic leverage over a small or impoverished State seeking the assistance of the former. Nevertheless to rely simply on informal means of maintaining the international status of international organisations would clearly be unsatisfactory, and therefore some measure of immunity is necessary.

[56] Thus the European Court of Human rights has suggested that any form of immunity for governmental authorities should be subjected to review for its conformity with Article 6 ECHR – see *Osman v. UK*, 28 November 1998

[57] See 1985 YBILC Vol.II pt 1 at p161

It might also be argued that simple reliance on the letter of treaty provisions seems somewhat formalistic. This is especially so when compared to the extensive interpretation which international organisations themselves and the International Court of Justice[58] have made in relation to their constituent instruments, so as to enable them effectively to meet the exigencies of new circumstances which they face.

Writers who maintain that the immunity of international organisations is absolute often emphasise that the immunity from local jurisdiction is not an immunity from justice.[59] They point to the obligation of international organisations to provide suitable alternative procedures for the settlement of disputes, in cases in which they rely on their immunity from jurisdiction. However this is, at very least, an obligation on which practice remains largely unreported and possibly undeveloped.[60] The usual alternative remedies are generally based on consent, with the danger that the one party or other may refuse to cooperate. If it is the international organisation which is in default, then its ability to assert immunity may cause further difficulty, as for example when an international organisation has sought to prevent the judicial supervision of the operation of an arbitration clause by asserting immunity.[61]

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[58] See for example the Advisory Opinions of the ICJ in cases of: *Reparation for injuries* 1949 ICJ Rep. 174; *Status of South West Africa* (1950 ICJ Rep.133; *Effect of Awards* (1954) ICJ Rep. 47; *Certain Expenses* 1962 ICJ Rep. 151.

[59] c.f. Dominicé *op cit* note 50 *supra* (1984) at p.157

[60] A relatively recent study on the settlement of contractual disputes of international organisations located only seven arbitral awards in the public domain – see Glavinis *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées* (LGDJ, Paris 1990).

[61] see eg *Boulois v. UNESCO* 1997 Rev. Arb. 575 and 1999 Rev. Arb. 343; see also *Groupement d'entreprises Fougerolle v. CERN* 102 ILR 209 discussed at greater in length in Chapter 4 below.

2. Restrictive immunity

The second position, that the restrictive doctrine of State immunity should be adopted in relation to international organisations, is a minority view both amongst writers on the subject, as well as in State practice.[62] It involves interpreting treaty provisions establishing immunity from jurisdiction as only applying in the case of acts *iure imperii* of international organisations. The question posed by those who take this position is whether it is any longer sustainable for international organisations to enjoy immunity in relation to their private or commercial activities, particularly in view of the increasing adoption of the restrictive doctrine of State immunity. For example Gaillard and Pingel-Lanuzza, whilst accepting that international organisations are entitled to jurisdictional immunity in order to protect their institutional autonomy, suggest that such immunity should not extend to their private law or commercial activities. [63] These authors take the view that since States have accepted that foreign courts may assert jurisdiction over their own private law activities without infringing their independence or sovereignty, then national courts can similarly assert jurisdiction over the private law activities of international organisations without infringing their independence.[64] They acknowledge that arguments that the vulnerability of international organisations required a more absolute form of immunity than States, might have had some validity when first raised in the 1950s and early 1960s, but they claim that now international

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[62] see Chapter 4 below at notes ... concerning in particular aspects of the jurisprudence from the US and Italy (though as noted in that Chapter these can, to some extent, be explained by particularities in the reception of the relevant international obligations into national law).

[63] "International organisations and immunity from jurisdiction: to restrict or bypass" (2002) 51 ICLQ 1 , however these writers whilst supporting the restriction of the immunities of international organisations are somewhat equivocal about the direct transposition of the restrictive doctrine of State immunity, claiming that practice on the point is "inconclusive" (at p.9).

[64] *ibid.* at p.5

organisations are sufficiently well-established for this not to be a concern which should override other considerations.[65]

Ebenroth wholeheartedly embraces the application of the restrictive doctrine of State immunity to international organisations.[66] He notes that if the immunities of international organisations were very much more extensive than those of States, it could lead to an abuse of the "corporate" form, i.e. that States might be tempted to combine in an international organisations to carry out certain acts of an *iure gestionis* nature simply in order to benefit from the more extensive immunities offered to international organisations, than would be available to them acting individually. He does not cite any cases in which this has occurred, however he was writing in the light of the collapse of the International Tin Council.[67]

A variation on these views is offered by Schröer who suggests that international organisations enjoy immunity from jurisdiction in customary international law for their acts *iure imperii* but not their acts *iure gestionis*.[68] For him the advantage of such customary immunities is that they can therefore also be opposed to non-member States.[69] Nevertheless he accepts that in parallel with customary immunities are the conventional immunities granted by the member States *inter se*, which are not

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[65] *ibid.* at p.15

[66] Ebenroth "Shareholders Liability in International Organisations – The Settlement of the International Tin Council Case" (1991) 4 Leiden Journal of International Law 171-83

[67] On which see Chapter 1 *supra* text at note 100

[68] See Schröer "De l'application de l'immunité juridictionelle des états étrangers aux organisations internationales" (1971) RGDIP 712

[69] *ibid.* at p. 717 and 739

generally limited, and which have primacy over the customary immunities as the *lex specialis*.[70]

However it should be noted that the distinction between acts *iure imperii* and acts *iure gestionis* is not without its problems even in relation to State immunity. The practice of different national courts on the characterisation of acts varies widely, and, whilst recent work in the Sixth Committee of the UN General Assembly suggests that the divergences may be narrowing, there is still not consensus on how take forward the draft articles of the International Law Commission on the jurisdictional immunities of States. Furthermore the aptness of the analogy between the position of States and international organisations may be questioned. We have already seen that there are important differences between States and international organisations, the latter having few of the characteristics of States, and in particular being entities of limited competence, without territory and population. In these circumstances it is debatable whether international organisation can truly be said to perform acts *iure imperii*.[71]

3. Functional criteria for restricting immunity

The third position is that the immunities of international organisations can be restricted on the basis of functional criteria. In recent years, this view has been taken most notably by Bekker.[72] He seeks to overcome the difficulties of the vagueness of

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[70] *ibid.* at p.741

[71] On this point compare for example Higgins *Problems and Process: International Law and How We Use It* (1994), p.93 who is sceptical of the analogy, with Seidl-Hohenveldern who considers international organisations to perform predominantly acts *iure imperii* (note 54 *supra*). See also Schröer in whose opinion the distinction of acts *iure imperii* and acts *iure gestionis* is relevant to customary immunities of international organisations, *op. cit.* note 68 *supra* at p.715-717 and 724.

[72] Bekker *The Legal Position of Intergovernmental Organisations - a Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff, Dordrecht, 1994)

the functional standard by suggesting that immunity should be limited to their "official activities". These are defined as

> "activities carried out by an organisation in the course of the actual exercise of its function in fulfilment of its purposes and should be a normal consequence of the organisation's functions and purposes to such an extent that they could be said to logically arise from its functions and purposes, rather than being merely 'useful' to the pursuit of the latter".[73]

He cites in particular an arbitral award, the *European Molecular Biological Laboratory Award*[74] in support, which applied such a characterisation to determine the extent of the fiscal immunities of the EMBL. However this Award can be distinguished from cases before a national court in which the extent of jurisdiction immunity would typically be at issue, on the grounds that: (a) it did not concern the extent of jurisdictional immunities, but rather fiscal immunities; (b) that the parties to the dispute were therefore the German Government and the EMBL, i.e. that it was a genuinely international dispute; and (c) an international tribunal, composed of distinguished international lawyers, was appointed to settle the dispute which involved making interpretations of the constituent instrument of the EMBL and its Headquarters Agreement on sensitive issues.[75]

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[73] *ibid.* at p.235.

[74] see 105 ILR 1

[75] In this respect it might be noted that the UN cites, apparently with approval, the Belgian case of *Manderlier v. the UN*, (69 ILR 139) in which the plaintiff claimed that the UN jurisdictional immunity was not absolute but could be limited according to what could be shown to be necessary for the performance of its functions, in accordance with Article 105 of the UN Charter. The Belgian court found that the jurisdictional immunity of the UN under 1946 Convention on the Privileges and Immunities of the UN, was not subject to any such restriction. It held that national courts would be exceeding their authority if they were to arrogate to themselves the right to determine whether the immunities granted under the 1946 Convention were necessary or not. (see 1985 YBILC Vol.II pt 2 at pp161-2).

Thus whilst this functional standard in broad terms may seem to be an appropriate basis on which to establish the limits of the immunities of international organisations, it may be a difficult standard for national courts to apply as a limit to the extent of jurisdictional immunity in practice. It is a vague test[76] and, given the sensitivities involved, one which the national court may not feel well-placed to apply. Further it seems to be based on the "purpose" of the act rather than its "nature". It might be recalled here that in a number of jurisdictions the so-called "purpose" test has largely been rejected in favour of the "nature" test in characterising State acts for the purpose of applying the restrictive doctrine of State immunity.[77] In that context the "purpose" test is considered to be essentially a subjective criterion, concerned with the motivation of one of the parties, which would tend to undermine the restrictive doctrine.[78]

Furthermore it has to be remembered that international organisations are, by their nature, entities whose competence is limited to the achievement of certain functions. Thus their functions can be said to inform all of their actions, albeit that for some acts the connection with the ultimate goals of the organisation may be more obvious than for others. The difficulty in Bekker's formulation is therefore that in stressing only the relationship between the act and the functions of the organisation, he offers no objective criterion for distinguishing between them. His interpretation of the

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[76] Schröer suggests it is too uncertain a standard to provide any assistance in determining the extent of immunity – *op. cit.* note 68 *supra* at p.739-40

[77] see eg the US Foreign Sovereign Immunities Act 1976, 28 USC §1603(d) which states that "[t]he commercial character of an activity shall be determined by reference to the nature of the ... act, rather than by reference to its purpose. In relation to the UK see the judgment of Lord Denning in *Trendtex Trading Co. v. Central Bank of Nigeria* [1977] QB 529. However it may noted that subsequently the UK courts have taken a rather broader view the context as a whole to determine the nature of the acts (e.g. *Holland v. Lampen-Wolfe*, HL, [2000] 1 WLR 1573

[78] see for example *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529.

concept of functional necessity therefore stresses thus the "functional" aspect at the expense of the concept of "necessity".[79]

A final difficulty related to the question of deriving an objective functional standard in Bekker's analysis is relation to whose characterisation of whether an act is official or not should be determinative in cases where this is disputed. For Bekker it is the views of the international organisation that should be determinative, for reasons of its closeness to and familiarity with the legal questions involved. However, in a case decided after Bekker's publication, the International Court of Justice has found that in determining whether an international official or expert on mission was acting within the scope of his of her functions, though the views of the international organisation are likely to be highly persuasive in most cases, it is the views of the local jurisdiction which in the final analysis are determinative.[80]

D. An Individuated Response - *ratione materiae*?

Whilst important points are made on all sides of this debate, it is argued here that in fact many of the contributions are pitched at a very general a level, and this makes any attempt to reconcile them or even to choose between them on purely legal grounds problematic. Interestingly when contemplating the adoption of the restrictive doctrine of State immunity, which is still unevenly applied in national legal systems, a number of common law States sought to codify the law by adopting an

[79] but for the difficulties of a national court in this respect see *Manderlier v. UN* (1969, 69 ILR 139) and note 75 *supra*

[80] see the *Cumaraswamy* case [1999] ICJ Rep. 62 at p.87 §61

individuated approach specifying which activities they considered acts *iure gestionis* so as to provide consistency of characterisation.[81]

An approach which seeks to consider in greater depth the appropriateness of national jurisdiction over certain categories of acts of international organisations has been suggested by Reinisch.[82] He supports a radical re-thinking of the immunities of international organisations so that (1) they should enjoy substantive exemptions from local law in relation to matters of their internal governance and administration.[83] However beyond that he suggests that national law and jurisdiction should apply in the usual way. Thus he suggests that (2) such lack of substantive competence is likely operate where employment cases are brought in national courts[84], but that in other respects the national court will be fully able to apply its private law, particularly in (3) contract, (4) tort and (5) property cases, or if necessary its rules of private international law.[85]

The five numbered points indicate the types of subject-matter in respect of which Reinisch makes his proposal for the delineation of competences between international organisations and national authorities. His is clearly a radical proposal and Reinisch makes it on the basis of *de lege ferenda* rather than as an explanation of the current law. Nevertheless it brings out some complex and interesting points about

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[81] See Crawford "International law and foreign sovereigns: distinguishing immune transactions" (1983) LIV BYIL 75-118. For examples of national legislation which follow this pattern see the UK State Immunity Act 1978 the Australian Foreign Sovereign Immunities Act 1984.

Subsequently the ILC has adopted a similar approach on its draft articles on the jurisdictional immunities of States and their Property 1991 YBILC vol.II.pt 2 p.13

[82] *op.cit.* note 11 *supra* esp. at pp.369-88 and 393

[83] *ibid.* pp.377-82

[84] *ibid.* pp.383-5

[85] *ibid.* pp.386-

the relationship of immunity and the application of national law. As such the remainder of this extended section will be devoted to a more detailed examination of the five points identified in the preceding paragraph.

1. Substantive exemption from national jurisdiction - the internal governance of international organisations

Whilst jurisdictional immunities properly so-called operate simply as a procedural bar to the jurisdiction of national courts, it has been noted that there may also be a more radical lack of competence on the part of the national authorities, to the effect that certain aspects or activities of international organisations fall outside the compass of national law.[86] We might call this an incompetence *ratione materiae*.[87] As has been observed this form of lack of competence may occur in some cases in parallel with procedural immunity from jurisdiction, but is distinguishable in that it asserts that, instead of national law, international law or the internal law of the international organisation in question governs the dispute, and therefore the national courts simply lack the competence to determine it.

It is clearly the case that in certain respects States may expressly agree to exempt international organisations from the application of national law by means of treaty provisions, for example exemptions from taxation and customs regulation are frequently provided for in treaties setting out privileges and immunities.[88] Additionally the body of national caselaw concerning international organisations

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[86] text at note 10 *supra*

[87] See Dominicé *op. cit.* note 51 *supra*, at p.83

[88] See Muller "International organisations and their officials: to tax or not to tax?" (1993) 3 Leiden JIL 47

reveals that national courts have felt that, quite aside from the question of immunity, they are unable to adjudicate over certain disputes because they do not have competence to apply the appropriate substantive law, where an issue of the internal governance of an organisation is in dispute.[89]

The basis of the claims for these exemptions from the applicability of national law is usually claimed to be the international personality of the organisation in question.[90] Thus it is said that international organisations enjoying personality and being the subject of rights and duties in international law, should not be subjected in those respects to national law. In particular it is claimed that to subject an international organisation to the local law of its host State, would be effectively to "nationalise" its international character.[91]

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[89] a striking example being the case of *Westland Helicopters v. AOI* [1995] 2 All ER 387

[90] Colin and Sinkondo take a very broad view of personality suggesting that it is close to the sovereignty enjoyed by States, noting that international organisations are often able to exercise a form of territorial jurisdiction over their HQ districts - "Les relations contractuelles des organisations internationales avec les personnes privées" in [1992] *Revue de droit international et de droit comparé* 7 at pp. 10-14.

In relation to the argument based on the regulatory power of for example the UN over its HQ District it should be noted that such provisions only appear in the HQ Agreements of some of the larger international organisations only and cannot therefore be the basis of a generalised rule. Moreover where it does exist the UN for example has not generally exercised such power to make regulations to replace substantive local law – an exercise of this power which came close, merely sought to set a limit to awards of damages against the UN for certain types of tort actions - see Szasz "The UN legislates to limit its liability" (1987) 81 AJIL 739.

[91] Jenks quotes Niboyet as saying

"Elles ont nécessairement leur siège dans un pays, parce que c'est une exigence de la vie terrestre, mais ce siège ne les nationalise pas et ne les astreint en rien à soumettre à la loi de ce pays, et cela à quelque point de vue que ce soit, à moins que les Etats qui ne les créent n'aient cru devoir en disposer autrement. Cette solution irait à l'encontre du but même, celui de faire de ces personnes des organismes avant tout internationaux"

- see *The Proper Law of International Organisations* (Stevens, London, 1962) at p. 134.The same passage is cited with similar approval by Valticos in his preliminary report to the Institut de Droit International on the subject of contracts concluded by international organisations with private persons – *op cit* note 23 *supra* at p.10

It certainly appears essential that the internal management and operation of an international organisation cannot, without its consent, be subject to the law of one of the member States. To allow national courts to act otherwise would be to infringe the international character of the organisation.[92] As has been observed above, the international personality of international organisations implies a degree of autonomy in the sense of self-organisation, governing both internal aspects of the organisation and its relations with its member States. However claims that the application of international/internal law to relations of international organisations with private third persons, over whom the organisation can not assert jurisdiction,[93] appear to be more questionable, and as Valticos points out must be balanced against the importance of legal certainty in those relations.[94]

It is interesting to note the beginnings of a broader public law of certain international organisations in developments within the EU[95] and a number of the development banks.[96] These developments may provide improved means of accountability and

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[92] In this respect Seyersted identifies the primary principle of jurisdiction exercisable by an international organisation as "organic jurisdiction" - i.e. the jurisdiction which an international organisation exercises over its own organs and internal management, including its relationship with its own employees: "Jurisdiction over Organs and of Officials of States, the Holy See and Intergovernmental Organisations" (1965) 14 ICLQ 31-82 and 493-527.

Thus for example the English Court found that various claims relating to a dispute as to the structure and continued existence of the AOI were questions of public international law which were not justiciable before national courts - see *Westland Helicopters v. AOI* [1995] 2All ER 387. Similar reasoning also explains the findings of non-justiciability in relation to the receivership actions against the *International Tin Council* see in particular the findings of Millet J.[1987] 1 All ER 890.

[93] In Seyersted's terms the external relationships of an international organisation with third parties fall outside its organic jurisdiction and where the third party in question is a private person, he/she/it will remain subject to the jurisdiction of those States which are entitled under international law to assert it, i.e. primarily under the principles of territoriality and nationality – *op. cit.* note 92 *supra*

[94] *op cit* note 23 supra at p.100

[95] see for example Tomkins "Transparency and the Emergence of a European Administrative Law" 2000 YBEL 217

[96] see for example the inspection panels of the IBRD, the ADB, the I-ADB, the Af DB and the CDB. See Bradlow "International Organisations and Private Complaints: the Case of the World Bank

even redress to individuals and other private persons in respect of acts of the international organisations in question, but for present purposes it is essential to underline the fact that they operate entirely outside the competence of national courts.

The fact that this substantive immunity is based upon a lack of competence of the national jurisdiction suggests that it is applicable in the courts of all States, whether or not they are members of the organisation. Thus for example in the *Westland Helicopters* case, though one of the member States wished the UK court to make a determination in relation to the status of the organisation, the court refused to do so on the ground that it had no competence to determine the issue.[97]

2. Employment

One area in which this limit to the applicability of local law arises frequently is in relation to employment questions. Employment is clearly a sensitive area for organisations, touching on questions of the integrity and independence of their internal structures. Dominicé, even suggests that in this respect alone it is appropriate to think in terms of the *ius imperii* of international organisations.[98] The employment law of international organisations is often called international administrative law, which is an indication of its public law character (analogies can be drawn with the public law character of public employment in many national systems of law).

Inspection Panel" (1994) 34 VaJIL 553; also Shihata *The World Bank Inspection Panel* (OUP Oxford 1994).

[97] See note 92

[98] "L'immunité de juridiction et d'exécution des organisations internationales" (1984) 187 *Rec. des cours* 145, at p. 185

In practical terms also it might be observed that employment is a major source of litigation for international organisations: at least a half of the cases from national courts considered in the preparation of this thesis were related to employment issues. If one adds to that the development of international administrative law and the caseloads of the various international administrative tribunals, the practical importance of this area for the functioning of international organisations quickly becomes apparent.

However it is important to note that international organisations will often have different types of employment relationship for different categories of employee. At the highest level there is the international civil service,[99] the officials permanently employed by the organisation to perform the functions for which it was created.[100] In most cases international civil servants are employed under the internal law of the organisation rather than an under local law.[101] There are then various categories of short-term or temporary employees, consultants and experts who also assist an organisation in accomplishment of various tasks. Though their employment contracts will usually be subject to the internal law of the organisation in question, they may

[99] It has been estimated fairly recently that there are in total some 90,000 international civil servants (about 47,000 being employed by the UN and its Specialised Agencies (not including the Bretton Woods institutions) - see H-J Priess "The International Civil Service" in Wolfrum (ed.) *United Nations: law, policies and practice* (1995) pp.94-99 at p.95.

[100] The definition of S.Basdevant is often quoted

"Est fonctionnaire international, tout individu chargé par les représentants de plusieurs Etats ou par un organisme agissant en leur nom, à la suite d'un accord interétatique et sous le contrôle des uns ou de l'autre, d'exercer, en étant soumis à des règles juridiques spéciales, d'une façon continue et exclusive des fonctions dans l'interêt de l'ensemble des Etats en question" from *Les Fonctionnaires Internationaux* (Paris, Sirey, 1931) at p.53

[101] Some elements of local national law may be incorporated into the internal law of some international organisations, often in relation to specific issues in the employment relationship, for example, social security (see also in this respect the cases of *Maida v. Administration for International Assistance* (1956) 23 ILR 510 and *International Refrigeration Institute v. Elkaim* (1989) 35 AFDI 875 though even this is unusual in respect of the larger organisations

be distinguished from the international civil service in that often they are not fully integrated into the structure of the employer organisation, for example they may only have limited authority within the organisation or limited powers to represent the organisation in external dealings.[102] Finally there is the category of local staff, who are often employed by organisations on local law terms, to perform ancillary and other support services to the organisation, and who again do not form part of the international civil service.

(a) The international civil service

It is often emphasised that the employment relationships of international organisations with the international civil service are subject to international administrative law and thus fall outside the reach of both national jurisdiction and national law. It is suggested that there is an important "public law" element to these relationships which makes it inappropriate for national labour courts to examine them against national standards.[103] Thus even if the relevant treaty provisions grant only limited jurisdictional immunity national courts frequently decline jurisdiction over such employment relationships.[104]

There are a number of cases before national courts, in particular from European "civil law" countries which support this approach based on lack of competence

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[102] See Schermers and Blokker *op. cit.* note 26 *supra* §§ 518-522.

[103] In the *Advisory Opinion on the Effect of Awards of Compensation made by the UNAT* the ICJ stresses the capacity in which contracts of employment of members of the international civil service are concluded on behalf of the Organisation: "Such a contract of service is concluded between the staff member concerned and the Secretary General in his capacity as the chief administrative officer of the United Nations Organisation, acting on behalf of that Organisation as its representative" (1954 ICJ Rep. 46 at p.53).

[104] See for example the consistent recognition by the US courts of the "immunity" of the IBRD in respect of its employment relations – see eg *Mendaro v. IBRD* (1983) 99 ILR 92.

ratione materiae.[105] However in common law jurisdictions this approach is less explicitly followed, though similar results are often reached through different reasoning. In these countries the closest analogies are with the conflicts of law principle of the non-application of foreign public law, and the less well-defined principle of non-justiciability in relation to the rights and duties of international persons under international law. There have been relatively few cases in the UK involving employment disputes of international organisations,[106] though there have been more in the US.[107] In all of them the complaints have been dismissed on grounds of immunity rather than non-justiciability.

In any event the policy interests of international organisations which are at stake on this issue of the law applicable to employment are very clear. The human resources of an international organisation are valuable assets, and the most essential determinants of its successful functioning. In this respect the staff of an organisation

[105] Thus for example in the case of *Eckhardt v. EUROCONTROL* (94 ILR 331)it was found that the international administrative law employment relationship in question , was by its nature not subject to local jurisdiction (notwithstanding that EUROCONTROL did not enjoy any conventional jurisdictional immunity in this respect). Dominicé cites two cases in which employment disputes involving EUROCONTROL were decided similarly by the German courts (see 187 Rec. des Cours 186). The French Courts have taken a similar attitude finding that the employment of international civil servants lies outside the framework of French law (regardless of the extent of any conventional jurisdictional immunities which may nave been granted) see for example *Chemidlin v. International Bureau of Weights and Measures* (1945) 12 ILR 281; *Klarsfeld v. Office Franco-Allemand pour la Jeunesse* (1968) ILR 191: *Hinterman v. WEU* (1995) 1997 JDI 141. In Italy the first such case was *International Institute of Agriculture v. Profili* (1930) (5 ILR 413), but can also be seen in cases such as *Mazzanti v. HAFSE.*(1955) 22 ILR 758; *ICEM v. Chiti.*(1973) 77 ILR 577; *ICEM v. Di Banella Schirone* (1975) 77 ILR 572; *Scivetti v. Bari Institutue* (1975) 77 ILR 609; *Christiani v. IL-AI* (1981) 87 ILR 21; *Galasso v. IL-AI* 1987 RDIPP 827. In Belgium the case of *Devos v. SHAPE and Belgium,* (1985) (91 ILR 242)similarly turns on the fact that the international civil service are not subject to local law.

[106] see *Mukoro v. EBRD* (1994) 107 ILR 604 and *Bertolucci v. EBRD* (1997) unreported

[107] See the cases, *Broadbent v. OAS* (1980) 63 ILR 162; *Tuck v. PAHO* (1980) 92 ILR 196; *Weidner v. INTELSAT* (1978) 63 ILR 191; *Mendaro v. IBRD* (1983) 99 ILR 92; *Donald v. Orfila* (1985) 618 F.Supp. 645; *Chiriboga v. IBRD* (1985) 616 F.Supp. 963; *Boimah v. UNGA* (1987) 664 F.Supp. 69; *Morgan v. IBRD.*(1990) 752 F.Supp. 492.

need to act in the interests of the organisation regardless of any national interests which may be at stake. Thus from its earliest days independence has probably been the most fundamental principle of the international civil service,[108] and is often guaranteed in the constitutive instruments of international organisations.[109] If the international civil service were subject to national law or national jurisdiction in the performance of its functions there might be serious implications for the international status of the organisation.[110] Thus from the point of view of an international organisation the sensitivity of these issues is potentially acute.[111]

Furthermore national jurisdiction should also be restrained for reasons relating to the proper management and cohesiveness of the international civil service within an organisation, since the principle of uniformity of treatment of employees is essential. The differential treatment which would follow from the application of different systems of national employment law risks deleterious effects on employment within an organisation, might endanger its proper functioning.

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[108] In the League of Nations the principle of the independence of the international civil service was promoted in particular By Lord Balfour and Sir Eric Drummond, following the tradition of independence of the civil service in countries such as the UK and France. Lemoine points to some particularly egregious attempts by States to interfere with the independence of civil servants of the League, which in turn led to a much stronger enunciation of the principle in Art. 100 of the UN Charter - *The International Civil Servant - An Endangered Species* (Kluwer, The Hague, 1995) at pp. 104-6.

[109] See Jenks *The Proper Law of International Organisations* (Stevens, London, 1962) at pp.27-33

[110] see *Reparation* case 1949 ICJ Rep. 174 at p.183

[111] Thus for example the issue of the independence of the international civil service arose dramatically during the controversy arising out of the loyalty investigations of international civil servants of US nationality during the McCarthy era. The particular issue of whether the national standards were acceptable in determining the suitability of persons for international service was discussed in the UN General Assembly (7th Session 416 and 417 Plenary Meeting)s, and subsequently the Secretary General accepted that the standards applied in this respect should be international rather than national (GAOR 7th Session 421 Plenary meeting at paragraph 127) – see Chapter V *infra*.

Thus there are important functional interests of an international organisation in having a system of law to govern the international civil service, separate from any national system. However whilst this separateness from the national legal system protects international civil servants from undue interference by States, it also leaves them without the protections offered by the national legal system. Thus as Amerasinghe points out they will have an equally important interest that the relevant international administrative law should be an objective legal system, capable not only of protecting them from interference by States but also from arbitrary treatment by the employer organisation itself.[112]

Thus international administrative law is drawn from a number of written sources including treaty provisions, staff rules and regulations, the employment contract itself (where applicable), and these are supplemented by other less formal sources such as the practice of the organisation in question, the general principles of law and the decisions of tribunals. An important aspect of the administrative systems of many international organisations is that the rights and obligations derived from these sources should be enforceable by a judicial organ, in most cases an administrative tribunal. The fully judicial nature of these tribunals has been asserted both by the tribunals themselves, by the international organisations and also by the International Court of Justice,[113] and appears now to be widely accepted.

Where the relevant system of international administrative law is well-developed, and the judicial protection it offers to employees is effective, there does indeed appear to

[112] Amerasinghe *Principles of the Institutional Law of International Organisations* (CUP, Cambridge, 1996) at p.330

[113] see for example the ICJ Advisory Opinion on *Effect of Awards cit* note 104 *supra* , at p.53

be good reason for national courts to decline jurisdiction over matters which would properly be dealt with before a genuinely judicial international organ, such as an international administrative tribunal. In this respect it is interesting to note that there are a number of decisions in which national courts have sought first to establish to their own satisfaction that the international administrative system in question affords adequate judicial protection to the employee before declining jurisdiction. [114]

(b) Short term or temporary staff

This intermediate category of staff are usually employed on a purely contractual basis. In relation to these contracts unless these is express provision, it is much less clear that they will be governed by international administrative law or that an international administrative tribunal will have jurisdiction over disputes relating to them. Whilst it seems that express clauses can specify that international administrative law should be applicable and that jurisdiction should be vested in an international administrative tribunal, where the contract is silent there does not appear to be any automatic operation of either. Thus for example in the case of *Rebek*

[114] Three cases may be cited in which the possibility of bringing a claim before an international administrative tribunal appears to have been a factor in the reasoning of the court. In two of them, *Chiriboga v. IBRD* ((1985) 616 F.Supp. 963) and *FAO v. Colagrossi,* ((1995) 101 ILR 386) the decisions turned on jurisdictional immunity rather than questions of justiciability as such. In the third case *Eckhardt v. EUROCONTROL* (94 ILR 331) the court's comments on the possibility of appeal to ILOAT could be interpreted as a supplementary argument to emphasise the separateness of the international administrative system from the Dutch legal system. Similarly, in its *amicus* brief, submitted to the US Court of Appeals (DC Circuit) in the case of *Broabent v. OAS,*((1982) 63 ILR 162 and 337) the UN emphasised the availability of genuinely judicial procedures and remedies in the international administrative system, but was careful to say it did so not as an invitation to the Court to assess the sufficiency of judicial protection it afforded, but rather to stress its autonomy from the national legal system (1980 UNJYB 224, at p.236). As will be discussed in the cases of *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* (*cit* note 38 *supra*), the European Court of Human Rights found that availability of an alternative remedy in international administrative law was the reason that the jurisdictional immunity of an international organisation did not violate Article 6 ECHR.

v. WHO,[115] in a dispute arising from the non-renewal of a fixed term contract which was silent both as to applicable law and as to jurisdiction, the parties agreed to arbitration of the dispute by the ILOAT. The Tribunal found that it could not apply WHO administrative law to the contract, as it was not an employment contract subject to the internal law of the WHO tribunal. Instead it was a service contract with an independent professional, governed by the system of law chosen by the parties, or, in default by the system designated by the tribunal seised of the dispute (whether national or arbitral). In this particular case the Tribunal appears to have applied the general principles of law.

Where an employee under a short-term contract seeks to seise a national court in these circumstances he or she may first have to overcome the hurdle of jurisdictional immunity. However if immunity does not extend to the question, the national court may be faced with a sensitive decision as to whether it can exercise jurisdiction. [116]

(c) Local staff

The position of local staff is quite different in that there is no presumption that they are engaged in direct relation to the achievement of the public international functions of an organisation. In other words the capacity in which an organisation engages such staff is much the same as a private employer. As such unless the employment contract expressly provides otherwise the presumption appears to be that the relationship is subject to local law rather than the internal law of the organisation (i.e. its international administrative law). In general local staff are engaged to undertake

[115] See ILOAT judgment no.77 of 1 Dec. 1964, 1965 ILO Bulletin p.126-30. See also Glavinis *op cit* note 60 *supra* at pp.179-82.

[116] See Ch 4 *infra* text at notes 120f

tasks of a relatively low degree of responsibility, not unlike the "service staff" of foreign diplomatic missions.

The treatment of local employees has been considered in a number of cases by the Italian courts, in particular in relation to the NATO bases in Italy.[117] Under the 1951 NATO Status of Forces Agreement the distinction between local employees and international civil servants is crucial, as the former are subject both to local law and jurisdiction. Thus in a series of cases the Italian courts have had to consider the nature of the employment relationship in order to establish the capacity in which NATO engaged their services.[118]

As local law is usually applicable to such employment relationships,[119] national courts will also have jurisdiction over disputes arising therefrom unless the organisation in question can assert jurisdictional immunity. Such immunity can certainly be waived expressly, and where the local law is applicable under the contract national courts may be willing to find an implied waiver.[120] Thus if international organisations wish to remove such contracts from the jurisdiction of the local courts, the onus should be on them either to elect to treat such persons as employees under international administrative law, or to provide alternative means for

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[117] It should also be noted that similar problems have arisen elsewhere in relation to NATO bases, e.g. the Belgian cases of *Devos v. SHAPE and Belgium* (1985) 91 ILR 242 and *Piha v. Belgium* 82 ILR 109 and also the French case of *Hénaut v. État-major des Forces Alliées en Europe* (1956) 2 AFDI 764

[118] see *HAFSE v. Ferrero, Sanita and INPS* (1975) 77 ILR 616 and *HAFSE v. Capocci Belmonte* (1976) in 3 (1977) IYIL 328

[119] See Duffar *Contribution à l'étude des privilèges et immunités des organisations internationales* (Pedone, Paris,1982) at pp.38-39

[120] See e.g. *Maida v. AIA* (1955) 23 ILR 510 and *Elkaim v. IIR* (1989) AFDI 875

the settlement of disputes arising therefrom.[121] In the absence of such provision it does not seem unreasonable for the local courts to adjudicate employment disputes of this nature.[122]

3. Contracts for goods and services

It will be recalled from the first chapter that from an early stage in their development international organisations have required the capacity to contract. It is difficult to conceive of an international organisation which does not need, or, indeed, have such capacity. As well as being frequently included in express provisions (either in the constitutive instrument itself or in another instrument dealing with the status of an organisation), it is likely that the capacity of international organisations to contract will readily, be implied, at very least by their member States.[123] In conventional provisions capacity to contract, though granted as a matter of international obligation, must be given effect in domestic law.[124] It is however sometimes argued

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[121] Thus for example Dominicé cites practice of the UN in relation to local staff recruited in relation to peace-keeping missions (1984 *op. cit* note 51 *supra* at p. 191-2)

[122] However it should be stressed that this only applies to adjudication of disputes arising from the contractual relationship between local employee and organisation. In no case has a local court been prepared to find that its jurisdiction should extend into the field of collective labour law: see eg *Camera confederale del lavoro and Sindicato scuola CGIL v. Bari Institute* (1974) 87 ILR 86; and *HAFSE v. Sindicato FILTAT-CISL Vicenza (*1978) 77 ILR 630.

The remedies which may be granted against an international organisation, may also be limited to awards of monetary compensation, as Orders for reinstatement may be found to impinge too greatly into the internal structure of the organisation (see *Minnini v. Bari Institute* (1980) 87 ILR 29) . However such a limitation is not unusual in relation to parallel cases in the context of State immunity.

[123] As was observed in Chapter 1 *supra* the International Court of Justice has on numerous occasions justified the doctrine of implied powers by invoking the principle of effectiveness – se E.Lauterpacht "The Development of the Law of International Organisation by the Decisions of international Tribunals" (1976) 152 *Rec. des Cours* 377 esp. at pp. 423f

[124] For example Article 104 of the UN Charter and Article 1 section 1 of the UN General Convention.

that these provisions should be interpreted broadly as entitling an international organisation to enter into contracts at both the national and international levels.[125]

The question then arises as to whether, in the absence of an express submission of a contract to a particular system of national law, national law can be applied either as the applicable law of the contract itself, or to determine the applicable law in accordance with its rules of conflicts of law. Or alternatively whether the international status of the international organisation in question requires that its contracts be considered as outside the purview of any domestic system of law, except to the degree to which the organisation has expressly consented to the application of such law. The latter appears to be the position taken by the UN.[126]

In fact rather than offering a categorical response to the problem, the numerous studies of the practice of international organisations in this respect suggests a more nuanced approach, in which the proper law should be determined in accordance with circumstances of each case, taking into account the intentions of the parties, the nature and terms of the contract in question.[127] Such examination of the intentions of the parties is premised on the assumption that the parties have made appropriate provision in respect of the nature of the organisation, as well as any element of risk attaching to the relevant systems of national law.

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[125] see for example Meyer "Les contrats de fourniture de biens et de service dans le cadre des opérations de maintien de la paix" XLII (1996) AFDI 79, at pp. 87-88.

[126] 1994 UNJY at p.449

[127] See Valticos *op. cit.* note 22 *supra*; Seyersted "Applicable law in relations between intergovernmental organizations and private parties" (1967) 122 *Rec. des Cours* 425 esp. at 462- 473 and 493-500; Mann "The proper law of contracts concluded by international persons" (1959) 35 BYIL 34; Jenks *op cit.* note 91 *supra.*at pp.147-55.

Such a flexible, case by case analysis also accords with the emphasis on the intentions of the parties in relation to most national systems of conflicts of law.[128] It is also underlined by the fact that many international organisations seek to delocalise their contracts further by including arbitration clauses for the settlement of disputes. Whilst this may not be sufficient to remove disputes entirely from aspects of local jurisdiction,[129] the advantage of arbitration is that its flexibility will allow the choice of law of the parties to be given full weight in accordance with the principle of *autonomie de la volonté.*

In general international organisations appear to be reluctant to make an express choice of national law to govern their contracts.[130] There appear to be three main bases for this preference. The first concerns the status of the organisation, as alluded to above some organisations take the view that it is incompatible with their independent international status to have their contracts subjected to national law.[131] Such reasons do not seem wholly convincing being set out in rather general terms without specifying how exactly how the independence of an organisation is compromised by the subjection of its contracts with private third parties to local rules of contract law. Nevertheless as the UN points out that for an organisation active in

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[128] See Jenks *op cit* note 91 *supra* p.148.

[129] It will be seen in Ch 4 *infra* that the degree to which international organisations may oppose their immunities from jurisdiction to national courts seeking to exercise supervisory jurisdiction over international arbitration proceedings remains controversial. See also 1994 UNJY 449.

[130] An important exception to this appears to be the European Communities which are willing for the laws of their member States to govern their contracts. Nevertheless they may also provide for arbitration by the ECJ.

[131] It may also be from a fear that national courts might interpret a choice of law clause as a waiver of immunity from jurisdiction as occurred in the case of *Maida* v. *AIA* (1955) 23 ILR 510.

as many countries in the world s it is, some standardisation of practice is necessary to ensure the proper and efficient performance of the functions of the Organisation.[132]

The second basis put forward is that an organisation must ensure fairness and uniformity of practice within an organisation, to ensure that the equality of the member States is respected and that there is no discrimination between contractors which are from different member States.[133] This argument has particular cogency in relation to employment matters, but may have some basis in relation to other contracts e.g. where tenders are invited in the procurement of goods and services.

The final argument put forward is not one of principle but one of both convenience and efficiency, though it reduces the merit of the second argument. The UN has said that it is less reluctant to agree to subject their contracts to certain systems of national law than others.[134] Where the co-contracting party proposes a system of national law with which it is familiar, for example New York law, it is more likely to concede to the proposal than where the system proposed in unfamiliar. This is, of course, perfectly understandable given that there is bound to be a limit to the knowledge of different legal systems of the staff any organisation, and the pressure on resources makes it more efficient to deal with those legal systems on which there is in-house

[132] 1985 YBILC Vol.II pt2 at p.153

[133] See 1994 UNJY 449

[134] See UN Office of Legal Affairs opinion of 10 December 1962, cited 1985 YBILC Vol.II pt2 at p.154. Similarly the World Bank in its borrowing operations will usually enter into contracts, containing an arbitration clause, but governed by the national law of the market in which the transaction takes place - see Valticos, *op cit* note 22 *supra*.

expertise rather than having to go to the expense of retaining private lawyers outside the organisation. [135]

A well-developed national legal system is likely to provide a comprehensive and detailed system of rules to govern most transactions for the purchase and sale of goods and services and therefore to provide legal certainty. Where the private party to such a transaction with an international organisation has sufficient bargaining power it is likely to be in its interests to insist on such a system of national law to govern the contract. It may also be in the interests of the international organisation. It is not therefore surprising that in relation to many contracts of a particularly technical or specialised nature, for example banking[136] and insurance contracts, as well as some transportation contracts, international organisations will often agree that they should be governed by a relevant system of municipal law.[137]

In doctrinal writings, some leading authors take as a starting point a rebuttable presumption that in the absence of an express choice of law, relevant municipal law should be applicable to contracts between an international organisation and a private

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[135] It might appear that the European Communities are at an advantage having a comparatively large legal staff drawn from the legal systems of the 15 Member States. As has been said the Communities appear to be willing to enter into contracts governed by the laws of any of their Member States – Hartley T.C. "Foundations of EC Law" 3rd ed, Clarendon, Oxford, 1994) pp.59-63.

[136] Some banking and insurance contracts may not only require subjection to local law but also submission to local jurisdiction. In relation to banking contracts involving security for loans it would appear to be necessary to subject such contracts to local law and jurisdiction. This is so whether the international organisation is the lender or the borrower, thus for example where the IFC lends money to private parties secured by way of mortgage or some other form of security it may well be necessary to ensure it is enforceable in the local courts. – se Valticos *op cit* at note 22 *supra* at p.59

[137] This appears to be the UN practice Meyer cites a Memorandum of the Director of the Office of Legal Affairs of 5 February 1988 to this effect - see "Les contrats de fourniture de biens et de service dans le cadre des opérations de maintien de la paix" (1996) 42 AFDI 79 at p.111-112, see also Valticos *op. cit.* note 22 *supra* at p.59

party.[138] In the simplest cases the relevant system of municipal law is likely to be the local law of the place of the Headquarters of an international organisation, though this will not necessarily follow in respect of all contracts,[139] particularly in the light of the truly international nature of many of the contracts of the operational international organisations.[140] In the absence of an express choice of law it will be for the tribunal chosen by the parties to determine finally the applicable law of the contract, but, particularly where the tribunal is a national court, it will probably only be able to do so by reference to the rules of conflicts of law of a given system of municipal law.[141]

On the other hand this presumption in favour of the application of municipal law carries with it the assumption that the ordinary law of contract should apply to a contractual relationship between an international organisation and a private party, into which both parties enter on the basis of equality. This model has been challenged in particular by a number of continental writers from jurisdictions which recognise a separate system of administrative contracts to govern the sale and

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[138] See Mann *op cit* note 127 *supra*; Jenks *op cit* note 126 *supra* at p. 148; and even Groshens "Les marchées passées par les organisations internationales" (1956 Rev. de droit pub. et de la science pol. 741 at p.765.

[139] Though Article 7 of the UN HQ Agreement with the US, provides for the application of relevant US, New York and local laws to be applicable in the Headquarters District unless otherwise provided for in the HQ Agreement or the General Convention, the UN does not interpret this as requiring that local law govern its contracts made at its HQ. However it does allow that the place of conclusion of the contract may be considered to be factor in the determination of the proper law of the contract, in accordance with the general principles of the conflicts of law - see 1985 YBILC Vol. II Pt 1 p.153

[140] see Meyer *op. cit.* note 137 *supra* at pp. 110 -117, in which she also raises the point that in certain situations where peacekeeping or peace-making forces have been deployed the local legal system may not be equipped to deal effectively with the types and complexity of the contractual arrangements which are necessarily involved in operations such as the UNAMIR deployment in Rwanda, or simply that the State and therefore also its legal system have collapsed as had precipitated the deployment of the UNOSOM forces in Somalia and UNTAC in Cambodia.

[141] see the UN Office of Legal Affairs Memorandum of 5 February 1988, cited by Meyer *op. cit.* note 137 *supra* at p.116.

purchase of goods and services in the public service, a relationship described as hierarchical in that it places greater powers over the negotiation and performance of the contract in the hands of the public service.[142] These writers propose that it is thus the internal law of the international organisation in question, a branch of international administrative law, which should govern its contracts. This being so it is suggested that such contracts escape any local jurisdictional control, being governed by a form of international law and are thus non-justiciable or "*irrecevable*" before local courts.

Whilst as we have seen there is support for this type of approach in relation to employment disputes, there appears to be little or no practice of national courts to support these contentions in respect of contracts for goods and services.[143] It is certainly true that some international organisations have increasingly stringent internal rules and procedures, like other public bodies, to ensure the efficiency and value for money in their procurement of necessary goods and services. However these are internal rules governing aspects of the process of procurement which are solely within the organisation. Thus they govern a stage anterior to the conclusion of a contract. Further it is not clear that they give rise to a direct relationship of responsibility between for example an international organisation and a person

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[142] For example France or Belgium where under domestic law contracts of public authorities with third parties maybe governed by a regime of administrative law (i.e. *contrat administratif*). See Groshens "Les marchées passées par les organisations internationales" (1956) Rev D. Pub. 741 esp at pp.766-9. Also Colin and Sinkondo (*op. cit.* note 90 *supra*) consider the similarities of procurement by international organisations with public procurement in domestic law, though they point out some key differences with respect to the question of applicable law.

There may be some historical support for this approach in that in the 19th Century before the doctrine of international personality was fully developed organisation could be given the status of a public authority in the host States, as for example was recognised by France in the case of the International Bureau of Weights and Measures – see Cahier *op cit* note 50 *supra* at pp.70-73.

[143] In the majority of reported cases involving contractual disputes not relating to employment, the issues raised are those of immunity rather than questions of applicable law or non-justiciability/*irrecevabilité*

tendering his goods or services to the organisation, and in any event it may well be that such questions will not be justiciable before any national court.[144]

It is also true that many international organisations have standard contractual terms which they will seek to introduce into all of their contracts. Some of these standard terms may seek to give the organisation in question greater powers of control over the performance of the contract or allow greater mutability of its terms than might commonly appear in contracts between private parties. [145] However such powers arise solely from the terms of the contract, which are the subject of negotiation and consent of the parties, whereas under, say, French or Belgian municipal law on administrative contracts the enhanced rights of the contracting public authority are ensured by general rules of law, rather than the terms of the contract.

An alternative to choosing national law as the governing law of the contract favoured by some organisations seeking to emphasise the delocalisation of their contracts, is an express choice of law clause electing some system of "transnational" law. The UN for example states that it has on occasion inserted a choice of law clause into its contracts electing "the general principles of law" as the governing law. Such a choice, however, is not without its own problems, particularly as some authors

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[144] It may be that the putative tenderer's State of nationality may be able to make an international claim against an organisation which failed to observe its own rules of procurement, but it is submitted that this would be a claim of the State rather than the tenderer, for the failure to observe the principles of the sovereign equality of States or non-discrimination as represented in the internal rules of the organisation on procurement.

An exception to this may be the European Communities for which rules of procurement are more firmly established, and for which the principle of non-discrimination is a central pillar of the Communities' legal order, and may be justiciable before the European Court of Justice.

[145] Colin and Sinkondo cite the some of the technical contracts of INTELSAT and CERN as examples *op. cit.* note 90 at pp. 21-23

seriously doubt whether the general principles of law can ever really represent a system of law at all rather than a supplementary source of law.[146]

Alternatively it might be suggested that international law (including the general principles of law) should be adopted as the governing law.[147] Again here there is some doctrinal dispute as to whether it is possible for international law to govern contractual relations between an international organisation and a private person.[148] However as this is a solution which is used in practice and has been applied by international arbitral tribunals it is assumed here that international law can govern such contracts. Clearly then international law should govern a contract where that contract expressly chooses international law as its governing law. However some international organisations claim that where the contract is silent on the choice of law, international law will automatically apply by virtue of the international status of the organisation in question.[149] Beyond these assertions by international organisations there appears, in fact, to be little judicial practice either to support or to disprove this proposition.[150]

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[146] See for example F.A.Mann *op.cit.* note 127 *supra* at p.45.

[147] See for example Schneider "International Organizations and Private Persons: the Case for Direct Application of International Law" in Dominicé et al. (ed.s) *Études de droit international en l'honneur de Pierre Lalive* (Basel, 1993) 345-58.

[148] There is now a considerable body of doctrinal writing to suggest that this is possible (see eg Mann *op cit* note *supra* at p.45) and also some important arbitration awards, in particular *Texaco v. Libya* 53 ILR 389. Similarly the practice of the EBRD might be cited by way of example. When making loans to public undertakings the EBRD will include a provision in relevant loan agreements that they should be governed by the rules of public international law (specifying the sources as applicable treaties, treaties which though in themselves applicable as such reflect customary international law, other forms of customary international law and the general principles of law) see Head "Evolution of the governing law for loan agreements of the World Bank and other multilateral development banks" 1996 AJIL 214.

[149] See 1976 UNJY 164; also the award of 1958 by Professor Batiffol cited by the UN in 1985 YBILC Vol.II pt 2 157-8 and discussed (critically) by Glavinis *op cit* note 60 *supra* at pp.189-94.

It might also be noted that the position of the World Bank has been that a non-State entity can not enter into a contract governed by international law with the Bank - see Broches "International Legal

From the point of view of an international organisation a choice of international law to govern a contract may be attractive in that its independence will not be compromised by having to rely on the law made by a single State. Correlative to a choice of international law as the governing law, will be choice of jurisdictional instance which removes the contract from the local courts, for example by providing for arbitration or dispute settlement by an international tribunal with jurisdiction to hear such a case (- it is difficult to envisage a national court applying international law as the governing law of a contract). These may be particularly important considerations in circumstances where, for example, the nature of the contract is so closely connected to the public international ends for which the organisation was established that the imposition of local law would carry with it a risk to the achievement of the mission. This may explain why, in relation to their lending activities, multilateral development banks appear increasingly to choose international law be as the governing law, particularly where there are serious risks attached to the possible local legal system (either in terms of their sufficiency or their stability).[151] Similarly the UN is frequently involved in major operations in the maintenance of international peace and security or the reconstruction of States, in situations where

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Aspects of the Operations of the World Bank" (1959) 98 *Rec. des Cours* 296 at p.351. However t should also be noted that Broches also felt that such a contract could not be governed by municipal law, rather unsatisfactorily leaving it juridically in no man's land (*ibid* at p.352).

Though this may seem debatable (especially given that there is no such assumption in relation to contracts between States and private persons) the UN generally appears to prefer that its contracts remain silent on the question of applicable law, on the basis that international law , or the general principles should be applied in that situation. It draws support for this conclusion from the Award of Professor Batiffol, see 1985 YBILC Vol.II Pt 1 at p.157.

Clearly the Intstitut de Droit International did not see this as uncontroversial and in fact in its resolution on the question called for international organisations to consider making an express choice of law in their contracts (see resolution adopted 6 September 1977, 57(2) Ann. DI 129).

[151] See Head *op cit* note 148 *supra*

the relevant local systems of law may be insufficient, little known or even hostile, and subjecting their contracts to international law may be an important aspect of ensuring its independent performance of its functions.[152]

However it must be noted that the rules of international law relating to contracts (let alone the particular category of contracts between international organisations and private parties) are still incomplete or indeterminate in some respects, relying as they do in the main upon analogy with treaty law and a series of international arbitration awards. It might be anticipated that choosing a body of rules on which there is so much uncertainty as to their content may cause problems for both the private party to the contract and to the international organisation itself, and may imperil the very legal security for which the contract was drafted and the proper law clause was instated in the first place.[153] It is therefore suggested that the principle criterion for the deciding the law applicable to the contract of international organisation should be the intentions of the parties,[154] which, if not express, may be implied from the entirety of the circumstances in which the contract was made. It does seem that in the majority of cases the presumption of the applicability of national law is likely to prove persuasive as a starting point, but it is rebuttable. Under current thinking in economics and public administration, international organisations, like national governments, seem to be set increasingly to use contracts with private parties for the

[152] See Meyer *op cit* note 137 *supra*

[153] It might even be argued that in an extreme some case the danger of prejudice to the interests of the private party arising out of such a contract is such that it does not conform to an "appropriate" mode of dispute settlement for the purposes of provisions such as Article 27 of the UN General Convention on Privileges and Immunities.

[154] Though Seyersted writing in 1967 thought that certain Latin American States may have problems with this, in particular he mentions Argentina and Uruguay as having long-standing private international law statutes containing more rigid rules – *op. cit.* note 127 *supra*, at pp.48-9

achievement of many of their functions.[155] Against this context therefore, where there are clear public international interests at stake international law may well prove to be an important alternative to national law for international organisations and as the international law of contract develops it is likely to be used more frequently.

4. Torts

Studies in comparative law show that in many legal systems the past fifty years have seen considerable development in establishing principles of tort liability in respect of public authorities.[156] The former immunities of States from non-contractual liability in their own legal systems have in large measure been replaced in line with modern conceptions of the rule of law. However the breadth of potential liabilities in tort is very wide, and in many States the area marks an interesting crossing-point between public and private law, and special (in some respects, hybrid) rules apply.

In the context of foreign State immunity such developments were influential in the development of the proper scope of restrictive immunity in respect of torts committed in the State of the forum, as shown in Sir Hersch Lauterpacht's classic article.[157] In practice the position which the restrictive doctrine of State immunity has reached on tort liability is not as radical as Lauterpacht's prescriptions. In part as a

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[155] see G.Burdeau "Les organisations internationales - entre gestion publique et gestion privée" in Makarczyk, J. (ed.), *Theory of International Law at the Threshold of the Twenty-First Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer, The Hague, 1996) p.611. In relation to this trend in public administration in the UK, see M.Freedland "Government by Contract and Private Law" 1994 Pub. Law 86.

[156] see for example J.Bell and A.Bradley (ed.) *Governmental Liability A Comparative Study* UKNCCL, 1991

[157] H.Lauterpacht "The Problem of jurisdictional Immunities of Foreign States" (1951) XXVIII BYIL 220 at p232-6. Lauterpacht suggested that a foreign State should be subject to the same liabilities as the forum State would itself be subject if *it* were the respondent (pp236-241).

result of the potential breadth of tort liability and its closeness to the performance of public functions and in part as result of the involuntary nature of tort liability, tort liability tends to have been dealt with in piecemeal fashion with immunity restricted only in relation to the least controversial aspects.[158] Thus for example under s.5 of the UK State Immunity Act a foreign State is not immune in respect of proceedings for personal or injury or death or damage to tangible property, caused by acts of the foreign State on UK territory. Immunity is also likely to be restricted in respect of commercial torts.[159] In other cases the complainant is likely to have to rely on such remedies as are available in the foreign State itself.

The position in respect of international organisations is somewhat different. Most international organisations have not developed a law of non-contractual liability of their own. In most cases therefore persons with complaints against international organisations will seek, in accordance with general principles, to establish the liability under the *lex loci delicti commissi*. Whilst this may be uncontroversial in respect of relatively straightforward cases such as road traffic accidents, or occupiers' liability,[160] in more complex cases which may relate to the discharge by an organisation of its public international functions, rules of liability in local law which would equate the organisation with a private party may not be appropriate. In these latter cases reliance by international organisations on their jurisdictional

[158] See H. Fox "State responsibility and tort proceedings against foreign states in municipal courts" (1989) XX Neth.YIL 1

[159] i.e. s.5. of the State Immunity Act 1978 It would also seem that the commercial transaction exception is broad enough to include commercial torts by virtue of s.3(3)(c), see Fox *ibid.* at pp21-24

[160] In practice organisations are unlikely to dispute their liability in local law in relation to these straightforward matters, and the availability of insurance in respect of such liability will often mean that organisations are even willing to waive their immunity from jurisdiction should it become necessary to refer claims to the national court for settlement.

immunities may thus mask a more profound objection to the applicability of local law.

In this respect it is interesting to note two instances in which international organisations have departed from the picture sketched here. The first is the case of the United Nations which in 1996 passed a regulation seeking to limit its potential liabilities in tort damages at its Headquarters in the US.[161] In that regulation the UN sought to avail itself of similar limits to tort damages as had been proposed or were in fact applicable to the US Federal Government.[162]

The second example is the European Community whose system of non-contractual liability is established under Community law by virtue of Art 288 (ex 215) EC. The Community is thus under the obligation to make reparation for any damages caused by its institutions or by its employees in the performance of their duties. The provision is subject to the sole jurisdiction of the European Court of Justice. Thus it appears that whilst the founders of the Community foresaw that it should enjoy very limited immunity from jurisdiction as a general matter, they considered that questions of non-contractual liability arising from the discharge by the Community of its public functions should be removed entirely from national legal systems, both as regards applicable law and adjudicative jurisdiction.

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[161] See Szass "The United Nations legislates to limit its liability" (1987) 81 AJIL 739

[162] It might also be noted that the UN has subsequently adopted a regulation inter alia providing for limitation of its liability in relation to damage caused in the course of peace-keeping operations – see D.Shraga " UN Peacekeeping operations: Applicability of International Humanitarian Law and Responsibility for Operations- Related Damage" (2000) 94 AJIL 406

Finally in relation to tort liability it has been proposed that there should be an exception to immunity in relation to claims for abuses of human rights.[163] This proposal appears to follow the suggestion of a number of writers that the immunities of foreign States should be limited in relation to claims made against them for human rights abuses.[164] It might be noted that State immunity has not been limited in this way, and is unlikely to be so in the immediate future.[165] In relation to international organisations such proposals also seem wide of the mark. Undoubtedly international organisations as subjects of international law, should adhere to and promote human rights standards. Indeed it is so important that human rights standards should be upheld in all aspects of their work, that these should form a primary aspect of the internal law of all organisations. A more appropriate strategy would therefore be to encourage international organisations to elaborate their own law and policies in this respect and to develop their own remedial systems, i.e. to develop the public law of international organisations rather than rely on the indirect route of characterising human rights abuses as private law torts.

5. Immovable Property

The principle that it is the *lex situs* which governs immovable property, is a broadly accepted in private international law, and corresponds to the notion of the exclusive territorial jurisdiction of sovereign States in public international law. As has been said the theory of extraterritoriality of diplomatic or international premises, has been

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[163] See M.Singer "Jurisdictional immunity of international organizations: Human rights and functional necessity concerns" (1995) 3 VaJIL1-61

[164] see for example Bianchi, A., "Denying State Immunity to Violators of Human Rights"' 46 *Austrian J. Publ. Int'l L.* (1994) 195.; and J. Brohmer *State Immunity and the Violation of Human Rights* (Kluwer, The Hague, 1997)

[165] Nevertheless in the case of *Al-Adsani v. UK* the European Court of Human Rights only upheld immunity by the narrowest of margins see judgment of 21 November 2001

abandoned in view the logical and practical difficulties of applying it. Thus there is a large measure of consensus amongst writers and in the practice of international organisations that the *lex situs* governs their immovable property.[166]

In practice many international organisations lease their Headquarters and other sites from public authorities in the host State, and those lease agreements often refer to local law.[167] Organisations will also seek, where applicable, the protection of their title to immovable property through registration with the local land registry. It also seems unlikely that an international organisation would be able to develop its own regulations to govern real property in most circumstances.

However even in relation to such an apparently straightforward picture there may be complicating factors. Jenks notes for example how when international organisations have entered into real property relations with each other, e.g. by leasing buildings one to another, the better view appears to be that those relations are governed by international law, subject to compliance with local formalities such as registration.[168] Similarly Knapp describes the complexity of legal relations in respect of the construction by the ILO of new buildings in the mid-1970s.[169] Whilst local law was *prima facie* applicable, in an agreement with the Swiss authorities the application of certain aspects of that law was modified to reflect the international character of the ILO. Thus for example whilst the Organisation was bound by Swiss law in respect of

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[166] Jenks op cit note 109 *supra* at pp 135-46; see also Morgenstern *Legal Problems of International Organisations* (Grotius, Cambridge, 1986) at p.38

[167] For a survey of such agreements see Jenks *ibid.* at pp135-38.

[168] *ibid.* pp.141-44

[169] B Knapp "Questions juridiques relatives à la construction d'immeubles par les organisations internationales" 1977 Sw.YBIL 51

matters such as land registration and aerial security, it was only bound "to take into account" the wishes of the Geneva authorities in respect of the design and construction of the new buildings.

Finally it might be noted that practice suggests that notwithstanding a general acceptance of the *lex situs* in respect of immovable property, national courts will not necessarily feel that this establishes their jurisdiction. The relevant caselaw reveals a great variety in the ways in which such questions have been dealt.[170]

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It therefore seems that whilst a theory of complementary competences between international law, the internal law of an international organisation and national law may seem attractive as a systematic and rational approach to the complex interaction between national jurisdiction and an international organisation, it seems that it is premature. Where there is some consensus as for example in relation to the employment relations of international organisations with their permanent staff, the explanation of the lack of competence in the national courts is convincing. However in most areas practice remains extremely varied between, and even within, organisations and also between national jurisdictions. Any attempt to build consensus in these other areas on how to allocate respective competences between national and international authorities would clearly be a major project, requiring *inter alia* a

[170] Thus for example when the Italian Court of Cassation found that the immunity of the FAO was limited in respect of the rent review proceedings in *INPDAI v. FAO* (87 ILR 1) resulted in a great controversy in the FAO. Preparations were underway to seek an Advisory Opinion of the International Court of Justice when a settlement was found with the Italian Government – see Reinsich *op cit* note 11 *supra* at pp187-8. By way of contrast in *Askir v. Boutros Boutros Ghali et al.*(1996, 113 ILR 516) a US Court found that the occupation of property by UN peacekeeping troops in Somalia was not an act *iure gestionis* and so was immune whether the restrictive theory of State immunity applied to the UN or not.

greater degree of convergence between national systems than currently exists. By comparison, the advantage of immunity as a technique is its simplicity and the relative ease by which it can be given effect.[171]

E. An Individuated Response – Conventional Immunities *ratione personae*

The huge variety in international organisations and their functions, powers and structures, must constantly be borne in mind when considering the law of international organisations - and this factor is no less applicable when considering questions related to their immunities. This heterogeneity suggests that the particular needs and circumstances of each international organisation in this respect will be reflected in the particular treaty provisions relating to each organisation. As will be shown in the next chapter such analysis shows some instructive patterns when the extent of immunities of international organisations are considered in the light of the functions of particular international organisations. Thus it can be seen that, in accordance with its functional needs, the immunities of a universal international organisation operating in the political field, such as the UN, are granted in the broad terms, for example "immunity from every form of legal process". Whereas a small,

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[171] Professor Crawford has considered whether State immunity should be abandoned in favour of an approach based on the incompetence *ratione materiae* of the forum. However he concluded that State immunity should be retained because (i) it was a familiar technique for States and their courts and its removal would cause serious concern to many States; and (ii) with a proper level of articulation immunity is a "relatively straightforward and predictable technique" and much better developed and more certain than the "vague, conflicting and disputable" doctrines of act of State and non-justiciability which form part of some common law systems. Furthermore (iii) the reliance on act of State or non-justiciability, may lead to an unnecessarily exaggerated form of dualism, which might threaten any ability of the municipal court to apply international law as part of the law of the forum. The central point being that State immunity is defeasible by consent of the respondent State. Similar objections *mutatis mutandis* can be made to the proposal to replace the immunities of international organisations by a general theory of the incompetence of municipal courts *ratione materiae*. Crawford "International and Foreign Sovereigns: Distinguishing Immune Transactions" (1983) 54 BYIL 75 at pp.81-2

functional organisation involved in, for example, scientific research is likely to be granted more rudimentary immunities.

However the European Communities appear somewhat exceptional in this respect. It now seems almost trite to observe that the powers of the Communities are notable both for their breadth over so many areas of the governance of their member States, but also for their depth as demonstrated by the direct applicability of Community law to individuals. In other words the Communities come closer than other international organisations to establishing a genuine economic and political community, comparable in some respects to that of a State. Yet when considering their jurisdictional immunities, it is striking how limited these are, relating to execution rather than jurisdiction.[172] Seidl-Hohenveldern[173] suggests that this is explained at the policy level by the intentions of the founding fathers of the Communities that they should resemble as far as possible the structures of a federal State, which do not have immunities from the constituent units, but rather enjoy wide areas of exclusive jurisdiction. In practice the European Court of Justice has wide areas of exclusive jurisdiction, and in some circumstances is available to private persons who are adversely affected by actions of the Communities. Moreover the ECJ has fashioned doctrines such as the supremacy of Community law which ensure that national courts can not hinder the functioning of the Communities.

It will be shown in the next Chapter that in respect of other international organisations, as a general rule, the greater that the involvement of a given

[172] See Ch.3 *infra*

[173] see Seidl Hohenveldern "L'immunité de juridiction des Communautés européennes" 1990 Rev. du Marché Commun 475-9

organisation in commercial activities is anticipated in the performance of its functions, the more limited its immunity is likely to be in respect of those activities. Hence the constituent instruments of the international development banks and other financial organisations anticipate their involvement in significant transactions on the international capital markets, and correspondingly their immunities are reduced in respect of these transactions. The reason cited for the restriction of immunity is that it assists these organisations in the achievement of their purposes, as without it they would not carry sufficient confidence in the market to be able to carry on the transactions necessary for the achievement of those purposes.

There would seem to be two possible arguments as to this treaty practice, the more radical would be that the treaty practice suggests that since immunity is restricted when commercial activities are clearly included within the purposes of the organisation, immunity ought also to be restricted when other international organisations take part in commercial transactions ancillary to their purposes. However the more conservative approach would be that since immunity is only restricted in relation to certain organisations in the relevant treaty provisions, an *a contrario* interpretation would suggest that other organisations must be intended to enjoy absolute immunity. Practice as will be shown is not completely unanimous but tends to favour the latter argument.

For those organisations benefiting from an absolute immunity under relevant treaty provisions there appear to be two mitigating circumstances whereby injustice to private parties external to these organisations can be avoided. Firstly in all the treaty provisions considered there is an express exception to immunity in cases of

waiver.[174] It might be noted that early in the development of international organisations it was thought that there would be a general willingness on the part of international organisations to waive their immunity in the day-to-day contacts with third parties, unless there were special circumstances by reason of which waiver was inappropriate.[175] However in practice almost the opposite has proved true, in that international organisations have proved rather unwilling as a rule to waive their immunity unless special circumstances exist whereby the international organisation is rendered free from direct involvement.[176]

The second mitigating factor is the obligation upon international organisations in cases in which they avail themselves of their jurisdictional immunities, to establish alternative dispute settlement procedures. The variety of options by which this obligation may be fulfilled is open. Thus whilst some international organisations rely solely upon *ad hoc* arbitration in this respect,[177] other possibilities range from a quasi-administrative claims procedure[178] to a full blown judicial procedure before standing court or tribunal.[179] However so far there has been little evaluation of how

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[174] See Chapter 3 *infra*

[175] Mackinnon Wood "Legal relations between individuals and a world organisation of States" 1944 Transactions of the Grotius Society 141 at p.162

[176] For example where an international organisation has insurance against third party claims, see ch.3 *infra*.

[177] Glavinis reviews the relatively small number of arbitral awards made in contractual disputes between international organisations and private persons. He concludes that arbitration is most suitable means by which international organisations can fulfill the obligation to establish alternative remedies to third parties see P.Glavinis *Les litiges relatif au contrats passés entre organisations internationales et personnes privées* (1990) esp. at pp.241-2

[178] In situations where a number of similar relatively small scale claims are likely to be made against an international organisation, it may set up a claims commission to handle them, as has been done by the UN in relation to certain peace-keeping forces (see Bowett *United Nations Forces* .(Stevens, London, 1964) at pp.242-8

[179] As regards the internal law of international organisations there are a number of well-established administrative tribunals which are established to settle employment disputes of international

fully this obligation is in fact discharged by the adoption particular modes of settlement. Thus for example in the *Beer and Reagan* case for example the European Court of Human Rights found that the existence of an alternative procedure before an appeals board was sufficient to satisfy the requirements of the right of access to a court for the determination of civil rights, without conducting a deeper enquiry into its adequacy.[180]

A final point to make is that these immunities *ratione personae* are granted to international organisations exclusively by treaty provisions. This means that by virtue of the rule of *non tertiis nocent* in international treaty law, such immunities only apply as between the member States of an organisation, and that there is no obligation upon non-member States to grant immunities of this nature.

F. Conclusions

The immunities of international organisations play an important role in ensuring the institutional autonomy and international status of international organisations. Jurisdictional immunities (properly so-called) are primarily granted by way of express treaty provision in accordance with the functional requirements of each

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organisations with members of their staff. However there are also two examples of standing judicial bodies which can hear a wider range of disputes:

The ILO Administrative Tribunal is also empowered to hear disputes arising out of ILO contracts in relation to matters other than employment, though there appears to be little practice in this respect (see eg Knapp "Questions juridique relatives a la construction d'immeubles par les organisations internationales" 1977 Sw.YBIL 51-80) and the competence does not extend to the non-employment contracts of the other international organisations which use the services of the ILOAT in the settlement of their employment dipsutes.

Secondly arguably the best example of a standing judicial procedure to determine the disputes of an international organisation is of course the European Court of Justice of the European Communities.

[180] Decided 18 February 1999, see casenote by Reinisch (1999) 93 AJIL 933.

organisation. It is therefore necessary to be cautious in generalising about the proper extent of the immunities of international organisations. The functional standard is a flexible one, and must be understood in the light of the treaty practice by which immunities of international organisations are granted. A consequence of such immunity deriving solely from treaty is that it only extends to the Parties to the treaty in question, and cannot impose on an obligation on third States to recognise immunity.

However at the same time as recognising these functional immunities, it might be noted that the international status of an international organisation may nevertheless require some recognition and accommodation within national law. It was argued in the last chapter that international personality derives from customary international law, and has an objective character, i.e. that it should be recognised by both member States and non-member States. It appears that the international status of an international organisation, gives rise to a rule requiring national jurisdictions to refrain from adjudicating upon issues governed by its own internal law or institutional law. This is based upon an incompetence *ratione materiae* and practice and principle suggest that it precludes all national jurisdictions, whether or not the forum State is a member of the organisation in question.

CHAPTER 3

SOURCES OF IMMUNITY AND THEIR INTERPRETATION IN INTERNATIONAL LAW

Introduction

The rationale of jurisdictional immunities of international organisations was discussed in the previous chapter, where it was shown that their conceptual basis in "functional necessity" was not a monolithic explanation, to be applied with equal effect to all international organisations. Instead it was suggested that the functional standard is a flexible approach, the purpose of which is to ensure that the functional requirements of each international organisation may be accommodated within the international system by which jurisdictional competence is allocated among States.

The aim of this chapter is to consider the sources of international law on the jurisdictional immunities of international organisations, in order to see how the functional approach has been applied and interpreted in practice. In contrast with the law on State immunity, the primary source of the law for the more recent and, in some respects, more complex immunities of international organisations is through a vast web of treaty provisions. The first section of this Chapter will consider those treaty provisions, and try and map through the range of this material. The second section will consider the practice of international organisations, which has a particularly significant role in the interpretation of treaty provisions relating to international organisations.[1] The third Section will consider how various international tribunals have interpreted international immunities.

[1] See E.Lauterpacht "The Development of the Law of International Organisation by the decisions of International Tribunals" (1976) 152 *Hague Rec.* 377, esp. at 447-465

A. Treaty Provisions

Claims to jurisdictional immunities by international organisations in most cases have their basis in provisions of treaty law, whether in the constitutive instrument of the organisation, or in an additional multilateral convention or protocol specifically on privileges and immunities, or in the headquarters agreement entered into by the organisation with its host State. In the past such treaty provisions have been said to be so similar as to provide a uniform rule as to jurisdictional immunity.[2] As will be shown below the multiplicity of organisations now in existence reveals a more varied range of treaty provisions than these writers anticipated. Certainly some organisations, mainly those which are universal, together with certain regional organisations which have broad political objects, as well as those which have judicial functions, enjoy wide jurisdictional immunities, often formulated in English texts as "immunity from every form of legal process". However in relation to other organisations, for example those with more limited or economic functions which envisage their entry into the market-place, or whose operations require direct considerable interaction with private persons, then immunity under the relevant treaty provision may be much more limited.

(1) Immunity from "every form of legal process"

(a) The United Nations

As was shown in the previous chapter, it is mainly in the post-World War II period that it has become usual for the immunities of international organisations to be addressed in

[2] see J.-F. Lalive "L'immunité de juridiction des états et des organisations internationales" (1953) 84 *Rec. des Cours* 205, at pp.304-6; and Jenks *International Immunities* (Stevens, London, 1961) pp.33-4.

conventional provisions.[3] The United Nations was one of the first organisations whose own jurisdictional immunity was specifically addressed by its member States, and the relevant conventional provisions have served in this respect as a model for subsequent organisations and agreements. Article 105 of the UN Charter provides:

> "(1) The organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
> (2) Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of the functions in connection with the Organisation.
> (3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose convention to the Members of the United Nations for this purpose."

Thus it is clear from paragraph (1) that "functional necessity" is the basis of the Organisation's own immunities. Examination of the documents of the San Francisco Conference reveals that this standard was chosen precisely because of its flexibility, both in relation to the extent of immunities and possibly even as between the different member States.[4]

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[3] The immunities of the League of Nations itself, were not contained in the Covenant (though article 7(4) required that its officials should be granted diplomatic immunities in the performance of their functions). However the *modus vivendi* of 1926 between the Swiss Government and the League of Nations and the ILO, contains an article providing that the League, "having international personality and juridical capacity, can not, in principle, under international law, be impleaded before the Swiss courts without its express consent" see ST/LEG/SER.B/11 at p.134.

The Bretton Woods Institutions established in 1944, appear to be among the first international organisations whose immunities are addressed in their constituent instruments, see text *infra*. For surveys of the historical development before 1945 see Cahier *Etude des accords de siège entre les organisations internationales et les états où elles résident* (Giuffre, Milan, 1959) and Kunz "Privileges and Immunities of International Organizations"(1947) 41 AJIL 828.

[4] The question of privileges and immunities was not considered in the Dumbarton Oaks proposals, but in the San Francisco Conference it was considered by a Subcommittee to Committee IV/2 on Legal Problems. The Subcommittee's report contains text of what is now Article 105, and contains *inter alia* the following comments indicating the flexibility that was intended by the functional necessity formula:

"[Sub-paragraph 1] of this proposed article refers to the Organisation considered as a distinct entity... In order to determine the nature of the privileges and immunities, the subcommittee has seen fit to avoid the term 'diplomatic' and has preferred to substitute a more appropriate standard, based, for the purposes of the Organisation, on the necessity of realising its purposes and, in the case of the representatives of its

However in accordance with Article 105(3), in 1946 the General Assembly adopted the Convention on the on the Privileges and Immunities of the United Nations, referred to as the "General Convention",[5] which seeks to give flesh to principle set out in paragraphs (1) and (2) of Article 105. The General Convention provides *inter alia* for the personality of the organisation, its immunities from jurisdiction and constraint, the inviolability of its archives and premises, its freedom from financial controls its fiscal immunities, and its freedom of communication. The General Convention also deals with the immunities of representatives of the Member States, the immunities of officials of the Organisation and the immunities of experts on mission.

The precise relationship between the provisions of Article 105(1) and (2), and the General Convention requires some consideration. Firstly there is a question as to whether the Convention contains obligations applicable only to the States Parties to that Convention, or whether it has a broader application as an interpretation of the functionally necessary privileges and immunities required by Article 105(1) and (2).

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members and the officials of the Organisation, on providing for the independent exercise of their functions... The draft article proposed by the subcommittee does not specify the privileges and immunities respect for which it imposes on the member States. This has been thought superfluous. The terms privileges and immunities indicate in a general way all that could be considered necessary to the realisation of the purposes of the Organisation, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials: exemption from tax, immunity from jurisdiction, facilities for communication, inviolability of buildings, properties, and archives, etc. It would moreover have been impossible to establish a list valid for all the member States and taking account of the special situation in which some of them might find themselves by reason of the activities of the Organisation or of its organs in their territory. But if there is one certain principle it is that no member State may hinder in any way the working of the Organisation or take any measures the effect of which might be to increase its burdens, financial or other." See UNCIO Documents vol.13 pp.778-780.

However Lalive suggests that despite its importance this Report should not be seen as providing an authentic interpretation, *op.cit.* note 2 *supra*, at p.311.

[5] ie the Convention which governed the juridical relations between the Organisation and its Members generally, as opposed to the "Special Agreement" which was to deal with relations with the Host State. In fact the HQ Agreement with the USA does not deal with the question of jurisdictional immunity as such.

The General Convention is widely taken up, and now has 146 ratifications out of 191 member States. However the UN Legal Counsel's opinion is clearly that the significance of the General Convention is broader than simply a contractual arrangement among the States which have ratified it, in a number of respects. Firstly Article 105 of the Charter obliges member States to accord the Organisation such privileges and immunities as are necessary. The General Convention then specifies that the immunities which the General Assembly considers are necessary. Its provisions in that sense may be seen as a minimum which all States must accord to the Organisation, whereas additional obligations may be necessary for certain States in which the Organisation carries out particular operations. Finally, not only are the vast majority of member States parties to the General Convention, but its provisions have been adopted in special agreements with a number of States which are either not parties to the Convention or not members of the Organisation. Legal counsel concludes therefore that whatever the status of the provisions of the General Convention may have been in 1946, "they are now so widely accepted that they have become part of the general international law governing the relations of States and the United Nations".[6]

On the question of jurisdictional immunities the General Convention provides:

> "*Section 2.* The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

[6] See Statement made by the Legal Counsel at the 1016th meeting of the Sixth committee of the General Assembly on 6.12.67 (1967 UNJY 311-314).

The words "every form of legal process"[7] have been interpreted literally as endowing the organisation with an absolute immunity from "every form of legal process before national authorities, whether judicial administrative or executive functions according to national law".[8] The Convention terms were initially drafted by the Preparatory Commission of the United Nations,[9] and at that time the question of jurisdictional immunity appears not to have been controversial either in the Preparatory Commission or the Sixth Committee of the General Assembly.[10]

However there is another possible interpretation of section 2 of the General Convention, which is relevant to the present enquiry, but which has been raised only rarely in caselaw or the literature.[11] The orthodox reading of section 2 of the General Convention together with Article 105(1) of the Charter is that the jurisdictional immunity required by the Organisation to fulfil its purposes is unlimited. However an

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[7] Though it might be noted that the French text of the Convention refers simply to "immunité de jurisdiction".

[8] see UN Legal Counsel's Statement 1967 YBILC Pt II at p.224 §76; and also see Dominicé "L'immunité de juridiction et d'exécution des organisations internationales" (1984) 187 *Rec. de Cours* 145 at p. 180.

[9] The original draft is similar but it may be argued that it anticipated (a) a slightly more precise concept of jurisdictional immunity (the reference to judicial as opposed to legal process) and (b) a broader concept of waiver. The Prep. Comm. draft read:

"The Organisation, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that in any case it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

It studied the terms of the constitutive treaties of a number of existing organisations but reproduced the terms of the IMF Articles of agreement on the point. The other organisations it considered were the IBRD (see text infra), UNRRA and ECITO (both of which referred to the immunities granted by the members to each other including immunity from legal process) and the FAO (which refers to the immunities granted to diplomatic missions).

[10] Sixth Committee discussions and documents A/C.6/17; A/C.6/19; A/C.6/28; A/C.6/31; A/C.6/32; A/C.6/33; and its Report to the GA A/43/Rev.1. For the discussion and resolution of the General Assembly see the Verbatim Record of the First Session for 13.2.46,p.448-456.

[11] But see the Belgian case of *Manderlier v. ONU* (1972) 69 ILR 139; also Wickremasinghe and Verdirame "Responsibility and Liability for Violations of Human Rights in the course of UN Field Operations" in C.Scott (ed.) *Torture as Tort* (Hart, Oxford,2001) p. 465, at pp.476-8

alternative reading would be that the immunity from every form of legal process in section 2 is limited by the notion of functional necessity in Article 105(1) of the Charter. Thus whilst Section 2 might be operative in relation to any form of legal process, it does not extend the scope of the immunity *ratione materiae* beyond what is functionally necessary in accordance Article 105(1) of the Charter. However as will be discussed in Chapter 4, application of this approach may raise difficult questions relating to the appropriateness of national courts determining what is functionally necessary.

In any event there are two established qualifications to the immunity of the Organisation. Firstly under terms of the Convention itself national courts will have jurisdiction in cases where the Organisation expressly waives its immunity. However as will be discussed below practice in relation to waiver of immunity remains largely undeveloped, as it is the UN appears generally to take a cautious approach to waiver.

The second relates to road accidents involving cars owned or driven by persons enjoying immunity from legal process. It was anticipated in the Sixth Committee that this might constitute a frequent source of difficulty, and thus they recommended that the General Assembly to adopt a resolution instructing the Secretary General to ensure that all UN drivers and vehicles, as well as members of staff who own or drive vehicles should be properly insured against third party risks. A resolution to this effect was adopted immediately following the General Assembly's adoption of the General Convention.[12] Further, as an exception to its general approach noted above, in cases of

[12] see Resolution 23(I) Annex E adopted on 13 February 1946

disputes arising from road accidents the United Nations may waive its immunity from suit to enable its insurers to defend proceedings if so requested.[13]

However as a counterpart to this wide immunity from suit in relation to proceedings before national courts, Section 29 of Article VIII of the General Convention also requires:

> "The United Nations shall make provisions for appropriate modes of settlement of:
> (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
> (b) Disputes involving any official of the United nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

In relation to contractual disputes this obligation is usually observed by the inclusion of a compromissory clause referring disputes to arbitration.[14] This is only a partial solution to the problems which jurisdictional immunities raise, as it is a largely consensual mode of settlement, and there are no standing arrangements which can be accessed by complainants for the settlement of disputes. Further as will be discussed later this is an obligation which appears to be enforceable only at the international level i.e. by a State party to the General Convention bringing a claim against the international organisation, and there being little a private party can do to enforce it.[15]

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[13] See Documents A/CN.4/L.118 and Add.1 & .2, 1967 vol.II YBILC p.155 at p.225 § 84; and A./CN.4/L383 and Add.1-3, 1985 Vol.II pt.1 YBILC p145 at p.162 §19.

[14] Whilst the delocalisation of disputes by the use of arbitration is in many ways understandable and may be important in relation to certain types of case, the juxtaposition of arbitration and jurisdictional immunity throws up some interesting questions which have not yet been resolved (see section on arbitration below).

[15] This is not a solely academic point, as at least one international organisation in the UN family has taken the view that it is under no obligation to include such compromissory clauses in contracts but rather that its obligations only extend to providing suitable procedures once a dispute has arisen - see information provided by UNESCO to N.Valticos "Les contrats conclus par les organisations internationales avec des personnes privées" (1977) Ann.IDI 1, at p.68). The point was also alluded to in

Lastly mention should be made of the position of the UN in Switzerland which until recently has been a party to neither the General Convention nor the UN Charter. In Switzerland the UN had to rely upon the "Interim Arrangement on Privileges and Immunities of the United Nations" of 1946.[16] According to Art.1 of this Agreement:

> "The Swiss Federal Council recognises the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organisation can not be sued before the Swiss Courts without its express consent."

This formulation appears to owe much to the *modus vivendi* between Switzerland and the League of Nations of 1926,[17] deriving jurisdictional immunity directly from international personality.[18] The insertion of the words "according to the rules of international law" may suggest a possible qualification, limiting immunity if that is what other rules of international law require. Writing in 1953 Lalive appears not to assign any particular value to this phrase, ruling out the possibility that it might import either the distinction between acts *iure imperii* and acts *iure gestionis* from the law of State immunity, or the possibility of it referring to conventional rules such as Article 104 and 105.[19] As will be seen below this view seems to have been largely accepted in practice, as the Swiss courts have not sought to establish jurisdiction over the United Nations.

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one part of the *International Tin Council* litigation (see *Standard Chartered Bank v. ITC* 77 ILR 8, at p.15).

[16] 1 UNTS 163

[17] reprinted in UN Doc. ST/LEG/SER/B/11 at p.134.

[18] There may be a danger of circularity here. In the *Reparation* case (discussed in chapter 1 *supra*) it will be recalled that the ICJ deduced the international personality of the UN from *inter alia* the separateness of the Organisation from its member States as demonstrated in the General Convention.

[19] *op. cit.* note 2 *supra* at pp.329-30

(b) The Specialised Agencies

In addition to drafting the General Convention, the Preparatory Commission of the United Nations also recommended drawing together the law on the privileges and immunities of the Specialised Agencies as far as possible, but in the light of the flexibility inherent in the functional standard.[20] The Convention on the Privileges and Immunities of the Specialised Agencies (hereafter the "1947 Convention") seeks to strike this balance laying out in its text standard clauses setting out the privileges and immunities generally to be granted to the Specialised Agencies (closely modelled on the provisions of the General Convention) and then providing in annexes modifications in the application of the standard clauses in relation to each of the organisations. Although there may be an underlying tension between the aims of unifying the law and allowing it sufficient flexibility to meet the particular requirements of each organisation, this appears not to have been a difficulty in relation to jurisdictional immunities for these organisations. Whilst most of the Specialised Agencies have a general clause in their respective Constitutions obliging member States to grant them privileges and immunities in very broad terms,[21] few specify that jurisdictional immunity shall be granted.

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[20] See *Report of the Preparatory Commission* 1945, Chapter VII, §5:

"The Preparatory Commission recommends to the General Assembly that the privileges and immunities of specialised agencies contained in their respective constitutions should be reconsidered. If necessary, negotiations should be opened for their coordination in the light of any convention ultimately adopted by the United Nations ... There are many advantages in the unification, as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialised agencies. On the other hand, it must be recognised that not all specialised agencies require all the privileges and immunities which may be needed by others. No specialised agency would however require greater privileges than the United Nations itself. Certain specialised agencies, may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations. The privileges and immunities, therefore, of the United Nations might be regarded as a maximum within which the various specialised agencies should enjoy just such privileges as the proper fulfilment of their respective functions may require. It should be a principle that no immunities, which are not really necessary, should be asked for."

[21] ie in general, the Constitutions of the Specialised Agencies contain a general provision requiring member States to accord to them such privileges and immunities as are necessary for the fulfilment of

Thus the 1947 Convention performs a similar function in relation to the Specialised Agencies as the General Convention does in relation to the UN itself. Its terms also reflect the General Convention: ss 4 and 31 of the 1947 Convention deal respectively with the questions of jurisdictional immunity and the settlement of disputes of a contractual or private law nature, in exactly the same terms as the provisions of the General Convention. In this respect only the IBRD, IFC and IDA[22] have specified that a more limited jurisdictional immunity should be applied to them in accordance with their constitutive instruments (see below). For the other Specialised Agencies the standard of immunity enjoyed by the UN, appears also to be applicable under the 1947 Convention.

This appears to have been widely accepted by the States parties to the 1947 Convention. In the various reservations and declarations which States have made to the 1947 Convention only Italy has reserved its position in relation to the extent of

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their purposes/functions eg ILO (Art. 40 Constitution of the ILO 1946 (15 UNTS 40)); UNESCO (Art.12 Constitution of UNESCO (4 UNTS 275)); WHO (Art.67 (2) Constitution of the WHO (14 UNTS 186)); WMO (Art.XIX(b)(i) Constitution of WMO 77 UNTS 144); WTO (Art.VIII(2); UNIDO (art. 21 of UNIDO Constitution (18 ILM 667) though in this case there is also reference to the specific standards of both the 1947 Convention and the General Convention); IFAD art.10(2) of the Agreement establishing IFAD (15 ILM 922)).

Somewhat different provisions govern the immunities of the FAO (Constitution of the FAO in Article XVI(2) obliges member States "to accord the organisation all the immunities and facilities which it accords to the diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation"); the IMF (Art.IX(3) Articles of Agreement of the IMF, provides for "immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract"); IMO (whose Constitution refers to the privileges and immunities as contained in the 1947 Convention (subject to the Annex relating to its application to the IMO)). For the IBRD and IFC see text infra.

The exceptions are: ICAO (Article 47 of the Chicago Convention of 1947 (15 UNTS 295) and WIPO (Art 12 of WIPO Constitution (828 UNTS 3)) whose Constitutions only refer to their legal capacity as being that necessary for the performance of their functions; and the ITU and UPU whose organisational structure is rather different, and whose Constitutions do not mention the issue.

[22] Annexes VI, XIII and XIV to the 1947 Convention, respectively.

jurisdictional immunity which it will grant to any Specialised Agency wishing to establish its Headquarters or any regional office on Italian territory, claiming that in accordance with section 39 the terms of the Convention will be subject to supplementary agreements contained in host State arrangements.[23]

In this relation it is interesting to note treaty provisions in the host State arrangements of two States which are not party to 1947 Convention, Switzerland and Canada, both which refer to extraneous standards of immunity. The practice of the Swiss government appears to use the diplomatic standard of immunity in HQ Agreements with international organisations based in its territory.[24] Contrastingly ICAO's HQ agreement with Canada refers to the Organisation as having the same immunity as a foreign State.[25] As no cases have been decided in which these provisions have been construed it is not possible to say whether these provisions introduce significant qualifications to the immunities provided for in the 1947 Convention.

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[23] The text of Section 39 in fact appears as if it were not intended to allow such limitations of immunities in this way, but rather only allow for supplementary immunities to be granted. However no State has objected to *this* reservation by Italy.

[24] See e.g. Art 3 of the HQ Agreement with ILO of 1946, reprinted in UN Doc. ST/LEG/SER.B/11 at p.138; and Art. 3 of the HQ Agreement with the WHO reprinted *ibid.* at p.254.

[25] In relation to ICAO's HQ Agreement with Canada it is interesting to note that it was renegotiated relatively recently and yet this provision has remained unaltered – see M.Milde "New Headquarters Agreement between ICAO and Canada" (1992) XVII-II Annals of Air and Space Law 305-22

It is also interesting to compare this situation under the ICAO HQ Agreement with the situation which previously obtained in relation to Italy's position on the 1947 Convention. When Italy first sought to accede to the Convention it also sought to make a reservation from the provision on jurisdictional immunity limiting the extent of immunity from suit enjoyed by the Specialised Agencies in Italy to that enjoyed by foreign States. This reservation was deemed unacceptable and Italy was not considered a party to the Convention (see Dominicé (1984) *187 Rec. des cours* 145, at p.190). This strongly suggests that the *opinio iuris* of States was that the rules of State immunity should not be applied directly to international organisations.

The result of the rejection of Italy's accession to the 1947 Convention was that, in the absence of an applicable treaty provision, the Italian Courts were left to apply customary international law. However following some controversial events which resulted from this situation, the anomalies of which were brought out by the fact of the HQ of the FAO being sited in Rome (and the fact that the HQ Agreement does not provide for the jurisdictional immunities of the Organisation), Italy has now modified its reservation see (text at note 23 *supra*) and acceded to the Convention on 30.8.85.

(c) Other "political" and "military" organisations

Similar provisions requiring immunity from every form of legal process also apply to a number of broad political organisations including the Council of Europe;[26] the WEU;[27] the Arab League;[28] OAS;[29] OAU(Art II and IX);[30] NATO;[31] and the IAEA.[32]

It is interesting to note that in all of these cases the document in question is a multilateral agreement ("a general convention") on the privileges and immunities, mostly dating from the 1950's, and that they are set out in broad terms of principle. These conventions tend to include in their final provisions that the Secretary-General of the organisation in question can enter into supplementary agreements with

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[26] See General Agreement on the Privileges and Immunities of the Council of Europe (1949 reprinted in UN Doc. ST/LEG/SER.B/11 at p390). Article 3 provides for immunity from every form of legal process except in so far as in any particular case the Committee of Ministers has authorised its waiver. Article 21 requires that any dispute between the Council and private persons regarding supplies furnished, services rendered or immoveable property, shall be submitted to arbitration.

[27] see Agreement on the Status of WEU, National Representatives and International Staff (1955 and reprinted in UN Doc. ST/LEG/SER.B/11 at p.421). Article 4 provides for immunity from every form of legal process except in so far as in any particular case the Secretary General authorises waiver. Article 26 provides that the Council shall make provision for appropriate methods of settling disputes of a private character to which the organisation is a party.

[28] see Convention of the Privileges and Immunities of the League of Arab States (1953 - reprinted in UN Doc. ST/LEG/SER.B/11 at p.414). Article 2 provides for immunity from every form of legal process, unless the Secretary General decides to waive it expressly. Article 31 States that the League shall establish an organ for settling contractual disputes and other disputes of a private law category.

[29] See Agreement on the Privileges and Immunities of the OAS (1949 - reprinted in UN Doc. ST/LEG/SER.B/11 at p.377). Article 2 provides for immunity from every form of legal process except in so far as it is waived. Article 12 States that the Organisation will make provision for appropriate modes of settlement of contractual disputes or other disputes of a private law nature.

[30] Convention on the Privileges and Immunities of the OAU (reprinted in Naldi (ed.) Documents of the Organisation of African Unity (Mansell, London 1992).

[31] Art.5 and 24 of the 1951 Ottawa Agreement on the status of the NATO, National Representatives and International Staff 200 UNTS 3.

[32] Agreement on the Privileges and Immunities of the IAEA (1959 - reprinted in UN Doc. ST/LEG/SER.B/11 at p.357). Section 3 provides for immunity from every form of legal suit except to the degree it has waived it in any particular case. Section 33 States that the Agency shall make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law nature.

members, which may include adjustments to these provisions. This raises the possibility for host States to introduce further qualifications to the immunity granted by the general conventions.

The position in relation to NATO is also subject to some qualifications in relation to its various HQ. Whilst the Ottawa Agreement is a General Convention stating the broad principle of an apparently absolute immunity enjoyed by the Organisation, in relation to its Headquarters, this is effectively modified by the incorporation of the provisions of the SOFA relating to claims. This establishes a special system for the settlement primarily of non-contractual claims.[33]

The organisations considered here, largely share the opinion that they have a full immunity from local jurisdiction, and thus the jurisdiction of the local courts can only be established on the basis of their consent or waiver.[34] Despite the breadth of these claims to immunity the numbers of disputes concerning their application are remarkably few.[35] As will be discussed below the general policy of most of these organisations will be not to waive immunity in most cases. In accordance with the requirement to provide suitable alternative modes of dispute settlement, a number of

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[33] Interestingly contractual claims are specifically excepted from the scope of the SOFA, and although the Paris Protocol provides that the Supreme HQ may be brought before local courts as a defendant or a plaintiff, the immunity provision of the Ottawa Agreement appears to govern, thus sheltering the organisation from their jurisdiction - see NATO replies to Secretariat Questionnaire ST/LEG/17 on 6 April 1987, at p.106. Whereas the liability of sending States in relation to claims against their forces under the SOFA, appear to be subject to the usual rules of State immunity regarding the difference between acts iure imperii and those iure gestionis, see Lazareff *Status of Military Forces under Current International Law* (Sijthoff, Leiden 1971) at p.313-315 (similarly where the SOFA is not part of local law the rules of state immunity are also likely to apply in relation to non-contractual liability eg see *Littrel v. USA (No.2)* ([1994] 4 All ER 203).

[34] see Valticos *op.cit.* note 15 *supra*, at pp.91-94

[35] In 1987, the UN collected together practice from many of these organisations in UN Doc. ST/LEG/17, and it is remarkable how few reported any difficulties at all in relation to the operation of immunities.

these organisations incorporate compromissory clauses providing for arbitration in their contracts with private persons.[36]

(d) International judicial bodies

A further category of international organisation which enjoy broad immunities from legal process are international courts and tribunals. It is axiomatic that the judicial function should be carried out in full independence as much in international law as it is in national law. The International Court of Justice as the principal judicial organ of the United Nations enjoys immunity under Article 105 of the Charter. In addition Article 19 of the Statute of the Court specifies that its members shall enjoy "diplomatic immunities" (following the Statute of the Permanent Court of International Justice), and Article 42 provided that the agents, counsel and advocates of the parties before the Court enjoy the privileges and immunities necessary to the independent exercise of their duties. In 1946 the Court negotiated an agreement with the Government of the Netherlands on the privileges and immunities of all those connected with the Court (including the Judges the Registrar and members of the Registry staff, assessors, agents, counsel as well as witnesses and experts) contained in an Exchange of Notes of 26 June 1946,[37] and subsequently approved by the General Assembly.[38] The Agreement therefore deals only with the immunities of persons involved with the Court, rather than the Court as an institution itself. These immunities are granted in the interests of the administration of international justice and not for the benefit of the individuals.[39] The Exchange of Notes reflects the General Assembly's view that the privileges and immunities of persons connected

[36] *ibid.* at pp.74-86

with the Court should be dealt with separately from the General Convention, since it was inappropriate to treat the Judges of the Court as "officials" of the Organisation.[40]

Other international courts which have express provisions on legal personality enjoy institutional immunities as well as the immunities of the various categories persons involved with them. Thus Article 5 of the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea (ITLOS), provides for an unrestricted immunity from legal process of the Tribunal, as well as the immunity of its property, assets and funds.[41] Similarly Article 6 of the recent Agreement on the Privileges and Immunities of the International Criminal Court, provides for immunity of the Court and property, funds and assets from "every form of legal process".[42] Other International judicial/arbitral bodies provide make similar provision.[43]

(2) Treaty provisions containing express limitations on immunity

(a) Organisations involved in economic and commercial transactions

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[37] For text see ST/LEG/SER.B/10 at p.193. For comment see Rosenne, S., *The Law and Practice of the International Court 1920-96* (Kluwer. The Hague, 1997) at pp. 426-30 and 440-41

[38] See Resolution 9(I) of 11 December 1946

[39] A similar approach is taken in respect of the European Court of Human Rights, see Sixth Protocol to the general Convention on the Privileges and Immunities of the Council of Europe (ETS No. 162) - see A. Dzremczewski "The European Human Rights Convention: A New Court of Human Rights as of 1 November 1998" (1998) 55 Wash. And Lee LR 697 esp. at pp.705-6

[40] see Resolution 22 (I) Annex C of 13 February 1946.

[41] Reproduced in *International Tribunal for the Law of the Sea - Basic texts 1998* (Kluwer, The Hague 1999) at p.81

[42] see www.un.org/law/icc/apic/apic(e).pdf

[43] see for example Article 18 on the 1965 Washington Convention on the International Centre for the Settlement of Investment Disputes (ICSID) (4 ILM 352)

Certain of the larger international organisations are granted only limited immunity under their relevant conventional instruments, including those in the World Bank Group, i.e. the IBRD, the IFC and the IDA. The jurisdictional immunity of the IBRD is dealt with in ss. 3 and 4 of Article VII of its Articles of Agreement, in the following terms:

> "*Section 3. Position of the Bank with regard to judicial process*
> Actions may be brought against the bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of a final judgment against the Bank.
>
> *Section 4. Immunity of assets from seizure*
> Property and assets of the bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure, by executive or legislative action."[44]

These provisions therefore quite severely restrict the scope of the jurisdictional immunities of the Bank. Similar provisions are incorporated into the constitutive instruments of other World Bank Group institutions, i.e. the IDA, the IFC and to some degree MIGA[45] (but not ICSID).[46] Additionally the Charters of the regional Development Banks also contain restrictions on their immunities, including the African Development Bank (though immunity is only limited in relation to its borrowing powers);[47] the African Development Fund (for which immunity is limited in relation to matters arising from the exercise of its powers to "receive loans");[48] the

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[44] 2 UNTS 134

[45] 24 ILM 1598 at art.44 - but note the additional exclusion of disputes on personnel matters

[46] *supra* at note 43

[47] art. 52 of the Agreement establishing the African Development Bank, officially published in the UK as Misc. 15 of 1981, Cmnd.8284.

[48] art. 43 of the Agreement establishing the African Development Fund, UKTS 49 (1979)

Asian Development Bank (whose immunity is limited in relation to its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities);[49] Caribbean Development Bank (a similar provision to that of the Asian Development Bank);[50] the European Bank of Reconstruction and Development;[51] and Inter-American Development Bank.

The reason for the restrictions on the immunities of these organisations is the fact that the achievement of their primary functions requires their substantial involvement in the market-place (largely in relation to the raising of private funds and the making of loans to private parties). In order to do so they must maintain the confidence of private parties in the market-place, and thus the restriction of their jurisdictional immunities is

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[49] art. 50 of the Agreement establishing the Asian Development Bank UKTS 53 (1968)

[50] art.49 of the Agreement establishing the Caribbean Development Bank UKTS 36 (1970)

[51] see art.46 of the Articles of Agreement, (1990) 29 ILM 1077: though note that a more specific immunities are prescribed in the UK, under the Headquarters Agreement, which provides:

"Article 4

1 Within the scope of its official activities the Bank shall enjoy immunity from jurisdiction, except that the immunity of the Bank shall not apply:

(a) to the extent that the Bank shall have expressly waived any such immunity in any particular case or in any written document;

(b) in respect of civil action arising out of the exercise of its powers to borrow money, to guarantee obligations and to buy or sell or underwrite the sale of any securities;

(c) in respect of a civil action by a third party for damage arising from a road traffic accident caused by an Officer or an Employee of the Bank acting on behalf of the Bank;

(d) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;

(e) in respect of the enforcement of an arbitration award made against the Bank as a result of an express submission to arbitration by or on behalf of the Bank; or

(f) in respect of any counter-claim directly connected with court proceedings initiated by the Bank.

2 The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of restraint, seizure, attachment or execution except upon the delivery of final judgment against the Bank."– see http://www.ebrd.org/pubs/insti/basic/basic6.htm

functionally necessary. In other words there is a recognition that for an organisation whose functions include a considerable degree of interaction with private parties, limitations on jurisdictional immunity are appropriate. The point is brought out by a contrast with the position of the IMF, which, though its responsibilities are in the economic sphere, it acts primarily on the intergovernmental plane rather than at private law and thus its immunities are not so limited.[52]

In relation to other economic organisations the various commodity agreements make an interesting contrast. In relation to the Common Fund for Commodities its involvement in the market place is clearly envisaged. Its constitutive instrument provides a comparable limitation on immunity allowing lenders to the Fund and purchasers/holders of securities issued by the Fund, and their assignees/successors to bring actions before national "courts of competent jurisdiction in places in which the Fund has agreed in writing with the other party to be subject".[53] However if the transaction makes no provision for forum, or if such provision as is made is ineffective through no fault of the other party, then an action may be brought in the courts of the host State (i.e. the Netherlands).

The constitutive instruments of a number of international commodity organisations also bear examination. In relation both to the previous generation of international commodity agreements which were equipped with economic provisions to maintain price and supply by market intervention, and to those which work essentially through research and analysis of markets and to some extent coordination of national policies,

[52] See Art.9(3) of the Articles of Agreement of the IMF UKTS 83 (1978)

[53] See art 42(1) of the Agreement establishing the Common Fund for Commodities 30 September 1981.

their constituent instruments usually do not specify the extent of their jurisdictional immunity, frequently stating that the organisation should enjoy such immunities as it may agree with its host State.

In the United Kingdom, which has been or is the host State to a number of these organisations, they have generally been granted quite broad jurisdictional immunities, but they are withheld in relation to proceedings in which the organisation has (a) waived its immunity, (b) road traffic accidents involving owned or driven by the organisation or its staff and (c) enforcement of arbitral awards.[54] The counterpart to this breadth of this jurisdictional immunity is an obligation to include arbitration in its contracts, other than staff contracts.[55] However in the light of collapse of the International Tin Council it might be thought that more limited immunities are appropriate to organisations directly participating in the market-place. The fact that the ITC enjoyed broad immunities under the Sixth International Tin Agreement was the source of some criticism during the litigation. It may be that greater restriction of its immunity may have ensured greater caution on the part of the ITC, or at least a realisation of its inability to meet its debts at an earlier stage.

The International Oil Pollution Fund presents an interesting case in that the Fund was established in order to provide an insurance pool to meet civil liabilities in respect of pollution from oil tankers. It was therefore anticipated that its functions would involve it in civil proceedings in respect of claims under the Liability Convention, but that in

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[54] see for example the International Sugar Organisation (Immunities and Privileges) Order 1969, SI No. 734 (1969); and the International Cocoa Organisation (Immunities and Privileges) Order 1975, SI No. 411 (1975).

[55] The relevant provisions of the Headquarters Agreements of some of these organisations limit this last obligation to contracts entered into with British residents.

certain respects it ought to be immune. Its immunities under its HQ Agreement with the UK are therefore heavily qualified.[56]

Finally, as regards the limitations on the immunities of organisations active in the economic/commercial sphere is quite clearly brought out in two of the institutions envisaged under Part XI the 1982 UN Law of the Sea Convention - the International Seabed Authority and the Enterprise. The former is a large inter-governmental body charged with a numerous functions primarily on the public international plane in relation to the governance of the seabed area (art.157). As such it enjoys immunity

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[56] Article 5 of the HQ Agreement (1163 UNTS 3) provides:

"Article 5. IMMUNITY

(1) Within the scope of its official activities the Fund shall have immunity from jurisdiction and execution except:

(a) To the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;

(b) In respect of actions brought against the Fund in accordance with the provisions of the Convention;

(c) In respect of any contract for the supply of goods and services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;

(d) In respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to or operated on behalf of the Fund or in respect of a motor traffic offence involving such a vehicle;

(e) In respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;

(f) In the event of the attachment, pursuant to the final order of a court of law' of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;

(g) In respect of the enforcement of an arbitration of an arbitration award made under article 23 of the Agreement; and

(h) in respect of a counterclaim directly connected with proceedings initiated by the Fund.

(2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except in so far as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund."

It is interesting to note Article 23 provides for arbitration *at the instance of the host State* of claims, other than as between a member of staff and the Fund, in respect of damage caused by the Fund or other non-contractual responsibility of the Fund, in respect of which it enjoys jurisdictional immunity or claims against a staff member who benefits from immunity and whose immunity has not been waived.

from legal process except only to the extent that it expressly waives its immunity in a particular case (art.178). However as originally envisaged the Authority was not to be involved in the practical aspects of seabed mining and this was to be done by the Enterprise. Although the Agreement on the implementation of Part XI of the Convention, suggests that the commercial role of the Enterprise remains to be decided upon,[57] the important point for present purposes is that in Annex IV of the Convention, the provisions relating to the privileges and immunities of the Enterprise, which at the time of drafting was expected to be a body acting with private parties on a commercial basis were very much more limited than those of the Authority. The Enterprise would not have immunity from proceedings in the courts of States in which it:

(i) has an office or facility;

(ii) has appointed an agent for the purpose of accepting service or notice of process;

(iii) has entered into a contract for goods and services;

(iv) has issued securities; or

(v) is otherwise engaged in commercial activities".[58]

However it would enjoy immunity from enforcement and attachment until such time as a final judgment is awarded against it.

(b) Specialised organisations of limited or regional composition

Of the more than three hundred international organisations which currently exist the largest number are regional organisations or those with limited membership (as

[57] See Section of the Annex to the Agreement relating to the Implementation of Part XI of the UNCLOS (adopted in by a General assembly Resolution on 17.8.94 A/RES/48/263) See also "Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" - D.H.Anderson (1994) 43 ICLQ 886, at p.891.

[58] Art 13. Annex IV

opposed to those universal or quasi-universal organisations mentioned above), and which, in contrast to the broad political organisations such as the Council of Europe or the OAS or OAU, have narrower and more specialised or technical functions. Such organisations carry out a broad range of activities both promotional and operational, ranging from technical assistance on matters such as environmental protection or civil aviation, to education and scientific research. The large numbers of organisations and the breadth of the treaty provisions within this category mean that a comprehensive survey is not possible. However a few generalised comments may be made and examples will be provided as illustrations.

The most remarkable feature of these organisations looked at as a category is the vast range of specialist subject matter with which they are respectively concerned. Some deal with traditional governmental activities such as the regulation of air traffic whereas others, such as the European Molecular Biology Laboratory or even aspects of the work of the European Space Agency deal with matters which are not particular to the public sector. Similarly the powers and structures of the organisations within this category vary considerably.

In relation to the specific question of jurisdictional immunity there is a diversity in the degree to which such immunities are granted, if at all. Thus for example the European Centre for Nuclear Research (CERN) is granted absolute immunity from every form of legal process,[59] this may reflect the sensitivity of its area of research but is probably also explained by the fact that it was negotiated in 1956. Other scientific research organisations have been granted more limited immunities, for example the European

[59] General Convention on the Privileges and Immunities of the CERN 200 UNTS 149

Molecular Biology Laboratory.[60] Whereas the immunities of the European Centre for Medium Range Weather Forecasts are still more limited.[61]

Other formulations differ further. Thus for example certain organisations enjoy immunity only in relation to their "official activities".[62] Other organisations do not appear to enjoy immunity from jurisdiction at all, though they may still enjoy immunity from execution and other privileges.[63]

In addition to considerations of the subject-matter, another factor favouring more restricted immunity might be that in an organisation of limited membership there is the possibility of greater consensus as to the appropriateness of the intervention of local jurisdiction. There is often a greater familiarity with the various legal systems of the

[60] Under Art. 6 of its HQ Agreement with Germany of 10 December 1974, the immunity of the EMBL is limited in respect of waiver, civil liability arising from road traffic accidents, contracts (other than employment contracts subject to the staff regulations) enforcement of arbitral awards, and attachment proceedings against the salaries of staff members - *Bundesgezetzblatt* 1975 II, 933.

[61] Under Article 3 of the Protocol on the Privileges and Immunities of the Centre for Medium Range Weather Forecasts (Cmnd. 5632) immunity from jurisdiction is limited to activities within its official functions, and then further limited in respect of waiver (on which there is an interesting provision that waiver shall be deemed if the Centre fails to respond to a request for waiver within 15 days), civil liabilities in respect of road traffic accidents, enforcement of arbitral awards and attachment proceedings against the salaries of staff members.

[62] For example under the Protocol on the Privileges and Immunities of the European Patent Office (1065 UNTS 370)

[63] Thus for example the International Maritime Satellite Organisation (INMARSAT) does not enjoy immunity from jurisdiction under Art.6 of its HQ Agreement with the UK, (UKTS 44 (1980)), but does enjoy immunity from execution. Similarly, the International Mobile Satellite Organisation (UKTS 73(1999). By way of contrast the HQ Agreement of the International Telecommunications Satellite Organisation (INTELSAT) with the UK does provide for immunity from jurisdiction but this is limited in respect of its commercial activities, civil liabilities arising from road traffic accidents, attachment proceedings against the salaries of staff members, and counter-claims.

EUROCONTROL does not enjoy immunity by virtue of its Article 26 of the EUROCONTROL Convention (UKTS 39 (1963)) as amended by the 1981 Brussels Protocol (UKTS 2 (1987)), but does enjoy immunity from execution.

member States, and a closer consensus as to issues which might properly fall within the competence of judicial branch of government.[64]

(3) The European Communities[65]

The European Communities are dealt with separately from the other international organisations considered here as they display unique constitutional and institutional characteristics. The development of the body of EC/EU law in both its substantive and institutional aspects, its integration within the local legal systems of the Member States and its direct applicability to persons within the members States, give the Communities a much closer degree of involvement in the local legal system than other international organisations. Moreover in view of sophisticated national legal systems of the Member States, and the broad consensus amongst them as to the rule of law and democratic governance of its member States, it is perhaps appropriate that the Communities should not enjoy the broad jurisdictional immunities enjoyed by other international organisations.[66]

Jurisdiction over disputes involving the European Community is governed by Article 240 (ex183) which provides that unless jurisdiction is conferred on the ECJ under the Treaty, "disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States". However this jurisdiction of national courts under Article 240, must be read together

[64] On the other hand organisations of limited membership also put into sharp relief the question of the immunities of international organisations in the legal systems of non-member States (a problem considered in chapter 4 *infra*).

[65] The reference here is to the Communities which enjoy legal personality, and not to the European Union, which as yet enjoys only limited personality and whose legal status is still evolving.

[66] Seidl Hohenveldern "L'immunité de juridiction des Communautés européennes" 1990 Rev. Marché Commun 475-9

with Article 288 (ex 215) which deals with liability of the Community. Under Article 288 the contractual liability of the Community is to be governed by the law applicable to the contract in question. Whereas non-contractual liability is governed by the general principles common to the law of the Member States and jurisdiction over such liability is vested exclusively in the ECJ (under Article 235 (ex 178). Jurisdiction over questions as to the legality of Community acts in terms of EC law are also vested exclusively in the ECJ. Thus the jurisdiction of national courts over the Communities will be largely confined to disputes arising from contracts which expressly or impliedly make a choice of such jurisdiction.[67]

However it should also be remembered that the Protocol on the Privileges and Immunities of the Communities of 1965, ensures *inter alia* the immunity of the Communities' property, assets and operations from seizure, save with the authorisation of the European Court of Justice.[68] As will be discussed below the ECJ has interpreted its power of authorisation under this provision in accordance with the functional principle, and has shown considerable flexibility in its approach.

(4) Public international corporations

A final category of organisations are the public international corporations, which may be distinguished from the other organisations in that their main function is to provide goods and/or services directly to private parties, and often on a commercial basis. They

[67] In this respect it should also be noted that under Article 238 (ex 181) the parties may choose to subject their contract to the jurisdiction of the ECJ, whether it be of private or a public law nature.

[68] It also deals with other questions such as the inviolability of archives, the Communities fiscal immunities, communications and *Laissez passer*, and the personal immunities of Members of the European Parliament, the representatives of Member States, and officials of the Communities. For a general survey of the Protocol see Schmidt "Le protocole sur les privilèges et immunités des Communautés européennes" (1991 Cahiers de Droit Eur. 67)

tend to take the form of corporations established under municipal law and so are outside the scope of this study. Though there is considerable variation amongst this category of organisations, many enjoy certain privileges and immunities, primarily in relation to fiscal and customs matters.[69] As a rule they do not appear to have any functional need for, nor are they granted, immunity from jurisdiction, though a number enjoy immunity from execution.[70]

B. THE PRACTICE OF INTERNATIONAL ORGANISATIONS

1. General

The practice of international organisations is of particular relevance in considering the way in which the treaty provisions relating to their immunities have been interpreted. Where such provisions are contained in the constituent instrument of a particular international organisation, the organisation will often have the primary role in their interpretation (under the principle of *Kompetenz-Kompetenz*). Not only does reference to the practice of international organisations accord with the usual rules of treaty interpretation,[71] but numerous decisions of the International Court of Justice suggest that the practice of an international organisations will be given a particularly important place in the interpretation of treaty provisions relating to institutional questions.[72]

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[69] see E.Librecht *Entreprises àcharactère juriquement international* (Sijthoff Leiden 1972) at pp.477-534; I.Seidl-Hohenveldern "Le droit applicable aux entreprises internationales communes, étatiques ou para- étatiques"(1983) 60 Ann. IDI 1-37 and 97-102; and Sundstrom *Public International Utility Corporat*ions (Sijthoff, Leiden, 1972).

[70] See Librecht *op cit* note 57 *supra* at pp. 481-490; Sundstrom *op cit* note 57 *supra* at pp.36, 60, 79,96, 120

[71] i.e Art 31(3)(b) of the Vienna Convention on the Law of Treaties.

[72] For a review of these decisions see E.Lauterpacht note 1 *supra.*

We have seen that the larger international organisations have claimed that they are entitled to unrestricted jurisdictional immunity, unless there are express limitations contained in the relevant treaty provisions. To the extent that this places international organisations in a more favourable position than is enjoyed by the individual States which established them, this is usually explained by reference to the different basis on which international immunities are granted. Thus it is claimed that the functional basis of the immunities of international organisations gives rise to broader jurisdictional immunities than those enjoyed by States. As discussed in the previous chapter, the rationale of such claims is that international organisations are created to perform certain functions in the international public interest and the performance such functions should not be interfered with by unilateral assertions of jurisdiction by national courts.

However the danger which arises with such reasoning is that it looks only to the relationship of an activity to the functions of the organisation, not at whether immunity is *necessary* to protect the organisation. Since international organisations are entities of limited competence, whose existence as separate entities from their member States is based on the functional requirements, it is arguable that practically anything which is done by an international organisation is connected the performance of its functions.[73] There is thus a danger then of an over-rigid interpretation of the functional standard, and both contrary to the intentions of States when the functional standard was first adopted, and unwarranted by a plain reading of the relevant texts, which speak of such

[73] In the context of State immunity an analogous problem arises in choosing between the "nature" and "purpose" tests to determine whether an act is *iure imperii* or *iure gestionis*. Proponents of the "nature" test insist upon it because a characterisation based on the purpose of act will be subjective since almost any act of a government will relate in some respect to its public functions.

privileges and immunities as are *necessary* for the performance of the functions of the organisation.[74]

Nevertheless claims to immunity by international organisations tend to be broad. The United Nations has said of its immunity from "every form of legal process":

> "These words have been broadly interpreted to include every form of legal process before national authorities, whether judicial, administrative functions according to national law. The Organisation's immunity from 'every form of legal process' has also been regarded as extending irrespective of whether the Organisation was named as defendant or was asked to provide information to perform some ancillary role. This interpretation, the essence of which is the maintenance of freedom from interference of the United Nations, does not, however, imply that the United Nations may not itself decide to take part in such proceedings, in particular if it considers that the requirements of justice so demand, but only that the determination in each case is one to be made by the United Nations itself."[75]

However in its practice even the United Nations, whose important political functions might suggest very broad immunity to be appropriate, recognises that in asserting its immunities some balance to take into account the interests of the local jurisdiction is necessary. As has been noted above from the very outset of the regime of the United Nations' immunities, special arrangements have to be made for the victims of road traffic accidents involving United Nations drivers and vehicles, including the maintenance of insurance. The United Nations maintains similar insurance in relation to potential liabilities arising from occupiers' liability at its Headquarters in New

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[74] see for example the "Memorandum by the Government of the UK on privileges and immunities of international organisations and replies from governments", appendicised to the *Explanatory Report* accompanying *Resolution (69)29* of the Committee of Ministers of the Council of Europe (Council of Europe, 1970)

[75] see the Secretariat's survey in 1967 YBILC Vol.II 155 at p.224. The breadth of the UN's claims to immunity from all forms of legal process are demonstrated by, for example, the UN's assertion of immunity to defeat garnishee proceedings brought by the creditors of UN employees.

York.[76] In relation to insured risks the United Nations will be prepared to waive its immunity to enable its insurers to take part in proceedings.[77]

In its commercial contracts the United Nations and many of its Specialised Agencies are unwilling to waive their immunity from suit, preferring instead arbitration for the settlement of disputes. Furthermore, as we saw in the previous chapter, the United Nations has claimed that in the light of its international status in most cases its contracts will not be subject to a system of municipal law, but rather to the general principles of law, unless there is an express choice of law to the contrary.[78] However the claims and practice of other international organisations, including some of the Specialised Agencies of the UN, are less categorical, showing a diversity of solutions as to the applicable law and the techniques of dispute settlement, according to the organisation in question and the subject matter of the contract.[79] In this respect it is also interesting to note that the IBRD though it does not enjoy immunity from suit in relation to its contracts, prefers in its practice the use of arbitration clauses.[80]

Where an international organisation takes part in a commercial venture with a view to profit it seems likely that it will not enjoy immunity from suit. Thus UN has taken the

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[76] However in 1986 the UN General Assembly adopted Regulation No.4, which, in response to the escalation of awards of tort damages and therefore of the costs of liability insurance, sought to limit the awards of damages to third parties in suits brought against the UN for torts committed in the Headquarters District - see Szasz "The United Nations legislates to limit its liability" (81 (1987) AJIL 738) who emphasises that the adoption of the resolution was not reliant upon the UN's immunity from suit, but rather it was an attempt to amend the applicable law, and thus an exercise in legislation.

[77] See 1985 YBILC Vol.II, pt2, at pp 162

[78] *ibid.*, at pp.152-155

[79] see Valticos *op cit* note 15 *supra*, at pp.55-64.

[80] However it appears to be more willing to allow for a national system of law to govern its contracts particularly on financial matters. -see Valticos *op cit* note 15 *supra* at pp.79-80

view that there are limits upon the commercially oriented activities it can undertake which are compatible with its status, privileges and immunities: it has considered that the publications, films etc which it produces, have not been predominantly commercial but rather for the purpose for increasing knowledge and understanding of the Organisation. Whereas any commercial activity it might undertake by means of joint venture would require it to waive its immunity.[81]

2. Waiver

Many international organisations appear to remain very reluctant to waive their immunity from jurisdiction under most circumstances. There may be some danger that this reluctance to waive immunity may entrench too rigid a regime of immunity to be able to accommodate the various interests which tend to promote the restriction immunity.[82] Moreover this reluctance to waive immunity may not reflect the balance which the General Convention and the 1947 Convention on the Specialised Agencies sought to establish. Certainly it does not accord with the way in which Mackinnon Wood foresaw developments in his well-known paper written in anticipation of the establishment of the United Nations, where he wrote:

> "... In all the normal transactions of normal times, the organisation will operate under ordinary law. We are thus left with the same abnormal factor as exists in the case of the present League, namely the exemption from the jurisdiction of the courts. We have seen why this is important for the organisation. How is it to be reconciled with the rights of persons having dealings with the

[81] see UN Legal Counsel's opinion on the "Advisability of the UN entering into a profit making joint venture with a private publishing firm" (1990 UNJYB 25). See also the opinions on whether UNICEF or its Greeting card operation could be a shareholder in a printing company (1990 UNJYB1 256) and on whether UNDP could become a founding member of a corporate body (an educational institute) under the national law of a member State (1990 UNJYB 259), both which Legal Counsel advised against because of the necessity of submission to local jurisdiction inherent in such activities.

[82] It is interesting to note that in the context of State immunity, the development of the doctrine of waiver of immunity, according to some accounts, was an important contribution in various of the European civilian jurisdictions to the development of the modern rule of restrictive immunity see EJ Cohn "Waiver of immunity" (1958) 35 BYIL 260.

> organisation or its officials to have a legal remedy for wrongs done to them? ... Actually the national courts would seem to be the best, as well as the natural, forum for cases arising under a country's domestic law. Except where it is necessary for one of the purposes for which it is granted, the rule should be to waive the immunity, and this will normally be the case with ordinary legal claims against the organisation."[83]

It should be pointed out that the relevant treaty provisions relating to very few organisations impose an explicit duty to waive immunity in particular circumstances,[84] unlike the more frequently invoked provisions in relation to the waiver of the immunities enjoyed by their officials.[85] In general national courts have not sought to imply waiver[86] except possibly in relation to counterclaims.[87] However whether an express contractual term vesting jurisdiction in national courts in advance of any dispute is a valid waiver of immunity, has caused controversy in the past. Whilst the treaty provisions relating to some organisations, such as the IMF and the former UNRRA, make specific provision for such contractual waiver, the Preparatory Commission of the 1946 General Convention intentionally omitted such a provision. UN Legal Counsel have in the past taken the position that a contractual provision in advance could not therefore constitute a valid waiver, noting at the time that this was in

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[83] See H. Mackinnon Wood "Legal relations between individuals and a world organisation of States" – (1944) 30 Transactions of the Grot. Soc. 141, at p.162

[84] see for example the European Space Agency Research Centre established in the Netherlands – discussed by A.Muller *International Organisations and their Host States* (Kluwer, Dordrecht, 1995) at pp. 164-5.

[85] See Chapter 5 *infra*

[86] It seems to be generally accepted that the entry of an appearance by an international organisation in proceeding solely for the purpose of asserting its immunity will not constitute a waiver, (though in fact international organisations may not need to enter an appearance for these purposes, since judicial notice must be taken of the question of immunity, and in practice this may be achieved in appropriate cases by a "suggestion of immunity" made to the court by the executive authorities of the State of the forum - see 1984 UNJYB 188-9).

[87] Reinisch suggests that this is probable but that there is not caselaw on the point – *International Organizations before National Courts* (CUP, Cambridge, 2000) at pp.204-5

line with US and UK authorities on waiver in relation to State immunity.[88] It seems unlikely that such a position could be maintained today before a national court, not only has the law changed in both of these States in relation to waiver of State immunity,[89] but there is also greater appreciation of the position of plaintiffs especially since an organisation will have freely entered into a such contract.[90]

3. Immunity from measures of execution

Given the coercive nature of measures of execution, immunity from execution is clearly an important means of ensuring the independence of an organisation from undue pressure from a territorial State. Such immunity is thus often maintained as a virtually absolute immunity, even in relation to organisations whose immunity from jurisdiction is limited.

In general it appears not to have been problematic. However some practice has arisen on the particular question of garnishee proceedings against the organisation to enforce a judgment debt of a creditor of the organisation (often in practice a member of staff). The UN considers that its immunity from execution extends to such garnishee

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[88] Even at the time it appears to have been arguable whether this really reflected the *opinio iuris* of States, for example the US International Organisations Act on which the UN had to rely for the elaboration of its immunities in the US until the US acceded to the General Convention in 1970, clearly recognises the validity of contractual waivers, and in any event the tradition of the European civilian jurisdictions was to be less formalistic on the question of waiver, see Cohn *op cit* note 82 *supra*.

[89] see s.2(2) of the State Immunity Act in the UK and §221 of the Foreign Sovereign Immunities Act in the US.

[90] see e.g. *Standard Chartered Bank v ITC*, 77 ILR 8

There may be a practical managerial problem for the United Nations in relation to contractual waivers, in that it takes the view that only the Secretary General can waive the immunity of the Organisation. Clearly even in relation to the principal organs of the UN this causes considerable difficulties but when one takes into consideration the number of subsidiary organs and programmes all of which rely upon the privileges and immunities contained the General Convention (many of which apparently have contractual capacity in their own names).

proceedings, but has now made administrative arrangements whereby the judgment creditor may obtain payment. However it stresses that these arrangements are not a waiver of its immunity.[91] The approach of the European Court of Justice to such garnishees proceedings is rather different (see section C.2 *infra*).

C. Decisions of International Courts and Tribunals

By their nature the jurisdictional immunities of international organisations are applied primarily by national courts. It is not surprising therefore that there are considerably fewer decisions of international courts and tribunals than there are of national courts. However it is particularly instructive to consider how international tribunals have dealt with the questions relating to immunities and the treaties, for a number of reasons.

Firstly typical situations in which questions of jurisdictional immunity arise, often involve a tri-partite relationship between the international organisation, the forum State and the private claimant, or at least a combination of the parallel bilateral relations between them. Thus a national court, whose competences are defined by one of the parties in this tri-partite relationship, may not be in a position to appreciate the full implications of its decision in respect of all aspects of that relationship, and thus an international tribunal may provide a more appropriate forum.[92] Secondly, decisions of international tribunals on immunities are likely to be particularly worthy of study, since they will have expertise and confidence in the interpretation and application of international law. International tribunals are therefore likely to have a broader view of the place of immunities within the context of international law as a whole, and thus

[91] See 1967 YBILC pt II at p.224 §77-79 and 88

[92] See for example the findings of the ICJ in the *UN Headquarters Agreement* case cited *infra*, at note 112

may be better able to elucidate unclear aspects of the law, or to resolve conflicts between international rights and obligations.

Following the tri-partite nature of the legal relations involved in the granting of international immunity, this section will consider the relevant decisions under all three aspects, i.e. (i) the relationship between the organisation and the forum State (governed by international law); (ii) the relationship between the organisation and the private party in question sometimes governed by international law, sometimes by national law, sometimes in the case of the European Communities, by European law and sometimes by some other system of law chosen by the parties, eg the general principles of law; and (iii) as between the forum State and the individual which though in the first instance by national law, may also be governed at least in part by international law, and in particular the international law of human rights.

1. The relationship between international organisations and the forum State

Despite its role in dispute settlement under the UN General Convention and the 1947 Convention on the Immunities of the Specialised Agencies,[93] the International Court of Justice has handed down only a few decisions relating to the relationship of States with international organisations directly bearing on the regime of international immunities. However these decisions, when set against the context of the Court's caselaw as a whole, are interesting as they constitute a meeting-point between two firmly established strands of that caselaw, namely the maintenance of the system of State jurisdiction and the promotion of the effectiveness of international organisations, and

[93] See Art.30 of the General Convention and Art.32 of the 1947 Convention; for comments see Ago "'Binding' Advisory Opinions of the International Court of Justice" (1991) 85 AJIL 439; and Wickremasinghe (2000) 49 ICLQ 724.

in particular the UN. As such the decisions considered in (iii) *infra* demonstrate how the Court has sought to accommodate the various countervailing rights and values raised by international immunities

(a) Decisions of the International Court of Justice

(i) State Jurisdiction

State jurisdiction exercised on the basis of territoriality is of course a central principle of the international legal system, and naturally is well-recognised in the jurisprudence of the PCIJ and the ICJ.[94] It is often said to have been given its clearest enunciation in the *Lotus* case,[95] but it also underlies many subsequent decisions. Exceptions to the principle of territoriality have been treated restrictively, so for example the duty of non-intervention in the territory of another State has been consistently upheld along with the prohibition on measures of self-help.[96]

In the present context the claimed exception to territorial jurisdiction pursuant to a treaty provision in the *Asylum* case[97] is of particular interest. In that case Colombia claimed the right to afford diplomatic asylum to a local fugitive from justice, at its embassy in Peru, pursuant to the 1911 Bolivarian Convention on Extradition and 1928 Havana Convention on Asylum. In doing so Colombia claimed that, as the country granting asylum, it had the power, under the Conventions, to make a unilateral

[94] The issue of extraterritorial jurisdiction was withdrawn from the Court in the *Arrest warrant (Democratic Republic of Congo v. Belgium)* case of 14 February 2002, but a number of the Separate Opinions made findings on this topic, including those of the President Judge Guillaume and Joint Opinion of Judge Higgins, Koojimans and Buergenthal. Despite the differing conclusions on the issue of extra-territorial jurisdiction, all started from the centrality of territorial jurisdiction to the international system.

[95] (1927) PCIJ Rep., Ser.A, No.10

[96] eg *Corfu Channel,* 1949 ICJ Rep. 4, and *Nicaragua v. USA,* 1986 ICJ Rep.14

[97] see 1950 ICJ Rep.266

determination of the nature of the offence which was binding on Peru. The Court distinguished between territorial asylum and diplomatic asylum, noting:

> "In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case."[98]

Thus the Court found that the institution of asylum provided for equal rights of determination for each of the States concerned. It found no basis for Colombia's claim to a unilateral and definitive right, in either of the Conventions on which it was seeking to rely. Instead, after emphasising the need to respect the jurisdiction of the territorial State and the duty of non-interference, the Court insisted upon the observance of the various procedural requirements for a valid grant of asylum under the Convention, including procedures for mutual communication and cooperation. In particular the Court emphasised that where, as here, there was no reason to suspect the impartiality of the courts of the territorial State, their jurisdiction should be upheld.

> "In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims ...
> ...the safety which arises out of the asylum cannot be construed as a protection against the regular application of the laws and the against the jurisdiction of legally constituted tribunals. Protection thus understood would authorise the diplomatic agent [i.e. the person granting asylum] to obstruct the application of the laws of the country whereas his duty is to respect them..."[99]

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[98] *ibid.* at p.274-5

[99] *ibid.* at p284

(ii) The development of international institutional law

The Court has played an important role in promoting the effectiveness of international organisations, (especially the UN) through the development of international institutional law.[100] As has been shown it was the Court which made the first definitive finding as to the international personality of the UN and the rights attendant thereon.[101] The Court has also contributed to the development of their internal legal orders both in terms of the allocation of powers between UN organs;[102] and their employment relations;[103] and their organic nature, including the recognition and development of their implied powers.[104]

(iii) The relationship of international organisations with State jurisdiction

The Court has been seised of a few cases in which these two strong strands of jurisprudence have had to be construed together. As noted in the Chapter 1 above, the first such case concerned the *European Commission on the Danube.*[105] In order to differentiate between the overlapping competences of the Danube Commission and the jurisdictional rights derived from the territorial sovereignty of one of the riparian member States of the Commission (Romania), the PCIJ found the only way to do so was to define the functions allotted to them. That is, whilst specifically denying the

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[100] see E. Lauterpacht note 1 *supra*

[101] see *Reparation* Case, 1949 ICJ Rep. 174, see Chapter 1 text at note 33ff

[102] *Certain Expenses,* 1962 ICJ Rep. 151

[103] *Effect of Awards* case 1954 ICJ Rep. 47; and the *UNAT* cases (1973 ICJ Rep. 166; 1982 ICJ Rep. 325; and 1987 ICJ Rep. 18) and *ILOAT* cases 1956 ICJ Rep. 77. For commentary see Amerasinghe "Cases of the International Court of Justice relating to employment in international organisations" in Fitzmaurice and Lowe (ed.s) *Fifty Years of the International Court of Justice*, at pp.193-209

[104] including *Certain Expenses cit.* note 87 *supra*; *Status of South West Africa,* 1950 ICJ Rep. 128

[105] (1927) PCIJ Rep. Ser. B No.1, see Chapter 1, text at note 11

Commission was an organisation possessing exclusive territorial sovereignty, the Court found that it was an international institution with a special purpose and functions bestowed upon it by its Statute, and that it had the power to exercise these functions to their full extent.

There are then two cases in which the Court has considered the rights and obligations of States and organisations derived from Headquarters Agreements, though both were concerned with procedural aspects of that relationship rather than substantive provisions regarding privileges and immunities.

In the *WHO* Advisory Opinion[106] the Court was asked by the World Health Assembly to consider the Headquarters Agreement of the WHO Regional Health Office in Egypt, and in particular the provision on its revision in the event that either party to the Agreement wished to transfer the Office to another State.[107] The Court insisted in looking at the question in the light of its full legal context. It noted the need to balance the right of an international organisation to select the seat of its headquarters or regional office against the rights of the host State:

> "The Court notes that in the World Health Assembly and in some of the written and oral statements before the Court there seems to have been a disposition to regard international organisations as possessing some form of absolute power to determine and, if need be, change the location of the sites of the headquarters and regional offices. But States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organisation within their territories; and an organisation's power of decision is no more absolute than is that of the State... International organisations are subjects of international law and as such are bound by any obligations incumbent upon them under the general rules of international law,

[106] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* 1980 ICJ Rep. 73

[107] The background of the case was that in the aftermath of Egypt entering into the Camp David Agreements with Israel, the majority of the other Arab States of the Region wanted the Office transferred to Jordan.

under their constitutions or under international agreements to which they are parties."[108]

The Court found that it was necessary therefore to construe the requirements of the Headquarters Agreement in question in the light of mutual obligations of cooperation and good faith. These duties were based as follows

> "The very fact of Egypt's membership of the Organisation entails certain mutual obligations of cooperation and good faith incumbent upon Egypt and upon the Organisation. Egypt offered to become host to the Regional Office in Alexandria and the Organisation accepted that offer; Egypt agreed to provide the privileges, immunities and facilities necessary for the independence and effectiveness of the Office. As a result the legal relationship between Egypt and the Organisation became, and now is, that of a host State and an international organisation, the very essence of which is a body of mutual obligations of cooperation and good faith... the element of mutuality in the legal regime thus created between Egypt and the WHO is underlined by the fact that this was effected through common action based on mutual consent."[109]

The Court therefore found that there was a duty incumbent on the Parties to consult together in good faith on the question of the conditions and modalities of any transfer; if so agreed to consult and negotiate on various arrangements necessary to effect a transfer in orderly manner minimising prejudice to each Parties' interests; and finally a duty on the Party proposing the transfer to give the other a reasonable period of notice of the termination of the existing situation.

The Court's finding of rights and obligations based upon the principles of cooperation and good faith, suggest that the Headquarters Agreement should be viewed in the context of the ongoing relationship of the parties. As such the Court did not give the Agreement a narrow purely textual interpretation, but was concerned with "what legal

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[108] *ibid* at p.89-90

[109] *ibid* at p.93

questions [were] really in issue".[110] This approach of weighing the interests of the Parties to the Agreement, and indicating a procedure by which the Parties may come to an accommodation, emphasises the consensual basis for the limitations on the exclusive jurisdiction of the territorial State necessitated by the presence of an international organisation.

A further case in which the Court considered the interpretation of a Headquarters Agreement was that of the United Nations itself.[111] The United States had adopted a law that made unlawful the establishment or maintenance within the US of an office of the PLO, and this threatened closure of the PLO Observer Mission to the UN. The UN claimed that this violated US obligations under the Headquarters Agreement, and sought to put in train the dispute settlement procedure contained in the Agreement which entailed an international arbitration. The US refused to cooperate in the arbitration procedure, on the basis that a dispute had not yet arisen. For the US although the Anti-Terrorism Act had come into force, the Attorney General had requested the closure of the PLO Mission, and had commenced proceedings to enforce closure, as the proceedings were ongoing and the PLO had the possibility of challenging the law, a dispute triggering the obligation to arbitrate had not yet arisen.

In considering this point the Court was careful to emphasise that it was dealing with the arbitration procedure under the Agreement rather than substantive violations of the Headquarters Agreement. From the outset it stressed the international law character of the question before it, making clear it was dealing with the relationship between two

[110] *ibid* at p.88

[111] *Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 ICJ Rep. 12.

subjects of international law under a treaty. The Court looked to the object of the arbitration procedure finding

> "The purpose of the arbitration procedure envisaged by the Agreement is precisely the settlement of such disputes as may arise between the Organisation and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of s.21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation."[112]

The Court found that a dispute had arisen notwithstanding the position in US law, and the "fundamental principle ... that international law prevails over domestic law"[113] was cited in support of this finding. Whilst the language and effect of the Court's Opinion may be rather different than in the Court's Opinion in the *WHO* case, the two Opinions may be reconciled in that both seek to make effective the procedural aspects of the Headquarters Agreements, in order to maintain the respective international rights and obligations of the Parties, at moments when their relationship was placed under stress by the unilateral actions of one of the Parties.

The only cases of the ICJ dealing directly with immunities of international organisations are the *Mazilu*[114] and *Cumaraswamy*[115] cases. Both concerned the applicability of Article VI, section 22 of the General Convention, concerning the privileges and immunities of experts on missions of the UN. In both cases the Court

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[112] *ibid.* at p.29

[113] ibid at p.34. In the event the difficulties were overcome by a remarkable judgement of the New Yrok District Court in which US law was interpreted in a sufficiently flexible way to accommodate the requirements of the UN – see *US v. PLO* (1988) 27 ILM 1055 , for comment see R.Higgins *Problems and Process* (OUP, Oxford, 1994, at pp.214-5

[114] 1989 ICJ Rep. 177

[115] 1999 ICJ Rep. 62

found the individual in question was entitled to immunities under the Convention and that these immunities could be opposed to the individual's State of nationality.

The *Mazilu* case concerned a Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and whether he had the status and therefore the privileges and immunities of an expert on mission under section 22 of the Convention. In order to determine who was covered under section 22 the Court based took a purposive approach to the construction of "experts on mission", basing itself on the intent of the section to ensure the independence of experts in the interests of the Organisation, and also on the practice of the Organisation in which experts were entrusted with a very varied range of missions. The independent capacity in which Rapporteurs performed their missions for the UN functions qualified them as experts for the purpose of section 22. The Court found that this status pertained notwithstanding the assertion of his State of nationality that he had become incapable of performing his task as Special Rapporteur due to illness. Evidence had been adduced to suggest that in fact the Rapporteur was willing and able to perform his task, and the suggestion was that his Government was seeking to prevent him doing so. In these circumstances the Court rejected the national Government's claim to be entitled unilaterally to determine the question, stating

> "It is sufficient for it [ie the Court] to note, first that it was for the United Nations to decide whether in the circumstances it wished to retain Mr.Mazilu as a special rapporteur, and secondly to take note that decisions to that effect have been taken by the Sub-Commission."[116]

[116] 1989 ICJ Rep. 177 at p

In the *Cumaraswamy* case the Court was asked to settle a dispute which had arisen between Malaysia and the UN as to whether a Special Rapporteur of the Human Rights Commission enjoyed immunity from suit in defamation proceedings. The UN Secretary General had certified that the impugned words of the Special Rapporteur were said in the performance of his official functions and were therefore immune. However the Malaysian Courts had found that the Secretary General's certificate was not definitive of the issue and that this was an issue which could be dealt with at the hearing of the merits of action, thus effectively denying the immunity to the extent of forcing the Special Rapporteur to defend himself.

The Court concluded that the Special Rapporteur had been acting in the performance of his functions when he made his impugned comments and was therefore entitled to immunity.[117] The Court found that the Malaysian Government had failed in its obligation to bring the Secretary-General's certificate before the Malaysian courts, and the Malaysian courts had failed in obligation to determine the issue of immunity *in limine litis*. However, interestingly, the Court was more nuanced about the status of the Secretary-General's certificate in such cases. It appears that his finding that an expert is entitled to immunity is highly persuasive but not a definitive determination of the issue. The Court found:

> "When national courts are seised of a case in which the immunity of a United Nations agent is in issue they should immediately be notified of any finding by the Secretary General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by the Court."[118]

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[117] [1999] ICJ Rep. 62, §56

[118] *ibid.* §61

In other words the Court stopped short of giving the UN Secretary-General a unilateral and definitive determination of the applicability of immunity, but rather the final decision was that of the national court in accordance with the principle of exclusive territorial jurisdiction, but having given due weight to the views of the Organisation.

The cases before the International Court of Justice therefore suggest that in relation to these truly international disputes (i.e. between a State and an international organisation) concerning privileges and immunities, the Court will be careful to consider the claims in their broad legal context. It will give careful consideration to the rights both of the territorial or national State wishing to assert jurisdiction and to the independent international character of the organisation. In so doing it has rarely been willing to concede that one party has a unilateral right to characterise an act affecting both parties. Instead it has sought to strengthen such procedures for cooperation as are available to the parties to arrive at a consensual solution to disputes.

(b) International arbitral decisions

In two public international arbitrations concerning questions of exemptions from taxation, the agreements between an international organisation and its host State have been considered. Each case was dealt with purely as a question of treaty interpretation, of the constituent instrument of the organisation and/or the Headquarters Agreement, in accordance with the usual rules on treaty interpretation. The cases differ from the Advisory Opinions of the International Court of Justice considered above, in that the arbitral tribunals were called upon to settle a dispute in hand in accordance with the questions before them, and therefore they fashioned rather precise answers to those

questions and tended not to be concerned with locating host State treaty arrangements within a broader legal context.

The first of these related to the taxation of officials of Euratom seconded to work in the UK on a high temperature gas cooled reactor project, known as the Dragon Project, a joint project with the UK Atomic Energy Authority (UKAEA) conceived under the auspices of the OECD.[119] The single arbitrator Edvard Hambro, considered the treaty arrangements in the establishment of the Dragon Project and found that they did not provide for a right of seconded Euratom employees to exemption from income tax in the United Kingdom. He found however that the employees had a claim against Euratom to recover any taxes paid by them. The arbitrator commenced this section of the Award by asserting the general rule, that as a matter of its own sovereignty a State shall decide any question of taxation imposed on its residents or on income derived from or paid in that State. He concluded by finding

> "... no clear stipulation exists imposing a legal obligation on the United Kingdom Government to grant such tax exemption. This is not a very satisfactory situation, but an international obligation for a State to grant tax exemptions must be based on internationally binding texts and not on implications from negotiations between bodies or representatives not having full powers in this respect."[120]

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[119] See *Case concerning the taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, decision 25 February 1967, 17 UNRIA 487. It is important to note that the UK itself was not a party to the dispute, only the UKAEA. However it is included in this section as clearly involved interpretation of the United Kingdom's obligations under the host State arrangements.

[120] ibid at p.511. The arbitrator having found that the employees had a claim to exemption from income tax from the Commission, also found that by the terms of the treaty the UKAEA was solely liable for all actions, claims, costs and expenses whatsoever arising out of the construction and operation of the Project. When read in context, the arbitrator found no reason to give this a restrictive interpretation, thus sums which the Commission was forced to pay refunding tax paid by its employees to the Inland Revenue of the UK, could thus be claimed back from the UKAEA.

The more complex and for present purposes the more significant was the case concerning the European Molecular Biology Laboratory (EMBL) and its host State, the Federal Republic of Germany.[121] The case concerned a dispute between the Parties over a number of tax exemptions claimed by the EMBL.

The Tribunal started from the position that the Parties were in public international law in a position of formal equality. It then went on to consider in some detail the ongoing relationship of the Parties. On all points in issue the Tribunal found that the relationship between the Parties was governed by treaty, i.e. the Agreement establishing the EMBL (the "constitutive Agreement") and the Headquarters Agreement. The Tribunal explicitly stated, in accordance with the submissions of the Parties, that it would not give a restrictive interpretation to the relevant treaty provisions, but would instead seek their "effective" interpretation.

The finding of greatest interest for present purposes was in relation to the specific question of the indirect taxation of goods and services supplied by the EMBL's canteen and guest-house. The Tribunal had to decide whether the supply of such goods and services was "strictly necessary for the exercise of its [ie the EMBL's] official activities" in which case they were exempt, or whether they were non-official activities and so taxable. The Tribunal approached this as a question of interpretation of the relevant Agreements, capable of objective determination, rather than as a matter for the unilateral decision of one of the parties. It sought an "effective" interpretation of the HQ Agreement in the light of its primary purpose, so as to enable the EMBL "fully and efficiently to discharge its responsibilities and fulfil its purposes".

[121] Award of 29 June 1990, 105 ILR 1.

The "official activities" of the EMBL were primarily the scientific purposes and the provision of the necessary facilities for them, set out in the constitutive Agreement. In addition the HQ Agreement provided that "administrative activities and those undertaken in pursuance of the purposes of the Laboratory as defined in the [constitutive] Agreement", were to be included within the term "official activities". However the Tribunal found that the requirement that in order to qualify for the tax exemption, purchases of goods and services had to be "strictly necessary" for official activities, restricted the interpretation of "official activities" for these purposes. Looking also at the financial structure of the EMBL, the Tribunal found that its official activities were to be financed by the regular budget of the organisation, and not from the sale of goods and services.[122] As such the Tribunal found that goods or services that were provided by the EMBL at a charge, whether for staff or visitors, became liable to taxation, since they constituted commercial activity, which did not fall within the official activities of the EMBL.

The major significance of the Tribunal's findings for present purposes, was that it is one of the few international decisions which has sought to establish limitations upon a functional privilege or immunity primarily by using the restrictive criterion of "necessity". Whilst it should be remembered that this arbitration concerned taxation rather than jurisdictional immunity, this aspect of the award may have broader application.[123]

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[122] The Tribunal pointed out "it is not part of the functions conferred upon the EMBL to pursue business transactions for profit"(p.47).

[123] see Bekker *The Legal Position of Intergovernmental Organizations* (Martinus Nijhoff, Dordrecht, 1994) pp.168-73

2. International judicial decisions on the relationship of international organisations and private parties

There are very few standing international tribunals in which international organisations and private parties can bring claims against each other. The contentious jurisdiction of the ICJ for example only extends to claims between States. Nevertheless the ICJ has, as we have seen, made considerable contributions to the development of international institutional law through various of its advisory opinions, and in a number of these the Court has indicated rule of law considerations governing the relations of international organisations with third parties. In for example its Advisory Opinion on *Certain Expenses of the UN*,[124] the Court made reference to the position of third parties in relation to decisions of the UN which were made irregularly according to its internal law.[125] The concern expressed there appears to be to protect the position of the third party and the need for security of legal transactions. The same rule of law concerns are brought out more strongly in a number of the Court's advisory opinions in relation to international administrative law. In the first, the *Effect of Awards* case,[126] before determining that the effects of the UNAT awards were binding upon the General Assembly considered that the power to establish an administrative tribunal was conferred on the UN by necessary implication from the express powers contained in the Charter. In this respect the Court found:

> "When the Secretariat was organised, a situation arose in which the relations between the staff members and the Organisation were governed by a complex code of law.... It was inevitable that there would be disputes between the Organisation and staff members as to their rights and duties. The Charter contains no provision which authorises any of the principal organs of the

[124] 1962 ICJ Rep. 151

[125] *ibid.* at p.168

[126] 1954 ICJ Rep. 47

United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organisation to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

In these circumstances the Court finds that the power to establish a tribunal to do justice as between the Organisation and the staff members was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity."[127]

International administrative tribunals have jurisdiction over claims between international organisations and individuals, though the latter cannot be considered as purely "private" parties in that the subject matter of such claims, being official employment, is governed by international administrative. There have been rare occasions on which international administrative tribunals have had occasion to consider the questions related to the immunity (and particularly the waiver of immunity) of staff members.[128]

International administrative tribunals will not in most cases have jurisdiction over disputes between international organisations and private parties. However the under Article II (4) of its Statute the ILO Administrative Tribunal does have the competence to exercise jurisdiction over contractual disputes of the ILO where this has been so provided by the parties.[129] Though this has been warmly applauded by some writers as

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[127] *ibid.* at p.57

[128] see B.Knapp "Les privilèges et immunités des organisations internationales et de leur agents devant les tribunaux internationaux" (1965) 69 RGDIP 615. The case of *Jurado v ILO (No.1)* is considered in Chapter 5 *infra* text at note 129

[129] For a short description of the ILO practice in this respect see Valticos "Les contrats conclus par les organisations internationales avec des personnes privées" (1977) Vol.57(I) Ann. IDI 1. at p.84-6. It should also be noted that the administrative tribunals of OAU and UNIDROIT enjoy a similar competence.

an appropriate model for the settlement of contractual disputes of international organisations,[130] it is interesting that there are no reported cases where the Tribunal has been seised of contracts outside the employment context, and in a survey of contractual practice of international organisations the ILO indicated that was simply one of a number of modes of dispute settlement that are adopted in its contractual practice.[131] Under its Statute it is clear that this broader competence of the ILOAT cannot be extended to the other international organisations over whose employment disputes it has jurisdiction. However it is possible for the ILOAT to be seised of disputes of these other organisations for settlement by way of arbitration.[132]

The lack of standing fora for the majority of claims between international organisations and private parties has been ameliorated in the case of contractual disputes in some measure by international arbitration, though even here there are relatively few decisions in the public domain. Given the consensual nature of the jurisdiction of the arbitral tribunal there have been few occasions on which conventional provisions on privileges and immunities have been in issue in such arbitrations.[133]

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[130] eg J-F Lalive "L'immunité de juridiction des états et des organisations internationales" (1953) 84 *Rec. des Cours* 205 at pp. 352-4: and Cahier *Etude des accords de siège entre les organisations internationales et les états où elles resident* (Giuffre, Milan, 1959) at p.243-44.

[131] See Valticos *op. cit.* note 129 *supra*, at p.81

[132] eg *Rebeck v. WHO*, (1965) 68 Bull. Off. Du BIT 127-30; for commentary see Galvinis *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées* (LGDJ, Paris, 1990) pp.179-182

[133] Though the decision of Arbitrator Professor Batiffol in relation to an UNWRA arbitration might be noted for its suggestion that the international law basis for the Organisation's legal personality and capacity to contract, had the effect of making the compromissory clause of a contract to which the Organisation had become party by virtue of this capacity, an international act. Therefore he found that the arbitration as a public international arbitration should escape entirely any national legal system, on the basis that this approach was only compatible with the Organisation's immunity from jurisdiction - see 1985 YBILC Vol.II Pt1 at pp.157-8; see Chapter 2 *supra* at note 149ff and *infra* Chapter 4 at notes 97ff.

The main example of a permanent international tribunal with competence to consider the application and interpretation of treaty provisions on questions of immunity in the relations between an international organisation and a private person, is the European Court of Justice and its jurisdiction over the immunities of the European Communities.[134] A variety of issues have arisen under the Protocol on Privileges and Immunities, and in almost all the ECJ has taken a characteristically purposive approach to the interpretation of its provisions.

As noted above the Communities do not enjoy immunity from suit, but their "property and assets ... shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice".[135] An issue which has frequently arisen is whether such immunity from execution is infringed by the making of a garnishee orders against the Communities, i.e. where an applicant seeks to attach monies owed by the Communities to a third party, in order to discharge a judgment debt which the third party owes to the applicant. The Court has consistently found that such garnishee proceedings do represent a measure of constraint falling potentially within Article 1 of the Protocol as this type of proceeding seeks to alter the legal position of the Communities.[136]

Despite the wording of Article 1, however, the Court has found that its authorisation is not required for the enforcement all such garnishee proceedings. The Court has

[134] see Schmidt "Le protocole sur les privilèges et immunités des Communautés européennes" (1991) 27 Cahiers de Droit Européen 67

[135] Article 1 of the Protocol on Privileges and Immunities of the European Communities

[136] see *Hubner v. High Authority of the ECSC* case 4/62 ([1962] ECR 41, at p.43. *Also SA Générale de Banque v. Commission* 1/88 SA ([1989] ECR 857 at § 9).

dispensed with the need for authorisation proceedings, where the Community institution against whom the garnishee proceedings are commenced raises no objection to the garnishment. The Court has found that in these circumstances authorisation proceedings are "pointless",[137] regard is had to the purpose of Article 1 which is to prevent obstacles to the functioning and independence of the Communities. The Court has found therefore that its jurisdiction with regard to garnishee orders "must be confined to considering whether such measures are likely, in view of the effects which they have under the applicable national law, to interfere with the proper functioning and independence of the European Communities".[138] When faced with such cases the Court has considered with some care the degree to which the proper functioning or independence may be infringed by its granting such authorisation, and has for example authorised attachment of rent owed by the Communities to the Belgian State in satisfaction of the State's judgment debts.[139] However it has suggested *obiter* that attachment of payments due to a State under policies or action programmes of the Communities may hamper the functioning of the Communities.[140]

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[137] see *X Co. v. Commission* Case SA1/71, 9[1971] ECR 363: also *Universe Tankship Co Inc. v. Commission Case* 1/87 SA ([1987] ECR 2807.

[138] see *Universe Tankship Co.* cit supra, at p.2809

[139] *ibid.*

[140] see *SA Générale de Banque v. Commission* (*cit.* note 136 *supra.*) The Court has however pointed out that immunity from attachment will subsist until the Court itself has authorised attachment, or the Community institution in question has expressly waived immunity - *Forafrique Burkinabe SE v. Commission* C-182/91 ([1993] ECR 2161).

Once monies have been paid out to States under such programmes, unless the Communities have formally retained some interest in those funds, their ability to protect such payments by asserting immunity under Article 1 may be limited - see *Philipp Brothers v. Republic of Sierra Leone* (CA, [1995] 1 Lloyds Rep. 289). The Communities therefore often disburse funds to ACP States under Lomé/ Cotonou Conventions under an express deed of trust, to the effect that the recipient States hold the monies on trust for the Communities.

The measures of constraint covered by Article 1 of the Protocol clearly go beyond the particular issue of garnishee proceedings, but it is striking again in relation to these other cases how by adopting a purposive construction of the Protocol, the Court has defined limits to the immunities granted thereunder. In the case of *Ufficio Imposte di Consumo di Ispra v. Commission*,[141] the Court was asked to authorise entry to and inspection of a research centre of Euratom, by officials of a local excise duty office, in the preparation of an assessment for local duty in respect of the building of leisure facilities at the Centre. After considering the nature of the inspection, the Court, declining to follow the Opinion of the Advocate General, found that there was nothing to indicate that it "would raise difficulties which might place in jeopardy the functioning, independence or security of the Centre" and thus granted authorisation.

Even more striking is the case of *Zwartveld*[142] in which an investigating magistrate (Rechter-commissaris) of a Dutch Court sought the assistance from the Commission in carrying out criminal investigations into alleged breaches of Community rules on fishing quotas, and in particular he sought disclosure of reports of EEC inspectors. The Commission had refused on the basis that the reports were part of one of its files on legal matters pending, and claimed that the inviolability of its archives under article 2 of the Protocol was on its face absolute, and made no provision for the Court to lift it.

However the Court took a quite different approach, starting from the fact that the Community was based upon "the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of whether the measures adopted by them are in

[141] Case 2/68, ([1968]ECR 435)

[142] Case C-2/88 Imm ([1990] ECR 3365

conformity with the basic constitutional charter, the Treaty".[143] It noted the duty of sincere cooperation in the relations between the Member States and the Community institutions (Article 10 (ex 5), and its particular importance as between the Community institutions and the judicial authorities of the Member States, who are responsible for ensuring the application of and respect for Community law. By comparison it found the privileges and immunities granted to the Communities under the Protocol "have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities". The Court found that functional immunities were therefore relative, and that it had jurisdiction to examine whether a refusal by a Community institution to cooperate with a national authority was justified under the Protocol in order to avoid interference with the functioning and independence of the Communities. In the circumstances the Commission was either to co-operate with the Rechter-commissaris, or produce to the Court "imperative reasons" for not doing so.[144]

The European system displays many unique characteristics and so a direct application of the Community experience is not necessarily appropriate for all international organisations.[145] However in displaying a strongly purposive approach to the interpretation of the immunities of the Communities, the Court has sought to accommodate the competing interests at stake, and to attempt a means of balancing them.

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[143] ibid. at p.3372 §16

[144] A comparable approach is taken by the Court in relation to the giving of evidence by officials of the Communities in legal proceedings to which the Communities are not a party, though this is governed by Rule 19 of the Staff Rules rather than the Protocol see *Weddel and Co.BV v. Commission* C-54/90 ([1992] ECR 871

[145] see Plouvier "L'immunité de contrainte des Communautés européennes" (1973) IX Rev. Belge DI 471 at pp.483-4.

3. International judicial decisions on the relationship of the private party and forum State in relation to immunity

As we have seen the operation of the immunities of international organisations risks hardship to private parties, and the primary way by which relevant international instruments seek to ameliorate this is by imposing on international organisations a duty to provide alternative remedies. However on occasion an injured private party might seek a remedy against the forum State which has given effect to the immunity of a respondent international organisation, either as an alternative or perhaps a default remedy.[146] However there appears to be little evidence that there exists a general obligation on States to provide such a remedy of last resort.[147]

Nevertheless with the development of the international law of human rights, international law is likely to have at least a supervisory role in respect of the operation of immunities.[148] The right to a fair trial before an independent and impartial tribunal

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[146] Seidl-Hohenveldern raises the possibility that where a plaintiff of the nationality of a non-member State of an international organisation is prevented from suing that organisation in the courts of one of its member States, the plaintiff's State of nationality may be able to make an international claim on the grounds of a denial of justice by the forum State – see "The Legal Personality of international and supranational Organisations" 1965) 21 REDI 35, at p.61. Such a case appears not to have arisen in practice, and in any event it would seem more likely that the plaintiff's State of nationality (whether or not it was a member of the organisation in question) would first make a claim against the international organisation for the substantive injury - see Chapter I at note 55ff.

[147] See for example *Ministre des Affaires étrangères v. Dame Burgat* (1976) 74 ILR 275 where landlords of property leased to a member of the Honduran delegation to sought an indemnity from the French State suffered loss and a diminution of their rights as landlords as a result of the immunity obligations under the HQ Agreement which had been published as French Decree in 1956. The *Conseil d'Etat* following a line of decisions which set out the circumstances in which the French State may be found liable for damage arising from its legislative acts, ordered the Ministry of Foreign Affairs to pay the indemnity by reason of the principle of equality in the bearing of public burdens. However it seems doubtful that this case is authority for a more general proposition that as a matter of French law where an individual is deprived of rights or remedies against an international organisation by virtue of its jurisdictional immunities, the French State will liable to indemnify him -see casenote by Burdeau (1977) 104 *Clunet* 631. *A fortiori* it cannot be considered as evidence of a more general international legal requirement to provide a default remedy against the State itself.

[148] It is important to make clear that the question here is not of applying human rights to an international organisation directly - where this has been attempted international human rights organs have found that

established by law, for the determination of rights and obligations, is a human right protected in all of the major Conventions protecting civil and political rights.[149] The importance of such rights is evidenced from the fact that due process rights are those which are most frequently litigated before international human rights courts. As is well known, the European Court of Human Rights, in its landmark ruling in the *Golder* case, interpreted Article 6 of the European Convention in the light of the object and purpose of the Convention, viz. being to guarantee the rule of law, so as to include a right of access to a court for the determination of any claims relating to a person's civil rights and obligations.[150] However the Court took care to point that such this right was not unlimited, and in subsequent caselaw it has elucidated three criteria by which to ascertain the permissibility of limitations:

> (1) the right of access by its very nature calls for regulation by the State, which may vary in time and place according to the needs and resources of the community and of individuals;
>
> (2) in laying down such regulation, States enjoy a certain margin of appreciation: however the final decision will be that of the Court, which must be satisfied that the limitations do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

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since organisations themselves are not signatories to the Conventions they can not be parties to a complaint (*CFDT v. EC and their Member States*, Appl. No 8030/77, 13 DR 231): and where the complaint has been against a State party to the human rights treaty in question it has been found that the acts of an international organisation are not acts within the jurisdiction of the Respondent State see eg Eur. Comm. HR, *Heinz v. Contracting Parties to the European Patent Convention* Appl. no.12090/92, 76A DR 125) also UN HRC *HvDP v. Netherlands* Doc.A/42/40 p.185).

[149] See art. 6 European Convention on Human Rights; art. 14 International Covenant on Civil and Political Rights; art.8 American Convention on Human Rights; and art. 7 African Charter of Human and People's Rights.

[150] see *Golder v. UK* Ser.A no.18.p.15-18

(3) any limitation must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and aim sought to be achieved.[151]

The Court has sought to ensure that this right of access to a court, operates to prevent illegitimate procedural barriers to access to a court to vindicate a pre-existing civil right or obligation, rather than to be the source of additional substantive rights. However by its own admission such a distinction is not always easy.[152] Thus for a case concerning the jurisdictional immunity of an international organisations to raise an issue under Article 6(1) it would be necessary to show that the immunity operated so as to prevent the access of a private party to a court for the determination of an otherwise justiciable issue relating to his or her civil rights or obligations.[153]

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[151] See *Ashingdane v. UK*, Ser.A No.93 at pp.24-25; *Lithgow v. UK*, Ser A No.102 at p.71; *Philis v. Greece*, Ser.A No.209 at pp.20-23. See also Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights* (1995) at pp.196-202

[152] e.g see *Fayed v. UK* Ser.A no.294 at pp.50-1. In the context of this study it is of course not always clear that the relationship between an international organisation and a private party is one of civil law, which but for immunity would be triable before the domestic courts.

[153] The establishment of this last point may be far from easy, as the Commission's caselaw shows:

In *Spaans v. Netherlands* (58 DR 119) an application by a former employee of the Iran-US Claims Tribunal was found to be inadmissible *ratione personae* because concerned the actions of the Tribunal, which could not be said to be acts within the jurisdiction of the Netherlands. The case concerned an employment dispute in which the Netherlands courts had upheld the immunity of the Tribunal. The Commission's decision appears not to address the applicant's claim against the respondent State for barring his access to a court.

In the field of diplomatic immunity, the Commission in a rather cryptic decision appears to find that diplomatic immunity imposes substantive limitations on the jurisdiction of national courts, and so Article 6(1) is not applicable (*N,C,F and AG v. Italy*, 84 DR 84).

Similarly in its decision in *Dyer v. UK* (39 DR 246) the Commission found that a statutory immunity from actions in tort brought by servicemen against the Crown, did not result in a breach of article 6(1), because the very nature of the work and training of the armed forces required that different rules on the civil liability of the State in these circumstances were applicable. See also *Vernacombe and others v. UK and FRG* (59 DR 186).

In the cases of *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany*[154] the applicants were initially employed by private companies but were subsequently "placed at the disposal of" the European Space Agency (ESA). They later applied to the German Labour Court claiming to have acquired the status of employees of the ESA, but these actions were declared inadmissible when the ESA relied upon its immunity from jurisdiction. The applicants' complaint to Strasbourg was therefore against Germany on the basis that they had been denied access to a Court, pointing to their complete exclusion from access to an independent tribunal by operation of immunity.

The Court, noting the permissible restrictions on the right of access to a court, considered the question of whether the immunity pursued a legitimate aim. It found in the affirmative on the ground that "the attribution of privileges and immunities to international organisations are an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments".[155] Moreover this was a long established practice in the interest of the good working of these organisations, which was enhanced by the trend towards greater international cooperation.

On the issue of whether the restriction imposed by immunity on the right of access to a court was proportionate to the legitimate aim of the immunities, the Court considered whether there were "reasonable alternative means to protect effectively their rights under the Convention" available to the applicants.[156] The Court found that the

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[154] Appl. No.s 28934/95 and 26083/94, respectively, both decided 18 February 1999

[155] *ibid.* at § 52

[156] *ibid.* at §58

applicants would have had recourse to the ESA Appeals Board, or alternatively could have brought proceedings against the companies which had originally employed them before hiring them to the ESA. The Court was therefore unanimous in finding that the immunity did not violate Article 6(1), and that to find otherwise would thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.

The case is therefore a strong vindication of the grant of jurisdictional immunities to international organisations. Nevertheless it should be observed that before the Commission, the Government of Germany had unsuccessfully claimed that the immunity of the organisation constituted a substantive limit to the jurisdiction of the national courts.[157] The Court also clearly rejected such a suggestion finding that:

> "... where States establish international organisations ... and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention ... if the Contracting States were thereby absolved from all responsibility under the Convention in relation to the field of activity covered by such attribution."[158]

Thus the Court found that the grant of immunities did raise issues under the Convention, and was therefore reviewable. However in the instant case the availability of "reasonable" alternative remedies was central to the Court's finding that the restriction on Convention rights was permissible. There has been some criticism that the Court's examination of the alternative remedies in this particular

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[157] 88 D&R 130

[158] *ibid.*at §57, on this point see also the case of *Denise Matthews v. UK*, 18 February 1999 at §32. It contrasts with the approach of the Commission to diplomatic immunity in (*N,C,F and AG v. Italy*, 84 DR 84).

case was rather superficial,[159] and one might expect in future cases a more careful review to ensure that such remedies meet the procedural safeguards of Article 6.[160]

Conclusions

This Chapter has sought to demonstrate the flexibility of the functional standard in accordance with which international organisations are granted immunities. Firstly it was shown that the express immunities granted to international organisations under relevant treaty provisions, vary considerably depending upon the nature of the primary functions of the organisation in question. The more that involvement of an organisation in private or commercial activities is anticipated, the more restricted its immunities are likely to be in respect of those activities. In contrast organisations whose activities are in the political or military spheres are granted much broader immunities. A further dimension is that the UN and most of its specialised agencies, as organisations of universal or at least quasi-universal participation, and whose functions are to be carried out in the universal interest, broad immunities appear to be more justifiable than in relation to smaller regional organisations.

The review of international caselaw relating to the immunities of international organisations it can be seen that in general international courts generally seem to have adopted a similarly flexible approach. The relevant decisions tend to acknowledge the strength of claims of the various parties concerned, whether the international organisation, the forum State or a private individual. In none of these

[159] See casenote by Reinisch, (1999) 93 AJIL 933

[160] see for example *Lithgow* Ser A No.102 at p.71. For commentary on this issue see W. Wedam-Lukic "Arbitration and Article 6 of the European Convention on Human Rights" *Arbitration* Feb., 1998, at S16-21

cases have international courts sought to establish the pre-eminence of one set of interests over the others, but have rather tried to accommodate them all recognising the ongoing relationships between an international organisation and its member States and their respective populations. In doing so they use techniques such as purposive or effective interpretation of the relevant treaty provisions and emphasise the importance of maintaining channels of communication and procedures by which the necessary accommodations can be found.

CHAPTER 4

THE IMPLEMENTATION AND APPLICATION OF IMMUNITIES IN NATIONAL LAW

Introduction

The previous Chapter considered the treaty provisions that are the primary source of the immunities of international organisations, and their interpretation. It was noted how at the level of international law level, the treaty technique has enabled necessary flexibility in the formation of international immunities, allowing immunities of differing extent to be granted to different organisations according to their functional requirements. The focus of this study now shifts to the level of national law, at which, contrastingly, it is the uniformity of application of treaty provisions (i.e. ensuring evenness in the application of immunity by all member States) that is a major advantage of using the treaty technique.[1] However this primary reliance on treaty provisions, leaves open the question of how cases may be dealt with where there is no applicable treaty provision. On this question the law less well settled, though a number of approaches to it will be considered.

The implementation in national law of treaty provisions on immunity, and their application by national courts will be considered in the first parts of this chapter. The final parts consider how national courts have dealt with suits involving international organisations in the absence of treaty provisions and raises the question of customary international law.

[1] This contrasts with the doctrine of State immunity, which has developed primarily as a matter of customary international law, and treaties have had relatively little impact in the development of the law. Accordingly it has been State practice made up often of action at the level of national law, which has been the primary basis of developments in State immunity; see for example H.Lauterpacht "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 BYIL 88-121

A. Implementation of International Immunities in National Law

It is clearly the intention of treaty provisions on the immunities of international organisations that they should be given their primary effect at the level of national law. Furthermore their effectiveness will often require their uniform implementation by all member States. However, as is well, known there are considerable differences in the way that States receive international obligations into their domestic legal systems.[2]

In so-called monist systems treaty obligations become part of the national legal system upon their ratification, or, at least, upon their official publication. Therefore it is clearly the text of the treaty that national courts will apply and interpret. Whereas amongst the dualist States in which treaty obligations must be incorporated by domestic legislative enactment in order to form part of domestic law, a variety of legislative techniques are adopted in accordance with local practice. As we have seen, in international law the functional standard of immunity on which the immunities of international organisations are based, is intended to be a flexible standard, which, when applied, allows differentiation as between organisations in accordance with the requirements of each. Thus unlike for example the situation of legislating for the immunity of foreign States, the local legislator must take care to reflect the precise extent of immunity required under the relevant treaty provision, separately in the case of each international organisation.

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[2] For surveys of European States see Eisemann P-M. (ed) *L'intégration du droit international et communautaire dans l'ordre juridique national* (Kluwer, The Hague, 1996); also Lueke and Wickremasinghe "Analytical Report" in *Treaty Making – Expression of Consent by States to be Bound by a Treaty* (Kluwer, The Hague, 2001) at pp.87-99.

One solution adopted by some legal systems is the legislative incorporation of the full text of each treaty to which the legislating State becomes a party. The German legislation for example publishes the full text of the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the UN, alongside the German Act of 1954 by which it becomes part of domestic law.[3] Some States adopt primary legislation to enact the obligations which must be given effect in national law in relation to the each organisation to which the State becomes a party, eg Sweden in which the relevant act names the organisations and refers to relevant provisions of regulations or agreements to which Sweden is a party.[4]

The common law States tend to follow the dualist approach to the reception of treaty obligations, and interestingly appear to take a more systematic approach to the incorporation of international obligations in this respect. In many of these States, an act of primary legislation enumerates the maximum range of immunities which an international organisation may enjoy, and then delegates to the Government the power to make regulations providing the precise immunities to which each organisation of which the legislating State is a member, is entitled. This method of legislation differs from that of other dualist States, in that the treaty texts themselves may not be incorporated by reference, instead the obligations are reformulated in the terms of the local legislation.

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[3] See the Act of 22.6.54 (IVKD, 1954, part II, No.12, p.639) translated and reprinted in UN Doc. ST/LEG/SER.B/11 at p.25. Under Article 3 of the Act the Federal Government is empowered to grant similar privileges and immunities, in whole or in part, to other official international organisations which are not Specialised Agencies of the UN, and to "foreign welfare organisations"(see eg the Order of 30.5.58, made under these powers in relation to NATO, reproduced in UN Doc. ST/LEG/SER.B/11 at p.26).

[4] see the Swedish Act of 10.7.54 which relates to the privileges and immunities of the UN, the OEEC the Council of Europe, the Customs Cooperation Council, the Specialised Agencies of the UN and the ICJ see UN Doc. ST/LEG/SER.B/10 at p.111 (No.s 511 and 334); and also the Act of 10.6.76 (No.661) (reprinted in 1980 UNJYB p.23).

The United Kingdom was one of the first States to adopt this model.[5] Accordingly the immunities of most international organisations are granted by Orders in Council made under the enabling powers contained in the International Organisations Act 1968 (as amended).[6] The legislation seeks to provide a comprehensive basis to govern all aspects of the relationship of an international organisation of which the UK is a member, with the local legal system. Thus its enabling powers relate to the grant of privileges and immunities not only to the organisation itself in relation to judicial, administrative and fiscal matters, but also to its officials and to the representatives of other members to the organisation (whether they represent governments or not). The terms of the Act are broad enough to cover both organisations of which the UK is simply a member and those to which it is also the host State,[7] as well as persons involved in international judicial or arbitral proceedings and representatives to international conferences.

Marston's study of the preparation of the Diplomatic Privileges (Extension) Act 1944 (the original precursor to the 1968 Act) reveals that there was considerable uncertainty at the time as to the position of international organisations in UK law.[8] In the pre-War period the office of the League of Nations in the UK had enjoyed broadly same status

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[5] In the United Kingdom the Diplomatic Privileges (Extension) Act 1944, was the first Act on the subject and the first to adopt this model. Aspects of its legislative history is carefully traced by Marston in "The Origin of the Personality of International Organisations in United Kingdom Law" 40 (1991) ICLQ 403-424.

[6] There are some exceptions in relation to the Bretton Woods institutions and the Commonwealth Secretariat, whose legal status, privileges and immunities are governed by primary legislation.

[7] For organisations of which the UK is not a member there is provision for the an Order in Council to be made to recognise their legal capacities and for certain tax reliefs, but there is no provisions for them to be granted jurisdictional immunities – see s. 4 of the Act.

[8] *op cit* note 5 *supra*

as a diplomatic mission, though the specific question of its jurisdictional immunity appears not have arisen. On the establishment of UNRAA in 1943 there was a strongly held opinion within the UK Government[9] that UNRRA, as an association of States, would enjoy the same immunities as its member States, and that the Foreign Office would simply be able to certify this status should any question arise before the courts. However it was anticipated that this might be more problematic in the case of other of the international organisations which were planned for the post-War period, and particularly given the variations in immunities to different organisations by virtue of the functional standard, it was felt the in order to avoid confusion it was more appropriate to adopt legislation than to leave the matter for the common law.[10]

As to the extent of immunities granted in the legislation, Marston's study shows that the Government and the draftsmen were of the opinion that the range of immunities of foreign States should be the maximum to which organisations might be entitled.[11] Whilst it should of course be remembered that at the time foreign governments enjoyed absolute jurisdictional immunity in UK law, there was also considerable concern expressed about the need to ensure legal security when private persons contracted with international organisations. In fact the Act enables "immunity from suit and legal process" (without qualification) to be granted by Order in Council, though in practice any qualification to the immunity of a given international

[9] This opinion was held in particular by the Attorney-General Lord Somervell who was also keen to avoid enacting legislation lest it be misinterpreted by other States less willing to grant immunities, as in any way constitutive of the status, privileges and immunities of UNRRA – *ibid.* at p.412

[10] *ibid.* p.414, and especially the summing up of the position by the Attorney General quoted there.

[11] Marston quotes the Attorney General as saying "[the Government's] intention was never to accord greater privileges than were accorded to foreign governments; in some cases they might accord considerable smaller privileges, eg in the case of bodies carrying on trade" - *op cit* note 5 *supra* at p.414.

organisation which is specified in relevant international instruments, will be translated into the Order made in respect of that organisation.[12]

The UK legislation has clearly influenced similar statutes in a number of Commonwealth States,[13] and was considered by the US Congress during its consideration of the International Organizations Immunities Act 1945 ("the IOIA").[14] Though the content and scheme of this legislation are in many respects similar to the UK Act, the pre-existing situation in US law was different, in that until the adoption of this Act the US had not recognised the immunities of any international organisation in customary international law, and nor had it accepted treaty commitments in this respect (even in respect of the Pan American Union which was based in the US).[15]

In recognition of the increased number of international organisations planned for the post-War period and of increased US involvement in them, as well as the likelihood of the situation of the UN Headquarters in the US, Congress accepted that the subject was of "pressing importance".[16] However the terms of the IOIA clearly show that Congress envisaged it as constitutive of the regime of international immunities in the US, rather

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[12] Thus for example the Order dealing with the UN provides for unlimited immunity from jurisdiction except to the extent that it is waived (see the United Nations and International Court of Justice (Immunities and Privileges) Order 1974 (SI 1974/1261), whereas for example the International Oil Pollution Compensation Fund 1992 (Immunities and Privileges) Order 1996 (SI 1996/1295) reflects the considerable limitations on the Fund's immunities as provided for in its HQ Agreement with the UK (see Chapter 3 *supra* at note 56).

[13] See for example: Australia - International Organisations (Privileges and Immunities) Act 1963; Canada – Part II of the Foreign Missions and International Organizations Act 1991,c.41; New Zealand – Part II of the Diplomatic Privileges and Immunities Act 1963; Singapore – the International Organisations (Privileges and Immunities) Act, C.145.

[14] see Report of House Committee on Ways and Means (House Report No.1203, 79th Cong., 1st Sess.1 1945) at p. 3. The IOIA (Pub. L. No 79-291, 59 Stat.669) is now codified at 22 USC §§ 288-288i

[15] For a discussion of the drafting of the IOIA see Glenn, Kearney and Padilla "Immunities of International Organizations" (1982) 22 Va JIL 247

[16] *op cit* note 14 *supra*

than simply as a means of translating into national law international obligations undertaken by the US in this respect.

The US legislation is applicable to public international organisations in which the US participates and which the President designates by Executive Order. It specifies the capacities, privileges and immunities which might be accorded by Executive Order to such organisations, their employees and representatives to them. In order to enable the differentiation between the privileges and immunities accorded to each organisation, a sentence is added that the President might in particular cases withdraw, withhold, limit or condition the grant of any immunity "in the light of the functions performed by any such organisation."[17] Though this might simply be interpreted as a rather clumsy attempt to ensure the flexibility inherent in the functional standard underlying international law of international immunities, its formulation in terms of a Presidential discretion and without reference to international obligations is questionable.[18] The Senate Committee on Finance suggested that it would "permit the adjustment or limitation of the privileges in the event that any international organisation should engage for example in activities of a commercial nature".[19] However in practice the section does not appear to have caused controversies.

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[17] 22 USC 288

[18] Preuss suggests that this section "should have be so drafted as to make it clear that the powers granted therein should be exercised in a manner consistent with international obligations, and to exclude the possibility that they might as a matter of municipal law, be construed to override the requirements of previous treaties and agreements", see "The International Organizations Immunities Act" (1946) 40 AJIL 332 at p.339.

The US courts have gone some way to remedying this danger by holding that art. 104 of the UN Charter is self-executing, see for example *Balfour, Guthrie & Co, v. US and others* (1950) 17 ILR 323 .

[19] see Senate report No.861, 79th Cong., 1st Sess., p.2

However more objectionable is the following sentence which allows for the revocation of immunities in cases of abuse. Though this was important to Congress as a means of ensuring the protection of US interests, it misconceives the relationship between the US and relevant organisations. That relationship is in fact governed by the constituent instrument and other relevant treaty obligations, and is not the same as that between two equal sovereigns which is governed by the international law of diplomatic relations.[20] As Lalive points out where international organisations are concerned, in cases of abuse it is more appropriate to seek the determination of an independent third party, than to have recourse to unilateral sanctions.[21]

The same misconception appears to be responsible for the continuing controversy as to the extent of jurisdictional immunities allowed under the IOIA. The relevant section provides:

> "International organizations, their property and their assets, wherever located and by whomsoever held, shall enjoy the *same immunity from suit and every form of judicial process as is enjoyed by foreign governments*, except to the extent that such organizations may expressly waive their immunity for the purpose of an proceedings or by the terms of any contract." [emphasis added][22]

At the time of the adoption by Congress of the IOIA, the US adhered to the absolute doctrine of immunity, thus the governmental standard of immunity appeared to be

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[20] This is also clear from the provision now at §288e which enables the Secretary of State to counter abuse of privileges and immunities by officials by declaring them *persona non grata*: for criticism of this section as incompatible with the independence of the international civil service see Preuss *op. cit.* note 18 *supra* at p.339.

See also §228f which enables the Secretary of State to withhold any privileges or immunities under the Act from nationals of any State which refuses to grant corresponding privileges and immunities to US citizens.

[21] see J-F Lalive "Les immunités des états et des organisations internationales" (1953) 84 *Rec. des Cours* at p.322. Both the UN General Convention and the 1947 Convention in relation to the Specialised Agencies establish a means of seeking a binding advisory opinion of the ICJ, whereas the US-UN HQ Agreement provides for international arbitration.

[22] 22 USC 288a, subsection (b)

broadly appropriate.[23] However since the adoption by the United States of the restrictive standard of immunity for foreign States,[24] the question has arisen whether such a restrictive standard is also applicable to international organisations. As will be seen below the question has arisen in a number of cases but judicial pronouncements on the subject have been somewhat ambivalent, and so the question is still open pending a definitive determination by the Supreme Court. The State Department appears to take the view that, in general, international organisations only enjoy restricted immunity,[25] but the weight of academic writing appears to be against this.[26]

B. Application of Immunities by National Courts

The privileges and immunities of international organisations seek to protect their genuinely international status by preventing undue interference with their independent functioning by the courts of any single member State. In part it can be traced back to the principle of sovereign equality of States, and in part it reflects the

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[23] see Report of the House Ways and Means Committee which stated "In general... the privileges and immunities provided in this legislation are similar to those granted by the United States to foreign governments and their officials ... The Committee has ascertained [from the Department of State] that the privileges to which international organisations and their officials will be entitled are somewhat more limited than those which are extended by the United States to foreign governments." *cit.* note 14 *supra.*

Preuss writing in 1946 found that the IOIA "in adopting as its general standard for international organisations the treatment accorded to foreign governments, conforms almost completely with the legal requirements arising out of the [constituent] instruments [of the specialised organisations or agencies now in existence]". *op. cit.* note 18 *supra*, at p.338.

[24] First by virtue of the "Tate letter" of 1952 and now as codified now in the Foreign Sovereign Immunities Act 1976 (28 USC §§1601-11).

[25] See 1978 US Digest of Practice 115, and 1980 US Digest of Practice 68

[26] See for example Ehrenfeld "United Nations Immunity Distinguished form Sovereign Immunity" [1958] Proc. ASIL 88; Fedder "The Functional Basis of International Law and Organization" (1960) 9 AmULR 60; O'Toole " Sovereign Immunity *redivivus*: Suits against International Organizations" (1980) 4 Suffolk T.JIL 1; Farugia "*Boimah v. United Nations General Assembly*: International Organizations Immunity is Absolutely Not Restrictive" (1989) XV Brooklyn JIL 497-525; Oparil "Immunity of International Organisations in the US Courts: Absolute or Restrictive" (1991) 24 Vand. JTL 689. The American Law Institute *Restatement of the Law on Foreign Relations (Third)* appears to accept that the restrictive doctrine of State immunity is not applicable to the UN and its Specialised Agencies, but is more nuanced about other organisations, §467, Comment d. and Reporter's Note 4 thereto.

principle of effectiveness. The intention behind the carefully drawn treaty provisions on immunity is therefore to ensure a uniform treatment of international organisations by their member States.[27] Thus the clarity of drafting of the relevant provisions is essential, leaving as little room as possible for differing interpretations by national courts. It may be a sign of success in this respect that, despite the large number of international organisations which exist (more than 300), there is a relatively small number of reported cases in which their immunities have been at issue.[28]

Nevertheless international organisations are, as has been observed, grafted on to an existing State-oriented structure of international law, rather than seeking to replace States. Accordingly, an appropriate accommodation of international organisations must be also made within the national legal orders of States, which are, of course, constituted primarily to reflect the values of the national community. Inevitably there have been some occasions on which that process of accommodation at the national level has been problematic. Whilst, viewed as a whole, the body of national caselaw on international immunities is relatively homogenous, suggesting a broad acceptance of immunities, there are nonetheless some notable exceptions and some remaining problem issues. Bearing in mind the functional rationale of international immunities, the sections which follow, therefore, consider how national courts have applied them in practice.

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[27] It is of course well-established that States can not invoke provisions of their national law to excuse them from carrying out their international obligations, see art 27 Vienna Convention on the Law of Treaties, and Advisory Opinion on the *Jurisdiction of the Courts of Danzig* (1928) PCIJ Ser B No.15, at pp.26-27

[28] A comprehensive survey of the caselaw was complied by A.Reinisch in *International Organisations Before National Courts* (CUP, Cambridge, 2000) in which he cites almost 250 cases from national courts. By way of comparison in the US alone a lexis search would show that the numbers of cases under the Foreign Sovereign Immunities Act runs into the thousands.

The jurisdictional immunities granted to international organisations under the relevant treaty provisions, act simply as a bar to the exercise of jurisdiction of the municipal court, which, but for the immunity, would ordinarily be able to exercise jurisdiction over the dispute in question. Thus such jurisdiction can be established when organisations waive their immunity. Express limitations on immunity in these treaty provisions tend to attach to certain types of subject-matter, particularly in respect of private law disputes with third parties (outsiders of the organisations such as members of the public, civilian contractors etc., as opposed to employees). Thus these are cases in relation to which the municipal court would have jurisdiction were they to take place between private parties, provided of course that sufficient connecting factors link the dispute to the forum and other local rules of jurisdiction are met.

Correspondingly it should be noted that there are other types of subject matter raised in disputes involving international organisations, over which the municipal court cannot appropriately exercise its jurisdiction. These are issues concerning the internal organisation and structures of organisations which are subject to the appropriate rules of each organisation, derived from international law. In most of these cases thus the issue is one of lack of jurisdictional competence of the municipal court, rather than a true immunity,[29] and thus the question of waiver cannot arise. Such lack of jurisdictional competence or non-justiciability is familiar in the context of inter-*State* relations, and as Professor Brownlie points out is based on the principle of non-

[29] See Brownlie. *The Principles of Public International Law*, 5th edn (1998) at p.326f. See also Niboyet "Immunité de juridiction et incompétence d'attribution" (1950) 39 Rev. crit. d.i.p. 139; and Dominicé "La nature et l'étendue et l'immunité de jurisdiction des organisations internationales" from Bocksteigel *et al.* (ed.s) *Festschrift für Ignaz Seidl-Hohenveldern* (1988) 77-93, at pp.82-85

intervention of in the internal affairs of other States.[30] Certain municipal courts have extended this principle of non-intervention to international organisations so that where the subject-matter of the dispute would involve the municipal court in questions of the internal management or administration of an international organisation, the municipal court has found itself unable to hear the case.[31] It is submitted that the principle of non-intervention may be so extended because of the international status of international organisations. There appears to be a general rule that disputes governed by the internal law of international organisations are not suitable to be determined by a national court.[32]

An express immunity, granted *ratione personae* under a treaty, may co-exist alongside these areas of non-justiciability, and where this occurs both issues may be put before the court in the alternative. Since the scope of the two issues is different, a case may be dismissed on grounds of non-justiciability notwithstanding that an organisation's immunity *ratione personae* is limited.[33] Thus, using as a model Brownlie's agenda of legal issues before a municipal court faced with a dispute involving the question of State immunity,[34] a court faced with a dispute involving a question of the jurisdictional immunity of an international organisation must consider the following:

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[30] *ibid.* at pp.327-8

[31] In particular see the treatment of employment cases involving members of the international civil service discussed in Chapter 2 *supra*, at note 104, in which national courts have found that they did not have jurisdictional competence over the disputes in question because of their internal nature - in some of these cases, even in the absence of an express immunity enjoyed by the international organisations in question.

[32] see e.g. the decision of the UK High Court in *Westland Helicopters v. AOI* [1995] 2 All ER 387

[33] see for example the discussion of the case of *Broadbent v. USA*, (63 ILR 162 and 337) – text at note 115 *infra*

[34] *op. cit* note 29 *supra* at p.334

1.(a) The existence and proper interpretation of a treaty provision granting the organisation in question immunity *ratione personae.*

(b) The existence and proper interpretation of any limitations upon that immunity.

2. The question of immunity in the absence of an express treaty provision, including the existence and scope of any immunity which the organisation might enjoy as a matter of customary international law.

3. The question of the justiciability of the subject-matter of a dispute, including the existence and scope of issues which are non-justiciable before the municipal court because they raise questions of the internal law of an international organisation which a national court can not properly determine. The question is thus often one of applicable law, rather than jurisdiction *simpliciter.*

4. Characterisation of the dispute, i.e. a determination as to whether the facts of the case fall within the class of immune transactions. This has been a major issue in a number of cases concerning State immunity,[35] particularly where the limitations on immunity are expressed in the broad terms of the *iure imperii/ iure gestionis* distinction, rather than say the more individuated approach adopted in some more recent formulations of the law on State immunity.[36] It may thus be an important issue

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[35] e.g. the UK case of *Kuwait Airways Corp v. Iraqi Airways Co.,* HL, [1995] 1 WLR 1147; and the *I Congreso* [1983] 1 AC 244. In the first of these cases the court was faced with the question of whether or not Iraqi Airways actions in removing aircraft from Kuwait, and subsequently retaining them for their own purposes, were done "in the exercise of sovereign authority" as *per* s.14(2) of the State Immunity Act. In the latter case various actions of State-owned companies some of which were at the behest of the Government had to be characterised as either *iure imperii* or *iure gestionis*, under the common law.

[36] Thus for example in the UK courts the difficult cases of characterisation mentioned in note 35 *supra*, have occurred in relation to areas in which broad distinctions between public and private acts,

in particular when considering organisational immunities that are limited, and especially where those limitations are expressed in broad terms. An example of how such characterisation issues might arise in relation to the immunities of international organisations, might be where the extent of immunity from jurisdiction is subject to a general limitation on grounds of functional necessity.[37] There is little practice from national courts in relation to the immunities of international organisations themselves on that question.[38] However greater controversy ha arisen in relation to characterisation of "official acts" for the purposes of the immunities of international officials.[39]

The remainder of this chapter therefore broadly follows that agenda of issues, save that the final issue is not dealt with separately for the reasons given.

1. The application and interpretation of treaty provisions on immunity

(a) Immunity

It might be thought that the application and interpretation of treaty provisions on jurisdictional immunity in national legal systems might be affected by the way in which the treaty obligation in question is received into the national legal system. However in practice this is, if at all, only partly true. Certainly the courts of monist States apply and interpret the treaty text directly. They are therefore likely to have

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rather than in relation to cases falling within the more specific and individuated rules in section 3-11 of the State Immunity Act 1976.

[37] As might arise should the reasoning of the arbitral tribunal which gave the *EMBL* Award (105 ILR 1, discussed at Chapter 3 *supra* at note 121ff) be applied in relation to jurisdictional immunities. See Bekker *The Legal Position of Intergovernmental Organisations - a Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff, Dordrecht, 1994) at 235

[38] See section 1(e) *infra*

[39] see chapter 5 *infra*

the international basis of the obligation clearly in mind, and one might therefore expect them to adopt a similar approach to an international tribunal on questions such as interpretation. The courts of those dualist States which formally incorporate the full treaty text itself by legislative act might be thought to be in a largely similar position. On the other hand In States such as the UK and the US, in which the obligations of the treaty are reformulated in the incorporating legislation, there may be some danger of either: (a) an inaccuracy in the reformulation of the text, or; (b) the treatment of the obligation simply as one of local law, subject to the usual rules as to hierarchy and /or interpretation in the local system.

As discussed above the language of the US International Organisations Immunities Act may be criticised in a number of respects.[40] Some commentators have noted a tendency on the part of US courts to apply immunities using "domestic law as the rule of decision",[41] which may explain to some degree the controversy concerning the application of the restrictive doctrine of State immunity to international organisations. Nevertheless the situation in the US should not be exaggerated. Whilst the numbers of cases brought in the US on international immunity points is relatively large in comparison with the numbers of cases from other countries, in absolute terms the overall numbers of cases are still very small.[42] Further, as will be discussed, the courts of other States, which operate different systems for the

[40] see text at notes 14ff *supra*

[41] see Glenn *et al. op cit* note 15 *supra*

[42] Reinisch *op cit* note 28 *supra* records about 65 decisions of the US courts relating to international organisations spanning the post War period, which given the quantity of US litigation in other areas of the law, suggests that this is not a major source of controversy.

reception of treaties in domestic law, have made similar decisions concerning the extent of immunity.[43]

On other hand in the UK there have been very few reported decisions in relation to the immunities of international organisations. Whilst it has been noted that in the *International Tin Council* litigation, the interpretation of the phrase "the legal capacities of a body corporate"[44] was a major source of controversy, the question of immunity appears not to have given rise to undue difficulties of application and interpretation. As regards interpretation, it is clear that the UK courts will look beyond the usual rules of statutory interpretation when dealing with legislative provisions by which international obligations are implemented, including referring to the text of the treaty itself and if necessary interpreting it in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties.[45]

As a general proposition then, the notion of immunity granted under treaty provision have not been subject to fundamental challenge from national courts. In terms of the modalities of immunities, by analogy with State immunity, it might be thought that the court should take judicial notice of immunities, particularly where a court acts without the appearance of an international organisation. It is also clear now that a court's failure to deal with the immunity of an international organisation *in limine*

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[43] see section 1(d) *infra*

[44] see s.1(2)(a) of the International Organisations Act 1968

[45] See *Fothergill v. Monarch Airlines* [1980] 2 All ER 896; in the context of the immunities of international organisations see the decision of the EAT in *Mukoro v. EBRD* (1994) 107 ILR 604, which considered the treaty basis of the immunities in the light of their object and purpose in addition to a textual analysis.

litis will engage the international responsibility of the forum State,[46] since such failure effectively nullifies immunity by forcing the international organisation in question to take steps to defend the substantive proceedings.

If then, in broad terms the concept of treaty-based immunities is accepted by national courts is accepted by local courts, it is perhaps unsurprising that the body of jurisprudence from national courts tends to focus on the limitations of immunity.

(b) Waiver

A limitation on immunity found in all of the treaty provisions which have been considered is in relation to waiver. It should be remembered that waiver is effective in relation to immunities only where the court in question would, but for the immunity, ordinarily enjoy jurisdiction over the subject matter of the dispute. As was noted above international organisations generally prefer not to waive their immunity and as a result there is not extensive jurisprudence on the question of waiver of immunity by international organisations.[47]

It seems clear that appearance in court only for the purpose of asserting immunity should not be deemed to be voluntary submission to jurisdiction or waiver of immunity. This is of course well established in relation to State immunity[48] and

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[46] *Cumaraswamy* case (1999) ICJ Rep.62, at para 63

[47] In *Boimah v. UNGA* ((1987) 113 ILR 499) a US District Court insisted that waiver must be express since it suggested that there were policy reasons to suggest that "courts should be reluctant to find that an international organisation has inadvertently waived immunity".

[48] see for example s2(4) of the UK State Immunity Act 1978; s.10(7)-(9) of Australian Foreign States Immunities Act 1985; Article 3(2) of the 1972 European Convention on State Immunity (1979 UKTS no.74); and Article 8(2) of the ILC draft Articles on the Jurisdictional Immunities of States and their Property UN Doc.A /CN.4/L.457

would appear similarly to apply to international organisations.[49] It is interesting to note that the United Nations has on occasion intervened in lawsuits as an *amicus curiae*, but has been careful to emphasise that it did not thereby submit to the local jurisdiction.[50]

There appears not to be any case in which the question of the position of an international organisation in relation to a counterclaim in proceedings commenced by that organisation.[51] However there do not appear to be strong policy reasons to differentiate the position of international organisations from that of a foreign State in an analogous situation, which has traditionally been considered to have submitted to the jurisdiction in respect of a counterclaim arising from the same subject-matter as the claim in which it has commenced proceedings.[52]

(i) Contractual waiver

(aa) Choice of jurisdiction

As noted above the UN has claimed that its immunity may only be waived expressly in a "particular case", and moreover that the removal of an express provision allowing waiver in advance by contract from an earlier draft of what is now Article II

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[49] See for example *African Reinsurance Corp. v. Abate Fantaye* (1986) 86 ILR 655; *US Lines v. WHO* (1983) 107 ILR 182.

[50] See for example *US v. Palestine Liberation Organization* ((1988) 27 ILM 1055), *Broadbent v. OAS* (63 ILR 162 and 337), for the UN *amicus* brief see 1980 UNJY 224

[51] In the case of *Communauté économique des États de l'Afrique de l'Ouest v. BCCI* ([1993] JDI 353) the Cour d'appel of Paris found that by commencing an action in the French Courts an international organisation may be deemed to waive any immunity from jurisdiction it may enjoy (see p.357); however the case, discussed in greater detail below, did not in fact involve a counterclaim as such, but the reasoning of the Court would appear to apply to cases of counterclaims.

[52] For academic support for the general proposition see Dominicé "L'immunité de juridiction et d'exécution des Organisations Internationales" (1984) 187 *Rec. des Cours* 145 at p, 184, and Reinisch *op cit* note 28 *supra* at pp.204-5 and 361.

section 2 of the General Convention,[53] precludes the possibility of such contractual waiver.[54] This interpretation appears to have been based on a previous rule applied in State immunity cases in certain jurisdictions, that waiver had to be express and in relation to the dispute which has arisen.[55] This rule has been superseded in many of the common law jurisdictions which have placed their law on State immunity on a statutory footing,[56] and it is doubtful whether it was ever generally applied in civil law jurisdictions.[57] The argument that the absence of an express treaty provision in relation to contractual waiver precluded the possibility of enforcing such a contractual clause was rejected in United Kingdom case of *Standard Chartered Bank v. International Tin Council*,[58] on the basis that the requirement that waiver be in "a particular case", was not that it must relate to a particular dispute or legal proceeding, but rather to "a specific transaction". It is noticeable that Bingham J was clearly influenced by recent developments in the law of State immunity on this point. Thus certainly in the English courts, a contractual waiver by an international organisation will be enforceable.[59] Although the point appears not yet to have been litigated elsewhere, similar reasoning would seem applicable.[60]

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[53] as compared to Article VII of the Articles of Agreement of the IMF.

[54] See Chapter 3 *supra* at note 88

[55] e.g. in the UK, see *Kahan v. Pakistan Federation* [1951] 2 KB 1003..

[56] See for example s.2(2) of the UK State Immunity Act 1978, § 1605 (a)(2) of the US FSIA which speaks of implicit, as well as explicit, waivers, which have been interpreted to include agreements to submit future disputes to the US courts (see *Birch Shipping Co. v. Embassy of the United Republic of Tanzania* (1980) 507 F.Supp.311); s. 10(2) and (5) of the Australian Foreign State Immunities Act 1985. See also Article 2 of the 1972 European Convention on State Immunity and Article 7(10(b) of the ILC draft Articles.

[57] See E.J Cohn "Waiver of Immunity" (1958) 34 BYIL 260.

[58] (1986) 77 ILR 8

[59] see also *Arab Banking Corporation v. ITC & others* (15.1.86) 77 ILR 1, discussed below.

[60] Many international organisations seek to avoid any such implication by deliberately omitting choice of jurisdiction clauses in order to de-localise their contracts and avoid any implication of a waiver - see chapter 2 *supra*.

The judgment of Bingham J. in the *Standard Chartered* case has been criticised for having applied the law of State immunity on the point, without seeking to differentiate the special position of international organisations,[61] notwithstanding that the defendant's arguments had relied upon statements of the UN which had themselves placed reliance on State immunity cases.[62] In any event such criticisms appear to be unfounded on two grounds. Firstly Bingham J. did in fact consider the position of international organisations in contradistinction to that of States, finding that, as a matter of English law, international organisations only enjoyed immunity to the extent granted by statute and that therefore the common law did not recognise any jurisdictional immunity in respect of international organisations.[63] Secondly and more importantly from a policy point of view it seems unobjectionable that international organisations should be held to agreements into which they have entered voluntarily. In particular it is difficult to see how in these circumstances a national court by upholding its jurisdiction over a contractual dispute would be unduly infringing the independent functioning of an organisation. Further in the case of a contractual matters, the potential scope of any disputes (as to possible parties and liabilities) is sufficiently foreseeable for the international organisation to take a view on whether a waiver clause is acceptable to it.

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[61] See Bekker *The Legal Position of International Organisations* (1994) p.224-231

[62] See 1967 YBILC vol.2 p.154 at p.225 §§ 82-83

[63] This particular finding may be open to challenge if it could be established that customary international law required a degree of immunity, for example by reason of the principle of non-intervention in the internal affairs of an organisation, see section on immunity in the absence of treaty provision *infra*, at section 2. However this is not the basis of Bekker's criticisms of the judgment note 61 *supra*.

The latter point is further borne out by the rule that such contractual waivers must be interpreted restrictively, and that waiver of immunity from jurisdiction does not, of itself, entail waiver of immunity from execution. The English High Court, in a slightly earlier case in the *ITC* litigation,[64] found that a similar clause to that in the *Standard Chartered* case, did not entitle a creditor to seek *a Mareva* injunction/ freezing order to prevent the removal of funds by the ITC from the UK. In other words the Court considered that whilst the clause may have waived immunity from jurisdiction, it did not waive immunity from execution.

(bb) Choice of law

The question as to whether an express choice of law clause in a contract, electing a system of national law to govern the contract can constitute a waiver of immunity arose in the Italian case of *Maida v. Administration for International Assistance.*[65] The case involved an employment dispute concerning a doctor who had been employed by the International Refugee Organisation. The Staff Regulations provided that settlement of disputes should be by way of arbitration by the Italian Chamber of Advocates, and that in relation to matters on which the Regulations made no provision reference should be made to the relevant Italian legislation on private employment. The Court found that the plaintiff had been employed by the IRO in pursuance of public purposes and not as a commercial matter, and thus the IRO was immune except to the extent that it had waived immunity. The Court found that from the provision for the residuary application of Italian legislation on private employment, it followed that the IRO "notwithstanding that it is a subject of

[64] See judgment of Steyn J. in *Arab Banking Corp. v. ITC*, (1986) 77 ILR 1

[65] Decision of 27 May 1955, 23 ILR 510

international law had placed itself indirectly and in a subsidiary manner under Italian law in certain respects."[66] Moreover as the arbitration clause was found to be ineffective because it made no provision for the number or appointment of arbitrators, the Court found the appropriate forum to be the ordinary civil labour court.

There appear be few other cases in which the question as to whether a contractual choice of law clause constitutes a waiver of immunity.[67] Certainly some international organisations are aware of this possibility and thus in their practice prefer to omit express choice of national law to govern their contracts.[68] It might be thought that implied waiver of this kind is unobjectionable, in that if an international organisation wished to avoid the implication of such a waiver, it has the opportunity to add an express provision to the effect that the parties agree that the inclusion of the choice of law clause does not imply a waiver of immunity, or alternatively to insist on the removal of the clause during the negotiation of the contract.

Nevertheless waiver implied from a choice of law clause is not generally accepted in State immunity, though practice is not uniform.[69] In any event it should be stressed

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[66] *ibid.* at p.513

[67] In the French case of *International Institute for Refrigeration v. Elkaim* 77 ILR 498, the court of first instance and the Cour d'Appel, similarly determined that a provision in the Staff Regulations referring to the residuary application of French employment law, was sufficient on which to base their jurisdiction. However subsequently the Cour de Cassation reversed this finding (1989) 35 AFDI 876.

[68] see N.Valticos "Les contrats conclus par les organisations internationales avec des personnes privées" (1977) Ann.IDI 1, at p.37*f*

[69] The practice in relation to State immunity varies between States: in the UK for example s.2(2) of the State Immunity Act specifically states that a contractual provision choosing UK law as the governing law shall not be considered a submission to the jurisdiction; similarly Article 7(2) of the ILC Draft Articles on the jurisdictional immunities of States. On the other hand statutes in some other jurisdictions do contain express provision on the point, e.g. the USA where the Courts have tended to treat a choice of US law as the governing law as an implicit waiver *Transamerican SS v Somali*

that this reasoning only applies where there is an express choice of law clause. Therefore a waiver of immunity cannot be implied, simply from the fact that an international organisation enters into a contract which might ordinarily have some connecting factor with the local jurisdiction, (e.g. through the place where the contract was made, or the place of its performance), but does not contain an express provision for the jurisdiction of the local courts and/or the application of local law.[70]

(ii) Submission to arbitration

It will of course be recalled that most international organisations enjoying jurisdictional immunity are also under an obligation to make provision for alternative methods for the settlement of their disputes of a private law nature. The preference of many international organisations is to discharge this obligation by providing ultimately for arbitration (though the relative paucity of published arbitral awards suggests that this obligation is most frequently discharged by negotiation or other informal methods). Arbitration will primarily be agreed for contractual disputes but is not necessarily limited to such disputes.[71] In his survey of the subject for the *Institut de droit international* Valticos notes the variety in types of arbitration

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Democratic Republic (1985) 767 F 2d 998; *Marlowe v. Argentine Naval Commission* (1985) 604 F. Supp. 703; and *Resource Dynamics International v General Peoples Commission* (1984) 604 F. Supp. 703.

[70] An exception to this appears to be the case of *Branno v. Ministry of War* (1954, 22 ILR 756) in which the Italian Court of Cassation found that when an international organisation "enters into contracts with private individuals it thereby agrees to be subject to the laws of Italian civil law which regulate such contracts, and therefore it agrees also to submit to the jurisdiction of the courts". This case seems to go well beyond the mainstream of cases on the point, and may perhaps be explained in part by the fact that the Court did not find that there was an applicable treaty provision on NATO's immunity in this case, and also from the inclination in Italian jurisprudence (now overruled) to apply the restrictive doctrine of State immunity to international organisations see text at note 144f *infra*.

[71] It is important to underline that the arbitrations dealt with in this section are arbitrations between an international organisation and a private person, and not public international arbitrations between a State and an international organisation, or as between international organisations.

proceedings for which international organisations provide in their contracts.[72] These may range from institutional arbitration agreements, such as ICC or the AAA, or *ad hoc* arbitrations, or, still rather exceptionally, arbitration before an organ of the organisation itself.

In this last category the European Court of Justice can fulfil this function in relation to contracts entered into by the European Communities or their organs, and the ILO Administrative Tribunal may do the same for contracts entered into by the ILO (though not other organisations whose administrative disputes are settled by the ILOAT).[73] Given the small number of organisations to whom recourse to a standing international tribunal is available and the limited practice on the point, this category of proceedings will not be considered here. The following discussion will centre only arbitrations between and an international organisation subject to some external institutional arbitration mechanism, or *ad hoc* arbitrations.

Although one of the effects of international arbitration may be to de-localise disputes by removing the process of settlement from a national jurisdiction (as is often the case in, for example, the context of disputes between a State and a private party), international arbitration proceedings may nevertheless require the support of the local legal system. This relates to aspects of supervision of the arbitration proceedings or recognition and enforcement of awards. Such supervisory jurisdiction

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[72] *op. cit.* note 68 *supra*

[73] See Chapter 3, note 129ff *supra*. Also the OAU (now the AU) sometimes provides in its contracts for an *ad hoc* administrative tribunal of the Organisation to have competence in its contractual disputes. UNIDROIT may also provide for its administrative tribunal to submit contractual disputes with private parties to its administrative tribunal – see Valticos *ibid.*at pp.85-6. However it has not been possible to locate a single instance where an international administrative tribunal has heard a contractual dispute outside the employment field.

will frequently include residual powers concerning the constitution of the tribunal, procedure before the tribunal, questions of validity and interpretation of awards, and even, in limited circumstances, the possibility of setting aside the award. Further questions are raised in relation to the enforcement of awards and especially the question of execution against property owned by a person otherwise enjoying immunity from execution (i.e. States and many international organisations).[74] In relation to arbitration of disputes between international organisations and private parties, clearly an international organisation cannot invoke its immunity to shield it from the arbitration proceedings themselves. However, the question arises as to whether the immunities from suit and execution of international organisations operate to prevent national courts from exercising such supervisory controls over an arbitration, or the enforcement of any resulting award.

Whilst there is some practice and writing on questions of State immunity and international arbitration,[75] there are many fewer reported decisions and less discussion of similar questions concerning international organisations.[76] If, as has been suggested by the European Court of Human Rights,[77] the provision of alternative modes of dispute settlement is essential to ensure that the jurisdictional immunity of international organisations does not violate the right of access to a court,

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[74] see for example G.Bernini an A.J. Van den Berg "The enforcement of arbitral awards against a State: the problem of immunity from execution" in Lew ed. *Contemporary problems in international arbitration* (Queen Mary College, London, 1986) at ch.33

[75] see *infra* text at note 79ff

[76] For such caselaw as there is, see *infra*, at notes 83ff. For one of the few articles on the point see Dominicé "L'arbitrage et les immunités des organisations internationales" in Dominicé et al. *Etdues en droit international en l'honneur de Pierre Lalive* (1993) 483-97; see also and P.Glavinis *Les litiges realtifs aux contrats passés entre organisations internationales et personnes privées* (LGDJ, Paris 1990)

[77] see *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany* both decided 18 February 1999, discussed in Chapter 3, text at notes 154ff

then such modes of settlement must clearly be effective. To the extent that the support of the local jurisdiction ensures the effectiveness of arbitration, it may be vital in maintaining an acceptable balance between the rights and interests of the both the international organisation and the private party. In this respect it might be noted that it is potentially as important to the international organisation as it is to the private party that this should be so.

As indicated above, discussion of the question of State immunity and its relation to the supervisory jurisdiction of the local courts, tends to focus on two aspects of immunity. The first is whether a State by agreeing to arbitrate should be deemed to have waived its immunity from jurisdiction in relation to the supervisory powers of local courts in relation to the arbitral proceedings themselves; and the second is whether by agreeing to arbitrate a State has implicitly waived its immunity from execution in relation to proceedings for the enforcement of an award in national courts. It is therefore on corresponding aspects in relation to international organisations that the following discussion focuses.

(aa) Arbitration and immunity from jurisdiction

There is now a considerable degree of consensus, certainly amongst those States which adopt the restrictive standard, that State immunity from jurisdiction should not operate as a bar to proceedings before local courts in the supervision of arbitral proceedings to which the State has voluntarily submitted.[78] This may, in some legal

[78] See G. Delaume "Sovereign Immunity and transnational arbitration", in Lew (ed.) *Contemporary Problems in International Arbitration* (Queen Mary College, London, 1986) Ch.28 at p. 314-318.

systems include the recognition or confirmation of an award by the national court, by means of an *exequatur*.[79] In countries adopting the restrictive standard of State immunity, an agreement to arbitrate is either specifically subject to the supervisory jurisdiction of the local courts by legislative provision,[80] or is deemed to be waiver of immunity from such jurisdiction.[81] The policy reasons for this were summarised by the Australian Law Reform Commission in its Report on Foreign State Immunity:

> "Most countries ... regulate the conduct of arbitrations within their jurisdiction, on the basis that the forum State has an interest in the conduct of such arbitrations in accordance with basic standards of due process and fairness. This interest is recognised in various multilateral treaties on arbitration which either apply specifically to or include 'private law' arbitrations to which States are parties [footnote reference to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 ICSID Convention]. There is therefore clear justification for asserting jurisdiction over matters such as arbitral procedure, the constitution of the arbitral tribunal, etc in respect of such local arbitrations."[82]

However there few cases concerning jurisdiction over arbitral proceedings relation to arbitrations between international organisations and private parties. In *Beaudice v. ASECNA*[83] the Cour d'Appel of Paris found that a clause contained in a contract of employment which provided for the settlement of disputes by arbitration presided

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[79] *ibid.* at p.316-7; however see *Centre for Industrial Development v. Naidu* (116 ILR 424) in which a Belgian court held that to issue an exequatur would infringe the immunity from execution of the Centre.

[80] In relation to international instruments see Art 12 of the European Convention on States Immunity and Art.18 of the ILC Draft Articles on the Jurisdictional Immunities of States; in terms of national statutory provisions see e.g. s.9 of the UK State Immunity Act has this effect (overruling the finding in *Duff Development v. Kelanatan Gov.* [192] AC 797); see also s.17 of the Australian Foreign States Immunities Act 1985; see also the 1998 amendment to US Foreign Sovereign Immunities Act in s.1605 (a)(6).

[81] See in the previous US caselaw: *Ipitrade International SA v. Federal Republic of Nigeria* 465 F. Supp. 824 and *LIAMCO v. Socialist People's Libyan Arab Jamahiriya* 482 F. Supp. 1175; see also a *dictum* in the much cited *Victory Transport* case 35 ILR 110; however for a conflicting case on the point see *Verlinden v. Central Bank of Nigeria* 488 F. Supp 1284, and 647 F2d 320. In France see *SEEE v. Federal Republic of Yugoslavia* [1971] JDI 131.

[82] See Australian Law Reform Commission , *Foreign State Immunity* Report No. 24 (1984).

[83] (1977) [1979] JDI 128

over by a nominee of the Administrative Tribunal of Paris, was implicitly a choice of French law to govern the arbitration. The Court therefore upheld its jurisdiction in accordance with French law on arbitration. However the case did not deal with the question of immunity, and the organisation may not have enjoyed immunity in any event as France was not a member State of ASECNA.

The case of *ITC v. Amalgamet*,[84] again involved a local court in a question relating to an arbitration between a private person and an international organisation of which the forum State was not a member. The contract provided that it should be governed by New York law, and disputes should be settled by arbitration in New York under the AAA rules. The case was in fact brought by the ITC to stay arbitration proceedings on the basis *inter alia* of its immunity. The New York Supreme Court found that the ITC enjoyed no immunity in the US as the US was not a member, and the organisation only enjoyed immunity by virtue of its Headquarters Agreement with the UK, which had no effect outside the UK. In any event, and strictly speaking *obiter dictum*, the Court found the agreement to arbitrate was a waiver of immunity.[85]

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[84] 524 NYS 2d 971 (supp.1988); 77 ILR 30

[85] In relation to this group of cases where the supervisory jurisdiction of local courts has been successfully established in the situation where the organisation does not enjoy jurisdictional immunity brief mention might be made of the *Westland Helicopters* affair, a complex arbitration lasting over a considerable period of time, during which various applications were made to the local courts in Switzerland. The Shareholders Agreement on which the arbitration was based, stated that it was to be governed by Swiss law and that disputes should be settled in the final analysis by arbitration in Geneva in accordance with the ICC rules. However the question of the immunity from suit of the Arab Organisation for Industrialisation did not arise before the Swiss courts. Rather, a major point in issue in the proceedings in the Swiss Federal Courts (80 ILR 622 and 653) was whether a voluntary submission to the arbitration by an international organisation could be deemed to be a submission by its member States. On the basis that the organisation enjoyed legal personality distinct from its member States, the answer of the Swiss Courts was that it could not.

In contrast to these cases, in *Groupement d'Entreprises Fougerolle v. CERN*[86] the Swiss Federal Court was faced squarely with the question of the relationship of jurisdictional immunity with proceedings relating to arbitration. It will be recalled that, under its Headquarters Agreement with Switzerland, CERN enjoys immunity from "every form of legal process" save to the extent that it has waived such immunity.[87] A consortium of five companies had entered into a major construction contract with the CERN, containing a dispute settlement clause providing for arbitration by a three member panel. In case of disagreement on the appointment of the third arbitrator, the clause specified that he or she would be chosen by the President of the Administrative Tribunal of the ILO. The clause also stipulated that the arbitral procedure should be governed by the "general principles of civil procedure".

The consortium invoked the arbitration clause in seeking a payment of 430 million Swiss francs, by way of an equitable payment for increased costs of the work. The arbitral tribunal instead awarded it about 44.6 million Swiss francs (i.e. about 10% of what the consortium sought). The consortium therefore applied the Swiss Federal Court for the annulment of the award. The CERN resisted this application on the basis that it enjoyed absolute immunity from the jurisdiction of the courts of the host State.

The Swiss court upheld the CERN's plea of immunity in this case. It started from a statement of general principles relating to the question. Firstly it held that the

[86] 21 December 1992, 102 ILR 209

[87] See Chapter 3 *supra* text at note 59

immunity of international organisations, unlike that of States, derived from conventional instruments rather than a rule of customary international law, and therefore for the distinction between *acta iure imperii* and *iure gestionis* had no application in relation to international organisations. It found that the immunity of international organisation was absolute.[88] Then, noting that the obligation of international organisations to provide appropriate alternative methods of dispute settlement was normally discharged by providing for arbitration, it found that "an award rendered within the framework of such arbitral proceedings is exempt from any judicial control by the very reason of immunity from jurisdiction".[89] The Court concluded this section on the general law by finding that

> "in contrast to the position in relation to States, the submission of international organisations to an arbitration clause does not constitute waiver of their immunity. The arbitration in which they participate is exempt from any intervention by the national courts unless the organisation itself waives its immunity, or the Headquarters Agreement otherwise provides." [90]

The Court then applied these general findings to the present case finding that the CERN had not waived its immunity from suit by entering into the arbitration clause. The contract had provided that the award "shall be final and binding on the parties, who, in advance, waive any possible right of appeal". It therefore found that all grounds for intervention by the national judge in the proceedings were excluded.

However the Court went further and asked itself (though it did not provide a definitive answer) the question of whether it should have dismissed the application,

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[88] *ibid.* at p.211

[89] *ibid.* at p.213

[90] *ibid.*

not so much on the basis of immunity, but on the basis that the arbitration was one which was beyond its competence, being a public international arbitration and thus outside the scope of Swiss arbitral law.[91] If this were so, the Court found that it would be unable to determine an application lodged against that same arbitration by the CERN, even if it waived its immunity.

The Court's decision is clearly important, and is interesting in that the Court placed considerable reliance on doctrinal writings, and in particular those of Professor Dominicé.[92] The Court's statement that an agreement to arbitrate by an international organisation should not constitute a waiver of its immunity from the supervisory jurisdiction of the national judge appears very broadly stated, but must be read in the light of the qualification that "where an arbitration agreement refers to national law ... the possibility of intervention in the proceedings by national courts may be implied."[93] In this respect it is significant that the Court took care to interpret the relevant contractual provisions to see whether they amounted to a submission to the jurisdiction.[94]

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[91] i.e. s.176ff Swiss Federal Law on Private International Law 1987.

[92] The Court considered Dominicé's 1984 Hague Lectures (*cit.* note 52 *supra*) as well a subsequent article "La nature et l'étendue et l'immunité de jurisdiction des organisations internationales" from Bocksteigel *et al.* (ed.s) *Festschrift für Ignaz Seidl-Hohenveldern* (1988). The Court cited a number of other academic writings including the J-F Lalive *op.cit.* note 22 *supra*, N.Valticos *op.cit.* note 69 *supra*, and P.Glavinis *Les litiges realtifs aux contrats passés entre organisations internationales et personnes privées* (LGDJ, Paris 1990).

[93] *loc. cit.* note 86 *supra* at p. 213

[94] However it might be noted that both Professor Dominicé and Dr. Glavinis take a more unequivocal position. Both suggest that the situation of States (for whom an arbitration clause may be considered as a waiver from the supervisory jurisdiction of the local court) can be differentiated from that of international organisations. These authors point particularly to the fact that it is since the introduction of the restrictive doctrine of State immunity from jurisdiction, that States do not enjoy jurisdictional immunity from suit in relation to their commercial contracts. Thus they claim that as international organisations enjoy immunity in respect of their contracts, an arbitration clause contained therein is similarly shielded from the supervisory jurisdiction of the local courts. See Dominicé "L'arbitrage et les immunités des organisations internationales" *cit* note 77 *supra* at p.490. Glavinis *op. cit.* note 92 *supra* at pp.131-2, and in his casenote on this decision (1994) *Rev. Arb.* 180-7 at p.182.

The decision has attracted some critical commentary in relation to the finding as to the complete autonomy of the arbitration from the local jurisdiction, and the Court's consequent *dictum* that it was probably unable to intervene even if so requested by the international organisation.[95] The latter appears to be based upon a view of the arbitration as being public international arbitration by virtue of the international personality of the CERN. In this respect the Court relied on a passage from Dominicé,[96] in which he refers to an arbitration award made in 1958 by Professor Batiffol in a contractual dispute between UNRWA and a private party.[97] This award found that the personality and capacity to contract of the organisation arose under international law, and therefore that an arbitration clause, which it undertakes, derives its legal basis from public international law, and thus may be valid under that law without any need for reference to the national legal system. Thus it was held that there was no possibility for a national judge to exercise any supervisory jurisdiction over such an arbitration.

The approach of Professor Batiffol is highly unusual,[98] and may be criticised for its apparent implication that whenever an international organisation enters into a

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[95] See e.g remarks by R. Briner in panel discussion "State immunity and sovereignty in relation to arbitration: issues related execution of awards" in [1995] *ASIL/NVIR Proceedings* p.62 at pp.66-69 . P.Glavinis criticises the judgment on a number of grounds considered *infra*, and also takes the view that if the CERN waived its immunity and the international obligations of Switzerland undertaken in the HQ Agreement require the seisin of the Swiss Courts – see casenote [1994] *Rev. Arb.* 175 at p. 187.

[96] Judgment at p.213 citing Dominicé's Hague lectures (*cit.* note 52 supra) at p.199.

[97] An English translation of the pertinent sections of the award appears in 1985 *YBILC* Vol.II pt.1 at p.157

[98] Glavinis suggests that the only other arbitration which appears to have taken a similar approach was Professor Dupuy's award in the *Texaco v.Libya* (1971, 53 ILR 389) - see *op cit* note 92 *supra* at p.192. In this regard it might be noted that the concession agreement in question in the latter case was

contract containing an arbitration clause, there is a presumption that public international law governs both the contract and the arbitration procedure itself. It may be that this would be true in relation to an arbitration concerned with the application of the internal law of the organisation. However it does not seem appropriate in relation to most contracts which international organisations enter into with private parties, which will usually be of a private law nature. Treaty provisions on the status, privileges and immunities of international organisations, provide for the contractual capacity of the organisation in terms of the domestic law of their member States, and the need to provide alternative modes of settlement "for disputes arising out of contracts and *other disputes of private law nature*"[emphasis added].[99] Further the writings of various commentators suggest that to the extent that public international law can operate as the governing law of contractual relations, it must be expressly chosen as such.[100]

By contrast, in a more recent case, the *Cour d'Appel* of Paris has rejected a claim by UNESCO that a contractual arbitration clause was not subject to the supervisory jurisdiction of the local courts.[101] Having entered into a contract with a private person containing an arbitration clause, UNESCO had refused to name an arbitrator, thus effectively preventing the constitution of an arbitral panel. The private party sought the assistance of the local court of first instance, which invited UNESCO to

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of quite a different nature than more quotidian types of contract for goods and services, which for the main part international organisations undertake.

[99] e.g. Section 29 of the Convention on the Privileges and Immunities of the UN ST/LEG/SER.B/10 p.189

[100] See Jenks, *The Proper Law of International Organisations*, (Stevens, London, 1962) at p.151

[101] *UNESCO v. Boulois*, Cour d'Appel de Paris (14 Ch.A), 19 June 1998, (1999) Rev. Arb. 343

appoint an arbitrator within 15 days.[102] The Court at first instance simply found that since the voluntary acceptance by UNESCO of an arbitration clause constituted a waiver of any immunity from the supervisory jurisdiction of the Court, so that the chosen method of dispute settlement, arbitration, could be put into effect. It was simply a question of performance of the contractual provisions in good faith. On UNESCO's appeal, the Cour d'Appel endorsed the reasoning of the lower Court, but added a further dimension, suggesting that allowing UNESCO's immunity to override the supervisory jurisdiction of the local courts would lead to a denial of justice.[103] The Cour d'Appel found that this denial of justice was contrary both to public policy and to Article 6(1) of the European Convention on Human Rights.

The Cour d'Appel's invocation of the Article 6(1) ECHR is interesting in pre-figuring the findings in the *Beer and Regan* and *Waite and Kennedy* cases by the European Court of Human Rights.[104] Interestingly the Cour d'Appel does not elaborate, but in the light of the subsequent Strasbourg jurisprudence, the reasoning would presumably that immunity will not violate Article 6(1) ECHR provided that an alternative mode of settlement is available. It would therefore be inconsistent to permit immunity to be used so as to defeat the possibility of such alternative remedy. It is suggested that the *Boulois* case provides a strong antidote to a dogmatic application of the reasoning of the Swiss Court in *Groupement d'Entreprises Fougerolle* case.

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[102] *UNESCO v. Boulois*, Triunal de grand Instance de Paris, 20 October 1997, (1997) Rev. Arb. 575, on which see Gaillard, E. and Pingel-Lenuzza "International Organisations and Immunity form Jurisdiction: to Restrict or Bypass" (2002) 51 ICLQ 1

[103] *loc cit* note 101 *supra*

[104] see Chapter 3 *supra*, at note 154

(bb) Arbitration and immunity from execution

The next question which should be asked is whether, by agreeing to arbitrate, an international organisation implicitly waives its immunity from execution before national courts, in relation to the enforcement of the resulting arbitral award. There appears to be nothing to exclude an award in an arbitration between an international organisation and a private person from the scope of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.[105] However that does not answer the question of immunity from execution. Given the coercive nature of enforcement and execution procedures in national legal systems, and the dangers of a significant impact on the autonomy of an international organisation, quite clearly questions of considerable delicacy are raised. Similar questions arise in relation to State immunity but uniform answers have not been forthcoming, with different jurisdictions adopting their own solutions.[106]

It should be noted straightaway that this problem has arisen very infrequently in practice and thus there is little hard law on which to base conclusions. In the survey carried out by Professor Valticos he found that international organisations rarely had recourse to arbitral proceedings and the subject of the enforcement of awards against international organisations did not even arise.[107] Jenks points out that an "international organisation has the responsibility of a public body to give effect to

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[105] See Jenks *p. cit.* note 100, p.247-8; see also Glavinis *op cit* note 92 *supra* at pp.154-6.

[106] A number of States which adopt the restrictive doctrine, consider the purposes for which the property to be executed upon is intended, and immunity is likely to be upheld if the property is intended to be used , at least in part, for public purposes: Austria - *Rep. of A Embassy Bank Account* 77 ILR 489; France – *Islamic Rep. Of Iran v. Eurodif* 77 ILR 513; Germany - *Philippine Embassy Bank Account* case 65 ILR 146; UK *Alcom v. Rep. Of Colombia* [1984] AC 580. For further see Bernini and Van den Berg *op. cit.* note 74 *supra.*

[107] *op. cit.* note 54 *supra* at pp. 78-84

any award given against it".[108] It is perhaps likely that this is keenly felt by most international organisations, even if there are limits to enforceability.[109]

It will be recalled that in relation to many of the smaller, regional or technical international organisations the treaty provisions under which they enjoy immunity contain an exception to immunity in relation to the enforcement of arbitration awards. An example of an exception to immunity of this kind was contained in the Headquarters Agreement between the International Tin Council and the UK. When the ITC declared it could no longer meet its liabilities, certain arbitral award creditors sought to enforce their awards by applying to have the ITC wound up under English company law. Millet J. rejected the claim that winding up proceedings could be considered enforcement proceedings in relation to an arbitration award, and in doing so placed particular reliance on the issues of policy at stake, and in particular those concerning the independent functioning of the organisation.[110] The nature of the winding up process and the compulsory duties of the liquidator made it inappropriate for application to an international organisation, which could be only be wound up pursuant to the diplomatic process and therefore such matters were not justiciable in the courts of a single member State. He found:

> "Sovereign States are free if they wish to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their members. But if they choose instead to carry it on through the medium of an international organisation, no one member State by executive legislation or judicial action can assume the management of the enterprise and subject it to its own domestic law. For if one could then all

[108] Jenks *op cit* note 100 *supra* at p.248

[109] see *Centre for Industrial Development v. Naidu* (116 ILR424).

[110] *In re International Tin Council* [1987] 1 Ch. 419.

could; and the independence and international character of the organisation would be fragmented and destroyed". [111]

At a later stage in the *ITC* proceedings an application by an arbitral award creditor for discovery of assets, was also made to Millet J.[112] Again the Judge considered the position of an international organisation adjudging it not be covered by the usual rules relating to such applications against a private persons. However exercising a broad discretion, he found that he had jurisdiction to make an order requiring an officer of the ITC to give evidence relating to the assets of the ITC, and found that reasons of policy required him to make the order.

Thus in cases where there is an express exception to immunity in relation to the enforcement of arbitral awards under the relevant treaty provision, a national court may still have to exercise its powers with due deference to the effect its orders may have on the internal functioning of the organisation. On the other hand in cases where there is no such express exception to immunity, then in general the Court must look to see if there has been a waiver of immunity from execution (and not just a waiver of immunity from jurisdiction). However provided such waiver is specific in this sense, Dominicé suggests that it may either be express (for example by a provision of the contract) or implicit.[113] In relation to implicit waiver he suggests if

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[111] *ibid* at p.452

In a subsequent case before Millet J award creditors sought to enforce an award by the appointment of a receiver of equitable execution to enforce, an obligation which the applicants claimed to be incumbent on the part of the Member States to meet the debts of the organisation. However the application failed because it did not disclose a justiciable cause of action - *Maclaine Watson and Co. Ltd v. ITC* [1988] 1 Ch.1

[112] *Maclaine Watson v. ITC (No.2)* [1987] 1 WLR 1711. The judgment was upheld on appeal to the Court of Appeal, where Kerr LJ placed particular reliance on the exception to the ITC's immunity from suit in respect of the enforcement of arbitral awards.

[113] Dominicé, *op. cit.* note 76 *supra* at pp.494-5

an international organisation fails to invoke its immunity from execution it may be deemed to have waived it.

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To summarise therefore it appears that where an international organisation agrees to arbitration with a private party, that can properly be considered to constitute a waiver of immunity from the supervisory jurisdiction of the national courts of the place where the arbitration is to take place, so as to ensure the effectiveness of the arbitration agreement. However any waiver of immunity from execution for the enforcement of the award must be express. Interestingly this the position which the Permanent Court of Arbitration in its Optional Rules for Arbitration between International Organisations and Private Parties, Article 1(2) of which reads:

> "Agreement by a party to arbitration under these Rules constitutes a waiver of any right of immunity from jurisdiction, in respect of the dispute in question, to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed."

(c) The position of organisations enjoying a limited immunity

It was observed in the previous Chapter that treaty provisions vary in the extent to which they grant immunity to international organisations (other than the UN, most of its Specialised Agencies and those other organisations enjoying an apparently unlimited immunity from "every kind of legal process"). Faced with a situation in which there is a conventional immunity provision subject to express exceptions, and a dispute as to whether or not the immunity can be invoked by the organisation in a particular case, the forum is likely to have to interpret the treaty provision and may have the delicate task of characterisation of the dispute.

Among the organisations whose immunity is limited under relevant treaty provisions are the World Bank and the various regional development banks. It will be recalled that in some cases, for example the World Bank and the Inter-American Development Bank, the relevant texts appear to deny jurisdictional immunity almost entirely in suits brought by private parties in member States in which the organisation has an office, or has appointed an agent to accept service of process, or has issued or guaranteed securities.[114] However in the relevant agreements relating to some of the other regional development banks immunity is granted except in relation to certain financial transactions in particular the organisation's powers to borrow money.[115] Nevertheless it should again be observed that there have been comparatively few occasions, in absolute terms, on which such provisions have arisen for interpretation by the courts of member States.

In *Lutcher S.A. Celulose e Papel Candoi v. Inter-American Development Bank*[116] a company which had borrowed from the I-ADB brought an action to restrain the I-ADB from making a loan to a competitor company, on the basis that it contravened an implied term of its own loan agreement. The US Federal District Court for the District of Columbia upheld the Bank's claim to immunity in this matter, on the basis that the case effectively sought to review a decision taken by the governing board of the Bank in its discretion and judgment. It found that "where delicate, complex issues of international economic policy are involved, jurisdiction should be denied".

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[114] see Chapter 3 *supra* text at note 44ff

[115] See Art. 50(1) of the Articles of Agreement of the ADB, Art. 52 of the AfDB, and Art. 69(1) of the Caribbean Development Bank, discussed in Chapter 3 *supra* at notes 47-50

[116] 42 ILR 138

On appeal the Court of Appeals upheld the dismissal of the suit, but only on the basis that it failed to state a cause of action for which relief was available either in contract or tort.[117]

However the Court of Appeals overruled the finding that the Bank enjoyed immunity from suit. It considered the Bank's constitutive agreement and found that the exception to immunity contained therein was not to be read restrictively.[118]

The Bank had argued that the policy behind the exception was to enable the Bank effectively to raise money on the capital markets, and that it should therefore be limited to suits with the Banks creditors and the beneficiaries of its guarantees. However the Court held that there was no necessity for limiting the exception to immunity as the Bank had argued, either from a textual analysis or from a policy analysis. From the policy perspective the Court appears to have started from an idea of the effective and independent functioning of the Bank, which was implicit in the Bank's arguments. It found that there was no reason to differentiate between the Bank's creditors and its borrowers, given that suits from the latter were unlikely to be more harassing to Bank or more expensive than those from creditors. Further just as the exception was necessary to enable the Bank to raise funds on the markets, the Court found that it was also necessary in order that the Bank could operate

[117] *ibid.* at p.139

[118] The Court refers to the exception to immunity as "waiver". However this is clearly not case of waiver in the sense of the word given in English jurisprudence and doctrine (i.e. a voluntary submission to the jurisdiction) but rather refers to an exception or limitation to immunity, which takes effect regardless of the consent of the international organisation. The word waiver appears to be used because the US IOIA provides the immunity shall be granted except to the extent that it is waived. However in the case of the Inter-American Development Bank the Executive Order granting the Bank immunity spelt out that the immunities granted to it under the Act "shall not be construed to affect in any way the applicability of the provisions of section 3 of Article XI [i.e. the limitations on immunity]".

effectively as a lender, since prudent borrowers would require the protection of the law. Finally in this respect it found that suits by borrowers were if anything likely to have less effect on the management and policy if the organisation, than suits by lenders (given the market power the Bank was likely to have over its borrowers). In the current case what was at issue was not an issue of international policy, but rather it purported (albeit wrongly) to allege a simple breach of contract or possible tort.

Whilst at first sight the rejection of the Bank's restrictive view of the exception to immunity in its constitutive instrument may seem potentially alarming to other international organisations, the text in question was carefully considered and did not bear the Bank's claim. Further careful reading suggests that the Court's treatment of the policy arguments relating to the powers of effective functioning and self-organisation of the Bank, was appropriate in the light of the dispute over the extent of immunity. In a series of more recent cases the US Courts have been asked to consider a similarly limited immunity, but in the context of the employment relations of the World Bank. Whilst it has been proposed that employment by international organisations is a matter over which national courts lack competence *ratione materiae*,[119] rather than a matter of immunity *per se*, it is necessary to consider here the judicial method actually adopted in these cases.

In *Mendaro v. IBRD*,[120] which involved allegations of sex discrimination and sexual harassment by a former employee of the Bank, the Court of Appeals (DC Circuit) again analysed both the policy questions raised by the case as well as the applicable

[119] See Chapter 2 *supra* section D.2.a

[120] 27 September 1983, 99 ILR 92

treaty text. The Court found that international organisations enjoyed immunity in relation to suits brought by their employees as a matter of customary international law.[121] It found that such immunity saved an organisation from having to administer different employment practices according to the country in which it employed its staff, and more importantly that the independence of the organisation from the national policies of any single member State was thus ensured. It then turned to the Bank's Articles of Agreement and took a strongly purposive approach to the exception to immunity contained therein. It stressed the links between the extent of the bank's immunity from suit and the effective achievement of its international functions. Where a limitation might arguably enable the Bank to pursue its international goals more effectively a broad approach could be taken to the construction of the limitation on immunity. However where the exception to immunity opened the Bank to suits which could significantly hamper the Bank's functions, this was less likely to have been the intention behind the provision, and a court should interpret the provision with that point in mind.[122] The Court accepted that the immunity of the Bank was limited in cases of its external relations, especially in relation to its banking activities, but also in relation to other commercial contracts for goods and services, including such matters as telephone services.[123] However it found that these limitations on immunity could not be construed so as to restrict the Bank's immunity in relation to its *internal* operations such as its relationship with its

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[121] *ibid.* at p.615

[122] ibid. at p.617

[123] On the specific point of telecommunications services see the IBRD *and IMF v. All America Cables and Radio Inc., et al.* (FCC Docket No. 9362) before the US Federal Communications Commission, discussed by J.Gold *The Fund Agreement in the Courts – II* pp.21-28 and 55-59, in which the IBRD and IMF claimed that the supply of telecommunications services should be supplied at the official governmental (reduced) rate. See also J.Gold "The Interpretation by the International Monetary of its Articles of Agreement" (1954) 3 ICLQ 256, at pp.265-70.

employees, since that would lay the Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions, and the more than 140 countries in which it could be involved in its lending and financing activities.[124]

This distinction between the external relations with third parties which are not immune under the limited immunity of the IBRD and the I-ADB, and their internal relations with for example their own employees, has been taken up in a number of subsequent cases[125]. However the line is not always easily drawn. In *Morgan v. IBRD*[126] the plaintiff was the employee of a temporary employment agency, who was placed as a secretary at the IBRD over a period of more than two years. An incident occurred after which he alleged that he had been detained against his will by the bank's security staff, and denied access to a lawyer and accused of theft. He also alleged that subsequently the security staff had made threats against him in the course of continuing harassment. He therefore sought compensatory and punitive damages for the intentional infliction of emotional distress, false imprisonment, libel

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[124] The Court distinguished the position of multinational companies which, though they often had to ensure their employment practices conformed to the laws of each country in which they retain employees, were organised under the laws of one more countries. International organisations on the other hand were created by the joint action of several States, to solve international problems for the collective good, thus they owed their primary allegiance to the principles and policies established by their organic documents, rather than the legislation of any one member: *loc. cit.* note 118 *supra* at p.619.

[125] see for example *Novak v. World Bank* in which a distinction was drawn between the Bank's external, commercial activities and its internal personnel practices No. 81-1329 (DDC 21 Dec. 1983) quoted by Oparil in "Immunity of International Organisations in United States Courts: Absolute or Restrictive?" (1991) 24 Van J T'nal L. 689 at p.699.

In *Chiriboga v. IBRD* (616 F Supp 963 at p.967) the issue arose as to whether a claim could be made against the Bank by the personal representatives of an employee who had been killed in air accident, for benefits under an insurance policy taken out by the Bank as part of its employee benefits plan. The Court found that "the dispute focuses on what the Bank did or did not contract with its employees. It is difficult to imagine a suit that touches more closely on the internal operations of an international organisation".

[126] 13 September 1990, 752 F.Supp. 492

and slander. The US District Court (District of Columbia) upheld the Bank's claim of immunity, finding that the case concerned an employment relationship and to allow it to proceed "would force the bank to defend internal employment practices traditionally shielded by immunity".[127]

It had also been argued that the Foreign Sovereign Immunities Act (i.e. the restrictive doctrine of State immunity) was applicable, but the Court avoided making a definitive finding on this, holding that in any event the investigation and treatment of the plaintiff was the exercise of a "discretionary function"[128] of the Bank, i.e. involving the exercise of policy judgment and monitored and guided by senior staff, and should thus be immune.[129] The Court's judgment has understandably been criticised for its characterisation of the dispute as an employment dispute.[130] Not only was the defendant not an employee of the Bank, but also his claims were for torts rather than remedies for breach of employment law. It is indeed surprising that an immunity which is not expressly provided for in the text of the Bank's Articles of Agreement but in fact has been found to exist only after an extensive interpretative exercise by the Courts, should result in debarring a third party[131] from bringing a suit for compensation for common law torts, or, from Singer's perspective, serious infringements of his human rights.[132]

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[127] *ibid.* at 494

[128] see 28 USC § 1605(a)(5)(A) restores immunity in relation to claims for compensation in relation to personal injury or death, which are based upon "the exercise or performance or the failure to exercise or perform a discretionary function, regardless of whether the discretion be abused".

[129] *loc. cit.* note 124 *supra* at pp.494-5.

[130] Notably by M.Singer "Jurisdictional Immunity of International Organisations; Human Rights and Functional Necessity Concerns" (1995) 36 VJIL 53 at p.152-4.

[131] It seems Morgan, not being an employee of the Bank, would have been precluded from bringing a complaint in the Bank's Administrative Tribunal under its internal administrative law.

[132] *op. cit.* note 130 *supra*, at p.153

Contrastingly in the decision at first instance in *Rendall-Speranza v. Nassim and the IFC,*[133] a claim brought by a female employee of the IFC for assault and battery by her supervisor (the first defendant) arising from her allegations of continued sexual harassment culminating in an assault, the IFC was found to be properly joined as second defendant, and without the benefit of immunity, by the court of first instance. The Court found that the more restrictive jurisdictional immunity under the Foreign Sovereign Immunities Act was applicable to international organisations under the IOIA, and that the assaults complained of could not be said to have been performed as a "discretionary function" and thus did not benefit from immunity. The Court also rejected the IFC's argument that the proper remedy, of which the plaintiff should have availed herself, was to a complaint under the World Bank's internal grievance procedures. The Court held that the injury complained of did not arise out of, or in the course of, the plaintiff's employment, and therefore those internal procedures were inapplicable.

Outside the USA the courts of other States have also drawn a distinction between an international organisation's internal and employment relations and its external relations with third parties, when considering the possible extent of immunity. In the case of Eurocontrol it will be recalled that its constitutive instruments make no provision for jurisdictional immunity. However when a dispute between Eurocontrol and an employee came before a Dutch court, it held that it did not have jurisdiction

[133] US District Court (District of Columbia), 18 March 1996, (942 F.Supp 621) and 8 July 1996 (932 F.Supp. 19). However subsequently the Court of Appeals found the claims against the IFC to be time-barred and upheld the immunity of her supervisor – US Court of Appeals (DC Circuit) 14 March 1997 107 F.3d 913 and discussed in Chapter 5 *infra* text at note 89

over the dispute as the contract of employment was not one of civil law but rather of administrative law in the performance of public purposes, and that under customary international law Eurocontrol was entitled to immunity in the performance of its public functions.[134]

Certain international organisations enjoy immunity only in respect of their official activities. In such cases there may be difficult problems of characterisation, as demonstrated by the *European Molecular Biology Laboratory* Arbitration discussed in the previous chapter.[135] The European Patent Organisation only enjoys immunity from jurisdiction and execution "within the scope of its to its official activities".[136] In *E GesembH v. EPO*[137] the Austrian Courts had to determine a dispute relating to rent arrears brought by the landlord of property leased by the EPO. The Court at first instance found that the dispute concerned the official activities of the EPO. The Court of Appeals overturned that finding on the basis that only those activities strictly related to the granting of European patents were immune. The Supreme Court however reversed the Court of Appeal on the grounds that the immunity of an international organisation, though granted on a functional basis, was an absolute immunity.

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[134] See *Eckhardt v. Eurocontrol (No.2)* District Court of Maastricht, 12 Jan. 1984 (94 ILR 331), overruling judgment of the Local Court of Sittard , 25 June 1976 (24 ILR 190).

For cases in which similar reasoning has been applied see also *International Institute of Agriculture v. Profili* (1930) 5 ILR 413and *Chemidlin v. International Bureau of Weights and Measures* (1945) 12 ILR 281

[135] See Chapter 3 *supra*, at note 121

[136] See Art.3 of the Protocol on the Privileges and Immunities of the European Patent Organisation (1065 UNTS 370)

[137] (1992) 47 Osterreichische Juristenzeitung 661, no 161 discussed by Reinisch *op cit.*note 28 *supra* at p.211

In *Mukoro v. European Bank of Reconstruction and Development*,[138] the UK Employment Appeal Tribunal was concerned with allegations of racial discrimination against the EBRD in rejecting the plaintiff's application for employment. The EBRD, which by virtue of its Headquarters Agreement enjoyed immunity for its official acts (subject to various exceptions),[139] asserted immunity. The plaintiff argued *inter alia* that an act of racial discrimination could not be an official act of the Bank, especially in the light of its constitutional commitment to "the rule of law" and "respect for human rights". The EAT distinguished between the Bank's activities and the manner in which they were carried out. Thus it found that the relevant activity was the selection of staff, which it found to be "administrative activity" which according to the Bank's constitutive agreement fell within the category of "official activities".[140] The allegation of racial discrimination related to the manner in which the official activity was performed. The EAT held that to find otherwise would be to render the Bank's jurisdictional immunity meaningless, since in order to establish whether or not an act of racial discrimination had occurred would require a full investigation of the matter by the Tribunal. Immunity would only be sustained if there had not been an act of unlawful discrimination (in which case it would of course be unnecessary). Thus the purpose of conferring immunity on the Bank, i.e. to shield it from having to defend itself from suits for alleged wrongs, would be defeated. The EAT thus considered the treaty provision its context and in the light of underlying policy, and sought an effective interpretation to the treaty in the light of the delicate issues at stake.

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[138] 107 ILR 604

[139] see Chapter 3 *supra* note 51

[140] *ibid.* at p.612

(d) The effect of the restrictive doctrine of State immunity

In contrast to the development of the restrictive doctrine of State immunity, the introduction of which was led by municipal courts asserting local jurisdiction over acts *iure gestionis* of foreign States, the immunities of international organisations are mainly based upon a large number of individual grants of immunity under treaties, and as a result a rather different pattern appears. As has been shown the degree of immunity granted to different organisations varies considerably.[141] Furthermore though the use of the treaty to grant immunity seeks to ensure uniformity of treatment of an organisation amongst the member States, whether such uniformity is achieved may depend upon how treaty obligations are received into the national legal system, and other particular characteristics of that system.

Despite the modern trend towards the restrictive doctrine of State immunity, the acceptance of which by States has increased markedly in the post-WW2 period (coincidentally the same period which has seen the rapid growth in the numbers and structures of international organisations), the practice of the majority of States is not to require a wholesale superimposition of the restrictive doctrine of State immunity on to the immunities of international organisations.[142] In most States the guide to the existence and extent of immunity will be the relevant treaty provisions granting immunity. Limitations on immunity should accord with the particular requirements of the relevant treaty provision, rather than an external notion of private or commercial acts. In relation to organisations whose jurisdictional immunity under

[141] see Chapter 3 *supra*

[142] There is nevertheless a growing minority of writers who call for the restrictive doctrine of immunity to be applied to international organisations – see Chapter 2 *supra* text at note.. ff

treaty is unlimited, municipal courts have in most cases to have been able to apply the immunity without undue difficulty.[143]

However in Italy a number of rather different lines in the jurisprudence of the courts have arisen.[144] It should be remembered not only that the Italian courts were amongst the first of the national legal systems to adopt the restrictive doctrine of State immunity,[145] but also one of the first national legal systems to acknowledge the personality of international organisations.[146] Thus it is perhaps less surprising that the decisions of the Italian courts are comparatively radical in seeking limits to the breadth of the immunities of international organisations. Some authors have criticised the Italian courts for simply importing the restrictive doctrine of State immunity to the immunities of international organisations,[147] but whilst there may be some strength to these criticisms in relation to certain aspects of the caselaw, it is submitted that in fact the Italian caselaw as a whole shows greater subtlety than is sometimes recognised.

A distinguishing feature of the approach of the Italian courts in many of the leading decisions, has been to regard the enjoyment of immunity by an international organisation as a consequence of finding that it has international personality and

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[143] See for example the French cases of *Procureur Général près de la Cour de cassation v. Société Immobilière Alfred Dehodencq* [1954] RCDIP 612, 21 ILR 279 and *Hintermann v. WEU* (Court of Cassation, 14.11.95) 124 Clunet 141; the Belgian case *of Manderlier v. UN and Belgian State* 45 ILR 446: and the Swiss case of *Groupement d'Entreprises Fougerolle v. CERN* 102 ILR 209.

[144] For an introduction to the Italian caselaw see Cassese "L'immunité de juriidiction des organisations internationales dans la jurisprudence italienne" (1984) 30 AFDI 556

[145] see Brownlie *op. cit.* note 29 *supra* at p.330

[146] see *International Institute for Agriculture v. Profili-* see note 149 *infra*, and Chapter 1 *supra* at note 26

[147] See for example Dominicé *op. cit.* at note 52 *supra*

consequently also the ability to organise itself independently of any national legal system, referred to in the caselaw as a power of "self-organisation". This was the approach of the Court of Cassation in the landmark case of *International Institute of Agriculture v. Profili,*[148] in which it was faced with an international organisation which did not enjoy immunity by virtue of a written provision, either from a treaty or in Italian legislation, and thus its finding of immunity was based on the more general notion of personality.[149]

In subsequent cases the Italian courts applied the reasoning of the *Profili* case to international organisations whose immunities are the subject of a treaty provision. The courts have been prepared to give such treaty provisions an extensive interpretation, finding the existence of limitations on immunity, sometimes explicitly on the basis of a customary international law as applied to State immunity and sometimes on the basis of the broad principle of functional necessity. The Courts have tended to find that both approaches lead towards a similar distinction between the public acts of an international organisation, which will be immune, and its private acts, which are not immune. This distinction has sometimes been drawn explicitly upon the basis of the applicability of the distinction between acts *iure imperii* and

[148] (1931) 5 Ann. Digest 413. This case has been influential in the development of the Italian caselaw ever since, in particular in relation to situations where there is no applicable treaty provision granting an organisation immunity see for example *Cristiani v. Italian -Latin American Institute* (1985) 87 ILR 21 and *Galasso v. Italian -Latin American Institute* [1987] RDIPP 827; *ICEM v. Di Banella Schirone* (1975) 77 ILR 572. However the same principle of self-organisation is also applied in cases in which a treaty provision was applicable - see for example *Camera Confederale de Lavoro CGIL v. Bari Institute* (Court of Cassation) (1979) 78 ILR 86 and *HAFSE v. Sindicato FILTAT-CISL Vicenza* (1978) 77 ILR 630.

[149] For a brief discussion of the development of status, privileges and immunities of the IIA see Cahier *Etude des accords de siège conclus entre les organisations internationales et les états où elles résident* 1959 at pp.67-9.

iure gestionis as applied to acts of foreign States.[150] In such cases "public" acts are those which are necessary for an organisation to achieve its institutional purposes and which thus fall outside the competence of the local courts, whereas its "private" acts must be subject to local private law.

In considering the Italian caselaw it is also important to note that this approach is not solely judge-made, and reflects to some extent the position taken by the Italian Government in relation to various of the international organisations which maintain offices in Italy. In relation to the FAO the Italian Government had sought unsuccessfully to make a reservation to the effect that immunity under the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the UN should be limited to the immunity granted to foreign States. However the specialised agencies objected to the Italian reservation, with the result that Italy was not considered a party to the 1947 Convention.[151] In the case of the Bari Institute, the Italian Government successfully made a reservation to the treaty granting it immunity, to the effect of limiting immunity to restrictive State immunity.[152] In relation to the NATO bases, the 1951 SOFA draws the distinction between local and international civilian staff, and accepted that the former will be subject to local law and jurisdiction

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[150] see for example *Branno v. Ministry of War*, 22 ILR 756; *Bari Institute of the International Centre for the Advanced Mediterrraanean Agronomic Studies v. Jasbez* (1977), 77 ILR 602; *Bari Institute v. Scivetti* (1975) 77 ILR 609; *ICEM v. Chiti*, (1973) 77 ILR 577 ; *Allied Headquarters in Southern Europe (HAFSE) v. Capocci Belmonte* (1977) 3 IYIL 328

[151] see Dominicé *op. cit.* note 52 *supra*, at pp. 170

[152] see Reinisch *op cit* note 18 *supra*, at pp186-7

However a decisive point in the Italian caselaw was reached with the well-known decision of the Court of Cassation in the case of *FAO v. INPDAI.*[153] This case concerned the question of whether an application for rent review by a landlord of premises leased to the FAO could be determined by the Italian courts. The Court of Cassation found that the immunity of the FAO did not extend to a lease on the alternative bases (a) that it was an act *iure gestionis* or (b) that "the choice of location of an office is a factor which is extraneous to the primary function pursued by the international organisation and which does not affect the autonomy and the structural planning of the entity under consideration".[154]

However the controversy and criticism that this decision provoked[155] led *inter alia* to Italy's accession to the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the UN[156] (which provides both for immunity but also the obligation of the Agencies to provide appropriate alternative means of dispute

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[153] (1982) 87 ILR 1.

[154] *ibid.* at p.9. The relevant treaty provisions before the Court were (a) Article XV of the Constitution of the organisation under which "each Member nation undertakes, in so far as it may be possible under its constitutional procedure, to accord the Organisation all the immunities and facilities which it accords to diplomatic missions..." and (b) Article VIII section 16 of the 1950 Headquarters Agreement between Italy and FAO which provided that "FAO and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case FAO shall have expressly waived its immunity". The Court found that the first of these provision specifically granted only diplomatic immunity which under both customary international law and the treaty provision itself, "must not infringe the basic tenor of the guarantee of effective judicial protection to which [Italian] nationals are entitled with regard to their rights and legitimate interests" under Article 24 of the Italian Constitution. It went on to find that the provision in the Headquarters Agreement could not grant an immunity wider in scope than diplomatic immunity.

[155] The Council of the FAO passed a number of resolutions critical of the decision of the Court of Cassation and asserting that the immunity granted by the Headquarters Agreement was clear and unlimited. It subsequently prepared a request to the International Court of Justice for an Advisory Opinion on the extent of immunity which the organisation enjoyed. However a settlement was reached whereby the Court of Cassation's judgment was not enforced, and Italy acceded to the 1947 Convention on the Privileges and Immunities of the Specialised Agencies. See 1984 UNJY

[156] Italy still made a reservation to the Convention but it was much more limited, providing that the Convention should be interpreted subject to the provisions of an applicable HQ Agreement, between Italy and the Organisation in question - see Chapter 3 *supra* at note 23.

settlement) and changes in Italian legislation. Furthermore the Court of Cassation has in a subsequent case specifically overruled the finding in the *INPDAI* case that the principles of customary international law concerning the immunity of States were applicable to the FAO.[157] In this subsequent case the Court was prepared to accept the immunity of the Organisation from suit in relation to an employment dispute, since, in view of the obligation under the 1947 Convention for the FAO to provide alternative means to resolve disputes of a private law nature, there was no infringement of the right to judicial protection under the Italian Constitution.[158]

It has yet to be seen how the Italian caselaw will develop outside the employment context, in which the majority of cases have arisen. However it would seem that the direct application of the law of State immunity to international organisations will no longer be arguable.[159]

The other major country in which the restrictive doctrine of State immunity is sometimes applied to international organisations, is the United States.[160] The State Department appears to take the view that similar limitations apply to the immunities of international organisations as those applying to the immunity of foreign States

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[157] *FAO v. Colagrossi* 101 ILR 386

[158] This is a rather unconvincing way of distinguishing the *INPDAI* precedent, as in that case the lease in question contained an arbitration clause. Nevertheless it is more in keeping with the approach of the European Court of Human Rights in the *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany* cases, of 18 February 1999, discussed in Chapter 3 *supra* at text note 154ff

[159] Though in the light of the reservation made by Italy to the immunities of the Bari Institute, exceptionally the State immunity standard might still be applicable.

[160] As noted above the US Government has historically been cautious on the question of the immunities of international organisations (see *supra* note 14 ff) and has insisted upon its constitutional protected traditions of equality before the law in relation to other related matters also such as its refusal to grant exemption from income taxes to officials of international organisations who are US nationals working in the US (see Chapter 5 *infra* at note 22)

under the restrictive doctrine as formulated in the Foreign Sovereign Immunities Act.[161] As noted above, this view is supported by a literal interpretation of the terms of the US International Organisations Immunities Act, which provides for international organisations to be granted the same immunities as are enjoyed by foreign governments. However given that the IOIA was enacted in 1945 at a time when the US afforded absolute immunity to foreign States, there is considerable debate among commentators as to whether the subsequent adoption of the restrictive doctrine should effect the interpretation of the IOIA.[162] Nor has there been a definitive settlement of the issue by the courts. Whilst there is authority supporting the adoption of the restrictive view,[163] there is also a larger number of cases in which the Courts have deliberately chosen not to determine whether immunity is restrictive or absolute, by means of finding that immunity would extend to the facts of these cases in either scenario.[164]

Thus at present the adoption of the restrictive doctrine in relation to State immunity has not, in the majority of jurisdictions, resulted in a similar approach being taken to the immunities of international organisations. However even though it may not be directly applicable the adoption of restrictive immunity may still have a broader

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[161] See for example the brief submitted by the State Department to the court of first instance in the case of Broadbent v. OAS – 1978 Digest of US practice in International law 115

[162] See for Glenn et al. *op cit.* note 15 *supra*

[163] See for example *Dupree Associates Inc. v. OAS* (63 ILR 92) in which the court found that international organisation enjoy only the same immunities as States, in a dispute concerning a construction contract.

[164] These cases have mainly been in the sphere of employment including cases such as *Broadbent v. OAS* (1980, 63 ILR 162), *Morgan v. IBRD* (supra note 126); *Tuck v. PAHO* (668 F 2d 547) *Mendaro v. IBRD* (*supra* note 120) and *De Luca v. UN* (841 F Supp 531) in which the respective Courts have found the question before them was immune whether absolute or restrictive immunity applied. In another context see also *Askir v. Boutros Boutros Ghali et al.* (933 F Supp 368).

significance in shaping expectations as to where the proper limits to national jurisdiction might lie for example for those negotiating relevant treaty provisions.

(e) Do national courts consider there to be a broad limitation to immunity based upon "functional necessity"?

Whilst there is general agreement, both in relevant texts and in doctrinal writing, to the effect that the basis of the immunities of international organisations is "functional", it is much less clear whether this amounts to an additional limitation on immunity, and what precisely that might mean in practice. As was seen in Chapter 2 there is a spectrum of doctrinal positions adopted on the question, and as was seen in Chapter 3 the question is not wholly resolved by the texts of international instruments on immunity. For example in relation to the UN, Article 105 of the UN Charter states the Organisation shall enjoy such privileges and immunities as are necessary for the exercise of its functions and the fulfilment of its purposes, and this is again made clear in the preamble of the General Convention; whereas section 2 of Article II of the General Convention states that the organisation shall enjoy "immunity from every form of legal process". It thus may be that considerations of functional necessity require that the Organisation should enjoy absolute immunity. Or alternatively functional necessity might represent the general principle on the basis of which, and subject to which, jurisdictional immunity is granted – it could thus be interpreted as providing the limits to immunity. However perhaps rather surprisingly this question has been little explored by national courts.[165]

[165] The functional basis of immunity has been accepted in a number of decisions in which immunity has been upheld and so that the question of limits to the scope of immunity deriving from functional necessity has not arisen, see *Boimah v. UN* (113 ILR 499). In that case relating to a claim of racial discrimination by an unsuccessful applicant for UN employment, it was stated that "an international organisations employment practices is an activity essential to the fulfilment of its purposes and thus an are to which immunity must extend". The case is interesting as it was argued (unsuccessfully) that a

The question as to whether the requirement of the functional necessity of immunity provides limits to the extent of the UN's jurisdictional immunity arose in the case of *Manderlier v. UN and Belgium.*[166] In that case the plaintiff sought compensation for damage to his property in the Congo, caused by the ONUC forces, in a suit in the Belgian Courts against the UN and the Belgian State. The Court of Appeals of Brussels however dealt with the point summarily, finding that the immunities contained in the General Convention were not limited by Article 105, but rather, represented what the signatories determined were necessary in accordance with Article 105. The Court found that it would be *ultra vires* for it to assess the essential nature of the immunities granted to the UN under the General Convention.

This rather terse finding is not fully explained by the Court, but the decision points up some important difficulties which might be faced by a national court in relation to an additional "functional" limitation on immunity. Firstly the broad terms in which the concept of functional necessity suggests that it may be difficult to apply in practice. Secondly, the vagueness of the standard is compounded by the question of the appropriateness or even competence of a national court to make this type of determination. As has been observed the competences of international organisations to carry out any activity are functionally determined. Thus all activities will be to some extent related to the achievement of the purposes of an organisation, and

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provision in the US-UN HQ Agreement prohibiting racial and religious discrimination amounted to an express waiver of immunity. In this respect an interesting argument that might have been made that the prevention of racial discrimination falls within the purposes for which the UN was established (Article 1(3) UN Charter), and that therefore the legal proceedings should be allowed to promote the purposes of the UN. However it would be unlikely to succeed, but shows a similar issue of characterisation as was seen in the *Mukoro v. EBRD* case see text at note 138 *supra.*

[166] 69 ILR 139

therefore what a national court would be asked in any case is whether immunity is *necessary* to enable the organisation to carry out its functions effectively and independently.

Nevertheless there has been some development of this approach in the caselaw of the Italian Courts, though this is obscured by the fact that findings that the extent of immunity is limited by reference to functional necessity have frequently been made alongside the application of State immunity principles.[167] Whilst the general applicability of the principles of State immunity *per se* to international organisations may be doubtful, the parallel strand in the Italian caselaw which interprets the scope of immunity in accordance with what is necessary to enable the autonomous functioning of the organisation can clearly be observed since the case of *Profili.*[168]

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[167] See cases cited at note 148 *supra*

[168] Thus in *ICEM v. Di Banella Schirone* (1975) (77 ILR 572) the Court of Cassation was willing to find that the employment of a secretary fell within the area of autonomous self-organisation enjoyed by the ICEM, as she had been permanently and continuously employed as part of the clerical staff.

In *Bari Institute v. Scivetti* (1975) (77 ILR 609) an employee who had continuous employment as an accountant took part in the institutional activities of the Institute and therefore was not entitled to bring his claim in the Italian Courts.

In *Bari Institute v. Jasbez* (1977) (77 ILR 602) the Court of Cassation found that an employment-related claim by a simultaneous translator/interpreter fell outside the scope of the Institute's powers of self-organisation, as the responsibilities of Ms Jasbez were limited to the mechanical repetition in another language of words written and spoken by other persons. Thus she played no role in the intellectual process of taking decisions or the public function of that process.

In *Bari Institutue v. Chirico* (1985) (87 ILR 19) a simultaneous translator/interpreter also supervised post-graduate students at the Institute, and so the Labour tribunal of Bari was able to distinguish the *Jasbez* case, and find that Ms Chiroco's position was in fact integrated within the structure of the organisation.

In *Christiani v. Italian Latin-American Institute* (1981) (87 ILR 21) the Court of Cassation found that responsibilities of an employee for the direction and organisation of the audio-visual centre of the Institute, were "certainly to be considered inherent in the purposes of the and institutional tasks" of the Institute, and "were directly related to the cultural purposes and the promotional and organisational activities" set out in the Institute's constitutive instrument.

In *Porru v. FAO* (1969, 71 ILR 240) an Italian messenger/lift operator, who had been employed continuously under a series of fixed term contracts, claimed that he had been refused permanent employment entitling him to greater benefits and participation in the UN Joint Staff Pension Fund. The local labour tribunal found that the challenged decision was a question of the internal structure of the Organisation which fell outside Italian jurisdiction.

However most of these cases have been determined in the field of employment, in which it might be said that, in light of the existence and applicability of the internal law of the organisation, national law is inapplicable.

However in other areas of activity of international organisations, seeking further limitations on treaty based immunities beyond those expressly included in the relevant treaty provisions, may well be more difficult and may well raise the kinds of difficulties alluded to by the Belgian Court in the *Manderlier* case (above). It therefore seems that whilst the concept of functional necessity may underlie and explain the relevant treaty provisions under which immunity is granted, in most cases it is unlikely to provide an additional source of limitation, beyond such express limitations as are contained in the relevant treaty provision itself.

2 Jurisdictional immunities in the absence of a treaty provision

The treaty basis of the immunities of international organisations considered thus far, raises the problem of how a national court should respond when there is no applicable treaty-based immunity. One approach is to ask whether there are applicable rules of customary international law which require that immunity be granted to international organisations. Lalive writing in 1953 asserted that there is a customary rule that the member States of international organisations should grant them absolute immunity from jurisdiction, and in some cases this extends to non-member States as well.[169]

See also Cassese "L'immunité de juridiction civile des organisations internationales dans la jurisprudence italienne" (1984) 30 AFDI 556

[169] J-F Lalive " Immunité de juridiction des États et des organisations internationales"(1953) 84 Recueil des cours 205, at p. 388

Subsequent authors have made more nuanced findings. For example, Professor Dominicé[170] suggests that the UN and its Specialised Agencies enjoy jurisdictional immunity in relation to both its member States and to non-member States, by virtue of a rule of customary international law. In support of this conclusion he mainly cites (a) the extensive treaty practice of these organisations, in which their immunities have been granted or recognised, and (b) the breadth of their membership. However it might be noted that neither of these factors is in themselves unambiguous evidence of the existence of a norm of customary international law.[171]

In relation to other international organisations Dominicé suggests that for their member States, the question can only be determined on a case by case basis looking at a number of factors, though he does suggest that there should be presumption in favour immunity. Further, he takes the view that if it is clear from the attitude of its member States that an international organisation enjoys immunity from their jurisdiction by virtue of customary international law, then that organisation should in principle enjoy the same immunity against non-member States. For those organisations which do not enjoy immunity in respect of their member States he suggests that it is difficult to claim that they should benefit from a customary international law rule of immunity in respect of third parties, but suggests that the European Communities are exceptional in this respect.[172]

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[170] C.Dominicé "L'immunité de juridiction et de exécution des organisations internationales" (1984) 187 Recueil des cours 145, at pp. 219-24

[171] see for example R. Baxter "Multilateral Treaties as Evidence of Customary International Law" (1965-6) 41 BYIL 275

[172] *op. cit.* note 170 *supra* at pp.222-4

From these writings it seems appropriate to examine the practice of national authorities on these questions, by taking two aspects of the problem in turn. Thus following subsections will consider on what, if any, basis national courts will decline jurisdiction over an international organisation in the absence of a treaty provision where: (a) the forum State is a member of the organisation in question; and (b) the forum State is not a member of the organisation in question.

(a) Where the forum State is a member of the organisation in question

This problem may arise either because the forum State, though a member of an organisation, is not a party to the treaty under which the immunity is granted, or because such treaties as there are relating to a given organisation do not provide for its immunity. In either case a national court may look to general international law to determine whether the organisation is entitled to immunity. It might, for example, seek to rely directly on a rule of customary international granting immunity, as suggested by Dominicé.[173] Alternatively it may derive immunity from broader obligations of good faith and co-operation, which might themselves be derived from the personality and/or the constituent instrument of an organisation.

In *Christiani v. Italian Latin-American Institute*,[174] the Italian Court of Cassation considered this type of situation as the Headquarters Agreement between the Institute and Italy had not yet been ratified, and thus the Court found that it could not rely upon the privileges and immunities contained in that Agreement. The Court noted

[173] *ibid.* at p. 220

[174] 25 November 1985, 87 ILR 21

that there was not a consensus as to the precise basis of the immunities of international organisations, but held:

> " whatever the basis of jurisdictional immunity may be, generally it is recognised by the doctrine and jurisprudence that it may be relied upon by unions of States, either when they enjoy legal personality or when they form a collectivity of States... On the question of the limits of immunity, the rule is that immunity will govern and cover all acts and relationships entered into the exercise of the essential functions of the organisation."[175]

After establishing that the IILA had legal personality it found that, in accordance with previous Italian caselaw, it enjoyed immunity under the customary international law rule *par in parem non habet jurisctionem.* The Court considered that immunity extended to the employment relationship between an international organisation and its officials, provided that the employee had a stable contract and was fully integrated into the structure of the organisation. Whilst such a direct assimilation of the position of States and international organisations is, for reasons already discussed, questionable, the decision appears to reach a balanced conclusion, taking into account the particular functional needs of the organisation.

However employment disputes have their own characteristics, which do not necessarily mean that they can be dealt with in the same way as disputes whose nature is of an exclusively private law nature. In another case arising from the collapse of the International Tin Council, *Bank Bumiputra v. ITC,*[176] the Malaysian High Court was faced with a plea of immunity by the ITC in respect of a suit commenced by the Malaysian Bank Bumiputra in relation to borrowings by the ITC. The ITC had borrowed money from the Bank in London, but by way of security had deposited tin warrants which related to tin held by a third party in Malaysia. The

[175] *ibid.* at p.

[176] 13 January 187, 80 ILR 24

Bank therefore commenced its action in Malaysia, to obtain payment and a declaration of its entitlement to the tin, against both the ITC and the third party. The ITC sought to resist the proceedings on the basis that it enjoyed immunity. However the Court found that it enjoyed immunity only under its Headquarters Agreement with the UK, and that the member States of the ITC had not intended that it should enjoy immunity outside the UK. In the light of the commercial nature of the transaction under examination, it held that the ITC had no immunity from the action.

It does not appear that an express argument based on customary international law was raised. The Court's direct reliance on State immunity cases may be questionable, in so far as it did not also examine the particular situation of the ITC as an international organisation. Nevertheless the approach of the Court does suggest that it was not seen purely as a private respondent, and that, even in the absence of a specific treaty provision, some degree of immunity may be appropriate, at least in relation to certain types of dispute, i.e. those which the Court might adjudge to be analogous to acts *iure imperii* of States.

Where the founding States have not made any provision for the immunity from jurisdiction of an organisation under its constituent instrument, national courts seised of a dispute involving such an organisation will, nevertheless, usually be careful to examine their appropriateness to determine the dispute. In such cases this may well involve national courts examining whether, in the light of the international status of the organisation, the particular dispute is justiciable, notwithstanding the fact that the member States have not expressly granted immunity to the organisation. Thus whilst there may be no particular difficulty in these circumstances for a national court to

adjudicate on the commercial acts of an organisation with a private person third party,[177] where a dispute relates to the internal law of an organisation, a national court is likely to find that these matters do not fall within its competence.

By way of illustration, it will be recalled that Eurocontrol does not enjoy immunity from jurisdiction by virtue of any conventional provision. However on a number of occasions proceedings have been brought against the Organisation before the national courts of its member States in respect of its "public law" activities, but proved unsuccessful. Various attempts to bring claims against Eurocontrol for infringing European competition law have foundered on the basis that it is not of a purely economic or commercial nature and thus Articles 85-86 EEC are not applicable to it.[178] Where employees have brought employment disputes before national courts they too have been unsuccessful because of the nature of employment relationships, which are governed not by national employment law but by the Staff Regulations of the Organisation.[179]

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[177] See also *Branno v. Ministry of War* (14 June 1954, 22 ILR 756) a case before the Italian Court of Cassation, relating to the provision of catering facilities to the NATO headquarters in Italy, at a time when there was no applicable treaty in existence. However as the Court relied directly upon the law of state immunity care is required in drawing conclusions from it

[178] See Case C-364/92 *SAT Fluggesllschaft v. Eurocontrol* [1994] ECR I-43 (note Drijber 1995 CMLR 1039); and the precursor *SAT Fluggesellschaft v. Eurocontrol* (Brussels Appeal Court 8th Chamber) 4 October 1990 ((1992) 15Rev. Belge de droit international 611). See also *Air Berlin v. Eurocontrol* (Brussels Appeal Court, 7th Chamber), September 1986; and *Irish Aerospace (Belgium) N.V. v. Eurocontrol*, (Commercial Court)[1992] 1 Lloyd's LR 383.

See also the analogous finding that judgments concerning the public law activities of Eurocontrol were outside the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, in Case 29/76 *LTU v. Eurocontrol* [1976] ECR 1541.

[179] See *Eckhardt v. Eurocontrol*, 12 January 1984, 94 ILR 331, decision of the District Court of Maastricht which overturned a decision of the local Court of Sittard which found that whilst Dutch labour law did not govern the contract there was nothing to prevent to the Dutch courts from assuming jurisdiction over the contract.

Similarly there appear to be a number of German decisions in cases brought by employees and former employees of Eurocontrol, in which the Courts have found that they did not have jurisdictional competence over the these employment relationships, as underlined by the fact that the applicable

Thus in disputes of an international organisation which does not benefit from an express immunity by virtue of a treaty instrument, rather than looking to establish whether there is an immunity by virtue of customary international law, national courts have instead tended to examine their own competence to apply national law to the subject-matter of such disputes. It is possible to argue that in a case where the forum State is a member of the organisation in question, there is an obligation based on international law, that the national court should not seek to assert its jurisdiction in cases in which it would interfere unduly with the independent achievement by the organisation of its international functions, based obligations of good faith or institutional loyalty. This was in large measure the approach of the German Federal Administrative Court in the *European School Employee Bonus case*,[180] in which it found itself to be lacking jurisdiction over an employment dispute, as the School's power to regulate its own employment relationships was based on its personal autonomy as an inter-governmental organisation and thus was outside the scope of German public law.

(b) Where forum State is not a member of the organisation

In cases where the forum State is not a member of the organisation the question as to whether an international organisation enjoys personality in local law, in order to sue or be sued was considered in Chapter 1. It was shown how, in general national courts have not found particular difficulty recognising that international organisations enjoy a measure of personality in domestic law even where the forum State is not a

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employment regulations provided for recourse to the ILOAT in cases of dispute see Reinisch *op. cit.* note 28 *supra* at p.104

[180] 29.10.92, see 108 ILR 664

member of the organisation and is not bound by any treaty provision to afford it recognition.[181] However on the question of immunity national courts have in general been unwilling to recognise broad jurisdictional immunities in favour of an international organisation of which their own State is not a member, in the absence of an international agreement to this effect.[182]

There are in fact few such cases reported and so generalisations must be treated with caution. That being said, there appear to be two distinct tendencies. On the one hand the cases display an unwillingness on the part of national courts to recognise jurisdictional immunity in respect of the international organisations in question. However on the other hand there is equally an unwillingness to assert national jurisdiction over matters which are not appropriate for the national courts to adjudicate. In this respect there are number of different techniques employed by the different national courts,[183] but the result of them is to preclude the national courts from adjudicating questions relating to the functions of the organisation on the international plane or to its internal law.

The first of these tendencies can be observed in *International Tin Council v. Amalgamet*,[184] in which the applicant sought to assert its immunity from suit and legal process in order to stay arbitration proceedings arising out of contracts it had

[181] Although there have been some difficulties in this respect in the UK – see chapter 1 *supra* text at notes 109ff

[182] As an example of such an agreement between an international organisation and a non-member State, see the Agreement between the UN and Switzerland on the privileges and immunities of the UN of 1946 (UN Doc ST/LEG/SER.B/10 at p.196).

[183] Reinisch notes a variety of what he describes as "avoidance techniques" and "judicial strategies involvement" *op.cit.* note 30 *supra* at pp.35-214.

[184] Supreme Court, New York County, 25 January 1988, 80 ILR 31

entered into for the purchase of tin with a US company. The contracts were subject to New York law and arbitration was provided for in New York. It will be recalled that the US was not a member of the ITC. The Court did not accept arguments by the ITC that either the act of State doctrine or considerations of comity required that it uphold immunity in favour of the ITC. In relation to the former it found that the contracts were simply commercial contracts, raising only private law issues, rather than broader questions of a political or sovereign rights. Whereas in relation to the arguments on the basis of comity the court found an examination of the constituent treaty and the ITC's Headquarters Agreement with the UK, revealed no intention on the part of the member States that immunity be granted outside the UK.

The French case *Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO) et Fonds de cooperation, de compensation et de développement de la CEDEAO v. BCCI et al.*,[185] related to claims by ECOWAS and its Development Fund. The claimants were thus organisations of which France was not a member, and nor had France entered into any treaty granting them immunity in proceedings before the French Courts. They held deposits with BCCI, a bank which subsequently became insolvent and whose assets were then frozen and held by administrators until such time as they could be paid out in accordance with French insolvency law. The claimants sought a stay of the insolvency proceedings in relation to the moneys held in their accounts, and an immediate repayment by the Bank and its administrators of the balances of those accounts. The claim was based on the argument that the claimants, by reason of the objective international personality which they enjoyed,

[185] see 13.1.93 Cour d'appel de Paris 1'ère chambre, section A, ([1993] JDI 353), upholding the judgment of the Tribunal de commerce de Paris 3'ème chambre, ([1992] JDI 692).

were entitled to immunities from jurisdiction and execution. Thus they argued that funds representing the balances held in their accounts should be exempted from the operation of French insolvency law that applied to the rest of the BCCI assets in France.

However the arguments in favour of immunity from jurisdiction were not convincingly made as they were largely based on the treaty provisions between the member States of ECOWAS, and thus the Court held that they were defeated by the rule that treaties cannot impose obligations on States which are not party to them. An alternative argument based on customary international law also failed on the ground that it had not been made out sufficiently.[186] The *Cour d'appel* did not basis its conclusions expressly on the nature of the transaction. However it is interesting that the court of first instance found that the deposit of the money with BCCI had been to take advantage of the high rates of interest offered by it, and that therefore the transaction was of a commercial nature aimed at making profits and thus outside the scope of any privileges and immunities as their international status might afford them.

By contrast both the court of first instance and the *Cour d'appel* suggest property belonging to the claimants *may* enjoy some immunity *from execution* in France. However both also found that the operation of the administration of the bank in accordance with insolvency law was not a measure of execution. Unfortunately neither of the decisions expands on the precise extent or exact basis of such

[186] though it is not entirely clear from the courts rather brief statements on the question what content was claimed for the rule by ECOWAS.

immunity from execution, but the fact in argument such immunity was derived from the international personality of the claimants, may suggest that such immunity from execution is necessary to protect the independent functioning of the organisation from the most intrusive aspects of judicial authority.

The *Amalgamet* and *ECOWAS* cases maybe compared with those cases in which national courts have found that an organisation was in fact immune from their jurisdiction or alternatively that they do not have jurisdictional competence over the dispute in question. In *Spaans v. Iran-US Claims Tribunal,*[187] a dispute arose between the Tribunal and an interpreter in its employment, at a point before negotiations for a host State agreement between the Tribunal and the Netherlands had been concluded. The Dutch Supreme Court found that an international organisation enjoyed immunity from the jurisdiction of the courts of its host State "for acts within the scope of the performance of its tasks" by virtue of customary international law. Basing itself on the extent of immunity generally contained in host State agreements, it found that there were some exceptions to this immunity, for example in relation to non-contractual liability for road accidents. It found further that there was an obligation on international organisations to provide for contractual disputes to be referred to arbitration. In relation to the instant case the Court held that employment disputes between an international organisation and those who play an essential role in the performance of its tasks, were immediately connected with the performance of those tasks, and thus the tribunal was entitled to immunity. The case

[187] 94 ILR 321. After the claimant had lost his case in the Supreme Court, he unsuccessfully petitioned the European Commission of Human Rights (Appl. No.12516/86, 58 D&R 119). The Commission found that the acts of the Iran-US Claims Tribunal did not occur within the jurisdiction of the Netherlands (for the purposes of Art.1 ECHR), they did not engage the responsibility of the Netherlands.

is unusual in that it arose before the relevant host State agreement had been concluded, but the court of first instance relied on a statement of the Dutch Government to Parliament that it assumed the Tribunal was entitled to "the usual immunity from jurisdiction ... necessary for the performance of the tasks for which the organisation has been established".[188]

Perhaps of more general interest is the case of *EAL Delaware Corp. et al. v. Eurocontrol et al.*,[189] in which a US District Court found that Eurocontrol was entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), as if it were an agency or instrumentality of a foreign State. The case involved a claim for damages and injunctive relief against Eurocontrol and the UK Civil Aviation Authority, by US companies which were the owners of an aircraft which they had leased to a European airline. The aircraft had been seized by the CAA in the UK at the request of Eurocontrol, for the non-payment by the airline of fees for air navigation service provided by Eurocontrol. The Court found that as Eurocontrol's functions were essentially governmental in nature, it should be accorded the same status as an agency or instrumentality of a foreign State. As such it was entitled to immunity under the FSIA (i.e. State immunity), as the acts complained of were performed in the exercise of its regulatory powers, and thus sovereign in nature rather than commercial.[190] In addition the court also found that it did not have personal jurisdiction over Eurocontrol on the basis that it lacked the minimum contacts with the US necessary to establish personal jurisdiction.

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189 107 ILR 318

190 *ibid.* at p.328-34. As a supplementary and strictly speaking an alternative finding it found that even if the acts complained of were commercial, they did not have a direct effect within the US as required under the FSIA - *ibid.* 334-8

A particularly interesting point to note in relation to the Court's finding that State immunity precluded subject-matter jurisdiction over the dispute, is that Eurocontrol is not entitled to a conventional immunity from jurisdiction within the territory of its own member States. Nevertheless the US Court's unwillingness to assert its jurisdiction over the public law activities of Eurocontrol is matched by a similar reluctance by the national courts of its member States.[191]

It should be emphasised that even in the absence of any right to immunity under customary international law, if the subject matter of a dispute is not one over which the national court can assert jurisdiction, for example it raises an issue of international law between the organisation and one of its member States or between two its member States, the national court is likely to declare the question non-justiciable, or find in similar terms that it has not been attributed the jurisdictional competence to decide the issue.[192] This rule of non-justiciability will apply whether or not the forum State is a member of the organisation in question. However there are in fact few such cases reported, which may suggest that many international organisations either tend not to carry out any operations in non-member States or will at least first secure an agreement with such third States, providing for their status, privileges and immunities where they do so.

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[191] *supra* text at notes 178-179

[192] See for example the judgment of Coleman J, in *Westland Helicopters v. AOI* [1995] 2 All ER 387.

Conclusion

The immunities enjoyed by international organisations from the jurisdiction of the courts of their member States, by virtue of treaty appear to have been implemented in local law and applied by the national courts reasonably successfully. There are relatively few cases that have been brought and relatively few issues on which there have been major controversies. One of these has been the applicability of the restrictive doctrine of State immunity to international organisations, particularly in the US and Italian courts. However even in those States judgments of the courts are in fact rather ambivalent, and the majority of academic opinion favours treating the immunities of international organisations as a distinct matter from those of foreign States.

In relation to the question of waiver, the issue of whether international organisations should immunity from the supervisory jurisdiction of national courts, in cases in which they have agreed to arbitrate with private persons is also unresolved in national caselaw, with divergent decisions coming out of different legal systems. It has been submitted here that an agreement to arbitrate with private person should in principle be considered as a waiver from the supervisory jurisdiction of the local courts, where this is necessary to give effect to an agreement to arbitrate. It is after all an important aspect of the immunity of international organisations that they are under a duty to provide alternative means of dispute settlement where they rely on their immunities. To rely upon an immunity from the supervisory jurisdiction of the local courts might mean that an organisation could effectively frustrate an agreement to arbitrate which it entered. However it accepted that an express waiver of immunity from execution would still be required in respect of enforcement proceedings.

Interestingly thus far the issue of whether the immunity violates human or constitutional right to due process, with some notable exceptions, is not widely discussed in the national caselaw. The Belgian courts were faced with the issue in the *Manderlier* case, but dealt with it rather unsatisfactorily. It of course underlies some of the Italian caselaw which considers the application of the restrictive doctrine of State immunity to international organisations. However international human rights law on the right of access to a court has been developed considerably in recent years, and following the *Beer and Regan* case cases in the European Court of Human Rights it might be expected that this will be increasingly a ground for challenge to immunity, particularly if it can be shown that the organisation in question has not provided a suitable alternative mode of settlement of disputes.

Finally it should be noted that since the immunities of international organisations are granted under treaty, they do not operate in the courts of non-member States. There does not appear to be a general rule of customary law extending these immunities beyond the scope of relevant treaty provisions. However it appears that in relation to matters of the internal law of an organisation or perhaps even matters which relate to its "public" functions, the courts of both member States or non-member States tend to decline jurisdiction. The terms by which this is achieved vary between national legal systems practice. Nevertheless, and despite the limited practice on the point, it is suggested here that this can be explained by the existence in customary international law of a rule of deference following from the international personality of an international organisation, that national courts do not have jurisdictional

competence over institutional questions of international organisations, *ratione materiae.*

Chapter 5

THE INDEPENDENCE AND JURISDICTIONAL IMMUNITIES OF INTERNATIONAL OFFICIALS

Introduction

An international organisation, being a legal rather than a natural person, will only be able to carry out most of its activities through the acts of natural persons in its employment or otherwise under its instruction. Thus the institutional autonomy of an international organisation from its member States which is protected by its privileges and immunities, can only be effectively maintained when those acting in its name are also given a commensurate degree of independence from the member States. To quote Jenks:

> "The immunity of international organisations would be illusory if their decisions could be questioned in proceedings against members of their staffs."[1]

As will be discussed, the guarantee of such independence for officials has various consequences, both political and legal, for the member States. In jurisdictional terms it is necessary that officials should have protection from personal liability in relation to acts they perform on behalf of the organisation. Whilst as we have seen the extent of immunities of organisations themselves varies considerably between different organisations, the immunities of their officials show much greater uniformity in this respect.[2]

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[1] C.W. Jenks *The Headquarters of International Institutions: a Study of their Location and Status* (RIIA, London, 1945) at p.40

[2] Although as will be discussed the can be some difference in the extent of immunity which different categories of officials within organisations enjoy.

Although in broad terms the immunities granted to international officials must be such as to enable the independent performance of the international functions of the organisations by which they are employed, this does not mean necessarily that the immunities of an official will be exactly co-extensive with that of his employer organisation. As will be discussed below an organisation may well be legally responsible for the acts of an employee, in relation to which the employee in question remains immune.

A. Historical Development

It is sometimes said that the immunities of international officials are an extension of those of the organisation.[3] However this has not always been so clear. As will be shown, in the Nineteenth Century, before the international personality of international organisations was established, the primary recipients of international immunities were international officials. They were seen as the main international functionaries rather than the bodies to which they belonged, and the guarantee of their independence was seen as necessary for the achievement of the international functions with which they were charged.

In these early international organisations various attempts at conveying this concept of independence can be observed using approximations from the practice of inter-State relations. Thus the status of "neutrality" was granted to officials of the first international bodies.[4] Subsequently, concepts derived from the diplomatic practice of

[3] See for example the views of the UN Office of Legal Affairs in 1981 UNJY 161

[4] see for example the Rhine Commission discussed in Cahier *Etude des accords de siège conclus entre les organisations internationales et les états où elles résident* (Giuffrè, Milan, 1959) at pp.280-1. See also Michaels *International Privileges and Immunities – a Case for a Universal Statute* (Martinus Nijhoff, The Hague, 1971) at pp.12-14 and 33-4

the time were adopted. Thus the European Danube Commission though initially granted the status of neutrality, was later granted "independence from territorial authority".[5] The Congo Commission and its employees were granted "inviolability" and "independence".[6]

However it was not until the end of the Nineteenth and the beginning of the Twentieth Centuries that international bodies and their officials were employed beyond such technical spheres, and directly in the political arena. Such tasks had hitherto been carried out through the processes of diplomacy, in particular at the multilateral level, through Conference diplomacy. In that system conferences were mainly staffed by the domestic civil service of the host State.[7] The officials of the new international bodies of this period were granted "diplomatic status": for example provision was made so that the Judges of the Permanent Court of Arbitration "... in the exercise of their duties, and out of their own country, enjoy diplomatic privileges and immunities".[8] The Covenant of the League of Nations provided that "... officials of the League, when engaged on business of the League shall enjoy diplomatic privileges and immunities".[9]

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[5] Art 53 of the Treaty of Berlin of 1878 - see also the PCIJ Advisory Opinion on Jurisdiction of the European Commission of the Danube (1927 PCIJ Ser.B No.14 at p.63-4

[6] Art. 18 and 20 General Act of the Conference at Berlin: Act of Congo Navigation of 26 February 1885 ((1884-5) 76 BSP 4. For discussion of the terms "neutrality", "inviolability" and "independence" see Michaels *op. cit.* note 4 *supra*, at pp. 33-39.

[7] Lemoine notes how the practice developed during the 19th Century of including diplomats of other nationalities, in the secretariats of international conferences – see *The International Civil Servant – An Endangered Species* (Kluwer, The Hague, 1995) at pp.16-7

[8] Art. 46 of The Hague Convention on the Pacific Settlement of International Disputes 1907

[9] Art.7(4) of the Covenant of the League of Nations

The establishment of the Secretariat of the League as a permanent and independent body, required considerable innovation. Its early establishment was based on principles derived from the national civil services such as Great Britain and France, including permanence and political neutrality.[10] However in the practice which developed during the life of the League, the simple grant of diplomatic status in itself proved to be too inexact to achieve the independence which international officials required for the proper discharge of their functions. As will be seen problems arose at a number of levels, some highly political, but at their heart was the relationship between the official and his own State of nationality. There are obvious sensitivities for States in loosening the ties of nationality between them and their nationals in order to enable the latter sufficient independence to discharge functions which are conceived of in the international interest, even if these are seen to conflict with the national interest. Effectively this was what was required and the declaration of loyalty to League which the Secretary-General and the higher officials of the Secretariat were required to make after 1932 makes this clear.[11]

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[10] See the Report of Lord Balfour adopted by the Council of the League in June 1920, where it is stated that "...the members of the Secretariat once appointed are no longer the servants of the country of which they are citizens, but become for the time being servants only of the League of Nations. Their duties are not national but international" (LNOJ June 1920 136-9, at p.137).

Many writers have pointed to the influence of the League's first Secretary General Sir Eric Drummond as being crucial in determining the ethos of the Secretariat of the League and his approach is often depicted as having been influenced in turn by the principles and traditions governing British civil service - see for example Lemoine *op cit note 7 supra*, at pp. 28-40.

[11] The following declaration had to be made to the League's Council "I solemnly undertake to exercise in all loyalty, discretion and conscience the functions that have been entrusted to me as ... of the League of Nations, to discharge my functions and to regulate my conduct with the interests of the League alone in view, and not to seek or to receive instructions from any Government or any other authority external to the League of Nations/ Secretariat of the League of Nations"; adopted by resolution of the 13th Ordinary Session of the League Assembly, on 13 October 1932 - see LNOJ Special Supplement, No.103, Nov. 1932. It is in fact not very different to the declaration made by the members of the UN Secretariat today.

The principle of independence of the League's Secretariat was challenged most seriously by the Governments of Italy and Germany and also, to some degree, Japan.[12] Italy, for example, went so far as passing a law in 1927 requiring, under threat of criminal sanction, that Italian nationals apply for authorisation from the Italian Ministry of Foreign Affairs before they could serve with international organisations and to leave such service when required to do so by the Italian Government.[13]

At a more technical (legal) level the "diplomatic" status which the Covenant endowed on the members of the League's Secretariat, caused problems of a rather different order for Switzerland and the Netherlands - the host States of the largest international organisations of that time. Whilst the choice of the term "diplomatic" appears largely to have ensured the requisite degree of independence to non-nationals of the host State, there were significant problems as to how such diplomatic status should apply to nationals of the host State.[14]

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[12] Lemoine describes the German and Italian approach to a review of the operation of the Secretariat. They sought to the installation of a rung of Under Secretaries General who would be nationals of the permanent members of the Council, who would form a Governing Board, which the Secretary General would be obliged to consult before taking any action. These two countries argued that such a mechanism was necessary because "so long as there was no super-State and therefore no 'international man', an international spirit can only be assured through the cooperation of men of different nationalities who represent the public opinion of their country". The majority of member States rejected this scheme as contrary to the spirit of the Covenant, a none too subtle attempt to ensure that more power within the organisation was controlled by the small number of permanent members of the Council: *op cit* note 7 *supra*, at pp.66-72.

[13] see Law of 16 June 1927 cited by Lemoine *op. cit.* note 7 *supra* at p.105

[14] See the case of *C.M. v.A.C.* (Ann.Dig 1929-30 case no 204 at p.313) before the *Cour de Justice civile* of Geneva. In the case of *Avenol v. Avenol* (Ann. Dig. 1935-7 case no 185 at p. 395) a French court found that the Secretary-General of the League enjoyed immunities on a functional basis but only before the Swiss courts. These immunities could not displace the jurisdiction of his home State. The case was a matrimonial dispute and so fell outside the official capacity of M.Avenol, but the judgment is ambiguous as to whether the Court would have jurisdiction over all acts of M.Avenol on the basis of his nationality or whether his immunity for official acts extended beyond Switzerland.

At the time the immunities of diplomats who held the nationality of the sending State covered all of their activities, both public and private. However there was no obligation on a receiving State to confer diplomatic status on any of its nationals who chose to work for a sending State, and such privileges as it might grant, were purely granted as courtesies.[15] The problems took on particular definition when it came to jurisdictional immunity. Whilst a foreign diplomatic agent, enjoyed immunity in the courts of the receiving State, he remained subject to the courts of the sending State. On the other hand if immunity from suit was granted to nationals of the receiving State who worked in the diplomatic mission of a sending State, that person would not be subject to the jurisdiction of the sending State in the same way, and there would thus be no national court with competence to hear complaints against such persons. This would create the dangers of denial of justice and a class of persons wholly outside national jurisdiction.

Writers of the time who were sympathetic to the League project sought to distinguish traditional diplomatic immunities and to insist upon a solution which met its policy requirements.[16] Secrétan, for example, argued that the superior interest of the international community made it essential that the international official should be

[15] Even today under Art 8 of the Vienna Convention on Diplomatic Relations, nationals of the receiving State may only be appointed to the diplomatic missions of foreign States, with the consent of the receiving State, which may be withdrawn at any stage. Further under Art.38 they only enjoy immunity from jurisdiction *ratione materiae* in respect of their official acts – see Denza *Diplomatic Law* (OUP, Oxford, 2nd ed. 1998) at pp.339-49.

[16] see Secrétan "The independence granted to agents of the international community in their relations with national public authorities" (1935) XVI BYIL 56; Hill *Immunities and Privileges of International Officials – The Experience of the League of Nations* (Carnegie Endowment for International Peace, Washington, 1947) esp at pp.8-9, 45-49, 56-7 and 76-80; Jenks *The Headquarters of International Institutions* (RIIA, London, 1945) esp. at pp.40-1. See also the work of the Institut de droit international at its 1924 Session in Vienna.

exempted from the jurisdiction of all States, and this was at least as necessary, if not more so, in respect of the jurisdiction of his own State of nationality.[17]

However, notwithstanding strong statements of principle from some States in favouring equality of treatment of international officials by the member States as between nationals and non-nationals,[18] it did not gain universal approval. Both Switzerland and the Netherlands refused to grant officials of their respective nationalities, the full range of immunities which they granted to officials of other nationalities. In particular on the issue of jurisdictional immunity, instead of full diplomatic immunity, Switzerland only granted its nationals who were officials of the League immunity from suit before the local courts "in respect of acts performed by them in their official capacity and within the limits of their official duties".[19] The Netherlands insisted on a similar limitation in the Regulations concerning the Permanent Court of International Justice, in relation to Dutch nationals who were either members of the Court or senior officials in the Registry.[20]

B. Officials of the United Nations

1. Jurisdictional immunities

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[17] *op cit* note 16 *supra* at p.71

[18] For example in the negotiations the League's Advisory Committee of Jurists in relation to the establishment of the Permanent Court of International Justice, Sir Cecil Hurst on behalf of the British Empire sought to remove proposed wording which would have restricted the enjoyment of immunities by judges of the Court, only when they were outside their own countries. See Secrétan *op. cit.* note 17 *supra* at p.72.

[19] see Article IX of the 1926 *Modus vivendi* between Switzerland and the League. For more detailed discussion of the situation in Switzerland and Italy at that time, see Hill *op. cit.* note 16 *supra,* especially at pp. 14-57

[20] Other contentious issues of this nature related to exemption from taxation (see below); national requirements in respect of military service; and because of the lack of a League passport the need to rely on national travel documents, see Hill *op. cit.* note 16 *supra*

The shortcomings of the system as set up under the Covenant of the League led to calls for clearer delineation of States' obligations in relation to the independence of the international civil service.[21] These were taken into consideration at the time of the drafting of the UN Charter. The first paragraph of Article 100 spells out in obligatory terms that the Secretary-General and his staff "shall not seek or receive instructions from any Government or other authority external to the Organisation" and "shall refrain from any action which reflect on their position as international officials responsible only to the Organisation". The second paragraph of Article 100 obliges member States "to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities".

The range of issues raised by Article 100 of the Charter is very broad indeed and the years since 1945 have seen a number of *causes célèbres* which have arisen in relation to the application of the principle of independence of the international civil service, the details of which go beyond the scope of this thesis.[22] Instead the focus of the

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[21] See Jenks "Some Problems of an International Civil Service" (1942) III (2) *Public Administration Review* 93, at pp.102 -104

[22] However mention might be made of the following controversies, arguments concerning the obligations of States under article 100(2) have arisen in a number of contexts. Early on in the history of the UN, the difference between the UN and the US concerning the taxation of UN officials of US nationality, which eventually resulted in the general levy of the staff assessment plan on all UN officials. During the negotiation of the General Convention the US strongly maintained that the principle of equality of treatment of US citizens for the purposes of taxation was of great importance and sensitivity within the US (in the light of strong Congressional insistence on this point) – See *US Foreign Relations* 1947 Vol.1 at pp.22-68

The episode of loyalty investigations of UN officials of US nationality during the McCarthy era, on which see Lemoine *op cit* note 7 *supra* at pp.114-63 and which forms the background to the Advisory Opinions of the ICJ on *Effects of Awards of the UNAT* 1954 ICJ Rep. 47 and the *ILOAT*, 1956 ICJ Rep 77. The State Department's took the view that care should be taken by the US authorities not to interfere with the official functions of international civil servants in the course of the investigations - *US Foreign Relations* 1952-4, Vol.III at pp. 312-413. It might also be noted tat the US "Loyalty Program" for US nationals employed by the US, has subsequently been declared unconstitutional in the US courts – see *Hinton v. Devine* (1986) 633 F.Supp. 1023, for comment see 80 AJIL 984.

remainder of this chapter will be on those issues which relate directly to the jurisdictional immunities of international officials.

In the context of the United Nations this of course involves not only the principle of independence set out in Article 100 of the Charter, but also the more specific grant of immunities to the Organisation and its officials as required under Article105 and in the provisions of the General Convention. As was discussed above, during the negotiations relating to the drafting of Article 105, the "diplomatic" standard of privileges and immunities was not felt to be "appropriate", and the "functional" standard was adopted in its place.[23]

2. The holders of immunities

In fact the General Convention, in seeking to give greater definition to these broad principles provides for different categories of UN personnel:

(a) High officials – (Officials of the first category)

The Secretary-General and his Assistant Secretaries-General and their immediate families enjoy full diplomatic status, under international law.[24] Thus on the basis that

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The subversion of the principle of independence of the international civil service by the USSR and other East European States during the Cold war, see for example Lemoine *op. cit.* note 7 *supra* at pp.194-233; and Zoller " The National Security of the United States as the Host State for the United Nations" 1989 1 Pace YIL 127, esp p.156ff. In particular the practice of insistence that USSR nationals be seconded from the national civil service on short-term contracts, thus requiring the consent of the USSR to extend or renew such contracts, see e.g. the ICJ's Advisory Opinion in the *Yakimetz* case (esp. the dissenting opinions of Judges Schwebel, Sir Robert Jennings and Evensen), 1987 ICJ Rep. 18.

[23] UNCIO Documents, Vol.13 pp. 778-780 - see Chapter 3 *supra*, at note 4.

[24] Article V, section 19 of the General Convention. Due to the expansion of the work of the UN and subsequent reorganisations under which Under-Secretaries have been given substantial executive authority, diplomatic privileges may now also be accorded to Under-Secretaries (1967 YBILC at p.281-2). At UN Headquarters in New York such privileges and immunities are more strictly limited to the Secretary-General and his Assistant Secretaries-General. Though at other important UN

the provisions of the Vienna Convention on Diplomatic Relations may also be considered customary international law in respect diplomatic privileges and immunities,[25] these high officials enjoy personal inviolability, absolutely immunity from criminal jurisdiction, and immunity from civil jurisdiction in most respects, save in three types of case of purely private activity.[26]

(b) other officials (officials of the second category)

The second category consists of those *officials* designated by the Secretary-General, who are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".[27] They are also to be exempted from taxes, immune from national service obligations, immune from immigration restrictions, as well given certain other rights akin to diplomatic representatives, including on appointment the right to import furniture and personal effects free of customs duties, and, at times of international crisis, repatriation facilities.

The scope of this second category of *officials* is in fact very broad. In UN General Assembly Resolution 76(I) of 7 December 1946 (which approved the General Convention) an exclusion from the protection under the Convention was made in respect of locally-recruited staff on hourly rates. Thus jurisdictional immunities under the Convention do not apply to this category of staff *per se*, nevertheless if a local jurisdiction sought to prevent them from carrying out official acts on behalf of

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stations, such as Geneva, Vienna and Nairobi, the host State arrangements provides for a broader range of officials to benefit from such status.

[25] See for example the decision of the ICJ in the *Tehran Hostages* case 1980 ICJ Rep. 3, at para 45 and 62

[26] see Art 29 and 31 of the Vienna Convention on Diplomatic Relations

[27] Article V section 18 of the General Convention

the UN, the Organisation might be able to claim its own immunities were being affected. In any event, in practice the number of staff members in this category are likely to be small, since most of the staff in the lower ranks of the Secretariat such as drivers, clerks and secretaries, whilst often recruited locally, are usually salaried rather than paid on hourly rates, and thus enjoy the same immunity in relation to official acts as other *officials.*[28]

(c) Experts on mission

The final category of UN personnel granted immunities under the General Convention, is that of "experts on Mission". In 1956 Legal Counsel of the UN explained that "the terms 'experts on missions for the United Nations' and 'experts serving on Committees or performing missions' for a Specialised Agency were intended to apply only to persons performing a mission for the UN or a Specialised Agency who, by reason of their status, are neither representatives of governments nor officials of the Organisation concerned but who, for the independent exercise of their functions in connection with their respective Organisations, must enjoy certain privileges and immunities."[29] Examples of such persons were cited as being members of commissions and committees of the UN or a Specialised Agency, who serve in their individual capacity - in the UN context this included military observers, headquarters staff of peacekeeping missions, members of bodies such as the UNAT and the ILC.

[28] See the statement of Legal Counsel to the General Assembly in 1981 cited 1985 YBILC, Vol.II part 1, at pp.170-1

[29] see 1967 YBILC Vol.II at p.284.

A broadly similar approach has been endorsed by the International Court of Justice. In the *Mazilu* case the Court found that the purpose for the including of privileges and immunities for experts on mission, was:

> "to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organisation, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission."[30]

After considering the breadth of the tasks entrusted to such persons the Court considered that the term "mission" was not used in narrow sense, implying a journey, but in a broad sense, to "embrace in general the tasks entrusted to person, whether or not those tasks involve travel".[31]

Experts on mission are expressly granted immunity from arrest and detention, and seizure of their baggage. They are granted certain rights of communication, including inviolability of papers and documents, the right to use codes and to receive

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[30] [1989] ICJ Rep. 177, at p.194 para 47.

[31] *ibid.*

Zacklin points out that in practice now international organisations often employ short-term consultants and other persons to perform services on their behalf, which do not fit within either the category of officials or experts on mission. In this respect he cites the standard UNDP Basic Assistance Agreement provides that "persons performing services" on behalf of UNDP shall enjoy the same privilege and immunities as *officials* of the organisation. Article 17(5) defines "persons performing services" to include operational experts, volunteers, consultants and juridical as well as natural persons and their employees, whether governmental or non-governmental. See *Handbook on International Organizations* ed R-J Dupuy, (Martinus Nijhoff, Dodrecht, 1988) at p.191-2. See also the Secretary-General's circular of 9 May 1951 the status of technical assistance experts of the UN, reproduced in 1967 YBILC Vol.II at p.264.

documents by courier or sealed bags.[32] As for jurisdictional immunity the Convention provides:

> "In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on mission for the United Nations."[33]

3. Nature of immunities

The jurisdictional immunity enjoyed by the Secretary-General and Assistant Secretaries-General under Section 19 of the General Convention i.e. officials of the first category, being assimilated to diplomatic immunity, is an immunity *ratione personae*, relating not only to the public/official activities of the holder but also to most of his or her private actions. Immunity may be waived by the Secretary-General in relation to the Assistant Secretaries-General, or by the Security Council in relation to the Secretary-General himself. The holder of such immunity enjoys it whilst he or she remains in the office to which it attaches. Once he or she leaves office he or she will no longer enjoy the broad immunities granted under section 19. However, to the extent that the immunity enjoyed by all officials (i.e of both the first and second categories) under section 18(a) of the General Convention continues to subsist after they cease to be employed by the UN, he or she will still enjoy immunity for all of his or her actions that are performed in official capacity.

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[32] Art VI section 22 of the General Convention. In addition experts enjoy similar facilities in relation to currency and exchange restrictions as accorded to representatives of foreign governments on temporary official missions and also the same immunities and facilities in relation to their personal baggage as are accorded to diplomatic envoys.

[33] *ibid.* Art VI section 22(b)

The nature of the jurisdictional immunity enjoyed by *officials* of the second category under section 18(a) is limited to "words spoken or written and acts performed by them in their official capacity". The extent of the immunity is therefore primarily determined by the nature of the act in issue, rather than the office or status of the person performing it, and thus might be described as an immunity *ratione materiae*.[34]

Here a comparison with the position of diplomats is illustrative. The immunity from jurisdiction of a diplomatic agent while in office is broad and granted *ratione personae* under Article 31(1) Vienna Convention on Diplomatic Relations (VCDR). Nevertheless it is now accepted that an underlying immunity *ratione materiae* in respect of the official acts of a diplomatic agent co-exists during his period in office, and this continues to subsist even after he has left office as recognised in Article 39(2) VCDR.[35] This subsisting immunity for official acts enjoyed by diplomats even after they have ceased to be diplomats, is sometimes justified on the basis that such acts are, in fact, acts of the sending State: that is they are attributable to the sending State, and as such engage the responsibility of that State.[36] Therefore it may be said that this underlying immunity *ratione materiae*, is not a right of the former diplomat

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[34] It should be noted that the immunity of officials, though granted *ratione materiae*, is distinguishable from what common law courts know as the question of justiciability, i.e. the question of whether the dispute is a proper one for the local court to adjudicate, or whether it is more appropriately determined at the international level. The inquiry into justiciability although also pertaining to the subject-matter of the dispute, can usually only be asked at a later stage once the parameters of the dispute are known (see *Kuwait Airways v. Iraq Airways* [1995] 1 WLR 1147). It might be added that in relation to suits against UN officials pleas of non-justiciability are unlikely to arise. Where an official act is in dispute, immunity will either be asserted in which case proceedings are terminated before the justiciability of the dispute can be considered by the court, or alternatively immunity will be waived in which case the UN will have by implication opined that it is a dispute suitable for settlement by the local court. In the latter case it seems highly unlikely that the respondent UN official himself could successfully plead non-justiciability.

[35] See Dinstein "Diplomatic Immunity from Jurisdiction *ratione materiae*" (1966) 15 ICLQ 76. In respect of former Heads of State, see *R v. Bow Street Stipendiary Magistrate, ex parte Pinochet (No.3)*, (House of Lords, [1999] 2 WLR 827).

[36] See for example Denza "*Ex parte Pinochet*: Lacuna or Leap?" (1999) 48 ICLQ 949.

at all, but rather a prerogative of the State in whose name he was acting.[37] Similarly immunity from jurisdiction *ratione materiae* can be claimed by other State officials who do not enjoy immunity *ratione personae* by virtue of their office.[38] Correspondingly it is interesting to note that the United Nations Legal Counsel has taken the view that the immunity UN officials under Section 18(a) subsists even when the official ceases to be employed by the UN.[39]

That this immunity of officials is essentially an immunity of the Organisation is also brought out by the provision on waiver (section 20). This section makes clear that immunities are granted to officials in the interests of the Organisation and not for the personal benefit of the individuals themselves.[40] The Secretary-General is entitled, and indeed obliged, to waive official immunity, where in his opinion the immunity would impede the course of justice and where it can be waived without prejudice to the interests of the Organisation.[41] Moreover even where a member of the UN professional staff himself requests waiver (for example in order to obtain permanent resident status in the State in which he is serving), the general practice of the United

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[37] see *Rahimatoola v. The Nizam of Hyderabad* [1958] AC 379. For the application of this principle in relation to officials of international organisations see *Zoernsch v. Waldock* [1964] 1 WLR 675 (discussed *infra* at note 111)

[38] Thus for example the immunities of consuls under Art 43 of the Vienna Convention on Consular Relations are limited to acts performed in the performance of consular functions. Under Art. 38 of the Vienna Convention on Diplomatic Relations the immunities of diplomatic agent who has the nationality of the receiving State enjoys immunity only in respect of official acts performed in the exercise of his functions. Other visiting State officials may also be able to claim the benefit of State immunity in respect of official acts – eg *Propend Finance v. Sing* (1996, Court of Appeal, 111 ILR 611).

[39] The Office of Legal Affairs prepared a memorandum to this effect in 1952, reaching its conclusion on the basis of the Article 105 of the UN Charter, the functional analogy between diplomats and UN officials, and the relationship between the General Convention and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the UN (as during the negotiation of the latter the question was discussed and although no express wording was included, it was thought to follow from the wording of the section as a whole) - see [1967] YBILC Vol.II at pp.269-270.

[40] see Section 20 of the General Convention.

[41] Section 20

Nations is not to waive immunity.[42] This would seem to suggest that even a voluntary appearance in Court by a UN official would not be sufficient in itself to constitute a waiver of his immunity, unless it is accompanied by an act of assent by the Organisation itself.[43]

The question of waiver brings out a further aspect of the nature of immunity. Although the immunity of an official is an immunity *ratione materiae*, the fact that it may nevertheless be waived, will enable a local court to assert its jurisdiction to hear the complaint. The immunity simply works as a bar to the jurisdiction of the national court which must be determined as a preliminary question at the outset of proceedings.[44] An enquiry is therefore necessary into whether the subject-matter of the dispute concerns an official act.[45] If a non-official act is involved, the Court will have jurisdiction and the case may proceed. If however an official act is in issue, immunity will preclude the local court from asserting jurisdiction, unless the Secretary-General chooses to waive it.

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[42] see Knapp "Les privilèges et immunités des organisations internationales et leurs agents devant les tribunaux internationaux" (1965) 69 RGDIP 615

[43] Indeed Cahier goes further, suggesting that high ranking international officials, who enjoy full diplomatic immunities, can not commence proceedings before municipal courts without the prior consent of the organisation by which he/she is employed, as commencing proceedings involves a submission to the jurisdiction – *op cit* note 4 *supra* p.307 (See also the case of *Jurado v. ILO* discussed *infra* at note). The UN Secretariat has now issued instructions for the handling of suits against UN officials ST/SGB/198 and ST/AI/299.

[44] See the Advisory Opinion in the *Cumaraswamy* case, 2000 ICJ Rep. 62, para 63 in which the ICJ held

"By necessary implication, questions of immunity are therefore preliminary issues which must be decided *in limine litis*. This is a generally recognised principle of procedural law, ...The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur, thereby nullifying the essence of the immunity rule..."

[45] On the questions of who ultimately has the power to make this determination see the discussion of the *Cumaraswamy* case text *infra* at notes 98f.

The nature of the jurisdictional immunity enjoyed by experts on mission does not materially differ from that of officials. It may be noted that the subsistence of immunity even after the expert has completed his mission is expressly provided for under the General Convention. However the additional express grant of immunity from personal arrest or detention during their mission (including on journeys connected therewith), appears to be absolute and would thus be applicable in relation to arrest or detention effected in connection with acts of the experts, which undertaken outside the accomplishment of their mission.[46]

C. The jurisdictional immunities of officials of other organisations

In contrast to the jurisdictional immunities of international organisations themselves, the immunities enjoyed by their officials are much more uniform. Relevant treaty provisions concerning the officials of most international organisations are similar to the provisions of the General Convention in this respect, generally extending to acts they perform in their official capacity. Under the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the UN, officials of the Specialised Agencies are granted jurisdictional immunity in identical terms to the second category officials of the UN under the General Convention. Full diplomatic privileges and immunities are also granted to the executive head of each Agency and those officials who deputise for him in his absence.[47] In addition many of the Agencies have, in the annexes they attach to modify the basic terms of the 1947

[46] see Zacklin *op cit* note 31 *supra* at p.192. Also see Schermers and Blokker "Mission impossible? On the immunities of staff members of international organisations on missions" in Hafner et al. (ed.s) *Liber Amicorum Seidl-Hohenveldern* (Kluwer, The Hague, 1998) at pp.37-53.

[47] In relation to some of the specialised agencies diplomatic immunities are recognised in relation to a relatively large class of senior officials, for example under the UNESCO HQ Agreement effectively all officials of the rank of senior officer (P.5) and above are granted diplomatic privileges and immunities.

Convention to their own particular requirements, included provision for the immunities of experts on mission in exactly the same terms as the General Convention.[48] The IMF, the IBRD, the IFC have attached annexes stating that the 1947 Convention shall not modify the effect of their constitutive instruments on the question of immunities their governors, executive directors, alternates, officers and employees, who therefore all enjoy jurisdictional immunity for their official acts. All are therefore granted jurisdictional immunity similar to that of "officials" under the 1947 Convention, without separate provision being made for the highest ranking officials or experts on mission. [49]

At the regional level there is a similar uniformity of provisions on the jurisdictional immunities of international officials. The OAS,[50] the OAU,[51] the Council of Europe,[52] the OECD,[53] and the WEU[54] all provide for jurisdictional immunity in the

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[48] These include ILO, FAO, ICAO, UNESCO,WHO,IMO and UNIDO see ST/LEG/SER.B/11 at pp.112-20.

[49] These instruments provide that such persons "shall be immune from legal process with respect to acts performed by them in their official capacity except when the [institution] waives this immunity" - IBRD Article VII Section 8(i), IMF Article IX Section 8(I), IFC Article VI Section 8 (i) (though reference to waiver is made in a later section), and IDA Article VIII Section 8(i). Similar provisions also appear in the Articles of Agreement of the regional Development Banks and Funds.

Some of the highest ranking officials of these organisations have in fact been granted diplomatic immunities, though as a courtesy rather than as of right. (1967 YBILC at p.136)

A recent case has arisen in which the failure to make special provision for the immunity from personal arrest or detention of experts on mission, has be highlighted. In the *Hong Yang* case an IMF official on mission was arrested and tried, while on mission in China, his State of nationality, in connection with acts performed before his appointment as an IMF official. As an IMF official he was only entitled to immunity for his official acts, and as the IMF did not make provision in relation to its participation in the 1947 Convention for a more general immunity from arrest and detention for experts on mission, he could be arrested and tried for acts alleged against him which did not relate to his official functions. Schermers and Blokker point out the vulnerability of the expert on mission in this respect and the dangers for the functioning of the organisation (*op. cit.* note 46 *supra*).

[50] Agreement on the Privileges and Immunities of the OAS 15 May 1949, see Art.s 8 and 10, ST/ LEG/SER.B/11 at p.377

[51] General Convention on the Privileges and Immunities of the OAU, 25 October 1965, reproduced in G.Naldi (ed.) *Documents on the Organisation of African Unity*, (Mansell, London, 1992)

[52] General Agreement on the Privileges ad Immunities of the Council of Europe 5 May 1949, Art.s 16-19, ST/LEG/SER.B/11 at p.390

same terms as the General Convention. This appears to apply whatever the nature or functions of an organisation.

Thus the scope of the jurisdictional immunity of international officials may in fact be broader than that of the organisation for which he or she works, in that in respect of his or her official acts, he or she will be immune notwithstanding that the immunity of the employer organisation may be limited. In such cases the organisation bears vicarious responsibility for the official acts of its agents, and claims are channelled towards the organisation rather than the agent in person.[55]

In this respect the position of the European Communities is interesting for whilst it will be recalled that the immunities of the Communities themselves are very limited,[56] Article 12 of the Protocol on the Privileges and Immunities of the Communities provides:

> "In the territory of each Member State and whatever their nationality, officials and other servants of the Communities shall:
>
> (a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Communities and, on the other hand, to the jurisdiction of the Court [i.e. the ECJ] in disputes between the Communities and their officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office".

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[53] See supplementary Protocol No.1 to the Convention for European Economic Co-operation, 16 April 1948, Art.s 13-17, ST/LEG/SER.B/11 at p.369

[54] See Agreement on the Status of the WEU, National Representatives and International Staff, 11 May 1955, Art.s 19-25, ST/LEG/SER.B/11 at p.421

[55] See for example *Rendall Speranza v. Nassim* (1997, Court of Appeals, DC Circuit, 107 F.3d 913), discussed in text at note 80f *infra*

[56] see Chapter 3 *supra* text at note 65.

In cases which involve the official acts of Community officials therefore suits are channelled to the Communities themselves, and must be determined in accordance with the relevant rules of liability in European (eg in relation to non-contractual liability Article 288 is the governing law which must be applied by the ECJ) or national law (e.g. contractual liability is determined under the law and before the forum chosen by the parties).

Schermers has questioned whether the category of "official acts" for the purposes of the immunities of Community officials is entirely congruent with attribution of non-contractual liability of the Communities under Article 288, which establishes the Community's obligation to "make good damage caused ... by its servants in the performance of their duties".[57] He suggests that on the one hand there are policy reasons for wishing to see a limited category of official acts for the purposes of immunities, i.e. so far as possible to ensure the equal protection of the law. Whereas on the other hand he suggests it will be important for good labour relations of the Communities that a broad definition of official act is adopted for the purposes of liability under Article 288, so that the Communities bear liability, rather than their servants personally. He suggests that the solution is the adoption of a single broad interpretation of official acts,[58] but for the Communities to waive the immunity in accordance with their duty to do so (Article 18 of the Protocol). The device of waiver of immunity therefore ensures that the concerns requirements concerning equal

[57] See Schermers "Official Acts of Civil Servants" in Schermers et al (ed.s) *Non-Contractual Liability of the European Communities* (Martinus Nijhoff, Dordrecht, 1988) at pp.75-81

[58] In this respect see the two cases of *Sayag v. Leduc*, Cases 5-68 and 9-69 discussed *infra* text at note 96

protection of the law can be met, whilst at the same leaving unaffected the liabilities of the Communities for the acts of their officials.[59]

D. Immunities of officials in practice

In broad terms the jurisdictional immunities of international officials have been widely recognised by national authorities. Nevertheless a survey of the practice of the decisions of courts and other authorities in this respect reveals a number of common issues.

1. Officials of the first category

Where the official in question is of the first category, i.e. he or she enjoys full "diplomatic" status, national courts have frequently sought to apply directly the law relating to diplomatic immunities, notwithstanding the important contextual differences between the regimes of diplomatic and international immunities.[60] In such cases an international official will enjoy immunity both in relation to his official acts and also to most of his private acts.[61] Unlike the traditional diplomatic

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[59] *ibid.* p.80

[60] Switzerland grants full diplomatic immunities to a broader category of officials than simply the executive leadership of an organisation, and accordingly Swiss caselaw on international officials makes frequent reference to the standards of Vienna Convention on Diplomatic Relations (though in fact many of the cases relate to taxation, rather than to jurisdictional immunity *per se*): see e.g. *CERN Official Taxation Case* (1982) 102 ILR 174; *Rastello and another v. Caisse Genèvoise de Compensation and another* (1984) 102 ILR 183; *Résidence Miremont v. Administrative Tribunal of Geneva* (1985) 102 ILR 189

[61] An exception to immunity in relation to proceedings their private residences may be applicable to international officials of the first category on the basis of the exceptions contained in Art31(1)(a) of the Vienna Convention on Diplomatic Relations. However this exception relates to real actions relating to immoveable property. In strict terms a lease may not be realty, but see the *Deputy Registrar* case (District Court of The Hague) (94 ILR 308) in which a plea of immunity was denied on the basis that there was an exception to diplomatic immunities in relation to rights *in rem* in immoveable property which ensures that such claims should be brought before the courts of the State in which the property was situate. The international official could not claim that he held the property on behalf of

representative of a State whose immunity generally only operates in respect of the receiving State,[62] an international official of the first category is able to rely upon it in all member States, including his own State of his nationality. There is a very clear danger of a denial of justice if immunity is maintained, and in response, therefore, a number of host States, whilst recognising diplomatic privileges and immunities in general for such high officials, have sought to restrict the enjoyment of such privileges and immunities for officials of their own nationality. [63]

In practice a particular area for problems has been family law.[64] It appears that in family law proceedings involving an official of the first category, such an official would, strictly speaking, be immune unless the organisation by which he/she is employed waives immunity. The complainant should therefore apply to the organisation to waive the respondent's immunity. It is likely that in most family law cases an organisation would be under an obligation to waive immunity to a court properly seised of the matter,[65] as it is unlikely to prejudice the interests of the

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the International Court of Justice (by whom he was employed), since, notwithstanding either that the Court found it useful or necessary for him to live nearby, or that he kept his own library at the premises, the sole function which the dwelling served in relation to his work was to provide him and his wife somewhere to live relatively close to the Court and thus it was a private property.

In relation to property rented by an official on behalf of an organisation however see the case of [61] In *Askir v. Boutros Ghali and others* (US District Court, Southern District New York 933 F. Supp 368) discussed *infra* at note 83.

[62] Though see Art.40 Vienna Convention on Diplomatic Relations, in respect transit rights.

[63] See for example Art.19(3) of UNESCO HQ Agreement with France of 2 July 1954 (ST/LEG/SER.B/11 at p.240); Exchange of Letters between the ICJ and the Netherlands of 26 June 1946 (ST/LEG/SER.B/10 at p.193);

[64] It should be noted here that this subsection deals with substantive proceedings brought against an international official alone. Where enforcement proceedings are brought in relation to maintenance obligations, for garnishment of the salary or pension of an official, it should be remembered that the immunity of the organisation itself, from measures of execution are likely to be an issue see *Means v. Means* (1969) 53 ILR 588, *Shamsee v. Shamsee,* 1980 UNJY 222 and *Menon v. Weil* 66 Misc. 2d 114 (New York City Civil Court).

[65] i.e. in accordance with obligation to waive immunity where the interests of the organisation are not prejudiced - see eg section 20 of the General Convention.

organisation unduly.[66] In any event a court which has jurisdiction under the usual rules of private international law, is, as Jenks suggests, likely to view plea of immunity with "scant sympathy".[67] Indeed a French court in *Avenol v. Avenol,*[68] rejected plea by the Secretary-General of the League of Nations (a French national) in colourful terms, though probably inaccurately if Article 7 of the Covenant of the League of Nations was interpreted strictly. Subsequently jurisdiction over family law cases has been established either by seeking a waiver by the organisation[69] or on the basis of the exception to immunity based on a counterclaim.[70] Where immunity is not waived an unsatisfactory situation may arise in which family proceedings will not be admissible in the courts of any State, leaving the spouse or family of an international official in a precarious position.[71]

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[66] In the context of diplomatic immunities the recent case of *Re P.* ([1998] 1 FLR 1026, CA; and [1998] 1 FLR 624, FD) suggests that requirements of public employment in the diplomatic service may have effects on domestic arrangements which can not be reviewed in foreign family courts. It is conceivable that a similar type of case might arise in relation to an international official, but if such official and his employer organisation maintained his immunity, there is a serious danger of a total denial of justice, there being no court to determine the case. In the case of a diplomat, his/her sending State is likely to be able to exercise jurisdiction in family law matters, as was found by the Court of Appeal in *Re P.*

[67] See Jenks *International Immunities* (Stevens, London, 1961) at p.135

[68] The Juge de Paix XVI arrondissement de Paris (Ann Dig. 1935-37 case No.185 at pp.395-7) expressed himself as follows: "Avenol further claims ... that the effect of this diplomatic immunity absolves him from answering before the courts of members of the League of Nations, and in particular before the French Courts; and that all proceedings taken against him are absolutely null and void ... If we were to decide that Avenol is covered by diplomatic immunity before the courts of sixty States Members of the League, we should have reached a decision which is ...palpably contrary to all the notions of law which have been gradually imposed on the human conscience since the ages of barbarism and which have become the universal charter for all civilised actions – a decision that Avenol is placed above the law, higher than heads of States..."

[69] As had happened in the cases of *Parlett v. Parlett* (1927) 5 ILR 316, Case No.207 and also in the relation to the *Jurado* case, ILOAT Judgment No. 70 (1964) 40 ILR 296

[70] In *Re RFN* (1977, 77 ILR 452) an Austrian court found that an international official who enjoyed diplomatic immunities, and who had petitioned the Court for custody of his child, was subject to the court's jurisdiction in relation to cross-petitions by his former wife.

[71] see *Picasso de Oyague v. Picasso de Oyague* (1986) 77 ILR 506

2. Officials of the second category and experts on mission

(a) Scope of immunity

The immunity from suit enjoyed by officials of the second category is more complex, as it only extends to acts performed in official capacity. As has been explained above it differs in nature from the jurisdictional immunity granted to officials of the first category, being an immunity for the benefit of the organisation in question thus granted *ratione materiae*, rather than an immunity attaching to an individual by virtue of his or her status, *ratione personae*. It is now well established that this more limited jurisdictional immunity should be granted by States to all officials irrespective of their nationality for all acts performed in their official capacity.[72]

This may of course involve difficult judgments concerning the proper limits to immunity and the characterisation of the acts in question. As a first step it has been important to define clearly the act which is in issue, and to ask in what capacity it was performed. Since the immunity is granted *ratione materiae*, to maintain a plea of immunity it is necessary to show that the act itself was performed in the exercise of the official functions, and not merely that the assertion of jurisdiction would affect the official's performance of his official functions. Thus in some early cases relating to allegations of espionage by members of the UN Secretariat in the US, the US

[72] See the cases of *Mazilu* (1989 ICJ Rep. 177) and *Cumaraswamy* (1999 ICJ Rep. 62). Whilst the jurisdictional immunities of officials is generally recognised irrespective of nationality, certain other privileges are not always granted by host States in respect of their own nationals. In this respect there is some variation in the treatment by host States of officials of their own nationality in respect of fiscal exemptions and exemption form national service obligations – as for example in the US (see note 22 *supra*).

courts were able to establish jurisdiction on the basis that the acts alleged did not form part of official functions of the defendants in question.[73]

Where the acts in issue were clearly not performed in an official capacity the relevant international organisation has a very limited role. Thus in relation to criminal proceedings against one of its officials an organisation may make inquiries of the State bringing the proceedings, to ensure that the acts in issue were not performed in his official capacity.[74] In so far as an international organisation may exercise functional protection in respect of its officials, it may also seek assurance that the official should be treated in accordance with accepted standards of due process.[75]

In relation to purely private civil claims against international officials of the second category, national courts have found few obstacles to their jurisdiction. Thus in relation to proceedings arising from a lease for the private residence property of such

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[73] See *US v. Melekh* (32 ILR 308 esp at p.333); and *also US v. Coplon and Gubitchev* ((1949) 16 ILR 293, Case no.102). In both of these cases the Court was also faced with arguments that the Russian defendants were also diplomatic representatives of the USSR, though examination of their official status made clear that they were officials of the UN and so entitled only immunity in respect of their official actions and not to full diplomatic immunity from criminal jurisdiction. As Bedjaoui points out, it would have been contrary to the basic principle of the independence of the international civil service for persons to be considered both officials of the organisation and representatives of their national States (see *Fonction publique internationale et influences nationales* (Stevens, London, 1958) at p.228).

[74] Thus in 1948 when a UN official was arrested at the UN Information Centre in Prague, the Secretary-General complained to the Czech Government about the contravention of the inviolability of UN premises and the arrest of the official. The Czech Government sought to excuse the alleged violation of the premises, but assured the Secretary-general that the official was not to be interrogated in related to his official acts. See Bedjaoui *ibid.* at p. 224

[75] Bedjaoui (*ibid.* at p.225) cites the arrest of two officials of the UN Commission for Korea in 1949 in which the Secretary–General explained to the Foreign Ministry of Korea that in such cases (1) the Secretary-General should be informed in advance of any arrest or proceeding against an international official; (2) an assurance should be given that the official would not be questioned about facts relating to his activities for the UN; and (3) the official should be treated in accordance with universally accepted principles of justice. The Korean Government replied that though it was not a member of the UN that it fully accepted the principles of Art.105 of the Charter and GA Resolution 76(1) which defined the privileges and immunities of the UN. It assured the Secretary-General that the officials were arrested in relation to crimes which had no connection with their official duties, but that it was often not possible to give the Secretary-General prior notice of arrests.

an official, immunity has been found not to be available, since the proceedings arise from a non-official act.[76] Where however immoveable property is rented in the name of an official on behalf of the organisation, for use by the organisation, such lease will in most cases be found to be an official act for which the individual will enjoy immunity. [77]

On the other hand in cases in which the acts in question were clearly performed in an official capacity national courts have taken a fairly broad approach and not allowed themselves to be drawn into reviewing the lawfulness of the particular act in question. Thus in cases brought by employees of international organisations against their superiors in relation to matters relating directly to their employment national courts will generally uphold the immunity of the superior employee. In *Donald v. Orfila*,[78] a former employee of the OAS brought an action against the former Secretary-General of the OAS for wrongful termination of his employment contract. The former Secretary-General submitted a plea of immunity on the basis that the acts complained of were performed in as part of his official functions. The complainant argued that the termination was not an official act because it was carried out in bad faith for reasons of a personal nature. The Court found that personnel management was one of the functional duties of the respondent, and was thus immune. There was

[76] See *Essayan v. Jouve* (Tribunal de Grande Instance de la Seine, 42 ILR 241), which related to proceedings for eviction of a delegate of the UNHCR in France.

[77] In *Askir v. Boutros Ghali and others* (1996, 113 ILR 516) the use of property in Mogadishu by UNOSOM troops as found to be immune. The question of whether restrictive State immunity should also apply to international organisations, which has not been resolved in the US caselaw, was raised, but the Court found that the billeting of troops were part and parcel of the military operations of UNOSOM and thus would be immune whether the UN enjoyed absolute or restrictive immunity.

[78] US District Court, District of Columbia 618 F.Supp 645, affirmed by the Court of Appeals (DC Circuit) 788 F 2d 36. The case is somewhat confused in use of the terms absolute and qualified immunity. Nevertheless its *ratio* was applied in *De Luca v. UN and others* (113 ILR 503) in respect of the individual respondents.

no qualification to the immunity of the respondent on the basis of the motivation of his official acts and that to find otherwise would undermine the nature of the immunity.[79]

Where the acts complained of take place within the context of the parties' employment in an international organisation, but are in fact of a non-official nature, a plea of immunity may still succeed. Thus in the case of *Rendall-Speranza v. Nassim*[80] a junior employee of the IFC brought a suit for assault and battery against her supervisor. The complainant alleged a course of sexual harassment culminating in a physical assault. The respondent claimed the alleged assault had occurred when he discovered the complainant trespassing in his office, and pleaded immunity. The IFC filed an *amicus* brief to the effect that the respondent was acting in his official capacity as an IFC employee, by protecting IFC offices from unauthorised entry and potential theft of documents. At first instance the plea of immunity failed on the basis that the alleged assault was not an act within his official functions.[81] The plaintiff also sought to join the IFC, claiming that it bore vicarious liability. The Court of Appeals however found that by this stage, any claim against the IFC was time-barred. It further found that in the motion to join the IFC the plaintiff was effectively maintaining that the supervisor's acts were official, in that she was asserting that they engaged the responsibility of the IFC itself. The Court therefore found that the supervisor was immune.

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[79] See also the *ESOC Official Immunity* case (1973) (73 ILR 683), a German Federal Labour Court upheld the immunity of an official in relation to an adverse assessment he had drafted on the complainant's work. The Court found that the complainant's argument that the assessment did not conform to the Staff Regulations of the Organisation, did not affect whether or not the respondent was acting in the exercise of his official functions.

[80] 1997, Court of Appeals (DC Circuit), 107 F.3d 913.

[81] District Court, DC, 932 F.Supp. 19

The scope of immunity from jurisdiction is not limited to cases in which an agent of an international organisation is a party to litigation, as the practice in relation to cases in which international officials are required to give evidence in national judicial proceedings or other public bodies.[82] Where an international official is required to give evidence to judicial proceedings under oath there is a danger that the official will be constrained to give evidence relating to matters of which he or she has knowledge by virtue of his or her official employment, and in relation to which he or she owes a duty of confidentiality to the organisation. The case of *Keeney v. US*[83] arose in the context of the "loyalty" investigations by a sub-committee of the Judiciary Committee of the US Senate into international officials of US nationality. The defendant had been asked by the Sub-Committee questions which related to her appointment by the UN in relation to which she had a duty to exercise the utmost discretion. On her refusal to answer the questions she was convicted of contempt of court. However the conviction was overturned on appeal. For Circuit Judge Edgerton the question clearly related to the functioning of the organisation and thus the defendant enjoyed privilege. He observed:

> "Compulsory disclosure of the persons who influence appointments to the staff of the United Nations would not be consistent with the independence of the Organisation or 'the exclusively international character of the responsibilities of the Secretary-General and the staff...' (art.100 (2)). And the prospect of such disclosure might influence staff members, in one degree or another, to regulate their conduct with a view to avoiding embarrassment of sponsors. The privilege of non-disclosure is therefore 'necessary for the

[82] The breadth of immunity may be reflected in the wording of the relevant treaty provision eg "immunity from legal process of every kind" enjoyed by UN experts on mission under Article VI section 22(b) of the General Convention. It might be noted that Article V, section 18 relating to the immunities of UN officials does not include these words, but practice suggests that their immunities will be similarly broad.

[83] 218 F.2d 843

independent exercise of their functions in connection with the Organisation' (Art.105(2)).'"[84]

In general the UN's stated policy is to waive immunity in cases in which staff members are requested to appear as witnesses but in which the UN as such has no interest. However the UN may only authorise an official to give evidence on matters of which they have knowledge by virtue of their official employment, on the basis (1) that there is no reasonable alternative to testifying for the "orderly adjudication or prosecution" of the of the case; and (2) that no significant UN interest would be adversely affected by such testimony.[85] In practice if a UN official is sub-poenaed to give evidence, the UN may assert immunity, but then authorise the voluntary giving of answers to specific questions, and/or, if possible, deal with it by correspondence or documentary evidence. Where a staff member does appear the UN takes the view that taking the usual oath or affirmation will not conflict with the obligations of his or her employment.

International organisations are of course reliant on the local legal system in relation to criminal offences, in that they do not have criminal jurisdiction themselves. However where an organisation is the victim or complainant of an offence, there may nonetheless be implications for its immunities and those of its officials. This is illustrated by the case of *Weiner v. US.*[86] The defendant was being prosecuted, following a complaint by a UN security guard who had apprehended the defendant for damaging UN property. The defendant indicated in pre-trial proceedings that he

[84] *ibid.* at p.845

[85] 1985 YBILC Vol.II pt.1 at p.172

[86] 378 NYS 2d 966

would be seeking to raise a cross-complaint that the security guard had assaulted him. The UN was asked by the Court for its opinion as to the immunity of the security guard. The UN claimed that whilst it was compatible with his immunity for him to appear voluntarily as a witness in the proceedings, it would be for the UN to determine on functional grounds whether immunity should be asserted in relation to contempt of court citations, perjury charges or cross-complaints, and there was no waiver by virtue of his voluntary testimony.[87] The Court found this to be an unacceptable position on the basis that it violated concepts of fundamental fairness and equal treatment.[88]

(b) Characterisation of "official acts"

In many of the cases considered the question as to how to determine whether an act of an international official is an official act was not given extensive consideration. However as we have seen questions of legal characterisation can raise issues of both complexity and sensitivity,[89] and this is no less true of an act as having been performed in official capacity or not, as will be seen in a number of leading cases.

In the well-known case of *Westchester County v. Ranallo*[90] proceedings were brought against the chauffeur of the Secretary-General of the UN for exceeding the speed limit, whilst driving the Secretary-General to an official meeting. Initially the UN sought to assert the immunity of the defendant. At a preliminary hearing on the

[87] The text of the UN letter appears in 1976 UNJYB 234

[88] The case also raised the controversy as to whether the UN or the local court should make the determination of the scope of immunity. The UN raised its concerns on this issue to US Government see 1976 UNJYB 236. For further discussion of this issue see section (ii) below.

[89] See chapter 4 *supra* text at note 38ff

[90] 67 NYS (2d) 31, 13 ILR 168 – on which see Preuss "Immunity of officers and employees of the United Nations for official acts: the *Ranallo* case" (1947) 41 AJIL 555

issue of immunity the Judge of the City Court of New Rochelle found that the defendant was not entitled to immunity as a matter of law, without trial of the issue of "fact" as to whether the defendant "was engaged in an official act which justified the grant of immunity". The Court therefore ordered the trial of the factual issue to proceed. However at that point the UN decided to waive the defendant's immunity, rather than press the issue of immunity, and so the issues which were raised in the preliminary ruling, were not finally resolved.[91]

The case raises the important question as to whose is the final determination of whether an act is official and thus immune (unless immunity is waived).[92] The Judge dealt with the Secretary General's submission that the acts in question were official as not being determinative of the issue. Interestingly however he indicated that he would consider a certificate from the State Department as determinative.[93] The central problem for the Court appears to have been that the United Nations was seen as essentially a foreign body imposing itself on the local legal system, which did not have the means to give full effect to such a claim. The Judge found that the UN position would require him to override important values of the local legal system,

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[91] It has been suggested that the reason for this decision lies in the fact that UN did not want to prejudice the negotiations on its Headquarters Agreement with the US, in which it was engaged at that time (see Preuss *op. cit.* note 90 *supra*). Certainly the case appears to have attracted a good deal of publicity - so much so that Bedjaoui questions the influence of public opinion on the findings of the Court (*op. cit.* note 79 *supra*, at p.223 note 41) . However there are also sound reasons why the Secretary General might either have reconsidered and found that speeding was not an official act, or that waiver would not prejudice the interests of the organisation unduly (see Preuss *op. cit.*, at p.575).

[92] The case also raises the question of what point in the proceedings immunity should be dealt with – which is also raised in the *Cumaraswamy* case, on which see text at note 108 *infra*.

[93] See the Court's finding at p. 171 of the ILR Report: "This Court feels strongly that the question of immunity should be entrusted, not to the whim or caprice of any individual or committee that might speak for the United Nations Organisation, but rather that such immunity should be available only when it is truly necessary to assure the proper deliberations of the Organisation – a circumstance that could readily be brought about if the granting of immunity were restricted to those cases where our own State Department certified that the exemption from prosecution or suit was in the public interest."

whereas he felt that did not have the authority to do so.[94] However he appears to suggest that he would have been able to do this, if the Executive branch of Government certified that the granting of immunity would be in the public interest. The difficulty with this argument is that, whilst the Executive branch of government in the forum State may indeed be an appropriate body to determine the national public interest (including its foreign policy dimension),[95] the national public interest is not usually the decisive issue to determine issues of immunity of international organisations.

An interesting contrast is the case of *Sayag v. Leduc* before the European Court of Justice,[96] which concerned also concerned the question of driving and official activities. Sayag, an employee of Euratom (who was not employed as a driver) had been instructed to escort two representatives of private companies to a meeting. He was doing this by driving them in his private car, when he had an accident in which they were injured. A question was raised as to the extent of his immunity in relation to his driving of a car. The ECJ took the view that:

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[94] The Court found (*ibid.* at p.169): "To recognise the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity even though the individual's function has not relation to the importance or the success of the Organisation's deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would in effect create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment. Any such theory is does violence to the American sense of fairness and justice...."

[95] In this respect perhaps the decision should be seen in its own context. At that time in common law countries Executive certificates or suggestions of immunity, tendered to the court in a broad range of immunity cases, were often determinative of such cases, and had the effect of reducing the scope of the judicial function considerably. However in recent times, and in many of these countries with the statutory enactment of the restrictive doctrine of State immunity, many more important decisions in immunity cases are now judicially determined (for example as to the extent of immunity), and the role of the Executive is correspondingly reduced.

[96] Case 5-68, 11 July 1968 (1968 ECR 395) - on which see Schermers *op. cit.* note 64 *supra*

> "The immunity from legal proceedings conferred on officials and other agents of the Community thus only covers acts which, by their nature, represent a participation of the person entitled to the immunity in the performance of the tasks of the institution to which he belongs ... driving a motor vehicle is not in the nature of an act performed in an official capacity save in the exceptional cases in which this activity cannot be carried out otherwise than under the authority of the Community and by its own servants."[97]

This decision was given as a preliminary ruling and suggests that whatever the Commission's view, the scope of immunity is a legal question to be determined in the final analysis by a competent court.

The issue as to who has the final determination of the scope of immunity has recently arisen very clearly in the *Cumaraswamy* case.[98] It should be noted at the outset that this case concerned the jurisdictional immunity of an "expert" rather than an "official", but it appears that its *ratio* would be equally applicable in relation to officials of the second category as well.[99] The case concerned a Special Rapporteur of the Human Rights Commission, (of Malaysian nationality) who was sued for libel in relation to an interview he gave to a legal journal, concerning certain issues in Malaysia that he was investigating in connection with the mandate that he had been given by the Commission. He sought to assert immunity from suit on the basis that the interview had been given "in the course of the performance of his mission" and was thus immune by virtue of Article VI, section 22 (b) of the General Convention. The Secretary-General of the UN confirmed that the words were spoken in the course

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[97] *ibid.* at p.402. In a subsequent preliminary ruling in the case the Court found that the Community's non-contractual liability was coextensive with this definition of an official act, Case 9-69 (1969 ECR 329).

[98] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights 1999* ICJ Rep. 62 – see casenote Wickremasinghe (2000) 49 ICLQ 724

[99] In a number of important findings the ICJ addresses its findings in respect of "UN agents", e.g. para 60 and 61

of his mission and were thus immune from legal process, and issued a certificate to this effect, which it asked the Malaysian Government to place before the relevant local court.

The Special Rapporteur applied to the court to dismiss the suit on grounds of his immunity, and entered the Secretary-General's certificate in support. The Malaysian Government took the view that the question as to whether or not the words of the Special Rapporteur which were at issue in this case, were immune was for the local court to decide, and issued its own certificate, making no reference to that of the Secretary-General, but setting out that the Special Rapporteur enjoyed immunity only in respect of acts done or words said in the course of the performance of his mission.

Both the Kuala Lumpur High Court[100] and the Malaysian Court of Appeal [101] considered that the question as to whether or not the words in issue were spoken in the performance of the Special Rapporteur's mission were issues which should only be heard at trial alongside the other evidence and issues. Both courts therefore denied the Special Rapporteur's application to dismiss and awarded the costs of the application against him.

The UN complained to the Malaysian Government that it had failed to place the Secretary General's certificate before the courts and that its own certificate to the courts was inadequate. More importantly for present purposes it disputed the opinion

[100] See *MBf Capital Bhd & Another v. Dato' Param Cumaraswamy*, 28 June 1997, [1997] 3 MLJ 300

[101] See *Dato' Param Cumaraswamy v. MBf Capital Bhd & Another v.*, 20 October 1997, [1997] 3 MLJ 824

of the Malaysian Government and the findings of the Malaysian courts on the basis that they had failed to give conclusive or determinative effect to the Secretary-General's certificate.

The case was eventually referred to the ICJ to settle under the "binding Advisory Opinion" mechanism provided for in Article VIII Section 30 of the General Convention. Though the question presented to the ICJ by ECOSOC was amended to consider the applicability of Article VI Section 22 of the General Convention to the Special Rapporteur,[102] much argument centred on the question of conclusiveness of the Secretary-General's determination of whether an act was done or said in the performance of the mission of the Special Rapporteur.

The Secretary-General took the position that it was implicit in the scheme of the General Convention and of the organisational structure of the UN that he should have the exclusive authority to determine whether or not an act was done by a UN official in his official capacity or by an expert in the performance of his mission, and that determination should be binding on the national court.[103] In particular he pointed to the discretion vested in him whether to assert or waive the immunity of an expert under Article VI, section 23 of the General Convention,[104] and to the removal of

[102] The Secretary-General had proposed to the ECOSOC that it ask the question whether the exclusive determination as to whether words were spoken in the course of the performance a mission for the UN for the purposes of an expert's immunity? And whether member States were under an obligation to effect to such immunity in its national courts? - see Advisory Opinion at para. 20.

[103] The see the written statements submitted on his behalf dated 2 October 1998 (paras 38-56) and 30 October 1998, and the oral Statement of 7 December 1998(para.s 15-36) and 10 December 1998 (para.s 45-55).

[104] In the present case the Secretary-General claimed that immunity would not prejudice the interests of justice since section 29 of the General convention provided for the settlement of UN disputes by appropriate alternative modes; whereas waiver would prejudice the interests of the UN in that any encroachment on the complete independence of Special Rapporteur's to speak out on human rights

disputes from national courts by virtue of the dispute settlement provisions contained in Article VIII, sections 29 and 30. Further it was he who had authority to offer functional protection to the agents of the Organisation in the performance of the official responsibilities. Pointing to his position as chief administrative officer of the Organisation and the exclusively international character of the organisation and its agents, he claimed that the question of whether or not an agent was acting in his official capacity was a question of fact, which was subject to his exclusive determination. His decision could not be reviewed by the domestic courts, but could only be reviewed by the ICJ under the Advisory Opinion procedure provided for in Section 30.

Although a number of States were broadly supportive of the Secretary-General's contentions,[105] some took slightly different approaches. Italy, the UK and the US all took the view that whilst the Secretary-General's determination, though persuasive in most cases, was not binding on the States parties to the General Convention or their domestic courts.[106] For the US, the Secretary-General's determination amounted to a rebuttable presumption, but the final decision lay with the national courts which might only overrule it for the most compelling reasons. It urged that no such reasons were apparent in the present case.

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questions would frustrate the and potentially endanger the human rights mechanism of the UN – see oral Statement of the UN Legal Counsel on 7 December 1998 (para.s 30-33) and 10 December 1998 (para.s 64-68)

[105] Notably Costa Rica in statement of 7 October 1998 and written comments of 6 November 1998; Germany, in letter of 5 October 1998; and Sweden in its Note of 6 October 1998.

[106] Italy submitted a note and made oral observations during the proceedings; the UK written statement of October 1998; and the US in written statement of 7 October 1998, and subsequent written comments.

On the issue of the authority of the Secretary-General to issue a conclusive determination of the scope of immunity in a given case, Malaysia started explicitly from the position of State sovereignty, and noted that in other regimes of immunity in international law (e.g. State and diplomatic immunities) the general approach was that it was a question for the forum whether or not immunity applied in the circumstances of a given case. Exceptions to this whereby a foreign authority had the power to make a binding determination of this question had to be specifically provided by treaty.

The ICJ in its Advisory Opinion focussed on the applicability[107] of the General Convention *in concreto* to Mr. Cumaraswamy's case. The Court endorsed the Secretary-General's determination as it applied the Convention in the case before it. It found Malaysia to be in breach of its obligations under the General Convention (a) by failing to inform the Malaysian courts of the Secretary-General's determination and (b) by the Malaysian courts failure to deal with immunity as preliminary issue (i.e. thus effectively denying the immunity by postponing its determination until the merits of the case and thus forcing the respondent to file a substantive defence).[108] However the ICJ appears to find that the national court is entitled to make the final determination on the issue of immunity, but in doing so it should treat the Secretary-General's determination as creating "a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight".[109]

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[107] In apparent contrast with its finding in the *Mazilu* case (1989 ICJ Rep 177, at para 27) the Court found "applicability" to be same for these purposes as "application" of the Convention – see para 49 of the Advisory Opinion

[108] see para 63

[109] see para 61

The Court does not give examples of what such compelling circumstances might be, the strength of the language it uses suggests that such circumstances are likely to be highly exceptional. Thus in practice it is likely that in most cases the Secretary-General's determination of the scope of immunity will be conclusive of the issue. The United Nations did however make clear in its pleadings - and the Court also makes reference to this[110] - that the assertion of immunity before national courts does not dispose of the question of the legal responsibility of the Organisation in relation to the claims of the private party plaintiff, which may pursue such claims directly against the Organisation in accordance with section 29 of the General Convention.

The special place given to the Secretary-General's determination can be defended on institutional grounds in that he is better placed than a national court to consider whether a given act falls within the official functions of an employee. This is underlined by the constant development of the United Nations functions and activities as it seeks to fulfil its broad purposes. The question of whether an act falls within or goes beyond the functions of an international official could be characterised as a question of the internal law of the Organisation, over which national courts do not have jurisdiction. This would be further borne out to the extent that the Secretary-General's finding that a given act of an official is immune engages the responsibility of the United Nations to settle the dispute in accordance with section 29 of the General Convention.

[110] see para 66

(c) Scope of immunity *ratione temporis*

It has been observed above that the immunity of international officials essentially relates to subject-matter (i.e. to acts done or words said in the performance of their official functions) immunity should prevail if the dispute concerns such subject-matter notwithstanding that by the time the dispute comes to the court the respondent is longer an official of the organisation. In practice the question has not been particularly controversial. In the case of *Zoernsch v. Waldock*,[111] the plaintiff tried to bring proceedings against the former President of the European Commission of Human Rights, alleging that he had been responsible for mishandling the plaintiff's unsuccessful application to the Commission. The English Court of Appeal considered that by analogy with the position of diplomats, international official similarly enjoyed a subsisting immunity for their official acts even after they had ceased to be officials of the organisation in question. The implication being that such immunity is necessary to protect the interests of the organisation, not the former official himself, just as the subsisting immunities enjoyed by the former diplomat are in fact an aspect of the immunity of his sending State.

The other aspect of this proposition is that an official of the second category *en poste* may be subject to jurisdiction in relation to acts he performed before his appointment, as is illustrated by the case of *Hong Yang*.[112] It might be noted however that experts on mission of the UN and most of its Specialised Agencies, enjoy an apparently unlimited immunity from personal arrest or detention during the period of their missions, which would preclude arrest or detention even in relation to acts done

[111] [1964] 1WLR 675

[112] See Schermers and Blokker *op. cit.* at note 46 *supra*

prior to their appointment as experts. In relation to other persons who exercise official functions intermittently , and thus immunity attaches to them intermittently, it will probably be for the official claiming immunity to establish his entitlement to immunity in a given case.[113]

3. Waiver

The main means by which the draconian effects of immunity are mediated, and abuse of immunity is prevented, is by waiver. Waiver of the immunity of an international official is a matter for determination by the employer international organisation, as is established by the relevant treaty provisions and by the practice of organisations. Accordingly requests for waiver are addressed to the organisation. On receipt of such requests that the chief administrative officer of an international organisation is often under a duty to waive immunity of an official in certain circumstances, and must therefore be under a duty to consider each request in good faith.

In the case of the UN, Sections 20 and 23 of the General Convention oblige the Secretary-General to waive the immunities of officials and experts where the assertion of immunity would impede the course of justice and waiver will not prejudice the interests of the Organisation. Since the test is cumulative the Secretary-General is entitled to decide not to waive immunity where either: (i) the maintenance of immunity would not impede the course of justice; or (ii) where the jurisdiction of the local court would prejudice the interests of the UN.

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[113] See *Stahel v. Bastid* 75 ILR 78; this case also suggests that immunities from *instruction* or investigation proceedings into the official enjoying intermittently, would have to be suspended during the periods for which he enjoyed immunity.

The UN appears not to have published detailed guidance on either limb of this test. However it has said that where for example a settlement cannot be negotiated the Secretary-General will normally waive immunity in cases of civil claims against staff members for their involvement in road traffic accidents whilst on official business.[114] Taking a literal approach to the first limb, it might be thought that the effect of immunity from jurisdiction in most cases would impede the course of justice. However a more nuanced view might be that where an alternative forum or means of settlement of the dispute can be established (e.g. some form of international tribunal, or the parties agree to arbitrate) immunity from the jurisdiction of the local courts would not necessarily impede the course of justice.

The question raised by the second limb, of when the interests of the Organisation are prejudiced by the assertion of local jurisdiction, is likely to prove more complex. The broadest interpretation of the expression suggests that it would cover any case in which official responsibility is in issue, and that would allow little scope for waiver. Alternatively a narrower interpretation may be given by considering first what interest(s) of the organisation are intended to be protected by the immunity, namely the independent functioning of the organisation. The question would then become whether the assertion of local jurisdiction would prejudice the independent functioning of the Organisation.

There is in fact little detailed practice available as to how such duty is discharged. Although the *Cumaraswamy* case concerned the scope of immunity, rather than its

[114] see 1967 YBILC Vol. II at p.283. Zacklin seems to suggest that this is generally the case in relation to civil actions *op cit* note 31 *supra* at pp.195-6, though in relation to criminal actions a decision is taken in the light of the particular circumstances of the case.

waiver, various comments in the UN's pleadings related to waiver. The UN suggested that it will consider that if an alternative remedy to litigation before the national courts is available, the assertion of immunity will not be considered to impede the course of justice.[115] The UN appears to take a broad interpretation of this requirement (which is of course contained in section 29 of the General Convention), to the effect that it may be satisfied by the possibility available to a complainant of submitting a claim to the Organisation for settlement by negotiation, with the eventual possibility of *ad hoc* arbitration.[116] The question of whether waiver would result in prejudice to the interests of the Organisation, appears to have been dealt with by the UN in broad terms in the *Cumaraswamy* case. It put forward the view that any encroachment by national authorities on the independence of Special Rapporteurs in the human rights field might inhibit their ability to speak out and potentially endanger the effectiveness of the human rights mechanism in the UN system.[117]

The duty to waive immunity therefore in fact involves the exercise of a discretion in respect of both the question of impediments to justice and the question of prejudice to the interests of the organisation. Whether or not such decisions are reviewable will depend upon the availability of an appropriate forum. In relation to the UN and its Specialised Agencies, it would seem that such a question could go before the International Court of Justice if it arose between an organisation and a State, by virtue of the "special" Advisory Opinion procedure in Article 30 of the General

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[115] See note 104 *supra*

[116] See oral pleadings of the UN Legal Counsel of 10 December 1998 at para.s 5-14

[117] See Written Statement submitted on behalf of the UN Secretary General of 2 October at para.s 54-55

Convention and Article 32 of the 1947 Convention on the Privileges and Immunities of the Specialised Agencies.[118] Similarly in relation to the European Communities, the European Court of Justice has considered the issue as justiciable requiring, the Commission to provide "a statement of the imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities" in order to justify its refusal waive immunity of its officials in connection with their official acts.[119]

On the other hand it seems unlikely that an official whose immunity is waived will be able to challenge that decision, which corresponds with the view that the immunities are for the benefit of the organisation rather than the individuals themselves. The case of *Jurado v. ILO (No.1)*[120] is illustrative, although it deals with an employee who enjoyed the fuller immunities of officials of the first category. In the course of family law proceedings brought by the wife of an ILO official, the Secretary-General waived the latter's immunity. The official complained to the ILOAT that the decision of waiver infringed his rights under the staff regulations and his right to diplomatic protection by the Organisation. The ILOAT found that the complaint raised no justiciable issue. The privileges and immunities of officials were agreed between the Organisation and the forum State, and were granted solely in the interests of the Organisation. As a matter of international administrative law, an official has no subjective right to immunity, where the Director has waived it in

[118] for a summary of aspects of this procedure, which differ from traditional dispute settlement procedures, see Wickremasinghe (2000) 49 ICLQ 724-30, esp.729-730

[119] See *Zwartfeld Case* C-2/88, Judgment of 13 July 1990, 1990 ECR I-3367

[120] 40 ILR 296

accordance with his duty to do so, i.e. where immunity would impede the course of justice and its waiver would not prejudice the interests of the Organisation.

Conclusions

It has been shown that the immunities of international organisations cannot simply be equated with those of States, because of various important differences between them. Such differences are also reflected in the immunities of their officials when compared to those of diplomats. The experience of the League of Nations whose officials were granted diplomatic privileges was so unsatisfactory that a new approach had to be taken by the founders of the United Nations, and subsequent organisations.

Diplomats and other high State officials will enjoy immunities *ratione personae* whilst overseas, which may cover both their private and official acts.[121] However even these are primarily justified upon functional grounds given the important roles which these persons play in international relations.[122] However it is only the very highest ranks of the international civil service (who play comparable roles in international relations) who now enjoy the broader immunities *ratione personae* equivalent to a diplomatic agent. Nevertheless functional reasons also justify the temporary grant to those on mission for the UN of express protection from arrest or detention whilst on mission to enable them to fulfil the purposes of such mission.

[121] see for example the personal inviolability, and absolute immunity from criminal jurisdiction of diplomatic agents under Art.s 29 and 31 of the Vienna Convention on Diplomatic Relations, as well those of serving Heads of State (as for example are granted under s.20 of the UK State Immunity Act), and were recently found by the ICJ to be enjoyed by serving Ministers for Foreign Affairs in the *Arrest Warrant* case (14 February 2002).

[122] See for example the fourth preambular paragraph of the Vienna Convention on Diplomatic Relations; and also the reasoning of the ICJ in the *Arrest Warrant* case (14 February 2002) at paragraph 53.

The majority of international civil servants do not enjoy the broad immunities of diplomatic agents but only enjoy immunities *ratione materiae* in respect of their official acts. As regards immunities claimed by State officials or former State officials *ratione materiae* for their official acts, the determination of what constitutes an official act is often linked to the test of imputability in the law of State responsibility.[123] Thus an act should be considered an "official act" where it engages the responsibility of the State on whose behalf it was done. A similar approach seems broadly appropriate (*mutatis mutandis*) in respect of international organisations.

The immunities of agents of international organisations for their official acts may therefore be considered as a manifestation of the immunity of the organisations themselves. This is borne out by the provisions on waiver which make clear that it is for the Organisation to determine whether or not to waive immunity based on its own interests rather than those of the individual concerned. Where immunity is asserted on behalf of the individual in respect of an official act, the organisation thereby accepts responsibility for both the act itself and, in most cases, for the provision of appropriate alternative means by which to settle the dispute.

Since the immunities of international officials correspond with the responsibility of the organisation, they operate so as to channel claims away from the individual personally and against the organisation itself. It, of course, depends upon the degree of immunity enjoyed by the organisation as to how far such claims can be made in local courts, and how far alternative modes of settlement must be relied upon in this

[123] See Denza "*Ex parte Pinochet*: Leap or Lacuna?" (1999) 48 ICLQ 949

respect. Nevertheless the point here is that the immunities of the officials of an organisation correspond with its legal responsibility rather than its own immunity in national courts. Thus, for example where an organisation only enjoys a limited degree of immunity, its officials will enjoy immunity from suit in relation to their official acts, notwithstanding that the Organisation itself does not enjoy immunity in respect of its liability for those acts.

This approach to the immunities of officials, based upon the vicarious liability of the organisation for official acts, operates most clearly in relation to civil liability. As has been shown by contrast many criminal acts by officials cannot be considered as official acts of the organisation, and so the question of immunity does not arise.[124] Nevertheless official act immunity should still be available in relation to criminal jurisdiction, where the independent functioning of the organisation would be adversely affected by criminal proceedings. However given the reasoning of the House of Lords in the *Pinochet* case[125] it debatable how far such immunity would shield an official from personal responsibility for the most serious of international crimes.

[124] see for example the cases of *US v. Coplon* (1949) (84 F.Supp. 472) and *US v. Melekh* (1960) (190 F.Supp. 67); also *Westchester County v. Ranallo* (1946) 13 ILR 168

[125] *R. v. Bow Street Stipendiary Magistrate ex parte Pinochet (No.3)* [1999] 2 WLR 827

CONCLUSIONS

The questions raised when international organisations come before national courts are complex and do not lend themselves easily to generalised conclusions. It has been shown that the range of variables is very broad. Different answers may be reached depending upon the nature of the organisation in question, or upon the nature of the acts under consideration. Differences may also arise as between national legal systems, particularly where their core values are at stake, such as the role of the courts themselves, and human and constitutional rights to judicial protection. The aim of this study has therefore been to map a route through this wide field, by which its different facets can be appreciated.

Broadly speaking two inter-related aspects have been identified in the accommodation of international organisations within the present international system, which is established on the basis of the allocation of jurisdictional competence to States. These are respectively: (i) a functional aspect and (ii) an institutional aspect. The first is outward looking concerns the scope of the activities of an organisation and its relations with outsiders. The second is inward looking and concerns the structures of the organisation itself and its internal relations.

The reason for the existence of any international organisation is the achievement of the functions which its member States have collectively entrusted to it, having determined that they are better achieved collectively than individually. The functions of an organisation are therefore at its very core, defining the scope of its powers and activities. The immunities of an international organisation are of particular

importance since they seek to guarantee its ability to achieve its functions free from any undue influence which any one of its member States (but perhaps particularly its host State) may have over that organisation through the exercise of national jurisdiction. The jurisdictional immunities of an international organisation are the primary means of accommodating a public international organisation, which does not have its own territory or population, within the system of which allocates jurisdiction amongst States.

Nevertheless this process of accommodation is not necessarily uniform or rigid but instead depends upon the functions of the organisation in question. Nor are analogies with other regimes of immunity, such as State or diplomatic immunities, directly transferable in relation to international organisations, since the recipients of those immunities are in legal terms treated equally, i.e. the legal equality of States suggests that a national jurisdiction will recognise the same immunities in respect of all foreign States, or diplomats from all foreign States. On the other hand each organisation is endowed with the immunities appropriate to the fulfilment of its own particular functions, with considerable differences between them in this respect. From a review of a broad selection of relevant treaty provisions, certain patterns begin to emerge. Thus the UN and many of specialised agencies, and many of the broad political and military organisations, whose primary functions are what might broadly be described as "political" being concerned with inter-State relations, enjoy a broad range of immunities from "every form of legal process". Similarly international courts whose independence from State influence is absolute in relation to their judicial functions, must be also be granted broad immunities. Whereas organisations whose functions involve them in extensive activities in the market-

place, as for example the World Bank Group, will enjoy more limited immunities, particularly in relation to those market-oriented activities. Further regional organisations and those with specific non-political functions such as for example a scientific research organisation may enjoy much more restricted immunities.

The flexibility inherent in the functional approach to immunity is also demonstrated in the range of international caselaw reviewed. A striking feature of many of those cases is the need to accommodate the various interests at stake. The immunities of an international organisation are seen as part of an ongoing relationship, based on duties of good faith and cooperation, in which the interests of an organisation and those of its member States must be balanced against each other. Thus for example in the *Cumaraswamy* case it was shown that the ICJ gave a rather nuanced answer to the question as to who ultimately should decide on whether an act of an official is performed pursuant to his official functions and is therefore (in the absence of waiver) immune. On the other hand the European Court of Human Rights, considering the position of the individual who is prevented from access to the local court an international organisation by reason of its immunity, upheld the immunity. However it balanced that finding on the basis that there were reasonable alternative remedies available to the individual.

The position of a national court is of course distinguishable from that of an international court. In many cases what is required of the national court is to give effect to the treaty-based immunities of international organisations duly given effect in the national legal system, in whatever way that may be achieved. If one considers the results of the various cases examined, it appears that a considerable degree of

uniformity has been achieved in the application of core treaty provisions on immunity. Despite some contrary indications from the US, and formerly Italy, it appears that a direct application of State immunity is not considered appropriate and much of the caselaw considers the situation of international organisations as particular. Nor, so far, has there been a widespread tendency to apply additional restrictions to immunity beyond those contained in treaties, based on a more extensive reading of the functional immunity standard, though again some aspects of the Italian caselaw reflect this approach. However it is not clear that national courts would generally be well-placed to make this decision.

Finally it is interesting to note that to date there have been few cases in which human or constitutional rights of access to justice have been opposed to international immunities, before national courts. It remains to be seen whether the *Beer and Regan* case before the European Court of Human Rights will lead to further challenges, particularly as regards the adequacy of alternative remedies provided by international organisations.

A further means by which flexibility may be achieved on questions of immunity is through the device of waiver. International organisations, understandably conscientious of the potential vulnerability in relation to national authorities, tend to try to avoid waiving immunity in advance by contractual provisions. Frequently an alternative remedy in the form of arbitration is provided for. However the importance of the provision of such alternative remedies as a balancing factor, suggests that any alternative remedy offered must be effective. It therefore appears that the treatment of an agreement to arbitrate as an implied waiver from the supervisory jurisdiction of

the local courts appears to be unobjectionable in principle, though there is some difference in treatment of this issue between national courts. It remains the case however that the more coercive nature of the process, means that any waiver of immunity from execution in respect of the enforcement of arbitral awards, must be express.

The second aspect of the accommodation of an international organisation within the system of national jurisdiction, has been termed the "institutional" aspect. What is intended here is that the focus should shift from questions of the appropriateness of exercise of national adjudicative jurisdiction over an organisation, to an acknowledgement by national courts that the proper law of an international organisation in respect of its internal or institutional relations derives from international law. This is a consequence of the creation of international organisations under international law, and an aspect their international personality.

The internal relations of international organisations, as for example as between the organisation and its member States or between organs of an international organisation, are governed by their own internal law which derives from their establishment in international law. In matters governed by the internal law of an organisation there is simply no place for the adjudication by national courts or the application of national law. Unlike with functional immunities, this lack of competence *ratione materiae* of national jurisdiction, does not arise by way of express treaty provision, but rather arises in general international law.

As such the scope of this lack of competence *ratione materiae* remains uncertain. In practice an important question is whether it extends to the employment relations of an international organisation. It would appear that most international organisations have developed their own systems of international administrative law, complete with not only substantive norms but also judicial procedures. Where this is the case there seems to be little place for the exercise of national law or jurisdiction. Clearly the independence from all forms of national influence of the staff of international organisation is a key principle of the international civil service and essential to the genuinely international status of international organisations.

In many cases the co-existence of broad jurisdictional immunity masks the dismissal of employment suits in national courts. An organisation which enjoys broad immunities by virtue treaty, may seek to rely on that immunity for the dismissal of employment suits, being a simpler or more immediate means to put an end to a suit. However where an organisation enjoys only limited or no immunity under treaty, the lack of competence *ratione materiae* of any national jurisdiction over these matters will provide a solution to the question. However it is noticeable that in such cases, national courts have not always explained this in full, but have expressed themselves in terms of an immunity in customary international law in respect of the employment relations of international organisations.

Finally the immunities of employees of international organisations for their official acts is so widely recognised in respect of organisations of all types that its is probably a rule of customary international law. They too have both functional and institutional aspects. They are necessary in part because to avoid the possibility of

rendering meaningless the functional immunities of the organisation itself, by the expedient of naming its officials instead of the organisation as respondents.

However as we have seen the immunities of international officials are not coterminous with the functional immunities of the employer international organisation. They can in fact apply in situations where the employer organisation is itself not immune, thus effectively channelling claims towards the organisation rather than the individual employees. Thus these immunities have an institutional aspect in maintaining the integrity and internal cohesion of the organisation itself.

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