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Third Report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur

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

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**RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS
(SECOND PART OF THE TOPIC)**

[Agenda item 8]

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(second part of the topic), by Mr. Leonardo Díaz González,
Special Rapporteur**

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NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.

Introduction

1. The Special Rapporteur submitted his second report¹ on "Relations between States and international organizations (second part of the topic)"² to the International Law Commission at its thirty-seventh session, in 1985.

2. In that report, the Special Rapporteur considered the question of the notion of an international organization and possible approaches to the scope of the future draft articles on the topic. He also examined the question of the legal personality of international organizations and the legal capacity resulting therefrom.

3. The report contained a draft article on the latter question, with two alternatives regarding presentation.³

4. The Commission also had before it a supplementary study prepared at the Commission's request by the Secretariat on the basis of the replies to the further questionnaire sent in 1978 by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA on the practice of those organizations concerning their status, privileges and immunities.⁴

5. The Commission considered the topic at its 1925th to 1927th and 1929th meetings, from 15 to 18 July 1985.

¹ *Yearbook . . . 1985*, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

² The first part of the topic, relating to the status, privileges and immunities of representatives of States to international organizations, was the subject of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted at Vienna on 14 March 1975 (hereinafter referred to as "1975 Vienna Convention on the Representation of States").

³ The two alternatives of the draft article submitted by the Special Rapporteur read as follows:

"TITLE I. LEGAL PERSONALITY

"ALTERNATIVE A

"Article 1

"1. International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- "(a) contract;
- "(b) acquire and dispose of movable and immovable property; and
- "(c) institute legal proceedings.

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

"ALTERNATIVE B

"Article 1

"International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- "(a) contract;
- "(b) acquire and dispose of movable and immovable property; and
- "(c) institute legal proceedings.

"Article 2

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

⁴ Document A/CN.4/L.383 and Add.1-3, reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

The discussion, although very useful, was incomplete because of the short time available to consider the topic. Accordingly, the Commission was not able to take a decision on the draft article submitted by the Special Rapporteur and therefore deemed it advisable to resume the discussion at its thirty-eighth session to enable more members to express their views on the matter.

6. The Commission also requested the Special Rapporteur to examine the possibility of submitting at the thirty-eighth session his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic, as well as a schematic outline of the subject-matter to be covered by the various draft articles.⁵

I. Discussion of the topic in the Sixth Committee at the fortieth session of the General Assembly⁶

7. During the fortieth session of the General Assembly, representatives in the Sixth Committee who made statements in connection with the present topic, with two or three exceptions, expressed appreciation of the Commission's continuation of the work on the subject. As on other occasions, mention was made of the interest, importance and complexity of the topic and the desirability of codifying it.

8. One representative questioned the usefulness of the Commission continuing its work on the topic.⁷ Another representative stated that his delegation "continued to have doubts about the scope for useful work by the Commission".⁸ Another representative considered that the topic should not be accorded high priority, since Governments were disinclined to expand the privileges and immunities of international organizations.⁹ Nevertheless, another representative pointed out in that regard that it was the General Assembly that had requested the Commission to study the subject and that it was important for the Commission to continue its work on the topic.

9. One representative said that the nature of the topic was such that it was likely to give rise to a variety of doctrinal difficulties, but added that, on balance, his delegation was not troubled by the general thrust of the work submitted by the Special Rapporteur.¹⁰

10. Another representative said that his country, as a host country of the United Nations and other important international organizations, took a keen interest in the question of relations between States and international

⁵ *Yearbook . . . 1985*, vol. II (Part Two), p. 67, para. 267 (d) and (e).

⁶ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. F.

⁷ *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 31st meeting, para. 32 (Australia).

⁸ *Ibid.*, 32nd meeting, para. 33 (United Kingdom).

⁹ *Ibid.*, 31st meeting, para. 15 (New Zealand).

¹⁰ *Ibid.*, 29th meeting, para. 37 (United States of America).

organizations and was pleased to note that the study of the second part of the topic was being pursued.¹¹

11. A number of representatives expressed support for the first draft article submitted by the Special Rapporteur, concerning the legal personality of international organizations. It was said in this connection that, by providing in the first article that international organizations should enjoy legal personality under international law, the Special Rapporteur was proposing to give expression to the basic principle which should be the foundation of the draft articles. One representative referred in particular to paragraph 2 of the draft article (alternative A), which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization. While the principle of the sovereign equality of States identified States as the primary subjects of international law, that was not so in the case of international organizations, which were the result of an act of will on the part of States which gave such organizations juridical features. It was essential not to lose sight of that principle, on which the draft article was based, when the topic was being considered. It was reasonable, in view of the difference in nature between States and international organizations, to limit the capacity of the latter. It was also to be noted that the draft article touched on the law of treaties. Another representative was of the view that the two paragraphs of the article should be considered as two separate articles.

12. The point was made by one representative that, in connection with the first draft article, on the legal personality of international organizations, a question arose as to the basis on which international organizations could be subject to the internal law of States. This was a matter to be resolved through individual agreements between States and each organization. It was inappropriate for such a matter to be considered in the context of the present topic.

13. As to the Commission's future work on the topic, support was expressed for the conclusions set forth in paragraph 267 of the Commission's report on its thirty-seventh session, and in particular for the recommendation that the Special Rapporteur should present a schematic outline of the subject-matter to be covered by the various draft articles he intended to prepare on the topic.¹² The hope was also expressed that the Special Rapporteur and the Commission would be in a position to provide as complete a definition as possible of an international organization as a subject of international law, a definition which was currently lacking.

14. The suggestion was made by one representative that the views of States should be submitted to the Commission, together with information on the status of the multilateral conventions on the topic. Another representative suggested that the views of international organizations themselves should be sought. It was also noted that the questionnaire addressed to international organizations in 1978 (see para. 4 above) had omitted to pose the basic question whether codification and

development of the law on the topic were necessary or desirable.

II. Conclusions regarding the discussion in the Commission and in the Sixth Committee of the General Assembly

15. The conclusions reached by the Commission as a result of its brief discussion on the topic at its thirty-seventh session were set out in its report on that session, submitted to the General Assembly at its fortieth session, and included the following:

(d) . . . the Special Rapporteur may examine the possibility of submitting at the thirty-eighth session of the Commission his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic;

(e) The Special Rapporteur may also consider the possibility of presenting at the Commission's thirty-eighth session a schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic;¹³

16. From the discussion in the Sixth Committee it may be inferred that the majority of representatives were in agreement with the conclusions reached by the Commission, particularly as regards the "possible scope of the draft articles to be prepared on the topic" and the presentation by the Special Rapporteur of a "schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic".

17. The previous Special Rapporteur, the late Abdullah El-Erian, had discussed these issues in his preliminary report¹⁴ and in his second report,¹⁵ submitted to the Commission at its twenty-ninth session (1977) and its thirtieth session (1978), respectively. After consideration of the topic, the Commission endorsed the conclusions and recommendations of the Special Rapporteur and referred them to the General Assembly in its reports on its 1977 and 1978 sessions.¹⁶ The General Assembly, in turn, approved those conclusions and recommendations.¹⁷

18. The present Special Rapporteur therefore took as his point of departure the fact that both the Commission and the General Assembly had approved the conclusions and recommendations of the previous Special Rapporteur. The present Special Rapporteur in fact referred to this matter in his preliminary report, submitted to the Commission at its thirty-fifth session.¹⁸

19. The Commission also endorsed the conclusions and recommendations contained in the preliminary report of the present Special Rapporteur and referred

¹³ *Ibid.*

¹⁴ *Yearbook . . . 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

¹⁵ *Yearbook . . . 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

¹⁶ *Yearbook . . . 1977*, vol. II (Part Two), p. 127, para. 95; and *Yearbook . . . 1978*, vol. II (Part Two), p. 147, para. 156.

¹⁷ General Assembly resolutions 32/151 of 19 December 1977 (para. 6) and 33/139 of 19 December 1978 (para. 6).

¹⁸ *Yearbook . . . 1983*, vol. II (Part One), p. 228, document A/CN.4/370, para. 11.

¹¹ *Ibid.*, 28th meeting, para. 56 (Austria).

¹² See footnote 5 above.

them to the General Assembly in its report on its thirty-fifth session.¹⁹ The General Assembly, in turn, approved those conclusions and recommendations.²⁰

III. Scope of the draft articles

20. In his preliminary report, the previous Special Rapporteur referred to three categories of privileges and immunities which might form the subject-matter of the study: (a) those of the organization; (b) those of officials of the organization; (c) those of experts on mission for the organization and of persons having official business with the organization who are not representatives of States. He also referred to resident representatives and observers, who may be sent by one international organization to another international organization or represent that organization.²¹

21. In the Commission itself, during the discussion of that preliminary report at the twenty-ninth session, in 1977, reference was made to the possible content and scope of the study, including the following questions dealt with by the Special Rapporteur: the place of custom in the law of international immunities; the differences between inter-State diplomatic relations and relations between States and international organizations; the scope of privileges and immunities; and the uniformity or adaptation of international immunities.²²

22. Other questions which arose during the discussion were: the need for an analysis of the practice of States and international organizations in the field of international immunities and its impact on the United Nations system; the need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States.²³

23. In the conclusions set out in his second report, submitted in 1978, the previous Special Rapporteur said it was gratifying that, in the discussions in the Commission and the Sixth Committee,

Subject to a few reservations which concerned matters of approach and methodology rather than principle, members of the Commission and delegations to the Sixth Committee were in favour of a study of the immunities of international organizations with a view to completing the work of the Commission in the field of diplomatic law, which culminated in the adoption of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention [on the Representation of States].²⁴

¹⁹ *Yearbook* . . . 1983, vol. II (Part Two), pp. 80-81, para. 277.

²⁰ General Assembly resolution 38/138 of 19 December 1983, para. 3.

²¹ *Yearbook* . . . 1977, vol. II (Part One), pp. 153-155, document A/CN.4/304, paras. 70-73 and 78.

²² *Ibid.*, pp. 151 *et seq.*, chap. IV.

²³ *Yearbook* . . . 1977, vol. II (Part Two), p. 127, para. 94.

²⁴ *Yearbook* . . . 1978, vol. II (Part One), p. 282, document A/CN.4/311 and Add.1, para. 117.

24. Moreover, there was agreement in the Commission and in the Sixth Committee that, at the beginning, the subject-matter of the study should not be unnecessarily restricted. Accordingly, it was agreed that the Special Rapporteur should be given some latitude. The same broad outlook was adopted by the Commission and the Sixth Committee with regard to the inclusion of regional international organizations and in connection with the subject-matter, inasmuch as the question of priority would have to be deferred until the study was completed.²⁵

25. The situation has not changed since. The present Special Rapporteur expressly mentioned this in his preliminary report when he consulted the Commission on the matter. The Special Rapporteur took it for granted that the schematic outline prepared by his predecessor in his two reports and approved by both the Commission and the General Assembly was still valid and was to serve as a guide for the continuation of the Commission's work on the topic. That outline can, of course, be broadened or amended, depending on the needs of the study and the Commission's decisions in that regard. The Commission endorsed that criterion by approving the conclusions contained in the Special Rapporteur's preliminary report, which were in turn approved by the General Assembly (see para. 19 above).

26. As already stated (para. 15 above), in the conclusions reached following its discussion of the Special Rapporteur's second report at its thirty-seventh session, the Commission requested the Special Rapporteur to present a schematic outline of the subject-matter to be covered by the draft articles. The three categories of privileges and immunities referred to in previous reports on the topic as possibly constituting this subject-matter have also been mentioned (para. 20 above).

27. When they were first discussed, at the twenty-ninth session, these three categories were approved by the Commission. One member, however, suggested that "a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems, such as those relating to international officials, should be left till later".²⁶

IV. Scope of privileges and immunities: privileges and immunities of international intergovernmental organizations

28. Apart from the contractual capacity of international intergovernmental organizations (capacity to contract, to acquire movable and immovable property and to institute legal proceedings) discussed in the Special Rapporteur's second report,²⁷ the United Nations and the specialized agencies enjoy certain privileges and immunities recognized in the general conventions and headquarters agreements and also in other supplementary instruments.

²⁵ See *Yearbook* . . . 1983, vol. II (Part Two), p. 80, paras. 269 and 276.

²⁶ *Yearbook* . . . 1977, vol. I, p. 210, 1453rd meeting, para. 13 (Mr. Reuter).

²⁷ See footnote 1 above.

29. From an analysis of headquarters agreements (the most comprehensive and precise instruments on this subject), the general conventions and the replies to the questionnaire addressed to the specialized agencies and IAEA on their practice concerning their status, privileges and immunities (see para. 4 above), a tentative outline can be drawn up of the privileges, immunities and other facilities accorded to international intergovernmental organizations and serve as a guide to the subject-matter to be covered by the draft articles, as requested by the Commission.

30. It is clear that all the privileges granted to international organizations in the instruments in question are founded on the principle underlying the legal status of those organizations, i.e. the guarantee afforded by the host country that they can, with complete freedom and independence, exercise on its territory their constitutional and statutory activities or any other activity connected with the functions assigned to them. Some host countries, as has been pointed out on other occasions, expressly include this guarantee in the headquarters agreements concluded with international organizations. This is the case with Switzerland, which expressly includes it in the headquarters agreements to which it is a party.²⁸ The first article of such agreements is usually worded as follows:

The Federal Council guarantees . . . the independence and freedom of action belonging to it as an international institution.

This question will be examined further in due course. For the time being, the purpose is simply to draw up an outline in compliance with the Commission's wishes.

31. The tentative outline is as follows:

- I. Privileges and immunities of the organization
 - A. Non-fiscal privileges and immunities:
 - (a) immunity from legal process;
 - (b) inviolability of premises and exercise of control by the organization over those premises;
 - (c) immunity of property and assets from search and from any other form of interference;
 - (d) inviolability of archives and documents;
 - (e) privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in diplomatic bags, etc.);
 - B. Financial and fiscal privileges:
 - (a) exemption from taxes;
 - (b) exemption from customs duties;
 - (c) exemption from currency controls;
 - (d) bank deposits.
- II. Privileges and immunities of officials
 - A. Non-fiscal:
 - (a) immunity in respect of official acts;
 - (b) immunity from national service obligations;
 - (c) immunity from immigration restrictions and registration of aliens;
 - (d) diplomatic privileges and immunities of executives and other senior officials;
 - (e) repatriation facilities in times of international crisis;
 - B. Financial and fiscal:
 - (a) exemption from taxation of salaries and emoluments;
 - (b) exemption from customs duties.

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

32. Under article VI of the 1946 Convention on the Privileges and Immunities of the United Nations, experts on mission for the United Nations are accorded certain immunities. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies does not include an equivalent article: the sole reference to experts appears in article VIII, section 29, in which the States parties are requested to grant travel facilities to "experts and other persons" travelling "on the business of a specialized agency". However, the provisions of article VI of the 1946 Convention are reproduced in annexes I to IV, VII and XII to the 1947 Convention, relating to ILO, FAO, ICAO, UNESCO, WHO and IMCO.²⁹

33. In addition to experts sent on mission by the United Nations or the specialized agencies, another category of persons (other than representatives of Member States) may be granted certain privileges and immunities, namely persons who have official business with the United Nations or specialized agencies. A number of headquarters agreements and supplementary agreements contain provisions whereby such persons are granted rights of transit to the premises of the organization in question (such as article IV of the Headquarters Agreement between the United Nations and the United States of America,³⁰ article 9 of the Agreement between UNESCO and France regarding the Headquarters of UNESCO and the privileges and immunities of the Organization on French Territory³¹ and article V, section 27, of the Headquarters Agreement between ICAO and Canada³²).

34. In keeping with the possible scope of the draft articles sketched out above, the Special Rapporteur proposes the following schematic outline of the subject-matter to be covered by the draft:

1. Definitions and scope. Bases of privileges and immunities:
 - (a) international organization;
 - (b) international officials;
 - (c) other persons connected with the functioning of the organization (experts, etc.);
 - (d) other terms used.
2. Legal personality.
3. Property and assets.
4. Privileges and immunities of the international organization:
 - A. Non-fiscal:
 - (a) immunity from legal process;
 - (b) freedom of assembly:
 - (i) freedom of access, stay and movement both for representatives of States and for experts and officials of the organization;
 - (ii) speedy issue of visas free of charge and exemption from any measure to restrict the entry into the host country of aliens or to control the conditions of their stay;
 - (iii) repatriation facilities in times of international crisis;

²⁹ United Nations, *Treaty Series*, vol. 33, pp. 290 *et seq.*; and vol. 645, p. 340.

³⁰ *Ibid.*, vol. 11, p. 11.

³¹ *Ibid.*, vol. 357, p. 3.

³² *Ibid.*, vol. 96, p. 155.

²⁸ See A. H. Zarb, *Les institutions spécialisées du système des Nations Unies et leurs membres* (Paris, Pedone, 1980), p. 221.

- (c) inviolability of premises;
 - (d) inviolability of archives and documents;
 - (e) communication facilities (use of codes, diplomatic bag, dispatch of correspondence, etc.);
 - B. Financial and fiscal: exemption from taxes, customs duties, currency controls, etc.
5. Privileges and immunities of officials:
- A. Non-fiscal:
 - (a) immunity in respect of official acts;
 - (b) immunity from national service obligations;
 - (c) immunity from immigration restrictions and registration of aliens;
 - (d) diplomatic privileges and immunities of executives and other senior officials;
 - (e) repatriation facilities in times of international crisis;
 - B. Financial and fiscal:
 - (a) exemption from taxation of salaries and emoluments;
 - (b) exemption from customs duties.
6. Privileges and immunities of experts on mission for, and of persons having official business with, the organization.
7. Laissez-passer.
8. Abuse of privileges and immunities.
9. Withdrawal of privileges and immunities.
10. Settlement of disputes.
11. Final clauses.

35. Naturally, the above outline does not constitute an exhaustive enumeration. It was drawn up in order to meet the request made by the Commission and may be amended at any time if circumstances require, or if the Commission deems it appropriate for any reason, or on the proposal of the Special Rapporteur.

V. Conclusions

36. The evolution of international law relating to the legal status and privileges and immunities of international organizations has resulted in a substantial body of legal norms regulating this area of international activity. This body of norms consists of an elaborate and varied network of treaty law, which requires harmonization, and a wealth of practice, which needs to be consolidated. From the discussions in the Commission and the Sixth Committee of the General Assembly in 1985, it can be affirmed that the Commission's conclusions in the past concerning the present topic are still valid.

37. In embarking on the work of developing and codifying this branch of diplomatic law, on the express instructions of the General Assembly, the Commission intends to complete the *corpus juris* of diplomatic law elaborated on the basis of its earlier work and embodied in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States.

38. Furthermore, far from the idea that Governments are disinclined to expand the privileges and immunities of international organizations, as was stated by one representative in the Sixth Committee (see para. 8 above), the supplementary study prepared by the Secretariat indicates that, as of 1 June 1985, 90 States were parties to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.³³

39. Similarly, States which are not parties to the 1947 Convention or which have not extended its application to all organizations have for the most part agreed to apply the provisions of the Convention to organizations operating in their territory. Such agreements concern technical assistance projects or conference agreements concluded for meetings held outside the organization's headquarters or permanent offices. In the case of the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation and the International Monetary Fund, if a member State is not a party to the 1947 Convention, reliance is placed on their respective Articles of Agreement.

40. As to the Agreement on the Privileges and Immunities of the International Atomic Energy Agency,³⁴ which is open to all 112 member States of the Agency, there were 56 States parties as of 1 June 1985.³⁵

41. Finally, no cases have been reported of the withdrawal of privileges and immunities previously granted to an international organization.

³³ Document A/CN.4/L.383 and Add.1-3 (see footnote 4 above), para. 244.

³⁴ United Nations, *Treaty Series*, vol. 374, p. 147.

³⁵ Document A/CN.4/L.383 and Add.1-3 (see footnote 4 above), para. 247.