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I. Introduction

A. Preliminary remarks

1. By its resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the International Law Commission to consider the question of relations between States and inter-governmental international organizations " at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly ".[1]

2. At its eleventh session in 1959, the International Law Commission took note of the resolution and decided to consider the question in due course (A/4169, paragraph 48).

3. At its fourteenth session in 1962, the Commission decided to place the question on the agenda of its next session. It appointed the present writer as Special Rapporteur, and requested him to submit a report on this subject to the next session of the Commission (A/5209, paragraph 75).

B. *The French delegation's draft resolution and the discussion in the Sixth Committee*

4. In the course of the consideration by the Sixth Committee, during the thirteenth session of the General Assembly in 1958, of chapter III (diplomatic intercourse and immunities) of the report of the International Law Commission covering the work of its tenth session, the representative of France submitted on 27 October 1958 a draft resolution whereby the General Assembly would request the Commission to include in its agenda the study of the subject of relations between States and international organizations.[2] In support of this request, it was stated in the preamble that:

> " . . . the development of international organizations, and in particular of the United Nations, and its specialized agencies, has increased the number and scope of the legal problems arising out of relations between the organizations and States, whether or not they are members of those organizations ", that " the existence of special conventions on the subject merely emphasizes the need for codification of the rules contained therein ", and that " the search for solutions, which remain undetermined, to problems arising out of relations between States and organizations would contribute to the progressive development of international law in a field which has assumed great practical importance . . . "[3]

5. The French delegation's draft resolution referred to paragraph 52 of the report of the International Law Commission covering the work of its tenth session (A/3859) which reads:

> " Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions."

6. A revised draft later (on 6 November 1958) submitted by the representative of France referred further to paragraph 51 of the International Law Commission's report on its tenth session, which refers to *ad hoc* diplomacy and in particular to diplomatic conferences. The operative part of the draft was also revised to provide that the General Assembly would request the Commission to give further consideration to the questions of relations between States and international organizations, in the light of the current study of diplomatic intercourse and immunities and of *ad hoc* diplomacy, and in the light of the discussion in the Assembly.[4]

7. In introducing his draft resolution, the representative of France stated at the 569th meeting of the Sixth Committee on 28 October 1958 that:

> " . . . one of the most characteristic phenomena of the present time was the development of international organizations of a permanent character as opposed to the temporary arrangements coming under the heading of '*ad hoc* diplomacy'. The development of permanent international organizations presented a number of legal questions, which were only partially solved by the special, bilateral conventions by which most of them were governed. It was necessary, therefore, not only to codify those special conventions but also to work out general principles which would serve as a basis for the progressive development of international law on the subject . . ."[5]

8. Later, the representative of France orally amended the operative part of his draft resolution to request the International Law Commission to give further consideration to the question of relations between States and international organizations at the appropriate time and after the study of diplomatic intercouse and immunities, consular intercourse and immunities and *ad hoc* diplomacy had been completed, in the light of the results of that study and of the discussion in the General Assembly (A/4007, paragraph 20).

9. The representative of France also accepted a suggestion by the representative of Greece that the draft should specify that the international organizations in question were inter-governmental (*ibid.*, paragraph 21).

C. *General Assembly. Resolution 1289 (XIII)*

" *The General Assembly,*

" *Taking note* of paragraph 51 of the report of the International Law Commission covering the work of its tenth session (A/3859 and Corr.1), which refers to *ad hoc* diplomacy and, in particular, to diplomatic conferences, and of paragraph 52 of the same report, which refers to relations between States and international organizations,

" *Considering* the importance and development of international organizations,

" *Considering* the observations made by Governments as the twelfth and thirteenth sessions of the

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[1] *Official Records of the General Assembly, Thirteenth Session, Annexes,* agenda item 56, document A/4007.

[2] *ibid.*, document A/C.6/L.247.

[3] *ibid.*

[4] *ibid.*, document A/C.6/L.427/Rev.1.

[5] *ibid.*, Sixth Committee, 569th meeting, para. 22.

General Assembly, particularly on the question referred to in paragraph 52 of the report,

" *Invites* the International Law Commission to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussions in the General Assembly. "

D. *Purpose of this study*

10. This report is intended primarily as a preliminary study of the scope of the subject of " Relations between States and inter-governmental organizations ", and the approach to it. It is, therefore, a reconnaissance rather than a definitive study.

11. Its purpose is to present a broad outline of the questions to be considered in connexion with the external relations of international organization and the legal problems they give rise to.

12. This report will first trace the evolution of the concept international organization. A second section will review the attempts to codify the international law concerning the legal status of international organizations and related problems. The third section will present in broad outline a detailed division of the subject with a view to defining and identifying the various legal questions which should be included in it.

II. The evolution of the concept of international organization

A. Historical development

13. Institutional co-operative plans and experiences between politically independent entities go far back in history, at least to ancient Greece. But the modern concept of international organization is the outcome of a century and a half of evolution in the co-operative practice of States in response to a rapidly changing world. The industrial revolution, through its impact on production, communication and commerce, increased the independence of the different parts of the world to an unprecedented degree. But at the same time, it progressively made available to man means of destruction which resulted in total war.

14. The partial accommodation to specific new needs paved the way for similar accommodation to similar future needs, and rendered the novel forms of co-operation more common and acceptable in international relations.

15. The evolution of co-operative forms of State practice took two parallel paths:

(1) An evolution from the stage of *ad hoc* temporary conferences which are convened for a specific purpose and which come to an end once the subject-matter is agreed upon and embodied in an international agreement, to the stage of permanent international organizations with organs that function permanently and meet periodically.

(2) An evolution from the level of purely administrative unions, each specializing in one kind of international activity of a basically technical character, to that of general international organizations whose scope of activities, though predominantly political, extends to all aspects of international co-operation, i.e. economic, social, technical, etc.

16. Two immediate tributary sources of present-day international organizations can be traced:

1. *The conference system*

17. For several centuries, European States used to call an international conference in the aftermath of a war to reach an agreement on territorial changes and adjustments which resulted from it and to prepare a peace treaty sanctioning the new situation.

18. Some such peace conferences constitute landmarks in the history of international law, such as those of Westphalia (1648) and Utrecht (1713). But in the nineteenth century their importance acquired new dimensions and they extended their scope beyond that of peace settlements.

19. (a) *The Congress of Vienna and the Concert of Europe systems:* The Vienna settlement of 1815 is particularly relevant to international organization, and in many ways. The preceding conferences had aimed at establishing peace, but the Vienna Conference aimed, in addition, at the maintenance of peace within the new European system it had established.

" It was considered by its leading participants as the forerunner of a series of regular consultations among the great powers which would serve as board meeting for the European community of nations." [6]

20. This scheme did not function except for the period from 1815 to 1822, during which four conferences took place. These revealed enough differences between the policies of the great powers to render such a system unworkable. But the technique of diplomacy by conference, outside the narrow case of peace settlements, whenever the European system was endangered, established itself as a basic feature of the century extending from 1815 to 1914. It is sufficient to mention a few examples such as the Paris Conference of 1856, the London Conferences of 1871 and 1912-13, the Berlin Congresses of 1878 and 1884-85, and the (Algeciras) Conference of 1906, to realize the great importance of this new technique.[7]

21. The Congress of Vienna system was accompanied by what became known as the Concert of Europe. It first appeared in the Treaty of Chaumont of 1814, in which the parties undertook to act " *dans un parfait concert* ". Then it merged into the Vienna system and survived it after 1822. It was neither a formal nor an institutional arrangement. But it operated according to certain principles, the most important of which was the special status of the great powers who assumed the position of " self-appointed guardians of the European community and executive directors of its affairs ".[8] They legislated on behalf of this community, basically to the small Powers, and admitted nations to this " exclusive club ". Thus they recognized the independence

[6] Inis Claude, Jr., *Swords into Plowshares,* The Problems and Progress of International Organization, p. 23 (2nd ed. rev.) (New York, 1959).

[7] *ibid., loc. cit.*

[8] *ibid.,* p. 25.

of Greece and Belgium in 1830 and declared in the Treaty of Paris 1856 that the Sublime Porte (of the Ottoman Empire) was admitted " *à participer aux avantages du droit public et du concert européen* ".

22. The political conference system which prevailed in nineteenth century European politics was a step forward towards the stage of international organization, but did not reach it. It did not develop " permanently functioning institutions ". Conferences were sporadic rather than periodic. They were " the medicine of Europe rather than its daily bread ".[9] But they increased the awareness of States of the need for new means of international co-operation and of the possibilities of multilateral or quasi-parliamentary diplomacy.

23. (b) *Multilateral Treaties:* Another innovation of the Congress of Vienna was the technique of multilateral treaty. Up to that time, this technique was unknown. When a peace settlement included several States, the end result was a series of bilateral treaties between different pairs of parties. This was the case in the Peace of Westphalia. It was also the case of the Paris Treaty of 30 May 1814 which was composed of seven separate treaties, each between France and an allied Power, although they were identical in their content. Thus, even when the content was identical, these treaties were legally separate.

24. The Final Act of the Congress of Vienna was, for the first time, signed by all of the parties to the Congress, and bound all the other bilateral treaties issuing from it into " one common transaction ". The evolution of the multilateral treaty culminated in the Paris Treaty of 1856 which took the initial form of a multilateral treaty without passing through the bilateral treaties stage.[10]

25. The multilateral treaty was soon extended in scope beyond the collective settlement into the legislative field. Law-making treaties (*traités-lois*) soon made their appearance, also within the framework of international conferences. They included general rules of international law, thus asserting their role as an important source of that law (e.g. the appendix to the Final Act of the Congress of Vienna concerning the rank of diplomatic agents). The also extended beyond the strictly narrow traditional subjects of international law to regulate certain efforts at international co-operation in the humanitarian and social fields such as the suppression of the slave trade, which was dealt with in several multilateral conventions from the Final Act of the Congress of Vienna to the General Act of the Anti-Slavery Conference at Brussels in 1890.

26. The relevance of multilateral treaties to international organizations is so obvious as not to need to be mentioned. Suffice it to say that they provided the means for their creation.

27. (c) *The Hague Peace Conferences:* The 19th century witnessed an ascending trend in favour of arbitration. This trend began with the Jay Treaty of 1794 and continued throughout the 19th century to culminate in the two Hague International Peace Conferences of 1899 and 1907.

28. These two Conferences, though fitting in the conference patterns described above, deserve some attention because of their special contribution to the concept of international organization. The contribution lies in two of their features. The first is the scope of international activities envisaged by the regulations ensuing from them. They used the technique of multilateral conventions to introduce more adequate regulations of the basic problems of international relations, namely those of peace and war.[11] They thus anticipated the major field of activity of the general international organizations which succeeded them. While they did not establish compulsory arbitration, they provided States with a standing arbitration machinery should they decide to use one; while they did not prohibit war, they tried to humanize it and limit its damage. The conventions which ensued exemplify international legislation as a principal source of international law better than most. They were " divorced from the immediate problems raised by particular wars or disputes " and were " concerned with international problems in abstract " and with institution building. They, thus, established

> " . . . the precedent that collective diplomacy should be oriented toward such matters as the codification and further development of important branches of international law, the formulation of standing procedures for the peaceful settlement of disputes, and the promotion of the principle that pacific solutions should be sought by disputants and might properly be urged and facilitated by disinterested parties ".[12]

29. The second element in the contribution of the Hague Conferences to the development of international organization is their orientation towards universality. While the first Conference was attended by only twenty-six States, mainly European, the second Conference was attended by forty-four States including most of the Latin-American republics,[13] in addition to some Asian Powers.

30. A third potential contribution might be added. The Conferences of 1899 and 1907 showed the possibility of periodic meetings.[14] This possibility was discussed in the second Conference which recommended:

> " The assembly of a third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers . . . " [15]

But the proposed third conference was never convened as a result of the outbreak of the First World War.

31. (d) *The Pan-American System:* The conference system was also resorted to on a regional level in the

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[9] Sir Alfred Zimmern, *The League of Nations and the Rule of Law*, 1918-1935 (London, 1936).

[10] See Guggenheim, *Contribution à l'Histoire des Sources du Droit des Gens*, 94 Recueil des Cours de l'Académie de Droit International de la Haye 1, pp. 70 *et seq.*, (1958 II); Lachs, *Le Développement et les Fonctions des Traités Multilatéraux*, 92 Recueil des Cours 229, pp. 237 *et seq.* (1957 II).

[11] *For* a brief description of these conventions, see Oppenheim, *International Law*, vol. I, p. 58 (8th ed by Lauterpacht) (London, 1955); Nussbaum, *A Concise History of the Law of Nations*, pp. 217, 227-229 (2nd ed. rev.) (New York, 1954).

[12] Claude, *op cit.*, p. 30.

[13] *Id.* at p. 29.

[14] Linden Mander, *Foundations of Modern World Society*, p. 594 (London, 1941).

[15] J.B. Scott, *The Reports to the Hague Conferences of 1899 and 1907*, p. 216 (Oxford, 1917).

Pan-American system. In 1826, a conference of American Republics was held in Panama under the influence of Bolivar, but did not yield tangible results. [16] The Pan-American system took shape, however, since the Washington Conference of 1889. Since then, several conferences have been held at somewhat regular intervals, usually of five years,[17] culminating in the establishment of the Organization of American States in 1948. Since the inception of the movement, a Bureau was created which acquired progressively more extensive functions. At the Buenos Aires Conference of 1912, the Conference adopted the titles of the Union of American Republics for itself and the Pan-American Union for the Bureau.

32. The periodic character of these conferences contributed in several ways to the techniques of international organization:

1. The conferences were not convened at the initiative of any one State, but the time and place of each were decided by the previous one.

2. The agenda of each conference was prepared by the governing body of the standing administrative organ, the Pan-American Union.

3. A greater possibility existed to undertake preparatory work before each conference than in the case of *ad hoc* conferences.

4. The periodic character made possible the development of more elaborate and formal procedural arrangements.[18]

2. *International administrative unions*

33. The second tributary source of present-day international organizations is the phenomenon of international administrative unions which appeared in the 19th century, especially in its second half. These were permanent agencies dealing with non-political technical international activities. They were called forth by the increasing complexity and interaction of technical, economic, social and cultural activities at the international level.

34. (a) *International river commissions:* The Final Act of the Congress of Vienna proclaimed in articles 108-117 the principle of freedom of navigation on international rivers (rivers separating or traversing several States) for all States.[19] This proclamation which responded to a felt need arising from the intensification of commercial and economic activities led to the appearance of a new type of international machinery in the form of river commissions.[20] Thus, the Convention of Mannheim of 1868 between the riparian States of the Rhine created the Central Commission for the Navigation of the Rhine, which was composed of one representative of each riparian State. The function of the Commission was to control the observance of the rules of the convention, its decisions were taken by unanimity and its powers were limited to recommending measures to riparian States for incorporation into their municipal law.[21] Moreover, it had jurisdiction over certain categories of legal disputes concerning individuals. [22] The European Danube Commission created by the Peace Treaty of Paris 1856 was given extended powers both as to the control and policing of navigation and as to the public works it could undertake to secure the navigability of the Danube estuaries.[23]

35. (b) *Other administrative unions:* A host of other administrative unions in many fields appeared as need arose. Thus, the Universal Telegraphic Union was established in 1865, and the International Bureau of Telegraphic Administration was established and located at Berne as its central organ. The General Postal Union was established in 1874, also with its Bureau in Berne. (The International Bureau of Industrial Property in 1883 and of Literary Property in 1886; the International Convention on Railway Freight Traffic in 1890; the International Radio Telegraphic Convention in 1906; the Convention on the Creation of an International Office of Public Health in 1907; etc.) [24]

36. Such unions had, in general, two organs:

1. Periodical conferences or meetings of the representatives of member States, whose decisions required usually the unanimity of votes;

2. A permanent secretariat, a Bureau, which assumed the administrative tasks.

37. These unions contributed to the concept of international organization a most important factor, namely the institutional element. Their permanent character which was secured through their standing organ, the Bureau, provided the threshold between the technique of the conference and that of the organization. Moreover, in some of them, the rules of unanimity and " no treaty obligation without ratification " were being pushed aside.[25] Finally, they contributed to the awareness of States " of the potentialities of international organizations as a means of furthering an interest common to numerous States without detriment to that of any concerned ".[26]

B. Definition of international organizations

38. It is possible to classify the different definitions of international organizations found in the literature on the subject into three categories. The first tends to assimilate or integrate the phenomenon of international organization into the traditional classical patterns of international law. The second projects our present understanding of the phenomenon retrospectively to cover certain earlier experiences, thus explaining the past by the present. The third undertakes to isolate and emphasize the element or elements of internatio-

[16] Harold Vinacke, *International Organization,* pp. 98-99 (New York, 1934).

[17] Washington 1889; Mexico City 1901; Rio de Janeiro 1906; Buenos Aires 1910 Santiago 1923; Havana 1928; Montevideo 1933; Lima 1938; Panama 1939; Havana 1940; Rio de Janeiro 1942; Chapultepec 1945; Rio de Janeiro 1947; Bogotá 1948.

[18] Vinacke, *op cit.,* p. 153.

[19] Oppenheim, *op cit.,* p. 467; Nussbaum, *op. cit.,* p. 186.

[20] See generally J.P. Chamberlain, *The Regime of the International Rivers, Danube and Rhine* (New York, 1923); Radovanovitch, *Le Danube et l'Application du Principe de Liberté de la Navigation Fluviale* (Paris, 1925).

[21] Reuter, *Institutions Internationales,* p. 189 (3rd ed 1962) [cited hereinafter as Reuter, Institutions].

[22] *Id.,* p. 191.

[23] *Id.,* p. 190; Nussbaum, *op. cit.,* p. 191.

[24] Nussbaum, *op. cit.,* pp. 198 and 213.

[25] Claude, *op. cit,* p. 39.

[26] 1 Hyde *International Law, chiefly as interpreted and applied by the United States,* p. 131 (2nd ed. rev.) (Boston, 1947).

nal organizations which are considered by the different authors in this category to be essential for them to be so considered.

39. It is not surprising that early definitions were of the first category which tried to explain the new phenomenon of international organization deductively in terms of the classical patterns of international law.

40. One of the earliest and most influential points of view belonging to this category is that of *Anzilotti* who characterized international organizations as collective (or common) organs of States, a concept which he defined as follows:

> " Sont organes collectifs ceux qui sont institués par plusieurs Etats ensemble et dont la déclaration de volonté est rapportée par le droit international à une collectivité de sujets et, comme telle, rendue la présupposition de conséquences juridiquement déterminées ".[27]
>
> He also specified that:
>
> " L'institution d'organes collectifs présuppose un accord entre Etats . . . " [28]

41. Anzilotti distinguishes between international conferences where the wills expressed by representatives of States remain separate and do not merge, though they may meet in an agreement, and collective organs where a common will emerges and is attributed to all States which have the organ in common.[29] This distinction may appear to be admitting the separate entity of the collective organ by emphasizing the existence of only one will, namely that of the collective organ. In fact, it does not. True, there is only one will, that of the collective organ, but it is not a separate will of the organ, it is the common will of the States whose organ it collectively is.[30] The phenomenon of international organization is explained in terms of organs (or representatives, agents) of States and treated as such side by side with diplomatic agents in the same chapter of the *Cours*. Although the institutional forms are dealt with by Anzilotti, they are treated as new modalities of the system of complex (collegiate) organs and not as a new phenomenon in itself. The emphasis is on the treaty aspects and the organ character of international organizations rather than on the institutional element.[31]

42. Another definition which explains international organizations in terms of pre-existing traditional international law is that of *Kelsen,* which reads as follows:

> " An organized international community is constituted by a treaty which institutes special organs of the international community for the pursuance of the purposes for which the community has been established. This community is an 'international' community; it has not the character of a State . . . [it]is an international organization. In contradictinction to a federal State, it is a confederation of Stales." [32]

43. This definition emphasizes the conventional basis of international organization and distinguishes its separate organs from those of the member States, but it does not mention the separate entity of the organization, and as such does not go far beyond Anzilotti. Moreover, it explains it in terms of " confederation ", although the two phenomena of confederation of States (and for that matter, other kinds of unions of States) and international organization are different in terms of both their historical process and setting and their purpose. A confederation of States is usually a first step towards the creation of a federal or even unitary State, while an international organization simply provides a framework for international co-operation between States without being necessarily envisaged as a stage towards the establishment of a union of States.

44. Kelsen admits that historically they are different, but considers that:

> "there is no essential difference between these confederations [the German Confederation 1815-1866, the Swiss Confederation and the USA before the last two became federal States in 1848 and 1787 respectively] and other organized communities of States (international organizations) which are not centralized as to form a federal State ".[33]

45. It is interesting to note that the three confederations he mentioned did lead to new federal or unitary States. His definition fails to bring forward the distinctive character of international organizations.

46. An example of the second category of definitions which projects retrospectively our present understanding of the phenomen of international organization, to include earlier experiences which set themselves to perform functions similar to those of present-day international organizations though by different means, is that provided by *Stanley Hoffmann.* He defines the term international organization as:

> " toutes les formes de la co-opération entre les états, tentant à faire régner par leur association un certain ordre dans le milieu international, créés par leur volonté et fonctionnant dans un milieu dont les états sont les personnes juridiques majeures ".[34]

47. This definition, which is based on the purpose and object of international co-operation, does not take into account its institutional aspects and the legal forms it takes and the procedures it follows. It is devised to

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[27] Anzilotti, *Cours de Droit International,* p. 283 (French translation by Gidel) (Paris, 1929).

[28] *Ibid.*

[29] *Id.,* p. 284.

[30] The difference between the two points of view is of little value as long as unanimity is required. But once votes are taken by majority the collective organ theory becomes less convincing. See Reuter, *Principes de Droit International Public,* 101 Recueil des Cours, p. 93 (1961 IV).

[31] Anzilotti even objected to the term " international organization ". M. O. Hudson wrote in this respect: " The term 'nternational organization' was never precisely defined in this connexion (advisory proceedings before the P.C.I.J.); in 1924 Judge Anzilotti referred to it as an unhappy expression which had been adopted to avoid mention of the ILO, and he sought to have the term defined, but refrained from pressing this proposal in 1926 because he thought difficulties could be avoided so long as the initiative rested with the Court. " Hudson, *The Permanent Court of International Justice 1920-1942, A Treatise,* p. 400 (New York, 1943).

[32] Kelsen, *Principles of International Law,* p. 172 (New York, 1952). Guggenheim provides a similar definition. He treats international organizations under the subject of " fédération internationale " and defines the latter as: " Une communauté conventionnelle où la législation et l'exécution des normes juridiques sont confiées, du moins en partie, à des organes particuliers et non aux organes étatiques créateurs de la fédération ". 1 Guggenheim, *Traité de Droit International Public,* p. 236 (Genève, 1953).

[33] Kelsen, *op cit.,* p. 172.

[34] Hoffmann, *Organisation Internationale et Pouvoirs Politiques des Etats,* p. 12 (Paris, 1954).

accommodate efforts at international co-operation from the Concert of Europe to the United Nations, explaining the past in terms of the present, and maintaining that, politically speaking, the differences between the two are unimportant. This last assumption is by no means fully corroborated. Moreover, because the definition does not take into account the legal technicalities and goes beyond them to the politically significant elements, it cannot be relevent for legal purposes.

48. The third category of definitions proceeds inductively to isolate and emphasize certain aspect or aspects of international organizations which are considered by the respective authors in this group as being the essential ones. These include the purpose of the organization, its conventional basis, its permanent character, its having its own organs separate from those of member States, its possession of a separate juridical personality, or a combination of these.

49. *Chaumont* defines an international organization as:

> " Une réunion de personnes, représentant généralement des Etats, qui exercent, au sein d'organes constitués d'une manière régulière et durable, certaines fonctions d'intérêt international." [35]

50. This definition emphasizes the institutional element and the purpose of international organizations, but it does not take into consideration its conventional basis and is wide enough not to exclude non-governmental organizations, which are not international organizations in the proper legal sense of the word.[36]

51. *Madame Bastid* definies international organizations as:

> " des groupements d'Etats qui reposent sur un traité et qui présentent une certaine stabilité ".[37]

This definition mentions the conventional basis and the stable character of international organization, but not its institutional element nor its separate entity, although it can be said that at least the institutional element is assumed in the stable character.

52. *Reuter,* after warning that:

> " Une définition est licite à la condition de renoncer à y attacher des conséquences juridiques strictes ",[38]

definies international organization by defining the two component words of the term:

> " En tant qu'*organisation* il ne peut que s'agir dun groupe susceptible de manifester d'une manière permanente une volonté juridiquement distincte de celle de ces membres.
>
> " En tant qu'organisation *internationale,* ce groupe est d'une manière normale, mais non exclusive, formé d'Etats." [39]

53. Thus, he emphasizes the elements of permanence and a separate will as expressions of the distinct and independant character of the international organization vis-à-vis its member States. Permanence is used in the sense of a continuous functioning of the organs of the organization, which permits it to assert a certain degree of independence of its members. But the most important element is the will of the organization, separate from the wills of the members States, which is expressed legally in terms of an independant juridical personality. To be politically significant, this separate will has, however, to express a certain political power and to be formulated according to the majority principle.[40] The *international* element of the definition presumes the conventional basis of the organization, which is also presumed, but more as a constitution than as a treaty, by the *organization* element of the definition.

54. Several definitions are provided by the Anglo-American literature.[41] Hyde, in discussing international co-operation, provides the following definition:

> " Some manifestations of international co-operation appearing in the course of the Nineteenth Century and early in the Twentieth, assumed the form of international organizations *established by treaty for the fulfilment of certain international tasks.*" [42]

He gives as examples several administrative unions and the so-called American International Union.[43]

55. This definition mentions the conventional basis and the purposes of international organization but does not take into consideration either the institutional element or the separate entity of the organization. At least the latter omission can be explained by the fact that the definition was formulated in connexion with the pre-First World War examples.

56. Hudson provides in his case-book a definition by John D. Hickerson which reads:

> " The international organization . . . emerges from a simple decision of national governments to deal with a particular subject in concert — or through multilateral diplomacy rather than in a series of separate negotiations — or through bilateral diplomacy. *Whenever the basic decision to act in concert produces an institution for common action, an international organization is created.*" [44]

57. This definition mentions only the institutional element. The conventional basis can be presumed. But the separate entity is not taken into consideration.

58. Both Brierly and Sir Gerald Fitzmaurice provided a definition of international organization in their reports on the law of treaties to the International Law Commission.

Brierly's definition is (A/CN.4/23, article 2):

> "An international organization is an association of States with common organs which is established by Treaty."

It emphasizes the conventional basis and the institutional element, but not the separate entity of the organization. It is similar to Kelsen's definition, and although

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[35] Chaumont, *L'O.N.U.,* p. 5 (3rd ed., Paris, 1962).

[36] See *infra,* para. 63.

[37] (Mme) Bastid, *Droit des Gens:* Principes généraux, p. 329 (Université de Paris, Institut d'Etudes politiques) (Lectures 1056-1957, mimeographed).

[38] Reuter, *Institutions,* p. 195.

[39] *Ibid.*

[40] *Id.,* p. 196.

[41] The USSR Academy of Sciences (Institute of State and Law) textbook on international law includes a chapter (VIII) on international organizations contributed by S.B. Krylov (English edition, Moscow, 1939. But this chapter does not contain a definition of international organizations. Neither Oppenheim's treatise nor Brierly's introductory book includes such a definition.

[42] 1 Hyde, *op. cit.,* p. 131.

[43] *Ibid.* (note 32).

[44] Hudson, *Cases and Other Materials on International Law,* p. 27 (3rd ed., St. Paul, 1951).

it includes all in international organizations, it does not exclude other associations of States.

59. Sir Gerald Fitzmaurice provides the following definition (A/CN.4/101, article 3):

> " The term 'international organization' means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States, and being a subject of international law with treaty-making capacity."

60. This definition, by using the enumerative method, gathers all the essential elements (which have been also derived from Reuter's definition): the conventional basis, the institutional element and the separate entity of the organization. The separate entity is expressed in three different ways: a personality distinct from that of the member States, the quality of subject of international law and the treaty-making power. This elaboration can be explained by the fact that the definition is given in the context of the law of treaties. The separate personality of the organization does not imply necessarily the treaty-making power. But the mention of the treaty-making power necessitates the mention of its condition precedent, namely the quality of subject of international law.

C. Classification of international organizations

61. Several classifications of international organizations have been proposed. These classifications can, in turn, be classified into those pertaining to the membership of international organizations and those pertaining to their function. But before dealing with these two categories, two other classifications have to be examined.

1. *The classification of international organizations into temporary (or* ad hoc*) and permanent organizations*

62. This classification, which is adopted by certain writers,[45] does not seem warranted. Temporary conferences are not international organizations in the sense which emerges from the definitions surveyed above, though they were a historical stage leading to international organizations proper. They lack the institutional element. Although periodic conferences can develop certain aspects of this element, they still lack an entity separate from those of the participating States, which is a necessary element for an international organization.

2. *The classification of international organizations into public (inter-governmental) and private (non-governmental) organizations* [46]

63. Private international organizations, in spite of the great importance of some of them and the role envisaged for them in the Charter of the United Nations (Article 71), are not international organizations in the proper sense. Their members are not States, and they are not created by a treaty, though some of them may be mentioned in or assigned certain functions by treaties. The Charter does not qualify them as international, but simply as non-governmental organizations, in Article 71. But it uses the term international organization without qualification in the same Article as well as in the Preamble to indicate public international organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the term " public international organisation ".

Classification of international organizations according to membership

1. *According to the scope of membership: universal and regional organizations*

64. A universal organizations is one which includes in its membership all the States of the world. This is not the case of any past or present international organization yet. Thus, it may be more accurate to use the terms " universalist " suggested by Schwarzenberger [47] or " of potentially universal character " used in the treatise of Oppenheim.[48] The French term " à avocation universelle " [49] conveys the same meaning as these two terms, which is that while the organization is not completely universal, it tends towards that direction. This was partially the case of the League of Nations and is, in a much broader sense, the case of the United Nations, especially after 1955, and the specialized agencies.

65. The United Nations Charter, in spite of devoting a whole chapter to regional arrangements, does not provide a definition of them. At the San Francisco Conference, the Egyptian delegation proposed that the following definition of regional arrangement should be introduced into the Dumbarton Oaks Proposals:

> " There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security in their region, as well as for the safeguarding of their interests and the development of their economic and cultural relations." [50]

This definition was rejected by Committee III/4 as being too restrictive.[51] In the absence of a definition, there is much debate concerning the extent to which the concept of regional arrangements can be stretched.[52] But, up to the present, the Security Council has not formally recognized any organization as possessing this quality.

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[45] Schwarzenberger, *A Manual of International Law*, vol I, p. 227 (4th ed., London 1960); USSR Academy of Sciences, *op. cit.*, p. 320 (Krylov qualifies the permanent organizations, however, as " organizations in the full sense of the word ". *Ibid.*)

[46] *Ibid.*

[47] Schwarzenberger, *loc. cit.*

[48] Oppeneim, *op. cit.*, p. 370.

[49] Bastid, *op. cit.*, p. 329; Rousseau, *Droit International Public*, p. 180 (Paris, 1953); Reuter, *Institutions*, p. 202.

[50] XII UNCIO p. 850.

[51] *Ibid.*, p. 701.

[52] Goodrich and Hambro, *Charter of the United Nations;* Commentary and Documents, p. 311 (2nd ed., Boston, 1949); Kelsen, *Recent Trends in the Law of the United Nations*, p. 918 (London, 1951).

66. Regional organizations can co-operate with the Economic and Social Council in their quality of international organizations under Article 71. This has been done by the Organisation of American States, especially in connexion with the activities of the Economic Commission for Latin America, and by the League of Arab States.

67. It is to be noted that the regional subsidiary organs of universal organizations, such as the regional economic commissions of the Economic and Social Council and the regional offices of the World Health Organization are not regional organizations in the above sense.[53] As sub-divisions of universal organizations with a regional sphere of activities, they do not have the independent character as international which is possessed by regional organizations.

2. *According to the procedure of admission to membership: organizations with automatic procedures and organizations with regulated procedures of admission* [54]

68. An organization with an automatic procedure of admission is one the admission to which depends solely on the will of the prospective member. This was the case of the Universal Postal Union, up to 1947, and it is still the case of the specialized agencies as regards the admission of States which are already Members of the United Nations.

69. Organizations with regulated procedures of admission are those which prescribe certain conditions for admission, whether these are objective conditions laid down in their constitutions (Article 1, para. 2 of the Covenant of the League of Nations and Article 4 of the Charter of the United Nations), or a discretionary decision of an organ of the organization (article 4 of the Statute of the Council of Europe).

70. Three observations are warranted in this regard:

(*a*) Even when admission is subject to the fulfilment of objective conditions, the element of political discretion cannot be practically eliminated.[55]

(*b*) The universal character of an organization receives its practical application in its attitude as regards the admission of new members.

(*c*) The automatic or regulated character of the procedure of admission is a matter of degree. They are hardly any organizations with a completely automatic procedure of admission.

Classification of international organizations according to function

1. *According to the scope of activities: general and specialized international organizations*

71. The general international organization is one whose jurisdiction covers the whole fabric of international relations. It is basically interested in the political problems, but its activities extend to other fields as well, e.g. economic, social and technical. Oppenheim emphasizes the comprehensive character of its scope of activities in defining it as

> " an association of States of potentially universal character for the ultimate fulfilment of purposes which, in relation to individuals organized in political society, are realized by the State ".[56]

72. The general character is not limited to universal organizations. A regional organization can be general if its scope of activities is global within its region. But it is true that the universality of membership is important to enable the organization to fulfil the comprehensive tasks described by Oppenheim. Moreover, there is an inherent trend in general universal organizations to increase both the universality of their membership and the comprehensive character of the scope of their activities. This has lead some authors to speak of the movement " from geographic to 'functional' universality " [57] or "universality by subject-matter " [58] in the United Nations.

73. A specialized organization is one which has a specific limited object and purpose, such as the specialized agencies which succeeded the 19th and early 20th century administrative unions. This specific object can be economic, cultural, technical, social or humanitarian.

2. *According to the division of power: legislative, administrative and judicial organizations*

74. If we consider the functions of international organizations as public functions, it becomes possible to classify them into judicial, executive or administrative and legislative or quasi-legislative organizations. Sometimes all these functions are undertaken by different organs of the same organization, e.g., the United Nations.[59]

3. *According to the extent of authority and power of the organization vis-à-vis States: policy-making, operative and supra-national organizations*

75. The policy-making or deliberative organization is, according to one author, that which is " wholly confined to the development of international policies through adoption of resolutions and making recommendations to member governments and depending wholly on governments for the implementation of policy ". [60] The operative organization is that which has " administrative operative responsibilities independant from the governments which created [it]. The governments' delegates lay down the policy but the organization would have the funds and the powers to carry them out without relying upon governments to do so ".[61] The first category includes general international organizations, whether universal or regional, while the second includes many of the specialized organizations.

76. In the second category, the organization has a real power of its own which can be exercised without being substituted for that of the State. [62] The functions of the organizations in this category can be either of the

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[53] Reuter, *Institutions*, p. 203.

[54] See generally, Reuter, *op. cit.*, pp. 204-205.

[55] See advisory opinion of the International Court of Justice on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, 1958, pp. 57-115.

[56] Oppenheim, *op cit.*, p. 370.

[57] Nincic, The Evolution of the United Nations, in Institute of International Politics and Economy, New Trends in International Law: Conference Materials, p. 34 at p. 40 (Belgrade, 1961).

[58] Bartos, The Characteristics of the New Trends in International Law, *ibid.*, p. 7 at p. 17.

[59] Schwarzenberger, *op. cit.*, p. 227.

[60] Leonard, *Internationl Organization*, p. 41 (New York, 1951).

[61] *Ibid.*

[62] Reuter, *Institutions*, p. 201.

management or of the control type. [63] The managing or operational organization is run as an enterprise such as the International Bank for Reconstruction and Development. The organization exercising control usually does so in connexion with an international convention or conventions, for example the International Labour Organization.

77. The supra-national organizations are organizations which replace governments in the exercise of sovereign powers legislation, adjudication or the ultimate use of coercion in a direct way over the populations and territories of member States without having, in doing this, to pass through their own governments.

78. The most important examples of this category are the European communities which are possessed of direct, if limited, legislative, executive and adjudicative powers.

79. Supra-national organizations lie on the outer limit of international organizations and on the border of federalism.[64] They are, hybrids which draw both on international law and municipal public law in their functioning techniques. As such, they are subject to the law of international organizations, but not in an exclusive way. [65]

80. It is to be noted that there is an inverse proportion between the actual power and authority of an organization on the one hand and the degree of its general and universal (and consequently heterogeneous) character on the other.

81. The preceding classifications are not exhaustive. They are sufficient, however, to illustrate the intricacies of the subject, especially if certain legal consequences are attached to them.

III. Review of the attempts to codify the international law relating to the legal status of international organizations

A. General remarks

82. The legal incidents of the external relations of international organizations with States, which may be generally referred to as " the law of the legal status of international organizations ", have not been the subject of comprehensive attempts of codification. This is due to the comparitively recent character of this branch of international law.

83. The inclusion in the Charter of the United Nations in 1945 of the provisions of Articles 104 and 105 [66] marked a decisive point of departure [67] in the development of that new branch.

84. Pursuant to Article 105, paragraph 3, of the Charter [68], the General Assembly approved on 13 February 1946 a " Convention on the Privileges and Immunities of the United Nations " [69] which elaborated on the legal capacity, privileges and immunities of the Organization and the privileges and immunities of the representatives of Members, the officials of the United Nations, and experts on missions for the United Nations. This Convention served as a prototype for and greatly helped in the drafting of a number of conventions between the United Nations, the specialized agencies or regional organizations and States.

85. Another decisive point was marked by the recognition by the International Court of Justice in its Advisory Opinion of 11 April 1949 on " Reparation for injuries suffered in the service of the United Nations " [70] that:

> " The Organization 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 upon an international plane . . . it is a subject of international law and capable of possessing international rights and duties and has capacity to maintain its rights by bringing international claims. . . ."

86. This section will review the efforts of codification in relation first to the specific question of international immunities, and secondly, to the other aspects of the subject of the legal status of international organizations.

B. International immunities

87. Long before the appearance of general international organizations (the League of Nations and the United Nations), constitutional instruments establishing international river commissions and the administrative unions in the second half of the nineteenth century contained treaty stipulations to which the origin of immunities and privileges of international bodies can be traced.[71] Examples are to be found in treaties establishing the European Danube Commission and the International Congo Commission, as well as the Permanent Court of Arbitration, the proposed International Prize Court and the Court of Arbitral Justice set up

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[63] *Ibid., loc. cit.*

[64] *Ibid.*, p. 20.

[65] The term " supra-national " is useful in emphasizing the greater powers delegated by member States to organizations of such a character, than those assigned to other types of international organizations. It is not, however, altogether accurate inasmuch as it may create the erroneous impression that they are no more inter-State (inter-étatique) organizations with all the legal consequences which such characterization entails.

[66] These Articles provide that the United Nations " shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the . . . fulfilment of its purposes ", and that " representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independant exercise of their functions in connexion with the Organization ".

[67] C. Wilfred Jenks, *International Immunities*, p. 12 (London, 1961).

[68] Article 105, paragraph 3, reads: " 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 conventions to the Members of the United Nations for this purpose. "

[69] For text, see Annex to General Assembly resolution 22 A (I). See also United Nations *Treaty Series*, vol. 1, pp. 15-32; and United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER. B/10), United Nations publication Sales No. 60.V.2.

[70] " Reparations for injuries suffered in the service of the United Nations ", Advisory Opinion, *I.C.J., Reports* 1949, p. 174.

[71] Jacques Secretan, " The Independance Granted to Agents of the International Community in their relations with National Public Authoritics ", in 26 British Year Book of International Law, (1935), pp. 59-65.

under the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.[72]

88. However, as stated by an authority on " international immunities ":

> " Historically, the present content of international immunities derives from the experience of the League of Nations as developed by the International Labour Organisation when submitted to the test of wartime conditions, reformulated in certain respects in the ILO-Canadian wartime arrangements, and subsequently reviewed by the General Assembly of the United Nations at its first session in 1946. . . ." [73]

1. *The League of Nations*

(a) *Constitutional provisions*

89. Article 7, paragraph 4 of the Covenant of the League of Nations provided that:

> "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

Paragraph 5 provided that:

> " The buildings and other property occupied by the League or its officials or by representatives attending its meetings shall be inviolable ".

90. Article 19 of the Statute of the Permanent Court of International Justice provided that:

> " The Members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities. "

(b) *Treaty provisions*

91. Detailed arrangements concerning the privileges and immunities of the League of Nations were worked out in agreements between the Secretary-General of the League and the Swiss Government. The " Modus Vivendi " of 1921 as supplemented by the " Modus Vivendi " of 1926 [74] granted the League immunity from suit before Swiss courts except with its express consent, recognized the inviolability of the archives of the League and of the premises in which the services of the League were installed, granted exemption from customs to League property and complete fiscal exemption to bank assets and securities, and accorded to officials of the League personal inviolability and immunity from civil and penal jurisdiction which varied according to different categories of officials.

92. At the suggestion of the Council of the League of Nations, the Permanent Court of International Justice entered into negotiations with the Netherlands Government which resulted in the Agreement of 1928, whereby effect was given to Article 19 of the Statute of the Court. The Agreement, which was given the title of " General Principles and Rules of Application Regulating the External Status of the Members of the Permanent Court of International Justice ", was approved by the Council of the League on 5 June 1928.[75] The Agreement confirmed the assimilation of members of the Court and the Registrar to heads of diplomatic missions, all enjoying not only the diplomatic privileges and immunities but also the " special facilities " granted to heads of missions. A distinction was made, however, between the Judges and the Registrar, the former alone being granted the " prerogatives which the Netherlands authorities grant, in general, to heads of missions. " [76]

(c) *The League Committee of Experts for the Progressive Codification of International Law*

93. This Committee was established by a decision of the Council of the League of Nations on 11 December 1924 " to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment. . . ." [77]

94. The list as finally drawn up by the Committee at its third session in 1927 included the subject of diplomatic privileges and immunities for which a sub-committee was appointed which consisted of Mr. Diena, who acted as Rapporteur, and Mr. Mastny. On the basis of a report by Mr. Diena,[78] which stressed the difference between League officials and diplomatic agents, the Committee expressed the view that " it is not certain that an absolute identity of privileges and immunities should be established between diplomats proper and the categories just mentioned. It seems possible that the difference of circumstances ought to lead to some difference in the measures to be adopted. " [79]

95. The whole subject of diplomatic privileges and immunities including those of League officials was, however, not included in the three subjects which the Assembly of the League decided at its eighth session in 1927 to retain as possible topics for codification at the First Conference for the Codification of International Law.[80]

(d) *Status of the International Labour Office in Canada during World War II*

96. When a nucleus of the staff of the International Labour Office was transferred from Geneva to Montreal in 1940, an arrangement defining in certain respects

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[72] In 1922 the French Government informed the Central Commission of the Navigation of the Rhine " qu'en raison du caractère de celle-ci, les représentants à cette commission, ainsi que ses agents, voyageant pour son service, bénéficieraient à l'avenir des mêmes facilités que s'ils jouissaient des immunités diplomatiques ". See Guenter Weissberg, " The International Status of the United Nations ", p. 143, also Francis Ray, " Les Immunités des Fonctionnaires Internationaux ", in 23 Revue de Droit International Privé (1928), p. 253.

[73] Jenksfi, *op. cit.*, p. 12.

[74] The " Modus Vivendi " of 1921 was embodied in a letter of 19 July 1921 from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations on behalf of the Secretariat of the League and also of the International Labour Office.

The " Modus Vivendi " of 1926 was submitted to the Council of the League for approval. For an account of the negotiations which led to the conclusion of these two Agreements, see Martin Hill, *Immunities and Privileges of International Officials*, The Experience of the League of Nations, pp. 14-23 (Washington, Carnegie Endowment for International Peace, 1947).

[75] *Official Journal*, 1928, pp. 985-987.

[76] Hill, *op. cit.*, p. 51.

[77] This decision was taken in pursuance of a resolution adopted by the Assembly of the League. League of Nations Document C. 196. M. 70. 1927. V.

[78] *Ibid.*, p. 85.

[79] *Ibid.*, loc. cit.

[80] These three topics were: nationality, the responsibility of States and territorial waters.

the status of the Office and its staff in Canada had to be worked out. This arrangement was embodied in a Canadian Order in Council of 14 August 1941. The Order recognizes " that by Article 7 of the Covenant of the League of Nations and Article 6 of the Constitution of the International Labour Organisation, the International Labour Office as part of the organization of the League enjoys diplomatic privileges and immunities ". It grants to " members of the international administrative staff " of the Office immunity from civil and criminal jurisdiction, subject to waiver by the Director. Other members of the staff enjoy this immunity " in respect of acts performed by them in their official capacity and within the limits of their functions ", likewise subject to waiver by the Director. These other members are expressly made subject to the jurisdiction of the Canadian courts in respect of acts performed in their private capacity. Salaries paid by the Office to the permanent members of its staff are exempted from " all direct taxes imposed by the Parliament or Government of Canada, such as income tax and National Defence Tax ".[81]

2. *The United Nations and the specialized agencies*

(a) *Constitutional provisions*

97. Article 105 of the United Nations Charter provides that:

" 1. The Organization 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 Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

" 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 conventions to the Members of the United Nations for this purpose."

98. Article 19 of the Statute of the International Court of Justice provides that:

" The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Article 32, paragraph 8 provides that the salaries, allowances and compensations (received by the members of the Court, the President, the Vice-President, the judges chosen *ad hoc* under Article 31) shall be free of all taxation.

99. Constitutional instruments of the specialized agencies usually contain stipulations which provide in general terms that the organization will enjoy such privileges and immunities as are necessary for the fulfilment of its purposes, that representatives of members and officials of the organization will enjoy such privileges and immunities as are necessary for the independent exercise of their functions. These constitutions usually provide also that such privileges and immunities will be defined in greater detail by later agreements (Article 40 of the Constitution of the International Labour Organisation, Article XV of the Constitution of the Food and Agriculture Organization of the United Nations, Article XII of the Constitution of the United Nations Educational, Scientific and Cultural Organization, Articles 66-68 of the Constitution of the World Health Organization, Article 27 of the Convention of the World Meteorological Organization, Article 60 of the International Civil Aviation Convention, Article 50 of the Convention on the Intergovernmental Maritime Consultative Organization, Article XV of the Statute of the International Atomic Energy Agency).[82] However, the constitutions of some specialized agencies define themselves in some detail the scope of the privileges and immunities of the organization (the Articles of Agreement of the International Monetary Fund, the International Bank for Reconstruction and Development and the International Finance Corporation.)[83]

(b) *The Preparatory Commission of the United Nations*

100. This Commission instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all Members to accord to the United Nations, its officials and the representatives of its members all privileges and immunities necessary for the accomplishment of its purposes, operated from the coming into force of the Charter and was therefore applicable even before the General Assembly made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105.[84]

101. It recommended that " the General Assembly, at its first session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose ". It transmitted for the consideration of the General Assembly a study on privileges and immunities, and, as " working papers ", a draft general convention on privileges and immunities and a draft treaty to be concluded by the United Nations with the United States of America, the country in which the headquarters of the Organization were to be located. It considered that the details of the prerogatives to be accorded to members of the International Court of Justice should be determined after the Court had been consulted, and that until further action had been taken " the rules applicable to the members of the Permanent Court of International Justice should be followed ". It recommended that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered and negotiations opened " for their co-ordination " in the light of any convention ultimately adopted by the United Nations.[85]

102. The documents of the Preparatory Commission were studied by the Sixth Committee of the General Assembly at the first part of its First Session in January-February 1946. The following resolutions concerning

[81] Hill, *op. cit.*, p. 93. For text of the Canadian Order in Council of 1941, see *ibid.*, Annex IV, pp. 203, 204.

[82] For these texts, see United Nations Legislative Series, Legislative texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. II (1961). (ST/LEG/SER.B/11, United Nations publication sales No. 61.V.3)

[83] *Ibid.*

[84] Report of the Preparatory Commission of the United Nations, document PC/20.

[85] *Ibid.*, pp. 60-74.

the privileges and immunities of the United Nations were adopted by the General Assembly:

1. A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed.

2. A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States, together with a draft convention to be transmitted as a basis of discussion for these negotiations.

3. A resolution on the privileges and immunities of the International Court of Justice.

4. A resolution on the coordination of the privileges and immunities of the United Nations and the specialized agencies.[86]

(c) *Treaty provisions*

(i) *General conventions*

103. A General Convention on the Privileges and Immunities of the United Nations (hereafter referred to as the General Convention) was approved by the General Assembly on 13 February 1946 and was in force on 1 October 1962 for seventy-four States.[87] In accordance with the provisions of this Convention, the United Nations and its property and assets enjoy immunity from every form of legal process, the premises of the United Nations are inviolable and the property and assets of the United Nations are immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action. The United Nations is also exempt from all direct taxes and customs duties and its publications are exempt from prohibitions and restrictions on imports and exports. The Convention accords to representatives of Member States privileges and immunities generally enjoyed by diplomatic envoys, such as immunity from legal process, inviolability of all papers and documents, exemption from immigration restrictions and alien registration and the right to use codes for their communications. Officials of the United Nations are immune from legal process in respect of acts performed by them in their official capacity, and are exempt from taxation on the salaries and emoluments paid to them by the United Nations. They are immune from national service obligations as well as from immigration restrictions and alien registration. The Convention also accords certain immunities for " experts on mission for the United Nations ".[88]

104. A Convention on the Privileges and Immunities of the Specialized Agencies [89] (hereafter referred to as the Specialized Agencies Convention) was approved by the General Assembly on 21 November 1947 and was in force on 1 October 1962 for thirty-nine States.[90] This Convention follows closely the terms of the General Convention, with a small number of significant variations.[91] The Convention is applicable, subject to variations set forth in a special annex for each agency the final form of which is determined by the agency concerned, to nine designated specialized agencies, namely the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the UNESCO, the International Civil Aviation Organization, the International Monetary Fund, the International Bank for Reconstruction and Development, the World Health Organization, the Universal Postal Union, and the International Telecommunication Union, and any further agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.[92] Accordingly, the Convention has been applied to the World Meteorological Organization, the Intergovernmental Maritime Consultative Organization and the International Finance Corporation. An Agreement on the Privileges and Immunities of the International Atomic Energy Agency was approved by the Board of Governors of the Agency on 1 July 1959, which " in general follows the Convention on the Privileges and Immunities of the Specialized Agencies ".[93]

(ii) *Headquarters agreements*

105. The General Conventions are supplemented by headquarters agreements between the United Nations and specialized agencies on the one hand and States in whose territory they maintain headquarters on the other hand. Headquarters agreements have been concluded by the United Nations with the United States of America and Switzerland, by the International Civil Aviation Organization with Canada, by UNESCO with France, by the Food and Agriculture Organization with Italy, by the International Atomic Energy Agency with Austria, and by the International Labour Organization, the World Heath Organization, the World Meteorological Organization, the International Telecommunication Union, and the Universal Postal Union with Switzerland.[94]

(iii) *Special agreements*

106. The Repertory of the Practice of the Organs of the United Nations contains in its section on Articles 104 and 105 of the Charter a synoptic survey of special agreements on privileges and immunities of the United Nations, classifying them in the following categories:[95]

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[86] Texts reproduced in Hill, *op. cit.*, Annexes VI-IX, pp. 224-247.

[87] Information on the status of this Convention and the number of States which had acceded thereto by 1 October 1962 was made available to the Special Rapporteur through the kindess of the Treaty Section of the Office of Legal Affairs of the United Nations.

[88] For a summary of the provisions of this Convention, see *Repertory of the Practice of the Organs of the United Nations* (*ad* Article 105, paragraphs 1 and 2), vol. V, New York, 1955.

[89] United Nations *Official Records of the General Assembly*, Second Session, document A/519.

[90] See footnote 87 above.

[91] Jenks, *op. cit.*, p. 5.

[92] See Francis Wolf, Le Droit aux privilèges et immunités des institutions spécialisées reliées aux Nations Unies, Université de Montréal, 1948, cited in Jenks, *op cit.*, p. 5, footnote 34.

[93] See the Preamble of the Agreement, International Atomic Energy Agency Document INFCIR/9/Rev.1, of 21 December 1959.

[94] United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. I (1959) and Vol. II (1961).

[95] *Repertory of the Practice of the Organs of the United Nations*, vol. V (1955).

1. Agreements with non-member States.
2. Agreements with Member States:
(*a*) Agreements complementary or supplementary to the General Convention;
(*b*) Agreements applying the provisions of the General Convention in cases where Members have not yet acceded to the Convention;
(*c*) Agreement specifying the nature of privileges and immunities to be enjoyed by certain United Nations bodies in host countries.
3. Agreements concluded with Member or non-member States by United Nations principal or subsidiary organs within their competence:
(*a*) Agreements on the operation of the relief programme for Palestine refugees;
(*b*) Agreements concerning the activities of the UNICEF in Member or non-member States;
(*c*) Agreements concerning technical assistance;
(*d*) Trusteeship agreements.

107. Jenks gives a detailed enumeration of these special agreements classifying them in the following categories: [96]

1. Host agreements (examples: agreements concluded by the World Health Organization for its regional offices with Egypt, France and Peru, and by the International Labour Organisation for its Field Offices with Mexico, Peru, Turkey and Nigeria).

2. Agreement relating to Special Political Tasks (examples: agreement concluded by the United Nations with Korea on 21 September 1951, agreement concluded by the United Nations with Egypt on 8 February 1957 concerning the United Nations Emergency Forces).

3. Technical assistance and supply agreements.

4. Agreements concerning particular meetings (example: the agreement of 17 August 1951 between the United Nations and France relating to the holding in Paris of the Sixth Session of the General Assembly).

3. *Regional organization*

108. Constitutional instruments of regional organizations also usually contain provisions relating to the privileges and immunities of the organization. Examples:
(*a*) Articles 103-106 of the Charter of the Organization of American States signed at Bogota on 30 April 1948;
(*b*) Article 40 of the Statute of the Council of Europe of 5 May 1949;
(*c*) Article 14 of the Pact of the League of Arab States of 22 March 1945;
(*d*) Article XIII of the Charter of the Council for Mutual Economic Assistance signed at Sofia on 14 December 1959;
(*e*) Article XIV of the Protocol for the Implementation of the African Charter of Casablanca signed at Cairo on 5 May 1961;
(*f*) Article 40 of the Charter of the Inter-African and Malagasy States Organization, adopted in principle at Lagos in January 1962.

109. These constitutional provisions have been implemented by general conventions on privileges and immunities [97] which were largely inspired by the General Convention of the United Nations and the specialized agencies conventions. A number of headquarters and host agreements were also concluded by regional organizations with States in whose territory they maintain headquarters or other offices.

C. Other aspects of the legal status of international organizations

110. Unlike the question of privileges and immunities of international organizations, the other aspects of the subject of external relations between States and international organizations have not received adequate regulation either in the form of international conventions (treaty law) or national legislation (statute law). Some of these aspects, however, were considered and solutions for their regulation were sought by the League of Nations, private authorities and the United Nations.

1. *The League of Nations*

The work of the League Committee of Experts for the Progressive Codification of International Law on Procedure of International Conferences [98]

111. At its first session held at Geneva (meeting of 8 April 1925), the Committee of Experts for the Progressive Codification of International Law adopted, among others the following resolution:
" (*g*) The Committee appoints a Sub-Committee (consisting of M. Mastny, as Rapporteur, and M. Rundestein) to examine the possibility of formulating rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be."[99]

112. The Rapporteur submitted a report containing two lists of the subjects to be examined in respect of procedure of international conferences and conclusion and drafting of treaties.[100]

The part of the report which relates to the procedure of international conferences can be summarized as follows:

1. The Rapporteur divides the rules " which usually govern the procedure of international conferences into two categories:

The first category includes a series of rules which are left to the free choice of the States and their representatives taking part in the conference.

As regards this category it is impossible to say that a custom exists in the legal sense of the term, as the rules are purely formal and can constantly be changed at the discretion of the participating States.

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[96] Jenks, *op. cit.*, pp. 7-11.

[97] Examples: Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; Protocole sur les Privilèges et Immunités de la Communauté européenne du charbon et de l'acier, signed at Paris, 18 April 1951; Convention on the Privileges and Immunities of the League of Arab States approved by the Council of the League of Arab States on 10 May 1953; Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959.

[98] See above paragraphs 93-95.

[99] League of Nations Document C. 47 M. 24. 1926 V.

[100] *Ibid.*, C. p. D. I. 32 (I).

The category of rules is based on usage followed without " opinio necessitatis ".

This second category, on the other hand, includes certain rules which from the legal point of view are merely the application of certain fundamental principles generally recognized as forming part of existing international law (customary law, " opinio necessitatis ").

2. He then poses the question " What such rules should be " and states:

" It is necessary first of all to decide on what basis regulation should be established.

" Three solutions suggest themselves:

" (1) Regulation of procedure containing only rules common to all types of conferences;

" (2) Detailed regulation of the procedure of a certain type of conference;

" (3) Adoption in a convention of certain general principles which should be observed by States when conferences are held, irrespective of the special nature of such conferences."

3. In examining these three types, the Rapporteur emphasizes that " For the purposes of codification, it would perhaps be necessary to establish certain distinctions. In the first place, a distinction might be made between conferences planned and organized by the League of Nations and held under its auspices, and all conferences unconnected with the League.

" A further distinction should be made between political conferences and non-political conferences (administrative, economic, social, etc.).

" From the legal point of view, a distinction should be made between conferences on international conventional law (codification conferences) and special conferences (conferences settling particular relations between the contracting States).

" Lastly, according to the character of the representatives, a distinction should be made between diplomatic conferences (diplomatic agents) and technical conferences (experts) ".

4. The Rapporteur concludes by favouring the third alternative " which contemplates the adoption, by means of conventions, of certain general principles of procedure for all international conferences irrespective of their special character," and states that " Codification in this last sense should be confined:

" (*a*) to the generally recognized principles of substantive international law (customary law);

" (*b*) to the general rules as regards form consecrated by usage;

" (*c*) to the positive rules of conventional legislation with a view to obviating the difficulties to which disputed questions may give rise (conventional law)."

2. *Work by private authorities*

(a) *Fiore's draft code, 1890*

113. Articles 81 and 82 and commentary: [101]

" 81. The status of a person in international society may be claimed by legal entities personified by reason of a well-defined purpose of international interest. This status is limited to the States which have recognized them as persons and given them the right to acquire certain privileges, which they must exercise and enjoy in order to fulfil the international mission for which they were created.

" 82. The international personality of legal entities must, in principle, be considered as limited to the exercise of the international rights granted to them, and it cannot have any effect on states which have not recognized these entities as international juridicial persons.

" The condition of legal persons according to international law is similar to that of legal persons under the civil law. The individuality of these two classes of persons which, as we have said elsewhere (rule 56), must be considered as an essential condition of their existence, depends on the personification which proceeds from the purpose by reason of which legal entities that are not persons *jure proprio,* acquire personality. Legal persons must be considered individualized in consequence of a legal fiction and become persons by virtue of the act granting them the capacity to operate, to bind themselves and to be considered the subjects of rights."

114. Article 748 and commentary: [102]

" 748 Any State which enjoys rights of sovereignty must be deemed capable, in principle, of concluding a treaty and thus contracting legal obligations and acquiring rights with respect to the other contracting party, subject, however, to the limitation set forth in rule 739.

" This capacity, furthermore, may be possessed by associations to which international personality has been attributed (see rule 81) within the limits, nevertheless, of the purposes for which personality was recognized and is considered as subsisting.

" The International Congo Association, to which international personality was attributed for the limited purpose for which it was formally recognized, was regarded as capable of concluding treaties, and has concluded several, including one with Italy, 9 December 1884.

" The Customs Association of the German States, known as the *Zollverein,* had the power to and did conclude, in its own name, several treaties, until it lost its international personality by the establishment of the German Empire.

(b) *Report of Sir John Fischer Williams on " The Status of the League of Nations " to the thirty-fourth Conference of the International Law Association (Vienna, 1926)*

115. Following are excerpts from the report of Sir John Fischer Williams on " The Status of the League of Nations " to the thirty-fourth Conference of the International Law Association held at Vienna in 1926:

" . . . My submission is e.g. . . . that the authors of the League, consciously or unconsciously, built a more novel and a more subtle construction (than a confederation of States). They were making a step forward in International Law: they were constructing, for the first time on any great scale, a thing in International Law analogous to the body corporate in municipal law. They were creating a subject of rights and duties of limited and definite scope of a nature different of the subjects of

[101] Pasquale Fiore, *International Law Codified and its Legal Sanction* or the Legal Organization of the Society of States. Translation from the 5th Italian Edition by Edwin M. Borchard, p. 116 (New York, 1918).

[102] *Ibid.*, p. 329.

rights and duties which alone — or almost alone — had hitherto been recognized."

" . . . . I assume that the conditions for the attribution of legal personality to a collectivity are the possession by the collectivity of rights and duties which are peculiar to itself, and are not rights and duties of the *personae,* natural or collective, who are members of corporators of the collectivity."

" . . . . The League has what is called an " action " (art. 2) which is effected " through the instrumentality " of an Assembly, a Council and a permanent Secretariat. Now an " action " is surely the outward and visible sign of a personality (the manifestation of a will)."

" . . . . Again, the permanent Secretariat is composed of the servants of the League (art. 6). With whom are their contracts of service? Not surely with the individual members of the League or of the Council; their contractual relations are with the League itself. . . . " [103]

" . . . . Ownership of property by the League seems at any rate to be currently accepted by the Governments interested. . . . "

" . . . . Similarly, the provisions as to the internal constitution of the League are more easily reconcilable with the conception of a permanent body with a personality of its own than of a loose association without corporate existence. The League is not a group of particular States; it is a body corporate with possibly changing corporators. . . . "

" . . . . Again, the League has 'Mandatories' who act on its behalf (art. 22 par. 2), not on behalf of the members of the League. . . . "

" . . . . On some points the action of the League may be determined by a majority vote (art. 4, 5, 15 & 26) . . . . an indication that we have not before us a mere congeries of separate units, but a single body with a common will. . . . "

" . . . . in the Treaty of Versailles . . . . two passages are striking: Art 49 of the Treaty makes the League a trustee (of the government of the Saar Valley), Art. 102 confers on the League the status of a guardian or protector (of the Free City of Danzig). . . . "

3. *The United Nations*

Resolution of the General Assembly of the United Nations on " Permanent Missions to the United Nations ", 3 December 1948

116. Resolution 257 A (III):

" *The General Assembly,*

" *Considering* that, since the creation of the United Nations, the practice has developed of establishing, at the seat of the Organization, permanent missions of Member States,

" *Considering* that the presence of such permanent missions serves to assist in the realization of the purposes and principles of the United Nations and, in particular, to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs af the United Nations,

" *Considering* that in these circumstances the generalization of the institution of permanent missions can be foreseen, and that the submission of credentials of permanent representatives should be regulated,

" *Recommends*

" 1. That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;

" 2. That the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission;

" 3. That the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of the head of the mission;

" 4. That Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General,

" *Instructs* the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations."

The rules of procedure of the General Assembly of the United Nations and their impact upon the development of organization and procedure of diplomatic conferences

117. Out of the rules of procedure worked out by the different organs of the United Nations and the specialized agencies, grew a substantial body of rules and regulations concerning the organization and procedure of diplomatic conferences which have become known as " multilateral " or " parliamentary " diplomacy.[104]

118. Special mention should be made of the preparatory work on the " method of work and procedure " of the United Nations Conference on the Law of the Sea. This work was undertaken by the Secretariat of the United Nations with the advice and assistance of a group of experts in implementation of paragraph 7 of General Assembly resolution 1105 (XI) which reads as follows:

" [The General Assembly]

" . . .

" Requests the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the Conference, with the following terms of reference:

" . . .

" (*b*) To present to the Conference recommendations concerning its method of word and procedure, and other questions of an administrative nature . . . "

119. The report submitted by the Secretary-General [105] pursuant to this request contained " Provisional Rules of procedure " which, for the most part, followed the standard pattern of the rules of procedure of the General Assembly. They were adopted [106] by the United Nations First and Second Conferences on the Law of the Sea in

[103] Report of the thirty-fourth Conference of the International Law Association, Vienna, 1926, pp. 675-695.

[104] See Philip C. Jessup, *Parliamentary Diplomacy, an examination of the legal quality of the rules of procedure of organs of the United Nations,* 89 Recueil des Cours, pp. 185-319 (1956 I).

[105] See *United Nations Conference on the Law of the Sea, Official Records,* vol. I: Preparatory Documents, United Nations publication, Sales No. 58.V.4, vol. I, pp. 172-175, document A/CONF.13/11.

[106] *Ibid.,* vol. II; Plenary meetings, pp. xxxi *et seq.*

1958 and 1960 [107], as well as the Conference on Diplomatic intercourse and immunities in 1961 [108] and the Conference on Consular Relations in 1963, with a limited number of appropriate significant variations.

D. The International Law Commission

120. A number of questions of international law relating to the status of international organizations were considered by the International Law Commission in connexion with its consideration of the subjects: selection of topics for codification, the law of treaties, the law of the sea, State responsibility, and diplomatic intercourse and immunities.

1. *In connexion with the selection of topics for codification*

121. Article 18 of the Statute of the International Law Commission provides that " the Commission shall survey the whole field of international law with a view to selecting topics for codification . . .". Pursuant to the resolution of the General Assembly 175 (II) of 21 November 1947, the Secretary-General submitted to the International Law Commission a memorandum (A/CN.4/1/Rev.1) entitled " Survey of International Law in Relation to the Work of Codification of the International Law Commission, Preparatory work within the purview of 18, paragraph 1, of the Statute of the International Law Commission ".

122. In surveying international law in relation to codification, the memorandum of the Secretary-General begins with a section on the topic of " Subjects of International Law " in which one finds the following references to international organizations:

> " The question of the subjects of international law has, in particular in the last twenty-five years, ceased to be one of purely theoretical importance, and it is now probable that in some respects it requires authoritative international regulation. Practice had abandoned the doctrine that States are the exclusive subjects of international rights and duties."
>
> " Account must be taken of the developments in modern international law amounting to a recognition of the international personality of public bodies other than States. The international legal personality of the United Nations, of the specialized agencies established under its aegis, and of other international organizations, calls for a re-definition of the traditional rule of international law in the matter of its subjects. That legal personality is no longer a postulate of scientific doctrine. It is accompanied by a recognized contractual capacity in the international sphere and, as with regard to the right to request an advisory opinion of the International Court of Justice, by a distinct measure of international procedural capacity."

123. The topic of " subjects of international law " was among the twenty-five topics which the International Law Commission reviewed consecutively in the course of its first session in 1949. The Commission did not, however, include it, in the provisional list of fourteen topics selected for codification which it drew up.[109]

2. *In connexion with the subject of the law of treaties*

(a) *Report of the first Special Rapporteur (Brierly) (A/CN.4/23)*

124. In his " Draft convention on the law of treaties ", Brierly included a number of provisions concerning international organizations in relation to:

1. Use of the term " treaty " (article 1 a);
2. Use of the term " an international organization " (article 2 b);
3. Capacity to make treaties (article 3);
4. Constitutional provisions as to the exercise of capacity to make treaties (article 4. 1 and 3);
5. Exercise of capacity to make treaties (article 5);
6. Authentication of texts of treaties (article 6 c);
7. Acceptance of treaties (article 7);
8. Acceptance by signature (article 8);
9. Acceptance by means of an instrument (article 9);
10. Reservations to treaties (article 10);
11. Entry into force and entry into operation of treaties (article 11. 2).

125. He explains his reasons for including in the draft articles provisions concerning international organizations as follows (*ibid.*, paragraph 26):

> " This draft differs from any existing draft in recognizing the capacity of international organizations to be parties to treaties. That capacity was not indeed denied by the Harvard Convention which, however, arbitrarily excluded from its scope any agreement to which any entity other than a State was a party. In so far as concerned the agreements of international organizations, this attitude was adopted 'because of their abnormal character and the difficulty of formulating general rules which would be applicable to a class of instruments which are distinctly *sui generis*'. It is now, however, impossible to ignore this class of agreement or to regard their existence as an abnormal feature of international relations.
>
> " For the International Court of Justice has observed, of the United Nations, that 'the Charter has not been content to make the Organization created by it merely a centre for harmonizing the actions of nations in the attainment of these common ends (Article 1, paragraph 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the members in relations to the Organization . . . . providing for the conclusion of agreements between the Organization and its members. Practice — in particular the conclusion of conventions to which the Organization is a party — has confirmed this character of the Organization . . .' . The difficulty of finding rules common to the treaties of States and to those of international organizations is, moreover, not insuperable."

(b) *Report of the second Special Rapporteur (Lauterpacht) (A/CN.4/63)*

126. In his draft articles on the law of treaties which he submitted to the International Law Commission, Lauterpacht in article 1 defines treaties as:

> " . . . agreement between States, including organiza-

[107] See *Second United Nations Conference on the Law of the Sea, Official Records* United Nations publication, Sales No. 60.V.6, pp. xxviii *et seq.*

[108] See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. I, United Nations publication, Sales No. 61.X.2, pp. xxiii *et seq.*

[109] Report of the International Law Commission on the work of its first session (A/925, paragraphs 15 and 16).

tions of States, intended to create legal rights and obligations of the parties "

127. In the commentary to this article, he states that the expression " organizations of States " is intended as synonymous with the expression " international organizations " for which he suggests the following definition:

" . . . entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State ".

128. He formulated his draft articles in a general form, on the basis of the definition he gives in article 1, which includes States and international organizations. Some of the provisions of his draft make specific mention of international organizations. Thus article 7 provides that " a State or organization of States may accede to a treaty . . . ".

(c) *Report of the third Special Rapporteur (Fitzmaurice) (A/CN.4/101)*

129. Like his two predecessors, Fitzmaurice formulated his draft " articles of Code " on the law of treaties on the basis of extending their scope to include treaties of international organizations. Thus article 3, paragraph 3, provides that:

" The provisions of the present code relating to the powers, rights and obligations of States relative to treaties, are applicable, *mutatis mutandis,* to international organizations, and to treaties made between them, or between one of them and a State, unless the contrary is indicated or results necessarily from the context."

130. He included in his 1956 draft specific provisions relative to international organizations with regard to:

1. Definition of terms (article 3 b);
2. Exercise of the treaty-making power (article 9, paragraph 2 b);
3. Drawing up of the text of the treaty at an international conference (article 15, paragraph 1);
4. Establishment and authentication of the text of the treaty through incorporation in a resolution of an organ of an international organization (article 18, paragraph 1 c);
5. Accession to a treaty the text of which is embodied in a resolution of an international organization (article 34, paragraph 5).

(d) *Report of the present Special Rapporteur (Waldock) (A/CN.4/144)*

131. In the introduction to his first report on the law of treaties submitted to the International Law Commission in 1962, which had instructed him in 1961 to re-examine the work previously done in this field by the previous Special Rapporteurs and by the Commission, Waldock discusses the scope of the subject in relation to treaty making by international organizations. He refers to the decision of the Commission in 1951, which was reaffirmed in 1959, to leave aside for the moment the question of the capacity of international organizations to make treaties, to draft its articles on the law of treaties with reference to States only, and, to examine later whether they could be applied to international organizations as they stood, or whether they required modifications. He takes exception to this view and points out that:

" The conclusion, entry into force and registration of treaties, with which the present articles are concerned, is to a large extent a self-contained branch of the law of treaties and, unless it is unavoidable, it seems better not to postpone all consideration of treaty-making by international organizations until some comparatively distant date, by which time the Commission will have dealt with many other matters not very closely related to this part of the law of treaties."

132. He included in his draft a number of provisions relative to international organizations with regard to:

1. Definition of the term " international agreement " (article 1 a);
2. Capacity to become a party to treaties (article 3, paragraph 4):
3. Adoption of the text of a multilateral treaty drawn up at an international conference convened by an international organization or an international organization (article 5, paragraph 1 d and c);
4. Authentication of the text of a treaty through its incorporation in a resolution of an international organization (article 6, paragraph 1 c);
5. Procedure of ratification in the case of a multilateral treaty adopted in an international organization (article 11, paragraph 3 c);
6. Participation in a treaty by accession in the case of a multilateral treaty drawn up in an international organization or at an international conference convened by an international organization (article 13, paragraph 2 d);
7. Consent to reservations and its effects in the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, (article 18, paragraph 4 c);
8. Objection to reservations and its effects in the case of a treaty which is the constituent instrument of an international organization (article 19, paragraph 4 d);
9. The depositary of multilateral treaties in the case of a treaty drawn up within an international organization or at an international conference convened by an international organization (article 26, paragraph 2 a).

(e) *Position taken by the International Law Commission at its fourteenth session in 1962*

133. The present Special Rapporteur on the law of treaties informed the International Law Commission, on presenting his first report at the beginning of its fourteenth session, that he had prepared for submission to the Commission at a later stage in the session a final chapter on " the treaties of international organizations " (A/CN.4/144, introduction, paragraphs 10 and 11).

134. In preparing its provisional draft articles on the law of treaties (Part I, Conclusion, entry into force and registration of treaties) in 1962, the Commission retained in general the provisions relating to the treaty-making capacity of international organizations, as well as those relating to treaties of States which are drawn up in an international organization or at an international conference convened by an international organization as suggested by the Special Rapporteur.

135. As regards the general question of treaties of international organizations, the Commission reaffirmed its decisions of 1951 and 1959 " to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States " (A/5209, paragraph 21). At the same time the Commission stated that:

" . . . (it) recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of States, the Commission has made it plain in the commentaries attached to articles 1 and 3 of the present draft articles that it considers the international agreements to which organizations are parties to fall within the scope of the law of treaties."

3. *In connexion with the subject of the law of the sea: supplementary report submitted by the Special Rapporteur (François) on " The right of international organizations to sail vessels under their flags " (A/CN.4/103)*

136. The general problems involved in the operation of ships registered with an international organization and flying its flag were discussed at the request of the United Nations by the International Law Commission in the course of its seventh session in 1955.

137. The discussion related to article 4 of the Commission's provisional articles concerning the regime of the high seas (A/2934, chapter II), which provides that:

" Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction in the high seas."

138. After the adoption of article 4 of the Commission's provisional articles concerning the regime of the high seas, the Chairman of the Commission read to the Commission a letter from Mr. C. A. Stavropoulos, Legal Counsel of the United Nations, relating to the flag and registry of ten fishing vessels owned by the United Nations (the United Nations Korean Reconstruction Agency). In this letter, Mr. Stavropoulos thought it desirable that the Commission's provisional articles concerning the régime of the high seas should at least not exclude the possibility of registration by an international organization of its own ships. At the same time, he called the Commission's attention to the questions of jurisdiction and of the law applicable aboard vessels under international registration.

139. The Commission considered the question raised in Mr. Stavropoulos' letter at its eighth session in 1956 on the basis of a supplementary report by Mr François, the Special Rapporteur (A/CN.4/103). In this report, Mr François divided the questions involved into three categories:

1. those connected with the possibility of the United Nations or other international organizations owning vessels;
2. those relating to the flag, registration, nationality and protection of vessels owned by the United Nations or other international organizations; and
3. Those concerning the law applicable to such vessels and the persons and chattels aboard.

He then pointed out that no doubt could exist regarding the question whether the United Nations and all international organizations of comparable capacity had or had not the right to own ships. He also noted that " no difficulty can arise over the question whether the United Nations may register the ships it owns with a particular State and have them fly the flag of that State ". As regards the question whether an international organization has the right to register the ships with itself, i.e., the system of an international organization registration, he found the legal status of an international organization ship not registered with a State highly problematical. He summarized the problems which such a situation creates as follows:

(i) The flag of an international organization cannot be assimilated to the flag of a State for the purposes of the application of the legal system of the flag State, especially with regard to the civil and criminal law applicable aboard ship;

(ii) The inability of an international organization " to offer the same guarantees as States for the orderly use of the seas ".

As a solution for the problem, he suggested that the following proposals may be taken into consideration (*ibid.*, paragraph 9):

" 1. The Members of the United Nations recognize a special United Nations registration which entitles the ship to fly the United Nations flag and to special protection by the United Nations;

" 2. The Secretary-General of the United Nations is authorized to conclude, as the need arises, a special agreement with one or more of the Members by which these Members allow the vessels concerned to fly their flag in combination with the United Nations flag;

" 3. The Members of the United Nations undertake in a general agreement to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in paragraph 2, may have been concluded, and to assimilate such ships to their own ships, in so far as that would be compatible with the United Nations' interests;

" 4. The Members of the United Nations declare in the same general agreement that they recognize the special agreements between the Secretary-General and other Members of the United Nations, referred to in paragraph 2, and extend to the United Nations all international agreements relating to navigation to which they are a party."

140. The Commission was unable to take a decision on this question. It took note of these proposals, and decided to insert them in its final report on the Law of the Sea in 1956 " since it regards them as useful material for any subsequent study of the problem " (A/3159, chapter II, commentary to article 29).

4. *In connexion with the subject of State responsibility: report of the first Special Rapporteur (García-Amador)*

141. In his report on State responsibility (A/CN.4/96, chapter IV, section 13), Mr. García-Amador discusses the question of " the responsibility imputable to international organizations ". He distinguished bet-

ween three cases in which the responsibility of international organizations may arise:

(i) responsibility towards officials or employees or towards persons or legal entities having contractual relations with the organization;

(ii) responsibility for acts or omissions on the part of the organization's administrative organs, or in respect of injury arising from its political or military activities;

(iii) responsibility for damage to third parties (indirect responsibility). He qualifies this classification by stating that:

> " This classification will doubtless be improved upon when an exhaustive study is made of the practice, although the latter is not as yet developed to allow a complete systematic analysis of the rules and principles which govern the responsibility of international organizations. Meanwhile, however, the above classification may serve as the point of departure for a future and more elaborate study " (*ibid.*, paragraph 84).

5. *In connexion with the subject of diplomatic intercourse and immunities: report of the Special Rapporteur (Sandström) on* ad hoc *diplomacy*

142. When, at its tenth session in 1958, the International Law Commission elaborated its final text of " draft articles on diplomatic intercourse and immunities ", the Commission confined the scope of the draft to diplomatic relations between States and decided to leave aside for the moment relations between States and international organizations (A/3859, chapter III, paragraphs 51 and 52).

143. The Commission's draft dealt only with permanent diplomatic missions. It was pointed out, however, in the introductory remarks that " diplomatic relations also assume the forms that might be placed under the heading of " *ad hoc* diplomacy " covering itinerant envoys, diplomatic conferences and special missions sent to States for limited purposes " (*ibid*).

144. However, the Commision, considering that these forms of diplomacy should also be studied in order to bring out the rules of law governing them, requested the Special Rapporteur on diplomatic intercourse and immunities to make such a study and to submit his report at a future session.

145. In his report on *ad hoc* diplomacy (A/CN.4/129), Mr. Sandström classifies *ad hoc* diplomatic relations into two categories:

(i) Diplomatic relations by means of itinerant envoys and special missions;

(ii) Diplomatic congresses and conferences.

He includes in his proposed articles relating to congresses and conferences a number of provisions concerning international organizations. Article 1 (c) defines the " delegation " to a congress or conference as:

> " the person or body of persons representing at the congress or conference a State, or an organization having international status, taking part in the congress or conference, and the auxiliary staff of such person or body of persons ".

Other provisions embody rules relating to delegates declared *persona non grata* (article 3 of chapter II of Alternative I), organization of conferences and congresses (article 5), immunities and privileges of the congresses and conferences and the delegations (articles 7 and 8).

146. The Commission considered the question of *ad hoc* diplomacy at its twelfth session in 1960. It decided to confine the scope of the topic to special diplomatic missions between States, and not to deal with the privileges and immunities of delegates to congresses and conferences. The Commission stated in its report that the question of diplomatic conferences was linked to that of relations between States and international organizations, and that the link made it difficult to undertake the subject of diplomatic conferences in isolation (A/4425, chapter III, paragraphs 32 and 33).

6. *In connexion with the work of the Sub-Committees on State Responsibility and on the Succession of States and Governments*

147. In concluding this recapitulation of the work of the International Law Commission and the position it took on a number of questions which come within the scope of the subject of relations between States and international organizations, reference should also be made to the work of the two Sub-Committees which the Commission set up in 1962 to define the scope and approach of its future work on the topics of State responsibility and the succession of States and Governments respectively (A/5209, chapter III, paragraphs 47, 54 and 62).

148. In the working paper submitted by Mr. Ago, Chairman of the Sub-Committee on State Responsibility,[110] the scope of the concept of international responsibility is defined as " responsibility of States and responsibility of other subject of international law ". When the Sub-Committee met in January 1963, it decided to suggest " that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside " (A/CN.4/152, footnote 2)

149. In the working paper submitted by Mr. Lachs, Chairman of the Sub-Committee on the Succession of States and Governments,[111] the question of " succession between international organizations " figures as one of the headings contained in the broad outline of the topic. When the Sub-Committee met in January 1963, it made a distinction between " succession in respect of membership of international organizations " (which is considered as succession of States) on the one hand, and " succession between international organizations " (which it considered as succession of international organizations) on the other. In the report which it prepared at the end of its meeting session in January 1963, reference is only made to " succession in respect of membership in international organizations " (A/CN.4/160, paragraph 13).

IV. Preliminary survey of the scope of the subject of the legal status of international organizations

A. The international personality of international organizations

150. The Advisory Opinion of the International Court of Justice of 11 April 1949 on the " Repara-

[110] A/CN.4/SC.1/WP. 6 of 2 January 1963.
[111] A/CN.4/SC.2/WP. 7.

tions for Injuries suffered in the Service of the United Nations ", marked an important stage in the development of the legal status of international organizations, and in more ways than one. In that Advisory Opinion, the Court found unanimously that the United Nations possessed a large measure of " international personality ", and stated that:

" It must be acknowledged that [the Organization's] 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.

" Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties . . . " [112]

151. The significance of this dictum can only be seen in its true dimensions when one recalls the controversial character which the concept of the international personality of international organizations assumed in the classical doctrine of international law and the fundamental change it has undergone in recent years. As a corollary to the traditional view regarded States only as the sole subjects of the international legal system, the international personality of international organizations had first been denied by a number of writers. An illustration of this school of thought is the statement by Neumeyer in 1924 that:

" Il nous sera donc permis de répéter l'antithèse que, d'après le droit actuel, les unions seront des personnes morales de droit local ou qu'elles ne le seront pas du tout ".[113]

152. A number of writers, who first adhered to the classical view, soon found themselves under the pratical needs of the developing international organizations making gradual but steady concessions in favour of the doctrine that international organizations possess a measure of international personality. Anzilotti is frequently cited as a noteworthy example of changing concepts in this domain. In 1904 he regarded it as " inconceivable that there should exist subjects of international rights and duties other than States ". However, in 1929, he cautioned against the mistake of affirming that States alone can be subjects of international law.[114] The gradual change in the concept of the international personality of international organizations may also be discerned by comparing the guarded pronouncement of McNair on the status of the League of Nations in 1928 with the categorical pronouncement on the same subject by Lauterpacht in 1955. Thus, McNair in the fourth edition of Oppenheim states the following:

" The League appears to be a subject of international law and an international person side by side with the several States . . . not being a State, and neither owning territory nor ruling over citizens, the League does not possess sovereignty in the sense of State sovereignty. However, being an international person *sui generis,* the League is the subject of many rights which, as a rule, can only be exercised by sovereign States ".[115]

Lauterpacht states in the eighth edition of the same work that " the predominant opinion was that the League of Nations . . . was a subject of international law " [116]

153. A parallel change of concepts is to be found in Soviet literature of international law. In 1947, Krylov stated in his lectures at the Hague Academy of International Law that:

" Les organismes internationaux ne sont pas non plus sujets du droit international . . . On ne saurait estimer être de véritables sujets du droit international les nombreux organismes administratifs de caractère international . . . " [117]

In his treatise on international law published in 1956, Tunkin states the following:

" There are not universally recognized norms establishing legal status of all international organizations ".

" At the same time international law does not preclude that this or that international organization may be given a certain measure of international personality. The scope of this personality is determined with regard to each particular international organization by a treaty by which the organization has been created."

" The general participation of States in a particular international organization, which possesses an international personality under its statute, or when the international personality of the international organization has been recognized not only by its members but also by other States, makes such international organization a generally recognized subject of international law ".[118]

B. Legal capacity and treaty-making capacity of international organizations

154. Article 104 of the United Nations Charter obligates each Member of the United Nations to accord to the Organization within its territory " such legal capacity as may be necessary for the exercise of its functions ".

155. The Convention on the Privileges and Immunities of the United Nations of 1946 [119] elaborated on the meaning of Article 104 as follows:

[112] " Reparations for Injuries suffered in the Service of the United Nations ", Advisory Opinion, I.C.J., Reports, 1949, p. 179.

[113] K. Neumever, " Les Unions Internationales ", 2, Revue de Droit International, de Sciences Diplomatiques, Politiques et Sociales (1924), p. 357.

[114] Quoted by G. Weissberg, The International Status of the United Nations, p. 3 (New York, 1961).

[115] Oppenheim-McNair, International Law, Vol. I, p. 321 (fourth edition, 1928).

[116] Oppenheim-Lauterpacht, International Law, Vol. I, p. 384 (eighth edition 1955).

[117] S. Krylov, Principes du Droit des Gens, Recueil des Cours, 1947 (I), p. 484.

[118] G. Tunkin, Fundamentals of Contemporary International Law, pp. 17, 18 and 19 (Moscow, 1956), in Russian. The English translation of the passage quoted from this work was made available to the Special Rapporteur through the kindness of the author. See also in the same trend an English summary of an article by R.L. Borov, " The Legal Status of the United Nations Organization " in Soviet Yearbook of International Law, 1959, pp. 240-242.

[119] Fort text see sources cited in footnote 69 *supra.*

" The United Nations shall possess juridical personality. It shall have the capacity:

" (*a*) to contract;

" (*b*) to acquire and dispose of immovable and movable property;

" (*c*) to institute legal proceedings. "

156. The constitutional instruments and conventions on the privileges and immunities of the specialized agencies and of a number of regional organizations contain provisions regarding the legal capacity of these organizations which vary as to phraseology but are similar in meaning.

157. By the International Organizations Immunities Act of 29 December 1945, the United States of America recognized international organizations coming within the terms of the Act, and to the extent consistent with the instrument creating them as possessing the capacity " (i) to contract; (ii) to acquire and dispose of real and personal property; (iii) to institute legal proceedings ".[120] By the " Interim Arrangement on Privileges and Immunities of the United Nations " between the United Nations and Switzerland of 11 June and 1 July 1946, the Swiss Government " recognizes the international personality and legal capacity of the United Nations ".[121]

158. The constituent instruments of international organizations do not in general contain a general authorization for the organization to conclude treaties, but many of them authorize it to conclude treaties of a certain type. The United Nations Charter specifically authorizes the Organization to conclude agreements with Member States on the provision of military contingents (Article 43), and with specialized agencies bringing them into relationship with the United Nations (Article 63). Articles 77 *et seq.* and 105 (3) have been interpreted as authorizing the conclusion of trusteeship agreements and conventions on privileges and immunities with Member States respectively.[122] Notwithstanding these provisions, the United Nations has concluded a great number of other treaties, both with States and with international organizations. In fact, in the years after the Second World War the practice of international organization with regard to their activities in the field of the law of treaties has grown extensively.[123] It is to be noted also that international organizations whose constitutions do not authorize the conclusion of any kind of treaties have, none the less, concluded treaties with States (headquarters agreements) and with other international organizations (on co-operation).[124]

159. The precise extent of the legal capacity of international organizations and in particular their capacity to conclude treaties has proved a controversial matter. Some writers adhere to the restrictive theory of " less delegated powers " according to which the capacity of international organizations is confined to such acts or rights as are specified in their constitutions. Others advocate the theory of " implied or inherent rights ". As we shall see, when we deal in the next paragraphs with the capacity of international organizations to espouse international claims, the International Court of Justice has taken cognizance of the fact that the capacities of the United Nations are not confined to those specified in its constitution. Thus, in the Advisory Opinion on " Reparation for Injuries suffered in the Service of the United Nations ", the Court stated:

> " Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties ".[125]

Similarly, in its Advisory Opinion on " Effects of Awards of Compensation made by the United Nations Administrative Tribunal ", the Court pointed out that the Charter contains " no express provision for the establishment of judicial bodies or organs and no indication to the contrary ", but held that capacity to establish a tribunal to do justice as between the Organization and the staff members " arises by necessary intendment out of the Charter ".[126]

C. Capacity of international organizations to espouse international claims, procedural capacity, functional protection

160. In its Advisory Opinion of 11 April 1949 on the " Reparations for Injuries suffered in the Service of the United Nations ", the International Court of Justice found unanimously that the United Nations possessed an international personality with capacity to bring international claims against Member and non-Member States, and that such claims could be brought for direct injuries to the Organization, i.e. " damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to interests of which it is the guardian ".[127]

161. There was a division of opinion in the Court, however, concerning " the capacity of the United Nations, as an Organization " to bring an international claim for indirect injury, i.e. to espouse the claim for damages for injury caused to its agents or to persons entitled through him. The majority opinion began by stating that the rule of diplomatic protection did not either exclude or justify by itself the rule of functional protection, and that it was " not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exist[ed] under Article 100 of the Charter,

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[120] See L. Preuss, " The International Organizations Immunities Act ", American Journal of International Law, vol. 40, pp. 332-345.

[121] United Nations *Treaty Series*, vol. 1, p. 164.

[122] See F. Seyersted, " United Nations Forces ", British Yearbook of International Law 1961. For a detailed classification of the agreements relating to privileges and immunities, see paragraph 105 above.

[123] For a detailed account of this practice, see J.W. Schneider, " Treaty-making Power of International Organizations ", Geneva, 1959; B. Kasme, " La Capacité de l'Organisation des Nations Unies de conclure des Traités ", Paris, 1960.

[124] Seyersted, *op cit.*, p. 450. For a comprehensive study of headquarters agreements, see P. Cahier, " Etudes des Accords de Sièges conclus entre les Organisations Internationales et les Etats où elles résident ", University of Geneva, Institut Universitaire de Hautes Etudes Internationales, 1959.

[125] " Reparation for Injuries suffered in the Service of the United Nations ", Advisory Opinion, I.C.J., Reports, 1949, p. 179.

[126] " Effects of awards of compensation made by the United Nations Administrative Tribunal ", Advisory Opinion of 13 July 1954, I.C.J., Reports, 1954, pp. 56-57.

[127] " Reparation for Injuries suffered in the Service of the United Nations ", Advisory Opinion, I.C.J., Reports, 1949, p. 180.

between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals ".[128] Then, in the silence of the Charter, it proceeded to examine the applicability of the criterion of implied powers to the question at hand in the following way:

" Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties . . .

" In order that the agent may perform his duties satisfactorily, he must feel that protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . . In particular, he should not have to rely on the protection of his on State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter . . . [I]t is essential that whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent — he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

" Upon examination of the character and functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter . . .

" In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization ".[129]

162. The dissenting judges challenged this interpretation on several grounds:

(i) That " [t]he exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents ";[130]

(ii) That " the bond between the Organization and its employees does not have the effect of expatriating the employee or of substituting allegiance to the Organization for allegiance to his State "; [131]

(iii) That " nationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant ";[132] and

(iv) That " to affirm, in the Court's opinion, a right of the Organization to afford international protection to its agents as an already existing right, would be to introduce a new rule into international law and — what is more — a rule which would be concurrent with that of diplomatic protection which appertains to every State vis-à-vis its nationals ".[133]

163. The recognition of the right of functional protection raises several problems to which the Advisory Opinion does not bring a solution. One problem is that of the reconciliation between the State's right of diplomatic protection and the Organization's right of functional protection. The majority opinion, after recognizing the possibility of such a competition, states that " there is no rule of law which assigns priority to the one or the other, or which compels either the State or the Organization to refrain from bringing an international claim ", and that it " sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense ".[134]

164. Another problem arising from the recognition of the right of functional protection is that concerning the arbitral or judicial instance which can ultimately be seized by the Organization in its exercise of the functional protection. Whenever there is an arbitration clause covering the situation, such as those included in agreements between the Organization and States concerning its privileges and immunities, the problem does not arise. Only in the absence of such a clause does it become relevant. In such a case, a paradox arises, however, from Article 34, paragraph 1, of the Statute of the International Court of Justice which stipulates that " only States may be parties in cases before the Court ". According to this stipulation, international organizations including the United Nations, of which the Court is the " principal judicial organ ", are barred from appearing before it as parties, even when they are in a legal situation similar to that of States such as that of being a claimant for direct or indirect injury against a State. Originally, the purpose of this Article was to exclude individuals from bringing claims against States before the Permanent Court of International Justice.[135] However,

" [w]hen a proposal was made to the 1929 Committee of Jurists that Article 34 be amended to provide that the League of Nations might be a party before the Court, President Anzilotti expressed the view that the text of Article 34 did not 'prejudice the question whether an association of States could, in certain circumstances, appear before the Court', and that 'if the League possessed a collective personality in international law, Article 34 would not exclude it from appearing before the Court'. " [136]

The fulfilment of the condition laid down by Anzilotti, i.e. the possession of an international personality by the international organization, has been unequivocally recognized by the Advisory Opinion quoted above. Some authors go so far as to consider that Article 34, para-

[128] *Ibid.* p. 182.
[129] *Ibid.*, pp. 182-184.
[130] Dissenting Opinion by Judge Hackworth, *ibid.*, p. 196 at p. 198.
[131] *Ibid.*, p. 201.
[132] *Ibid.*, p. 202; Judge Winiarski associated himself with the views expressed by Judge Hackworth, *ibid.*, p. 189; the dissenting opinions of Judges Badawi and Krylov raise similar arguments to those of Judge Hackworth, *ibid.*, p. 205 and p. 217 respectively.
[133] *Ibid.*, p. 217 (dissenting opinion of Judge Krylov).
[134] *Ibid.*, pp. 185-186.
[135] Hudson, The Permanent Court of International Justice 1920-1942, A Treatise, p. 186 (New York, 1943).
[136] *Ibid.*, p. 187, citing Minutes of the 1929 Committee of Jurists (League of Nations Doc. C.166.M.66, 1929.V), pp. 59-60.

graph 1, of the Statute does not bar the United Nations from bringing claims before the Court, as it can be assimilated to States for that purpose and in such a situation.[137] Others, without going so far, advocate the revision of the Statute in this direction.[138]

165. The limits of functional protection are not yet precisely defined. The Advisory Opinion envisaged the case of the United Nations and based its recognition of the capacity of this Organization to exercise functional protection partly on its universal character and the general scope of its activities. Even in the case of the United Nations, it has left some of the questions unanswered. The conditions and limits of the recognition of the same capacity in the case of other international organizations have yet to be laid down.

166. There are other situations, aside from the existence of a functional link, where it is conceivable that an international organization exercises a role similar to that exercised by States for their citizens in diplomatic protection. This can be the case in connexion with the population of a territory put under the direct international administration of an international organization, e.g. in the proposed plan for Trieste which did not materialize; in the case of West Irian during the transition period, etc. In some respects, this is also the case of the international protection of refugees by international agencies.[139]

D. Privileges and immunities of international organizations ius legationum and diplomatic conferences

167. One of the most developed branches of the subject of the legal status of international organizations is that relating to privileges and immunities. " The law governing international immunities no longer consists primarily of a general principle resting on the questionable analogy of diplomatic immunities; it has become a complex body of rules set forth in detail in conventions, agreements, statutes and regulations ".[140] The treaty and statute law has been supplemented by a considerable body of case law.

168. As we have seen in the previous chapter, the greatest bulk of codification of the law relating to the legal status of international organizations was devoted to international immunities. Reference has also been made to the efforts of both the League of Nations and the United Nations to codify the rules relating to international conferences and Resolution 257 (III) of the General Assembly of the United Nations concerning " Permanent Missions to the United Nations ".[141] We shall therefore concentrate our attention here on a number of problems which have, a special bearing upon and are likely to be encountered in any future work in the codification of privileges and immunities of international organizations and the other aspects of the law of diplomatic relations in its application to international organizations.

1. *The place of customary law in the system of international immunities*

169. The majority of writers state that, unlike the immunities of inter-State diplomatic agents, international immunities have been regulated almost exclusively by conventional law, and that international custom has not yet made any appreciable contribution in that branch of law. A number of writers acknowledge, however, that " a customary law appears to be in the process of formation, by virtue of which certain organizations endowed with international personality may claim diplomatic standing for their agents as of right ",[142] and speak of " l'existence d'une véritable coutume internationale ou en tout cas d'un commencement de coutume . . . ".[143]

2. *Uniformity or adaptation of international immunities?*

170. The regime of international immunities is based at present on a large number of instruments whose diversity causes practical difficulties to States as well as to international organizations. It is of great practical importance to all national authorities concerned with customs, emigration etc. that the provisions are the same for all or most international officials: " From the standpoint of an international organization conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries." [144] However many writers qualify their enthusiasm for the objective of uniformity by pointing out to the need for adaptation of immunity to function in particular cases.

3. *Problem of accreditation of representatives to international organizations*

171. The problem of accreditation of representatives to the United Nations was discussed at the third session of the General Assembly. " It was then generally understood that even the term 'credentials' was out of place because it tended to give the impression that the United Nations was a State . . . " [145] The General Assembly adopted on 3 December 1948 resolution 257 (III) on permanent missions to the United Nations [146] recommending that credentials of members of such missions " shall be transmitted to the Secretary-General ". Many writers on international immunities have interpreted this provision as implicitly ruling out the requirement of agreement.[147]

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[137] e.g., Eagleton: " It would not be unreasonable or illogical for the Court to hold, if opportunity presented, that the word 'states' was used in the sense of 'international legal persons' and that consequently, international organizations having legal personality could be allowed to appear before the Court ". Eagleton, " International organization and the Law of Responsibility ", 76 Recueil des Cours, p. 323 at p. 418 (1950 I); Weissberg, The International Status of the United Nations, p. 200 (London, 1961).

[138] Eagleton, *op. cit.* p. 418; see also all the authorities cited in Weissberg *op cit.*, p. 200, note 136.

[139] See in general, Weis, The International Protection of Refugees, 48 American Journal of International Law, p. 193, especially pp. 218 ff (1954).

[140] Jenks *op. cit.*, p. xxxv.

[141] See paragraph 116 above.

[142] L. Preuss, " Diplomatic Privileges and Immunities of Agents invested with functions of an international interest, " American Journal of International Law, vol. 25 (1931), p. 695.

[143] J. F. Lalive, " L'immunité de Juridiction des Etats et des Organisations Internationales ", 84 Recueil des Cours (1953), p. 304. See on this question Weissberg, *op. cit.*, pp. 142-146.

[144] Jenks *op cit.*, p. 149.

[145] General Assembly Official Records (3rd session) part I, Sixth Committee, p. 624.

[146] See paragraph 116 above.

[147] L. Gross, " Immunities and Privileges of Delegates to the United Nations ", International Organization, vol. XVI, Summer 1962, p. 491.

E. Miscellaneous

1. *Responsibility of international organizations*

172. The continuous increase of the scope of activities of international organizations is likely to give new dimensions to the problem of responsibility of international organizations. The Agreement concluded between Indonesia and the Netherlands concerning West New Guinea (West Irian), of which the General Assembly of the United Nations took note at its 1127th plenary meeting on 20 September 1962, gave the Organization its first practical case of administering a territory with the attending legal consequences comparable to State responsibility on a territorial basis.

173. The International Conference on Civil Liability from Nuclear Damage (Vienna, April-May 1963), which prepared a Convention on Civil Liability for Nuclear Damage, adopted a resolution recommending " that the International Atomic Energy Agency . . . establish a standing committee composed of reprentatives of the Governments of fifteen States with the following tasks . . .

> " (*c*) to study any problems arising in connexion with the application of the Convention to a nuclear installation operated by or under the auspices of an inter-governmental organization, particularly in respect of the 'Installation state as defined in Article I (of the Convention)'." [148]

2. *Recognition of international organizations*

174. The problem of recognition arises in respect of international organizations of regional or limited scope. With regard to the universal organizations (the United Nations and the specialized agencies,) there is substantial support for the submission that they enjoy international personality on an objective basis. Thus one of the findings of the International Court of Justice, in its Advisory Opinion on " Reparation for Injuries suffered in the Service of the United Nations ", was that:

> " 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, and not merely personality recognized by them alone . . . " [149]

3. *Succession between international organizations*

175. International organizations being a relatively recent phenomenon, many of the legal problems pertaining to their status are not yet subject to a settled practice. Succession between international organizations is one of these problems. The problem is simple when the membership of the two organizations is identical or when the membership of the new organization is wider than that of the old one. It becomes more complicated in the case where some of the members of the old organization do not take part in the new one.

176. In the few instances where the problem of succession arose, it was settled by an agreement between the two organizations concerned. Such was the case of the different agreements between the United Nations and the League of Nations [150] based upon the Interim Arrangements which were signed at the same time as the United Nations Charter

177. Where certain functions are entrusted to the old international organization by international agreements other than its constitutional instrument, " it is desirable that [the constituent instruments of the successor organization] should embody an undertaking whereby members of the body being created agree to the transfer thereto of the functions, powers, rights and duties vested in the old body by instruments to which they are parties. Failing such action the continued execution of such instruments may be prevented or impeded when the old body ceases to exist, and it is the consent of the individual parties to the instruments conferring functions, powers, rights or duties, rather than that of the old body, which is necessary in order to avoid this result. " [151]

This precaution was taken in the case of the International Court of Justice. Article 36, paragraph 5, of its Statute stipulates that:

> " Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms ".

Conclusion

A. Broad outline

178. In the light of the foregoing review of attempts to codify the international law relating to the legal status of international organizations and the preliminary survey of its scope, the subject may be classified into the following self-contained and closely related groups of questions:

I. First group — the general principles of international personality, which would include:

1. Definition of the concept of the international personality of international organizations;
2. Legal capacity;
3. Treaty-making capacity;
4. Capacity to espouse international claims.

II. Second group — international immunities and privileges, which would include:

1. Privileges and immunities of international organizations;
2. Related questions of the institution of legation in respect to international organizations;
3. Diplomatic conferences.

III. Third group — special questions:

1. The law of treaties in respect to international organizations;

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[148] International Atomic Energy Agency, Document CN-12/48.

[149] I.C.J. Reports 1949, p. 174.

[150] United Nations Treaty Series, vol 1, pp. 109, 119, 131, 135 (1946).

[151] C. W. Jenks " Some Constitutional Problems of International Organizations ", XXII British Yearbook of International Law p. 11 at p. 69 (1945).

2. Responsibility of international organizations;
3. Succession between international organizations.

B. Method of work and approach to it

179. Upon a consideration of the relevant provisions of the Commission's Statute, and of the general directives to rapporteurs on other topics, and in particular, in connexion with the work of the two Sub-Committees on State Responsibility and the Succession of States and Governments, the Rapporteur wishes to make the following two recommendations to the Commission:

1. The work of the Commission on the subject of relations between States and inter-governmental organizations should proceed in the order outlined in the previous paragraph;
2. The work of the Commission on this subject should concentrate on international organizations of universal character (the United Nations system), and prepare its drafts with reference to these organizations only and examine later whether they could be applied to regional organizations as they stood or whether they required modifications.