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Preliminary report on the second part of the topic of relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteut

Topic:

Status, privileges and immunities of international organizations, their officials, experts, etc.

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LONG-TERM PROGRAMME OF WORK

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Preliminary report on the second part of the topic of relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur

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CONTENTS

CONTENTS (*continued*)

ABBREVIATIONS

EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund
ITU	International Telecommunication Union
OAU	Organization of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization

CHAPTER I

The basis of the present report

1. In its report on the work of its twenty-eighth session, the International Law Commission included the following paragraph:

The Commission also approved the recommendations of the [Planning] Group, which was submitted to it by the Enlarged Bureau, that at least three meetings should be set aside for a discussion of the second part of the topic "relations between States and international organizations". In considering the question of diplomatic law in its application to relations between States and international organizations, the Commission concentrated first on the part relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted on this part at its twenty-third session in 1971 were referred by the General Assembly to a diplomatic conference. This conference met in Vienna in 1975 and adopted

the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Commission requested the Special Rapporteur on the topic, Mr. Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States. [1]

2. By its resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the Commission to consider the question of relations between States and intergovernmental 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".

3. In 1963, the Special Rapporteur presented to the Commission a first report, [2] and a working paper, [3] on relations between States and intergovernmental organizations, in which he made a preliminary study with a view to defining the cope of the subject and determining the order of future work on it. In 1964, he submitted a working paper [4] as a basis of discussion for the definition of the scope and mode of treatment of his topic.

4. This working paper contained a list of questions, some of which related to:

(*a*) The scope of the subject [interpretation of General Assembly resolution 1289 (XIII)];

(*b*) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);

(*c*) The mode of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations).

5. The conclusion which the Commission reached on the scope and mode of treatment of the topic, after discussing the preliminary study and list of questions mentioned above, was recorded in its report on the work of its sixteenth session in the following terms:

> At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and intergovernmental organizations should receive priority. [5]

6. At its 757th meeting, held on 2 July 1964, the Special Rapporteur indicated to the Commission his intention to contact the Office of Legal Affairs of the United Nations. Consultations at that stage of the work centred on the manner in which the legal advisers of the United Nations and the specialized agencies could best assist the Special Rapporteur in furnishing to him the necessary data and legal opinions on the problems which arose in practice concerning his topic. Pursuant to those consultations, two questionnaires were prepared and addressed by the Legal Counsel of the United Nations to the legal advisers of the specialized agencies and IAEA. The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA" and the second to the "status, privileges and immunities of the specialized agencies and of IAEA other than those relating to representatives". The questionnaires were carefully prepared so to be as comprehensive as possible with a view to eliciting all information that would be useful to the Commission. The agencies to which the questionnaires were addressed were reminded, however, that the questions might not be exhaustive of the subject. They were therefore requested to describe in their replies any problems not covered by the questionnaire which might have arisen in their organizations and which they thought should be brought to the attention of the Special Rapporteur. The agencies were further reminded that, as the questionnaire was designed for all the specialized agencies, its terminology might not be completely adapted to a particular organization, which should in such case endeavour to apply the question to its special position. After receiving replies from the organizations concerned, the Secretariat of the United Nations issued in 1967 a study entitled: "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities". [6]

7. At its 886th meeting, held on 8 July 1966, the Special Rapporteur suggested to the Commission that it should divide the subject into two parts and should concentrate its work first on the status, privileges and immunities of representatives of States to international organizations and that the second part of the subject, namely, the status, privileges and immunities of international organizations, should be deferred to a later stage. The Special Rapporteur stated that:

> With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the General Conventions on the privileges and immunities of the United Nations and the specialiezd agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect. [7]

8. The suggestion by the Special Rapporteur was accepted by the Commission and the work on the subject of relations between States and international organizations proceeded in the manner indicated. [8]

9. The present report is intended as a preliminary study

[1] *Yearbook... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

[2] *Yearbook... 1963*, vol. II, p. 159, document A/CN.4/161 and Add.1.

[3] *Ibid.*, p. 186, document A/CN.4/L.103.

[4] A/CN.4/L.104. For the substance of this paper, see *Yearbook... 1964*, vol. II, p. 226-227, document A/5809, para. 41.

[5] *Ibid.*, para. 42.

[6] *Yearbook... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1-2.

[7] *Yearbook... 1966*, vol. I (Part Two), p. 279, 886th meeting, para. 8.

[8] See para. 1 above.

of the scope of and the approach to the second part of the topic of relations between States and international organizations, namely, the legal status, privileges and immunities of international organizations. Its purpose is to: (*a*) trace the evolution of legal norms which govern that branch of international law; (*b*) point out some recent developments in other related subjects which have their bearing on the subject-matter of this study; and (*c*) examine a number of general questions of a preliminary character with a view to defining and identifying the course of action and method of work to be submitted to the Commission for its consideration.

CHAPTER II

Evolution of the international law relating to the legal status and immunities of international organizations

10. 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.[9] Examples are to be found in the treaties establishing the European Commission for the Control of the Danube, the International Commission for the Navigation of the Congo, as well as the Permanent Court of Arbitration, the proposed International Prize Court and the Judicial Arbitration Court provided for by the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.[10]

11. 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.[11]

A. The League of Nations

1. CONSTITUTIONAL PROVISIONS

12. 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.

13. Article 19 of the Statute of the Permanent Courts of International Justice provided that:

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

2. TREATY PROVISIONS

14. 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,[12] 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.

15. 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

[9] J. Secretan, "The independance granted to agents of the international community in their relations with national public authorities", *The British Year Book of International Law, 1935* (London), vol. 16, pp. 59-65.

[10] In 1922, the French Government informed the Central Commission of the Navigation of the Rhine "qu'en raison du caractère international 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". (G. Weissberg, *The International Status of the United Nations* (New York, Oceana, 1961), p. 143, also F. Ray, "Les immunités des fonctionnaires internationaux", *Revue de droit international privé* (Paris), vol. 23, No. 3 (1928), p. 266.)

[11] C. W. Jenks, *International Immunities* (London, Stevens, 1961), p. 12.

[12] The *Modus Vivendi* of 1921 (United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No. 61.V.3), p. 127) 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 (*ibid.*, p. 134) 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 M. Hill, *Immunities and Privileges of International Officials—The Experience of the League of Nations* (Washington, D.C., Carnegie Endowment for International Peace, 1947), pp. 14-23.

of the League on 5 June 1928.[13] 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".[14]

3. The League of Nations Committee of Experts for the Progressive Codification of International Law

16. 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 ...".[15]

17. 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,[16] 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.[17]

18. 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.[18]

4. Status of the International Labour Office in Canada during the Second World War

19. 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 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".[19]

B. The United Nations and the specialized agencies

1. Constitutional provisions

20. 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.

21. 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.

22. 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 XVI 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

[13] League of Nations, *Official Journal*, 9th year, No. 7 (July 1928), pp. 985-987.

[14] *Ibid.*, p. 985.

[15] This decision was taken in pursuance of a resolution adopted by the Assembly of the League on 22 September 1924. See League of Nations, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation* (C.196.M.70.1927.V), p. 75.

[16] *Ibid.*, pp. 78-85.

[17] *Ibid.*, p. 77.

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

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

of the Constitution of the World Health Organization, Article 27 of the Convention of the World Meteorological Organization, Article 47 of the Convention on International Civil Aviation, Article 50 of the Convention on the Intergovernmental Maritime Consultative Organization, Article XV of the Statute of the International Atomic Energy Agency). [20] However, the constitutions of some specialized agencies themselves define 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). [21]

2. The Preparatory Commission of the United Nations

23. In June 1945, 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. [22]

24. 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 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". [23]

25. 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 the privileges and immunities of the United Nations, were adopted by the General Assembly on 13 February 1946:

(*a*) A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, and text of the Convention;

(*b*) 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 of America, and text of a draft convention to be transmitted as a basis of discussion for these negotiations;

(*c*) A resolution on the privileges and immunities of the International Court of Justice;

(*d*) A resolution on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies. [24]

3. Treaty provisions

(a) *General conventions*

26. A Convention on the Privileges and Immunities of the United Nations (hereafter referred to as the 1946 Convention) was approved by General Assembly resolution 22 A (I) on 13 February 1946 [25] and was in force on 31 December 1976 for 112 States. [26] 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 missions for the United Nations". [27]

[20] For these texts, see United Nations Legislative Series. *Legislative texts and Treaty Provisions ...*, vol. II (*op. cit.*).

[21] *Ibid.*

[22] Report of the Preparatory Commission of the United Nations (PC/20), chap. VII, sect. 1, para. 1.

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

[24] Resolutions 22 A (I), 22 B (I), 22 C (I) and 22 D (I), respectively.

[25] United Nations, *Treaty Series*, vol. 1, p. 15.

[26] *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions—List of Signatures, Ratifications, Accessions, etc., as at 31 December 1967* (United Nations publication, Sales No. E.77.V.7), pp. 35-37.

[27] For a summary of the provisions of this Convention, see *Repertory of Practice of United Nations Organs*, vol. V (United Nations publication, Sales No. 1955.V.2 (vol. V)), Articles 104-105, paras. 50-166.

27. A Convention on the Privileges and Immunities of the Specialized Agencies [28] (hereafter referred to as the 1947 Convention) was approved by General Assembly resolution 179 (II) on 21 November 1947 and was in force on 31 December 1976 for 81 States. [29] This Convention follows closely the terms of the 1946 Convention, with a small number of significant variations. [30] The 1947 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 ILO, FAO, UNESCO, ICAO, IMF, IBRD, WHO, UPU and ITU, and any further agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter. [31] Accordingly, the Convention has been applied to WMO, IMCO, IFC and IDA. 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". [32]

(b) *Headquarters agreements*

28. The general conventions are supplemented by headquarters agreements between the United Nations and specialized agencies on the one hand and the States in whose territory they maintain headquarters on the other hand. Headquarters agreements have been concluded by the United Nations with the United States and Switzerland, by ICAO with Canada, by UNESCO with France, by FAO with Italy, by IAEA with Austria, and by the ILO, WHO, WMO, ITU, UPU and WIPO with Switzerland. [33]

(c) *Special agreements*

29. The *Repertory of Practice of United Nations Organs* 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: [34]

(*a*) Agreements with non-member States.

(*b*) Agreements with Member States:

(i) Agreements complementary or supplementary to the 1946 Convention;

(ii) Agreements applying the provisions of the 1946 Convention in cases where Members have not yet acceded to the Convention;

(iii) Agreements specifying the nature of privileges and immunities to be enjoyed by certain United Nations organs in host countries.

(*c*) Agreements concluded with Member or non-member States by United Nations principal or subsidiary organs within their competence:

(i) Agreements on the operation of the relief programme for Palestine refugees;

(ii) Agreements concerning the activities of UNICEF in Member or non-member States;

(iii) Agreements concerning technical assistance;

(iv) Trusteeship agreements.

30. Jenks gives a detailed enumeration of these special agreements, classifying them in the following categories: [35]

(*a*) Host agreements (e.g. agreements concluded by WHO for its regional offices with Egypt, France and Peru, and by the ILO for its field offices with Mexico, Peru, Turkey and Nigeria);

(*b*) Agreements relating to special political tasks (e.g. agreement concluded by the United Nations with Korea on 21 September 1951, agreement concluded by the United Nations with Egypt on 8 January 1957 concerning the United Nations Emergency Forces);

(*c*) Technical assistance and supply agreements;

(*d*) Agreements concerning particular meetings (e.g., 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).

C. Regional organizations

31. The constitutional instruments of regional organizations also usually contain provisions relating to the privileges and immunities of the organization. Examples:

(*a*) Article 14 of the Pact of the League of Arab States, signed at Cairo on 22 March 1945; [36]

(*b*) Articles 103-106 of the Charter of the Organization of American States, signed at Bogotá on 30 April 1948; [37]

(*c*) Article 40 of the Statute of the Council of Europe, signed at London on 5 May 1949; [38]

(*d*) Article 76 of the Treaty instituting the European Coal and Steel Community, signed at Paris on 18 April 1951; [39]

(*e*) Article 218 of the Treaty establishing the European Economic Community, done at Rome on 25 March 1957; [40]

(*f*) Article XIII of the Charter of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959; [41]

[28] United Nations, *Treaty Series*, vol. 33, p. 261.

[29] *Multilateral treaties...* (*op. cit.*), pp. 40-46.

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

[31] See F. Wolf, "Le droit aux privilèges et immunités des institutions spécialisées reliées aux Nations Unies", thesis, University of Montreal, 1948, cited in Jenks, *op. cit.*, p. 5, foot-note 34.

[32] United Nations, *Treaty Series*, vol. 374, p. 148.

[33] United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I (United Nations publication, Sales No. 60.V.2), and vol. II (*op. cit.*), and WIPO document WO/CC/II/3.

[34] *Repertory of Practice of United Nations Organs*, vol. V (*op. cit.*). See also *ibid.*, Supplement No. 1, vol. II (United Nations publication, Sales No. 1957.V.4 (Supp. 1) (Vol. II)), Supplement No. 2, vol. III (Sales No. 63.V.7) and Supplement No. 3, vol. IV (Sales No. E.73.V.2).

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

[36] United Nations, *Treaty Series*, vol. 70, p. 256.

[37] *Ibid.*, vol. 119, pp. 88 and 90.

[38] *Ibid.*, vol. 87, p. 124.

[39] *Ibid.*, vol. 261, p. 215.

[40] *Ibid.*, vol. 298, p. 87.

[41] *Ibid.*, vol. 368, p. 280.

(*g*) Article 35 of the Convention establishing the European Free Trade Association, signed at Stockholm on 4 January 1960; [42]

(*h*) Article XXXI of the Charter of the Organization of African Unity, done at Addis Abeba on 25 May 1963. [43]

32. These constitutional provisions have been implemented by general conventions on privileges and immunities, which were largely inspired by the 1946 Convention and the specialized agencies conventions. Examples:

(*a*) Convention on the Privileges and Immunities of the League of Arab States, approved by the Council of the League on 10 May 1953; [44]

(*b*) Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; [45]

(*c*) General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; (and additional Protocols); [46]

(*d*) Protocol on the privileges and immunities of the [European Coal and Steel] Community, signed at Paris on 18 April 1951; [47]

(*e*) Protocol on the Privileges and Immunities of the European Economic Community, done at Brussels on 17 April 1957; [48]

(*f*) Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959; [49]

(*g*) Protocol on the legal capacity, privileges and immunities of the European Free Trade Association, signed at Geneva on 28 July 1960; [50]

(*h*) General Convention on the Privileges and Immunities of the Organization of African Unity, adopted by the Assembly of Heads of State and Government of OAU at Accra on 25 October 1965. [51]

A number of headquarters and host agreements were also concluded by regional organizations with States in whose territory they maintain headquarters of other offices.

[42] *Ibid.*, vol. 370, p. 24.

[43] *Ibid.*, vol. 479, p. 86.

[44] *Legislative Texts and Treaty Provisions* ..., vol. II (*op. cit.*), p. 414.

[45] *Ibid.*, p. 377.

[46] United Nations, *Treaty Series*, vol. 250, pp. 12 and 32, and *ibid.*, vol. 261, p. 410.

[47] *Ibid.*, p. 239.

[48] *Ibid.*, vol. 298, p. 140.

[49] *Ibid.*, vol. 368, p. 242.

[50] *Ibid.*, vol. 394, p. 37.

[51] L. B. Sohn, ed., *Basic Documents of African Regional Organizations* (Dobbs Ferry, N.Y., Oceana, 1971), vol. 1, p. 117.

CHAPTER III

Recent developments in the field of relations between States and international organizations

33. At its twenty-third session in 1971, the Commission completed its work on the first part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of representatives of States to international organizations. It adopted at that session the final text of its draft articles, with commentaries, on the representation of States in their relations with international organizations and the annex thereto. [52] The Commission decided also, in conformity with article 23, paragraph 1 (*d*), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study those draft articles and to conclude a convention on the subject. [53] The above-mentioned draft articles were divided into four parts; part I (Introduction) concerned the introductory provisions, which were intended to apply to the draft articles as a whole; part II (Missions to international organizations) contained provisions dealing specifically with the rules on permanent missions and permanent observer missions; part III (Delegations to organs and to conferences) contained provisions dealing specifically with delegations to organs of international organizations and delegations to conferences convened by or under the auspices of international organizations; part IV (General provisions) contained those further provisions which were generally applicable to missions to international organizations and to delegations to organs and to conferences. The draft articles contained also a set of provisions on observer delegations to organs and conferences, which were presented in the form of an annex.

34. In formulating the above-mentioned draft articles, the Commission sought to produce a comprehensive regulation of the legal status of permanent missions sent by States members of an international organization to the organization, permanent observer missions sent by non-member States of an international organization to the organization, delegations to organs of international organizations and to conferences convened by or under the auspices of international organizations and observer delegations to such organs and conferences. The draft treated, *inter alia*, the following questions: the establishment, functions and composition of those missions and delegations; the appointment and accreditation of their members; and the facilities, privileges and immunities accorded to missions and delegations and their members respectively. The draft also contained general rules relating to respect of the laws and regulations of the host State, entry into the territory of the host State, non-discrimination and consultations and conciliation.

35. Since the adoption of the above-mentioned draft articles by the Commission at its twenty-third session in 1971, two important developments have occurred which have a bearing on the subject of the present study. First, the Commission redefined a number of points concerning relations between States and international organizations in the course of its work on the question of treaties

[52] *Yearbook... 1971*, vol. II (Part One), p. 281, document A/8410/Rev.1, para. 39, and p. 284, chap. II, sect. D.

[53] *Ibid.*, p. 284, para. 57.

concluded between States and international organizations or between two or more international organizations. Second, the United Nations Conference on the Representation of States in Their Relations with International Organizations introduced a number of refinements and precisions into the draft articles prepared by the Commission which were referred to that Conference by the General Assembly of the United Nations as the basic proposal for its consideration.

A. The work of the Commission on the topic "Question of treaties concluded between States and international organizations or between two or more international organizations"

36. In the course of preparing its draft articles on the law of treaties, the Commission decided to limit their scope to treaties concluded between States to the exclusion of treaties between States and other subjects of international law and treaties between such other subjects of international law. [54] Article 1 of the draft articles, adopted by the Commission at its eighteenth session in 1966, [55] which is entitled "The scope of the present articles", provides that

> The present articles relate to treaties concluded between States.

37. The United Nations Conference on the Law of Treaties, adopted at its second session in 1969 a resolution in which it:

> *Recommends* to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations. [56]

38. It was on this basis that the General Assembly adopted at its twenty-fourth session, a resolution to the same end, namely, resolution 2501 (XXIV) of 12 November 1969. [57] Pursuant to that resolution, the Commission decided, at its twenty-second session in 1970, to include the question in its programme of work and to set up a Sub-Committee to consider preliminary problems involved in the study of this new topic. After considering and adopting at its twenty-second session a report by this Sub-Committee, [58] the Commission, at its twenty-third session, took note of a working paper, prepared by the Secretary-General at the Commission's request, which contained a short bibliography, a historical survey of the question, and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*. [59] During the same session, the Sub-Committee submitted to the Commission a report which contained general trends to serve to guide the work of the Commission on this topic and its Special Rapporteur, Mr. Reuter. [60] The Sub-Committee report was adopted by the Commission. The General Assembly approved the approach suggested by the Commission and recommended, in its resolution 2780 (XXVI) of 3 December 1971, [61] that the Commission

> Continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations. [62]

39. As in the case of its study of the first part of the topic of relations between States and international organizations, i.e. the status, privileges and immunities of representatives of States to international organizations, the Commission had of necessity, in the course of its work on the question of treaties concluded between States and international organizations or between two or more international organizations, to take a position on a number of questions of a general character such as the scope of the draft, the notion of an international organization and the relationship between the rules embodied in the draft and the internal rules of each organization concerned. It would be, therefore, useful to refer briefly to the position taken by the Commission on such preliminary notions in its work on the question of treaties concluded between States and international organizations or between two or more international organizations, in as much as the Commission will also have to define its position on these notions in order to chart its future work on the second part of the topic of relations between States and international organizations, i.e. the legal status, privileges and immunities of the organizations, their officials, experts and persons engaged in their service other than representatives of States, which is the subject of the present study.

1. Scope of the draft

40. Article 1 of the provisional draft articles on treaties concluded between States and international organizations or between international organizations, which was adopted by the Commission at its twenty-sixth session in 1974, provides that:

> The present articles apply to:
>
> (*a*) treaties concluded between one or more States and one or more international organizations, and
>
> (*b*) treaties concluded between international organizations. [63]

[54] *Yearbook... 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 28.

[55] *Ibid.*, p. 177.

[56] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex, resolution relating to Article 1 of the Vienna Convention on the Law of Treaties.

[57] See also *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (*b*), document A/7746, para. 118.

[58] *Yearbook... 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

[59] A/CN.4/L.161 and Add.1-2.

[60] *Yearbook... 1971*, vol. II (Part One), p. 348, document A/8410/Rev.1, chap. IV, annex.

[61] See also *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 168.

[62] For a summary of the background of the work of the Commission on the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", see *Yearbook... 1972*, vol. II, pp. 176-185, document A/CN.4/258, paras. 18-48.

[63] *Yearbook... 1974*, vol. II (Part One), pp. 294-299, document A/9610/Rev.1, chap. IV, sect. B.

41. In defining the scope of these draft articles, the Commission adopted an approach different from the one it took in its draft articles on representation of States in their relations with international organizations. [64] Article 2, paragraph 1, of the latter provides that:

The present articles apply to the representation of States in their relations with international organizations of *universal* [65] character and to their representation at conferences convened by or under the auspices of such organizations.

The expression "international organization of universal character" is defined in article 1, paragraph 1 (2), as "an organization whose membership and responsibilities are on a world-wide scale".

42. The reasons for the different approach taken by the Commission are laid down in the commentary to article 2 of the draft articles on treaties concluded between States and international organizations or between international organizations:

(10) ... The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(11) Here the present draft differs profoundly from another text prepared by the Commission, namely the draft articles on the representation of States in their relations with international organizations, which cover basically international organizations of universal character.

(12) The difference stems from the very purpose of the two drafts. The draft articles on the representation of States in their relations with international organizations are concerned with the law of international organizations and their purpose is to unify, within a limited area, the specific rules of certain organizations. Consequently, if the draft is limited to certain organizations possessing similar characteristics, namely universal character, there is no good reason why each organization should be endowed, in that particular area, with a régime of its own. The present draft articles, however, deal not with the law of international organizations but with the law of treaties; the legal force and the régimes of the treaties considered therein derive their substance, not from the rules of each organization—that is to say, rules which would have to be unified—but from general international law. Hence the rules that govern a treaty between the United Nations and the ILO should be the same as those that govern a treaty between the ILO and the Council of Europe, for both sets of rules derive from the same principles.

(13) The inference from this basic legal analysis is that the scope of the present draft should include treaties to which all international organizations are parties. Historical and practical considerations point to the same conclusion. This was certainly what the United Nations Conference on the Law of Treaties and the General Assembly had in mind when they requested the Commission to undertake this study. Since the Conference did not have time to adopt the provisions required in order to settle in a single convention the position with regard both to treaties between States and to treaties between States and international organizations or between international organizations, the whole topic should at least be confined to no more than two instruments. The very aim of codification, which is a matter of unity, clarity and simplicity, would be jeopardized if, beyond the scope of two texts, a large area of treaty relations between States and organizations, or between organizations, had still to be left in doubt. [66]

2. Notion of an international organization

43. Article 2, paragraph 1 (i) of the draft articles on treaties concluded between States and international organizations or between international organizations gives to the term "international organization" a definition identical with that in the Vienna Convention on the Law of Treaties. It simply identifies an international organization as an intergovernmental organization. In the commentary to article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties, the Commission stated that:

The term "international organization" is here defined as an *intergovernmental* organization in order to make it clear that the rules of non-governmental organizations are excluded. [67]

44. The Commission also pointed out in the commentary to article 2, paragraph 1 (*i*) of its draft articles on treaties concluded between States and international organizations or between international organizations the following:

(7) ... This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connexion, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.

(8) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(9) In the present draft, this very elastic definition is not meant to prejudge the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is—and we shall revert to this point in the commentary to article 6—that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned. [68]

3. Capacity of international organizations to conclude treaties

45. Article 6 of the draft articles on treaties concluded between States and international organizations or between international organizations provides that:

[64] *Yearbook... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

[65] Emphasis added by the Special Rapporteur.

[66] *Yearbook... 1974*, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, article 2, paras. (10)-(13) of the commentary.

[67] *Yearbook... 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, article 2, para. (14) of the commentary.

[68] *Yearbook... 1974*, vol. II, pp. 295-296, document A/9610/Rev.1, chap. IV, sect. B, article 2, paras. (7)-(9) of the commentary.

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization. [69]

46. This formulation was adopted by the Commission as a compromise text in view of the divergence of opinion on this question. After reviewing the efforts of the Commission to include in its draft articles on the law of treaties a provision on the capacity of international organizations to conclude treaties and the Commission's decision to abandon such an attempt, the Special Rapporteur, Mr. Reuter, was inclined at first not to recommend to the Commission the insertion of an article or series of articles concerning the capacity of international organizations. [70] However, the Special Rapporteur, taking into account the views expressed in the Commission as well as in the Sixth Committee of the General Assembly, presented to the Commission two alternative proposals.

47. One alternative was worded as follows:

The extent of the capacity of international organizations to conclude treaties, a capacity acknowledged in principle by international law, is determined by the relevant rules of each organization. [71]

48. The other was worded as follows:

In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization. [72]

This alternative provided the basis for the text adopted by the Commission which states:

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

The commentary to article 6 of its draft articles on treaties concluded between States and international organizations, explain why the Commission opted for this formulation:

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations at international law; that question remains open, and the proposed wording is compatible both with the conception of general international law as the basis of international organizations' capacity and with the opposite conception. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the régime of treaties to which international organizations are parties, by what rules their capacity to conclude treaties should be assessed. Some members of the Commission, however, took the view that draft article 6, as at present worded, would not suffice to solve all the problems which the Commission would encounter in its further work on the draft articles, for example when it had to draw up, for application to international organizations, rules to match those laid down for States in articles 27 and 46 of the Vienna Convention.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft and developed in the commentary to that provision. The addition, in article 6, of the adjective "relevant" to the expression "rules that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" *as a whole*, article 6 concerns only *some* of those rules, namely those which are relevant in settling the question of the organization's capacity. [73]

B. The work of the United Nations Conference on the Representation of States in Their Relations with International Organizations

1. Notion of an international organization

49. The identification of an international organization as "an intergovernmental organization" in article 1, paragraph 1 (1) in the draft articles on the representation of States in their relations with international organizations, adopted by the Commission in 1971, [74] was approved by the United Nations Conference on the Representation of States in Their Relations with International Organizations (hereafter referred to as "the Conference") as article 1 of paragraph 1 (1) of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (hereafter referred to as "the Convention"). [75]

50. In his third report, submitted to the Commission in 1968, the Special Rapporteur on the topic of relations between States and intergovernmental organizations had proposed the following definition:

An international organization is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States. [76]

The Commission thought, however, that such an elaborate definition was not necessary for the time being since it was not dealing at that stage of its work with the status of the international organizations themselves, but only with the legal position of representatives of States to the organizations.

51. Some delegations at the Conference expressed themselves in favour of the adoption of an elaborate definition

[69] *Ibid.*, p. 298, article 6. The corresponding provision (article 6) of the Vienna Convention on the Law of Treaties reads: "Every State possesses capacity to conclude treaties."

[70] *Yearbook... 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

[71] *Yearbook... 1974*, vol. II (Part One), p. 150, document A/CN.4/279, article 6, para. (20) of the commentary. Cf. the formula submitted by Professor R. J. Dupuy to the Institute of International Law in his provisional report of 1972, which is entitled "L'application des règles de droit international général des traités aux accords conclus par les organisations internationales". Article 4 of this report provides that:

"Unless the constituent instrument provides otherwise, every international organization has the capacity to conclude agreements in the exercise of its functions and for the achievement of its objectives. (*Annuaire de l'Institut de droit international, 1973* (Basel), vol. 55, p. 314.) [translation from French].

[72] *Yearbook... 1974*, vol. II (Part One), p. 145, document A/CN.4/279, article 6.

[73] *Ibid.*, p. 299, document A/9610/Rev.1, chap. IV, sect. B, article 6, paras. (2)-(3) of the commentary.

[74] For reference, see foot-note 64.

[75] *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 209.

[76] *Yearbook... 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, article 1 (*a*).

of the term of international organization which would lay down the constituent elements of the concept. An amendment was presented to article 1 (Use of terms) with a view to including a definition similar to the one proposed in 1968 by the Special Rapporteur. However, following a brief discussion and an explanation by the Expert Consultant of the Conference on the reasons which led the Commission not to adopt such a definition, that amendment was withdrawn. [77]

2. Scope of the Convention

52. Article 2 of the Convention, which is entitled "Scope of the present Convention", provides that:

1. The present Convention applies to the representation of States in their relations with any international organization of a universal character, and to their representation at conferences convened by or under the auspices of such an organization, when the Convention has been accepted by the host State and the Organization has completed the procedure envisaged by article 90.

2. The fact that the present Convention does not apply to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

3. The fact that the present Convention does not apply to other conferences is without prejudice to the application to the representation of States at such other conference of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

4. Nothing in the present Convention shall preclude the conclusion of agreements between States or between States and international organizations making the Convention applicable in whole or in part to international organizations or conferences other than those referred to in paragraph 1 of this article.

53. The wording of this article is based on, and corresponds to, the formulation adopted by the Commission in defining the scope of its draft articles submitted to the Conference (articles 2 and 3 of the Commission's draft articles). In the commentary, the Commission stated:

(2) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles might be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies. That Convention lists in article 1 a certain number of specialized agencies and adds that the expression "specialized agencies" also applies to "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter". That method of determining the scope of the Convention leaves aside such organizations as IAEA which is not considered, strictly speaking, a specialized agency as defined in the Convention in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves aside other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute for the Unification of Private Law, the International Wheat Council and the Central Office for International Railway Transport. The wording of paragraph 1 of article 2 is designed to be comprehensive, embracing all international organizations of universal character. [78]

54. It is noteworthy, however, that the Conference introduced some precisions to the criteria for identifying an international organization of universal character as well as the machinery for determining it. While, according to article 1, paragraph 1 (2), of the Commission's draft,

"international organization of a universal character" means an organization whose membership and responsibilities are on a world-wide scale,

the corresponding text in the Convention reads:

"international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale.

Furthermore, article 2 of the Convention injected the acceptance by the host State and the organization into the determination of the "universal character" of the organization. Thus paragraph 1 of that article provides:

The present Convention applies to the representation of States in their relations with any international organization of a universal character, and to their representation at conferences convened by or under the auspices of such an organization, *when the Convention has been accepted by the host State and the Organization has completed the procedure envisaged by article 90.* [79]

Article 90 of the Convention, referred to in paragraph 1 of article 2, is entitled "Implementation by organizations" and reads:

After the entry into force of the present Convention, the competent organ of an international organization of a universal character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention. [80]

3. Resolution relating to delegations of national liberation movements

55. The draft articles adopted by the Commission in 1971 did not contain provisions concerning representatives of entities other than States (e.g. representatives of national liberation movements and petitioners) who might participate in the work of organs or conferences of international organizations. In its report on the work of its twenty-third session in 1971, the Commission, after referring to these categories of representatives, stated:

The Commission considers that such categories can be more appropriately dealt with under the subject of representatives of

[77] See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.75.V.II), pp. 328-329, 44th meeting of the Committee of the Whole, paras. 55-59; and *ibid.*, vol. II (*op. cit.*), pp. 165-166, document A/CONF.67/17, paras. 846 and 849.

[78] *Yearbook... 1971*, vol. II (Part One), p. 287, document A/8410/Rev.1, chap. II, sect. D, article 2, para. (2) of the commentary.

[79] Emphasis added by the Special Rapporteur.

[80] For an analysis of this compound formula, which was adopted as a compromise solution between two positions, one favouring the extension of the scope of the Convention to apply to all international organizations, both universal and regional, and the other advocating its limitations to the United Nations family, see A. El-Erian, "La Conférence et la Convention sur la Représentation des Etats dans leurs relations avec les organisations internationales (Un aperçu général)", *Annuaire français de droit international, 1975* (Paris, 1976), vol. XXI, pp. 468-469.

international organizations and their officials and in conjunction with experts and other persons who may be engaged in the official service of international organizations. [81]

56. The Convention adopted by the Conference in 1975 also did not contain provisions relating to representatives of entities other than States. However, the Conference adopted the following resolution:

RESOLUTION RELATING TO THE OBSERVER STATUS OF NATIONAL LIBERATION MOVEMENTS RECOGNIZED BY THE ORGANIZATION OF AFRICAN UNITY AND/OR BY THE LEAGUE OF ARAB STATES

The United Nations Conference on the Representation of States in Their Relations with International Organizations,

Recalling that, by its resolution 3072 (XXVIII) of 30 November 1973, the General Assembly referred to the Conference the draft articles on the representation of States in their relations with international organizations adopted by the International Law Commission at its twenty-third session,

Noting that the draft articles adopted by the Commission deal only with the representation of States in their relations with international organizations,

Recalling further that, by its resolution 3247 (XXIX) of 29 November 1974, the General Assembly decided to invite the national liberation movements recognized by the Organization of Africa Unity and/or by the League of Arab States in their respective regions to participate in the Conference as observers, in accordance with the practice of the United Nations,

Noting the current practice of inviting the above-mentioned national liberation movements to participate as observers in the sessions and work of the General Assembly of the United Nations, in conferences held under the auspices of the General Assembly or under the auspices of other United Nations organs, and in meetings of the specialized agencies and other organizations of the United Nations family,

Convinced that the participation of the above-mentioned national liberation movements in the work of international organizations helps to strengthen international peace and co-operation,

Desirous of ensuring the effective participation of the above-mentioned movements as observers in the work of international organizations and of regulating, to that end, their status and the facilities, privileges and immunities necessary for the performance of their tasks,

1. *Requests* the General Assembly of the United Nations at its thirtieth regular session to examine this question without delay;

2. *Recommends* in the meantime, the States concerned to accord to delegations of national liberation movements which are recognized by the Organization of African Unity and/or by the League of Arab States in their respective regions and which have been granted observer status by the international organization concerned, the facilities, privileges and immunities necessary for the performance of their tasks and to be guided therein by the pertinent provisions of the Convention adopted by this Conference;

3. *Decides* to include the present resolution in the Final Act of the Conference. [82]

[81] *Yearbook... 1971*, vol. II (Part One), p. 283, document A/8410/Rev.1, para. 54.

[82] *Official Records of the United Nations Conference ...*, vol. II (*op. cit.*), pp. 204-205, document A/CONF.67/15, annex.

CHAPTER IV

General questions

A. The place of custom in the law of international immunities

57. Some writers state that international immunities, in contrast to the immunities of inter-State diplomatic agents, are almost exclusively created by treaty law, and that international custom has not yet made any appreciable contribution to this branch of law.

58. Several 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",[83] and speak of "l'existence d'une véritable *coutume internationale* ... ou en tout cas d'un *commencement de coutume*".[84] One writer has summed up the position, as it has developed since the creation of the League of Nations, as follows:

En voie de création est une règle coutumière qui assure aux organisations internationales et à leurs fonctionnaires supérieurs les mêmes privilèges et immunités diplomatiques qu'au personnel diplomatique. Les étapes de ce développement sont constituées par les arrangements conclus entre la Suisse et la Société des Nations en 1921 et en 1926, ainsi que par ceux qui sont intervenus entre la Suisse, d'une part, les Nations Unies et l'Organisation internationale du Travail d'autre part, en 1946.

Le fait que certaines conventions internationales ont des contenus identiques, ce qui est particulièrement caractéristique pour les traités d'établissement, de consulat et d'extradition, n'entraîne pas en soi la formation d'une règle coutumière. [85]

59. A parallel development of concepts can be found in practice. In a diplomatic note by the United States Government, dated 16 October 1933, it was stated that:

... under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League. [86]

[83] L. Preuss, "Diplomatic privileges and immunities of agents invested with functions of an international interest", *American Journal of International Law* (Washington, D.C.), vol. 25, No. 4 (October 1931), p. 696.

[84] J.-F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye (1953-III)* (Leyde, Sijthoff, 1955), vol. 84, pp. 304-305.

[85] P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, pp. 51-52.

[86] G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1942), vol. IV, pp. 422-423.

When, however, at the end of 1944 the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of the international organizations, their staff, and the representatives of member Governments, was introduced in Parliament, the Minister of State explained that, where a number of Governments joined together to create an international organization to fulfil some public purpose, the organization should have the same status, immunities and privileges as the foreign Government members thereof enjoyed under the ordinary law. He elaborated that, in principle, they were entitled to it as a matter of international law which the English courts would regard as being part of the common law. However, legislation was regarded as desirable in order to put the legal position beyond dispute and to define with precision the extent of the prerogatives.

60. The Swiss Federal Council stated in a message dated 28 July 1955 to the Federal Assembly:

> ... Une organisation internationale, fondée sur un traité entre États, jouit d'après le droit international d'un certain nombre de privilèges dans l'État où elle a fixé son siège ...
>
> ... Nous étions donc en présence d'un droit coutumier auquel notre pays ne pouvait pas se soustraire ... [87]

61. The Supreme Court of Mexico, in its decision of 28 April 1954, declared that ECLA could enjoy immunties recognized by international law.

62. Reference may also be made in this respect to article III, section 3 of the Agreement between Egypt and WHO, which provides:

> The Organization and its principal or subsidiary organs shall have in Egypt the independence and freedom of action belonging to an international organization according to international practice. [88]

B. Differences between inter-State diplomatic relations and relations between States and international organizations

63. International intercourse within the framework of international organizations resembles in certain respects diplomatic relations between States. The evolution of conference diplomacy took a path analogous to bilateral diplomacy. The latter has passed through two clearly distinct periods: the period of non-permanent and *ad hoc* embassies, covering antiquity and the Middle Ages, and the period of permanent legations, beginning in Italy in the fifteenth century. Similarly, multilateral diplomacy developed 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.

64. A number of differences exist, however, between bilateral and conference diplomacy, which stem from a basic difference in the legal relationships involved in the two types of diplomacy. In traditional inter-State diplomacy, the relationship is a bipartite one between the sending State and the receiving State. However, in diplomacy within an international organization, the relationship is a tripartite legal position which involves the sending State, the international organization and the host State in whose territory the representative of the sending State or the international organization and its personnel enjoy the legal status conceded to them. Unlike its corresponding provision in the League Covenant, Article 105 of the United Nations Charter did not use the words "diplomatic privileges and immunities", but employed instead the words "privileges and immunities as are necessary for the fulfilment of its purposes". The report of the Rapporteur of Committee IV/2, which was adopted by the United Nations Conference on International Organization (1945), includes the following comment on this Article:

> In order to determine the nature of the privileges and immunities, the Committee has seen fit to avoid the term "diplomatic" and has preferred to substitute a more appropriate standard, based, for the purpose of the Organization, on the necessity of realizing its purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions. [89]

The theoretical basis of the immunities of inter-State diplomatic agents has varied from age to age. In its general comments on the relevant provision of its draft articles on diplomatic intercourse and immunities, contained in the report on its tenth session (1958), [90] the Commission, while recognizing the role played by the fiction of "exterritoriality", stated that it took as a theoretical basis the "functional necessity theory" supplemented by the "representative character theory". Since international organizations do not have territorial jurisdiction, no reliance could be placed on the fiction of exterritoriality, nor do they have the sovereign character possessed by States, from which the "representative character theory" emanates. International immunities, therefore, can only be based on the "functional necessity theory".

C. Legal capacity of international organizations

65. 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".

66. The 1946 Convention elaborated on the meaning of Article 104 as follows in article 1:

> The United Nations shall possess juridical personality. It shall have the capacity:
>
> (*a*) To contract;

[87] Quoted in P. Cahier, *Le Droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 47-48. The author rightly points out an important practical aspect of the question of the place of custom in the diplomatic law of international organizations by observing that "L'existence d'une coutume peut permettre aussi de combler les lacunes que l'on rencontre parfois dans les accords de siège. C'est ainsi que par exemple l'accord du 28 mai 1946 conclu entre la Suisse et l'OIT ne mentionne pas les privilèges des experts."

[88] United Nations, *Treaty Series*, vol. 223, p. 90.

[89] *United Nations Conference on International Organization*, IV/2/42(2).

[90] *Yearbook... 1958*, vol. II, pp. 94-95, document A/3859, chap. III, section II, general comments on section II of the draft articles.

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

(*c*) To institute legal proceedings.

67. 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.

68. By the International Organizations Immunities Act of 29 December 1945, the United States recognized international organizations coming within the terms of the Act, and to the extent consistent with the instrument creating them as possessing the capacity "(*a*) to contract; (*b*) to acquire and dispose of real and personal property; and (*c*) to institute legal proceedings". [91] By the "Interim Arrangement on Privileges and Immunities of the United Nations" between the United Nations and the Swiss Federal Council of 11 June and 1 July 1946, the Swiss Government "recognizes the international personality and legal capacity of the United Nations". [92]

69. 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". 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 of 11 April 1949 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. [93]

Similarly, in its Advisory Opinion of 13 July 1954 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". [94]

D. Scope of privileges and immunities

1. The organization

70. Besides the contractual capacity possessed by international organizations mentioned above (capacity to contract, acquire and dispose of immovable and movable property and to institute legal proceedings), the United Nations and the specialized agencies enjoy certain privileges and immunities laid down in the General Conventions and headquarters agreements and other supplementary instruments. They include, *inter alia*:

(*a*) Immunity from legal process;

(*b*) Inviolability of their premises and the exercise of control by them over their premises;

(*c*) Immunity of their property and assets from search and from any other form of interference;

(*d*) Inviolability of their archives and documents;

(*e*) Privileges relating to taxes, customs duties and currency controls; and

(*f*) Privileges and immunities in respect of communication facilities (e.g. use of codes and dispatch of correspondence by courier or in bags).

2. Privileges and immunities of officials

71. These include:

(*a*) Immunity in respect of official acts;

(*b*) Exemption from taxation of salaries and emoluments;

(*c*) Immunity from national service obligations;

(*d*) Immunity from immigration restrictions and alien registration;

(*e*) Diplomatic privileges and immunities of executive and other senior officials; and

(*f*) Repartiation facilities in times of international crisis.

3. Privileges and immunities of experts on mission for, and of persons having official business with, the organization

72. Under article VI of the 1946 Convention, certain immunities, broadly similar to those accorded to officials, are granted to "Experts ... performing missions for the United Nations...". The 1947 Convention does not contain an equivalent article; the only reference to "experts" in the text of that Convention is in article VIII, section 29, whereby States parties are asked to grant travel facilities to "experts and other persons" who are travelling "on the business of a specialized agency". However, the provisions of article VI of the 1946 Convention are contained in the annexes to the 1947 Convention in respect of FAO, ICAO, UNESCO and WHO.

73. In addition to United Nations and specialized agencies "experts on missions", a remaining category of persons (other than representatives of Member States) who may enjoy certain privileges and immunities are those having official business with the United Nations and the specialized agencies. A number of headquarters agreements and supplemental accords contain provisions expressly granting such persons rights of transit to United Nations and specialized agencies premises (e.g. article IV of the Headquarters Agreement between the United

[91] See L. Preuss, "The International Organizations Immunities Act", *American Journal of International Law* (Washington, D.C.), vol. 40, No. 2 (April 1946), pp. 332-345.

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

[93] *I.C.J. Reports, 1949*, p. 182.

[94] *I.C.J. Reports, 1954*, pp. 56-57.

Nations and the United States, [95] article 9 of the Headquarters Agreement between UNESCO and France, [96] and article V of the Headquarters Agreement between ICAO and Canada. [97]

4. Uniformity or adaptation of international immunities

74. The régime 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 organisation conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries. [98]

However, many writers qualify their enthusiasm for the objective of uniformity by pointing out the need for adaptation of immunity to function in particular cases.

[95] United Nations, *Treaty Series*, vol. 11, p. 20.

[96] *Ibid.*, vol. 357, p. 8.

[97] *Ibid.*, vol. 96, p. 172.

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

Chapter V

Conclusions

75. In the light of the foregoing survey of the evolution of the international law relating to the legal status and immunities of international organizations, it would appear that there exists a substantial body of legal norms in this field. It consists of an elaborate and varied network of treaty law, which requires concretization, as well as a wealth of practice, which needs consolidation. An undertaking by the Commission aimed at the codification and development of this branch of diplomatic law would complete the *corpus juris* of diplomatic law achieved through the work of the Commission and embodied in the 1961 Vienna Convention on Diplomatic Relations, [99] the 1963 Vienna Convention on Consular Relations, [100] the 1969 Convention on Special Missions [101] and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. [102]

76. Furthermore, in the light of the foregoing survey of the work of the Commission on the first part of the topic "Relations between States and international organizations", namely, the status, privileges and immunities of representatives of States to international organizations, as well as on the topic "Question of treaties between States and international organizations or between two or more international organizations", it would appear that the Commission inclines to pursue an empirical method and a pragmatic approach. The Commission does not favour the course of engaging itself in such theoretical notions as the concept of an international organization, its juridical personality or its treaty-making capacity. It prefers instead to deal with the practical aspects and concrete issues of the rules which govern the relations between States and international organizations. The Commission takes great care to safeguard the position of internal law and the relevant rules of each organization and, in particular, the general conventions on the privileges and immunities of the United Nations and of the specialized agencies and the headquarters agreements of these organizations. Thus, paragraph 7 of the preamble of the 1975 Vienna Convention reads;

> *Taking account* of the Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 and other agreements in force between States and international organizations.

The implications of this statement are explicitly and elaborately laid down and defined in its articles 3 and 4:

> *Article 3. Relationship between the present Convention and the relevant rules of international organizations or conferences*
>
> The provisions of the present Convention are without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.
>
> *Article 4. Relationship between the present Convention and other international agreements*
>
> The provisions of the present Convention
>
> (*a*) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and
>
> (*b*) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character of their representation at conferences convened by or under the auspices of such organizations.

77. Articles 3 and 4 are of significant importance. [103] Given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the Convention is designed to establish a common denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization. Their purpose is twofold. First, they are intended to reserve the position of existing international agreements regulating the same subject-matter. Thus, while intended to provide a uniform régime, the rules of the Convention are without prejudice to different rules which may be laid down in such agreements. Second,

[99] United Nations, *Treaty Series*, vol. 500, p. 95.

[100] *Ibid.*, vol. 596, p. 261.

[101] General Assembly resolution 2530 (XXIV), annex.

[102] For reference, see foot-note 75 above.

[103] For a fuller account of the purposes of these two articles, see *Yearbook... 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chapter II, sect. D, commentaries to articles 3 and 4.

it is recognized that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to that organization. The rules of the Convention are not intended in any way to preclude any further development of the law in this area.

78. Bearing in mind that many years have elapsed since the preparation of the replies by the United Nations and the specialized agencies to the questionnaire addressed to them by the Legal Counsel of the United Nations,[104] the Special Rapporteur believes that it would be useful if the United Nations and the specialized agencies were requested to provide the Special Rapporteur with any additional information on the practice in the years following the preparation of their replies. Such information would be particularly helpful in the area of the category of experts on missions for, and of persons having official business with, the organization. Another area in which information is needed is that relating to resident representatives and observers who may be sent by one international organization to another international organization or represent that organization.

[104] See para. 6 above.