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

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

[Agenda item 8]

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Fourth report on relations between States and international organizations (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.

*Incorporating document A/CN.4/424/Corr.1.

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (hereinafter "1975 Vienna Convention on the Representation of States")

Ibid., vol. 1155, p. 331.

Source

United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

I. Introduction

1. The Special Rapporteur submitted his third report on "Relations between States and international organizations (second part of the topic)"¹ to the International Law Commission at its thirty-eighth session, in 1986.

2. The Commission considered the third report at its thirty-ninth session, from the 2023rd to 2027th meetings and at the 2029th meeting.²

3. In his third report, the Special Rapporteur analysed the debates on the topic in the Sixth Committee at the fortieth session of the General Assembly and in the Commission at its thirty-seventh session and drew a number of conclusions from those debates. Similarly, he set out a number of considerations regarding the scope of the

¹ *Yearbook . . . 1986*, vol. II (Part One), p. 163, document A/CN.4/401.

² See *Yearbook . . . 1987*, vol. I, pp. 187 *et seq.*

topic and submitted to the Commission, in compliance with its request, an outline of the subject-matter to be covered by the draft articles the Special Rapporteur intended to prepare on the topic.

4. After hearing the Special Rapporteur's introduction, the Commission held an exchange of views on various aspects of the topic, such as the scope of the future draft, the relevance of the outline submitted by the Special Rapporteur and the methodology to be followed in the future.

5. Further to the exchange of views, the Commission decided to request the Special Rapporteur to continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the opinions expressed on the topic during the debate at the Commission's thirty-ninth session.

II. Discussion of the topic in the Sixth Committee at the forty-second session of the General Assembly

6. During the forty-second session of the General Assembly, the Sixth Committee discussed the Commission's work on the topic.³ A first remark that should be made is that several representatives, stressing the role played by international organizations, emphasized the relevance and importance of the topic. They welcomed the work of the Commission thereon and approved of the Commission's request that the Special Rapporteur should continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the exchange of views in the Commission. These representatives generally found the outline approved by the Commission to be a good beginning and an adequate basis for further work.

7. As regards the general approach to be adopted, the remark was made that the future draft, instead of being confined to the existing legal régime, should endeavour to remedy the shortcomings of that régime, thus providing a better basis for the privileges and immunities of inter-

national organizations and the guarantees given to their officials, and that the outline provided by the Special Rapporteur should be expanded so as to include the capacity of and means at the disposal of international organizations for defending their officials' immunities, in accordance with the relevant jurisprudence of the ICJ. It was pointed out in this connection that the draft under consideration should include the duty of the host country to ensure legal protection and respect for the status, privileges and immunities of the organizations and their officials so as to make it impossible for the host country to take restrictive measures of a discriminatory nature against officials of an international organization, as had been the case in certain States.

8. Support was expressed for the methodology adopted by the Commission, which combined the codification of existing rules and practice with the identification of lacunae. Both were viewed as useful undertakings which should be seen as complementary rather than mutually exclusive.

9. With regard to the scope of the topic in terms of the organizations to be covered, the general view was that only international organizations of a universal character

³ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-second session of the General Assembly" (A/CN.4/L.420), sect. E.

should be included. Regional organizations could be dealt with at a later stage.

10. On the concept of an international organization, it was stated that, while no useful purpose would be served by embarking on a new definition, since the definition contained in the 1975 Vienna Convention on the Representation of States was still adequate, the Commission should consider the question of the international personality of international organizations. In this connection, the view was expressed that draft article 1, presented by the Special Rapporteur in his second report,⁴ was somewhat narrowly conceived: it was said in particular that the words "to the extent compatible with the instrument establishing them" appeared to be restrictive and

⁴ *Yearbook . . . 1985*, vol. II (Part One), pp. 112-113, document A/CN.4/391 and Add.1, para. 74.

III. Notion of an international organization

12. The Special Rapporteur dealt with the question of the notion of an international organization in his second report;⁵ accordingly, he will refer to what was said in that report on the subject.

13. The Special Rapporteur noted in his second report that virtually all the members of the Commission who had spoken during the debate on his preliminary report had taken the view that it did not seem appropriate to try to work out and propose a precise definition of what an international organization was, particularly since the Commission's task was not to draw up a treaty on such organizations. The Special Rapporteur was asked "to avoid protracted discussions of a doctrinaire, theoretical nature".⁶

14. Following a series of comments, he reached the conclusion that he should continue to follow the pragmatic approach adopted during the discussion of three of the drafts formulated by the Commission, each of which is now a convention, namely the drafts on the topics "Law of treaties", "Representation of States in their relations with international organizations of a universal character" (the first part of the topic now under consideration) and "Treaties concluded between States and international organizations or between international organizations".

15. Article 2, paragraph 1 (*i*), of the draft articles on treaties concluded between States and international organizations or between international organizations gives the term "international organization" a definition identical with that in article 2, paragraph 1 (*i*), of the 1969 Vienna Convention on the Law of Treaties. It simply identifies an international organization as an intergovernmental organization. In paragraph (14) of the commentary to article 2 of the draft articles on the law of

that subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 gave the impression that international organizations could have no other attributes than the ones mentioned in those subparagraphs. The words "under the internal law of their member States" were queried on the ground that such internal law was hardly relevant. On the other hand, support was voiced for the Special Rapporteur's proposal that paragraph 2 of the draft article should be made a separate article, subject to the addition of the words "and by international law" at the end of the paragraph.

11. The General Assembly, on the basis of the report of the Sixth Committee, adopted resolution 42/156 of 7 December 1987, in paragraph 3 of which it recommended that the Commission should continue its work on the topics in its current programme. That recommendation was reiterated by the Assembly at its forty-third session, in resolution 43/169 of 9 December 1988.

treaties, the Commission stated that the term "international organization" was defined in paragraph 1 (*i*) as an intergovernmental organization "in order to make it clear that the rules of non-governmental organizations are excluded".⁷

16. In paragraphs (7), (8) and (9) of the commentary to article 2 (adopted on first reading) of the draft articles on treaties concluded between States and international organizations or between international organizations, the Commission also stated, with regard to paragraph 1 (*i*):

(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 prejudice 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 prejudice 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.⁸

⁷ *Yearbook . . . 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II.

⁸ *Yearbook . . . 1974*, vol. II (Part One), pp. 295-296, document A/9610/Rev.1, chap. IV, sect. B; previously cited in the Special Rapporteur's second report (*Yearbook . . . 1985*, vol. II (Part One), p. 106, document A/CN.4/391 and Add.1), para. 25.

⁵ *Ibid.*, pp. 105-107, paras. 15-30.

⁶ *Ibid.*, para. 15.

17. The Special Rapporteur therefore believes that, for the purposes of the present draft articles, the Commission should maintain its position that an "international organization" means an intergovernmental or inter-State organization.

18. Further, in accordance with the views expressed in

the discussions in both the Commission and the Sixth Committee of the General Assembly, we should, for the time being, confine ourselves to organizations of a universal character, taking account of the reservations expressed during those discussions and indicated in the Special Rapporteur's second report.

IV. Part I of the draft articles: articles 1 to 4 submitted by the Special Rapporteur

19. Part I of the draft articles would read as follows:

PART I.

INTRODUCTION

Article 1. Terms used

1. For the purposes of the present articles:

(a) "international organization" means an intergovernmental organization of a universal character;

(b) "relevant rules of the organization" means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

(c) "organization of a universal character" means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

(d) "organization" means the international organization in question;

(e) "host State" means the State in whose territory:

(i) the organization has its seat or an office; or

(ii) a meeting of one of its organs or a conference convened by it is held.

2. The provisions of paragraph 1 of this article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 2. Scope of the present articles

1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the article

[Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article.

Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations

The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization.

Article 4. Relationship between the present articles [Convention] and other international agreements

The provisions of the present articles [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 privileges and immunities of international organizations of a universal character.

20. Two earlier comments need to be repeated here. First, the Commission, it will be recalled, reached the conclusion that, for the purposes of its initial work on the second part of the topic, it should adopt a broad outlook, inasmuch as the study should include regional organizations, and that the final decision on whether to include such organizations in a future codification could be taken only when the study was completed.⁹ Secondly, as has been pointed out, the other terms that may be used in the draft articles will be defined when work on the topic has been concluded.

21. Finally, it is worth noting that the 1975 Vienna Convention on the Representation of States, which dealt with the first part of the present topic, was confined to international organizations of a universal character, but a reservation was made, in article 2, paragraph 2, of the Convention, to the effect that the limitation of the scope of the Convention to the representation of States in their relations with international organizations of a universal character did not preclude the application to the relations of States with other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

⁹ *Yearbook* . . . 1983, vol. II (Part Two), p. 80, para. 277 (c).

V. Legal capacity of international organizations

22. The Special Rapporteur dealt in his second report with the legal capacity of international organizations and presented a draft article 1, which was later divided into draft articles 1 and 2.¹⁰ The discussion in both the Commission and the Sixth Committee indicated a widespread feeling that paragraph 2 of the proposed article 1 should be made a separate article, with the addition, at the end, of the words “and by international law”. It seems unnecessary to add anything else to what was said in the second report.

¹⁰ See footnote 4 above.

VI. Part II of the draft articles: articles 5 and 6 submitted by the Special Rapporteur

23. Part II of the draft articles would read:

PART II.

LEGAL PERSONALITY

Article 5

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 6

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

VII. Privileges and immunities accorded to international organizations

A. Immunity from legal process: basis

24. It is undeniable that, in order to guarantee the autonomy, independence and functional effectiveness of international organizations and protect them against abuse of any kind, and because national courts are not always the most appropriate forum for dealing with lawsuits to which international organizations may be parties, some degree of immunity from legal process in respect of the operational base of each organization must be granted.

25. The arguments put forward in support of the immunity of States from legal process, which are similar,

by and large, to those cited in the case of international organizations, might suggest that the rules applicable to States can also be applied to international organizations.

26. A substantial number of authors consider that too rigid a parallel between the jurisdictional immunities of States and those of international organizations is not warranted, since the reasons advanced for granting immunity are not the same in the two cases. It is not clear, to begin with, that the immunities which States need and the immunities which international organizations need have to be of equal scope. The Special Rapporteur believes that the right approach is to consider what degree of immunity from legal process ought to be

granted to a given international organization in the light of its functional requirements.¹¹

27. If the *raison d'être* of an international organization is the functions and purposes for which it was set up, those functional requirements must be one of the main criteria, if not the only one, used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization. The independence of the organization will thus be safeguarded to the extent necessary for it to perform its functions and accomplish its objectives.

28. Justification for the privileges and immunities granted to international organizations can also be found in the principle of equality among an organization's member States. As international organizations are the creation of States which are equal among themselves, those States must all be on an equal footing *vis-à-vis* the organization they have set up and belong to. In particular, no State should derive unwarranted fiscal advantages from the funds put at an organization's disposal.

29. Precedent has been a factor in defining the privileges and immunities of international organizations. For understandable practical reasons, the privileges granted in the past to a number of similar organizations have been a useful reference point in considering the question of what privileges and immunities to grant to a new organization.

30. As soon as the first international bodies were set up, it became apparent that there was a need to afford them some protection against local State authorities, particularly judges and executive officials, capable of interfering with their operation. International organizations, lacking territory of their own, have to be based in the territory of a State.

31. Originally, the privileges and immunities were granted to officials or representatives of such bodies, generally by assimilating them to diplomatic personnel. Very soon, given the rapid growth of international organizations, a new doctrine prevailed. This well founded doctrine provided a justification for granting privileges and immunities to international organizations which was independent of and different from that established in relation to States.

32. International organizations enjoy privileges and immunities *motu proprio*, being granted them in conventions, headquarters agreements, or possibly by custom, in their capacity as international legal persons, as subjects of international law. They are entitled to privileges and immunities and can require them of States. One basic difference in relation to States concerns reciprocity. The different nature of the parties precludes international organizations from offering equivalent benefits in exchange for the privileges and immunities

accorded to them. As Christian Dominicé puts it:

None of the conventions on the privileges and immunities of such organizations, the headquarters agreements especially, would make any sense if the organizations lacked international juridical personality. This is not to say, however, that immunities are a necessary attribute of such personality. They derive from the specific rules prescribing them . . .¹²

33. Being unable to enjoy the protection conferred by territorial sovereignty, as States can, international organizations have as their sole protection the immunities granted to them. The ample immunity afforded them is fully justified, in contrast to the increasingly restricted immunity of States, for the good reason that States are political entities pursuing their own interests while international organizations are service agencies operating on behalf of all their member States.¹³

B. Classification of international organizations

34. Before going further, the question should be considered, as it was in the case of the definition of an international organization, whether it is possible, and above all whether it is necessary and desirable, to embark on a classification of such organizations, in other words, whether it would be useful to divide international organizations into categories with a view to determining what privileges and immunities should be given to them in each case.

35. The classifications proposed by legal writers are very varied. In general, the sole purpose of such classifications is to facilitate the enumeration of existing organizations. This is readily understandable. As already stated,¹⁴ each organization has its own characteristics according to the functions assigned to it by the legal instrument whereby it was created. While some international organizations have common features, they also have a variety of distinguishing features, depending on the purpose for which they were established by the will of States.

36. Given these circumstances, any attempt at classification can only result in the identification of types of international organizations, which is more of a systematization than a mere theoretical description. Given the wide variety of functions entrusted to international organizations, as has been observed, any classification will necessarily be inadequate.

37. The classification of international organizations most frequently used in legal doctrine is based on the following criteria: (a) composition; (b) purpose of activity; and (c) powers.¹⁵

38. In classifications made on the basis of composition,

¹² C. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Collected Courses of The Hague Academy of International Law, 1984-IV* (Dordrecht, Martinus Nijhoff, 1985), vol. 187, p. 164.

¹³ *Ibid.*, pp. 178 *et seq.*

¹⁴ See the Special Rapporteur's second report (*Yearbook . . . 1985*, vol. II (Part One), p. 107, document A/CN.4/391 and Add.1), para. 32.

¹⁵ See P. Reuter, *International Institutions* (New York, Rinehart, 1958), pp. 219 *et seq.*; M. Virally, "Definition and classification of international organizations: A legal approach", in G. Abi-Saab, ed., *The Concept of International Organization* (Paris, UNESCO, 1981), pp. 50 *et seq.*

¹¹ See, in particular, the report prepared for the Council of Europe in 1968 by the Sub-Committee on Privileges and Immunities of International Organisations and Persons connected with Them, as revised and completed by the European Committee of Legal Co-operation: Council of Europe, *Privileges and Immunities of International Organisations*, Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and explanatory report (Strasbourg, 1970), p. 23, para. 31.

a distinction is drawn between organizations which have a universal vocation and regional organizations. The first are difficult to define. None of the international organizations is totally universal. Because they are built on a voluntaristic basis, it is always possible for some States to refrain from membership in them. Even the phrase "which have a universal vocation", which emphasizes the fact that the universality is only virtual, is not entirely satisfactory. This is because it does not cover an organization such as the World Bank which, being founded on economic principles, cannot allow the States that reject those principles ever to become members. Regional organizations are easier to define in terms of composition. But there is a third category of international organizations which has no place in this dualistic classification: that of organizations which do not have a universal vocation and which are not established on a regional basis, such as, for instance, OPEC, OECD and the various councils and boards responsible for primary commodities.

39. In classifications made on the basis of the purpose of the activity, a distinction is frequently made between political organizations and technical organizations—or between general organizations and specialized organizations—depending on the organization's sphere of competence. Other authors go further and distinguish between political, economic, financial, social, cultural, administrative, military and other organizations. There is no limit to this purely descriptive list, which is, in fact, an enumeration rather than a real classification.

40. In classifications made on the basis of powers, a distinction is drawn between consultative, standard-setting and executing organizations, depending on whether or not they are empowered to take decisions that are binding on their members and whether or not they can themselves carry out their decisions. From a legal point of view, this is a more promising distinction. However, this, too, is not entirely satisfactory. Considered from the standpoint of the binding force of decisions taken, for example, the United Nations General Assembly would appear to be a consultative body, because its resolutions have the force merely of recommendations, whereas the Security Council would be deemed to be a standard-setting body, because it can take binding decisions.¹⁶

41. The best approach would be to try to establish a more systematic (or scientific) classification on the basis of a characteristic of international organizations that is as typical as possible but, at the same time, varies significantly from one organization to another.¹⁷ As has already been pointed out, it is an organization's function that constitutes its true *raison d'être*. It is in order that it may perform this function that its member States have established it and take part in its operation, bearing the costs and accepting the constraints that inevitably derive therefrom. The organization's structure is itself subordinate to the requirements of its function.

42. Existing international organizations almost all conform to a single model operating at three levels:

(a) At the highest level, the plenary intergovernmental organ;

(b) At the lowest level, the administrative secretariat; and

(c) At the intermediary level, the plenary intergovernmental organ (in organizations composed of only a small number of States) or the limited intergovernmental organ (in the case of world-wide organizations).

43. This general pattern is complicated by a number of adjuncts that vary considerably according to the nature of the functions assigned to the organization in question, the circumstances with which it has to cope, the direction given to its activities and so forth. Obviously, it is extremely difficult, if not impossible, to reduce this multiplicity of institutional elements to a few well defined and significant types.

44. This having been said, and given the functional approach which the Commission has adopted as the principal basis for this study, the function of international organizations, as a principle of classification, can be considered principally from three points of view:

(a) According to the extent of the co-operation that it is the organization's mission to bring about;

(b) According to the scope of the field of action reserved for or assigned to such co-operation; and

(c) According to the means used to effect such co-operation and the type of relations instituted between the organization and its members and between the members themselves.

45. Using the first criterion, a distinction would be drawn between universal or world-wide, or even global, organizations and organizations whose membership is restricted. The aim of world-wide organizations is, of course, to bring about the unification of the international community by grouping within themselves all the States that make up that community and by seeking to solve the problems that arise at a planetary level. Organizations of limited membership seek to promote co-operation among a particular group of States only, restrictively defined on the basis of specific interests which they all share and which distinguish them from the rest of the international community. In a sense, it may be said that organizations of a universal character are founded on the principle of inclusion, whereas organizations of limited membership are founded on the principle of exclusion. The distinction between these two types of organization not only concerns the number of members and the rules relating to their admission but also entails a whole series of consequences in regard to the establishment of the system of organs, its relations with member States, the purpose of its work and the whole of its activities.

46. The second criterion would give rise to a distinction between general international organizations and sectoral international organizations. The first category is made up of international organizations established to allow organized co-operation in all fields in which such co-operation may appear useful, without any limitation, or excluding only certain clearly defined sectors (for example, national defence). These general international organizations may, like the United Nations, be set up on a world-wide basis, or, like OAS or OAU, on a regional basis. The second category is made up of international organizations which are assigned a function limited to a single

¹⁶ See Reuter, *op. cit.*, pp. 219 *et seq.*; Virally, *loc. cit.*, pp. 58-59.

¹⁷ See Virally, *loc. cit.*, pp. 59 *et seq.*

sector of activity, or at least to a set of strictly defined sectors.

47. In the case of the third criterion, the distinction would be between standard-setting international organizations and operational international organizations. Standard-setting organizations are principally concerned with orienting their members' attitudes to prevent their becoming conflictual (or, if that has already happened, to end the conflict) and with assisting the attainment of common objectives through the co-ordination of efforts. However, the methods used to achieve those ends may differ from one organization to another. Operational organizations take action themselves, using their own resources or resources made available to them by their members, but of which they determine the utilization and therefore have the operational management. It is true that, in most cases, the resources used by international organizations derive from their member States, but the situation differs considerably according to whether these resources have been definitively transferred to the organization (as in the case of financial contributions) or are simply supplied to it on an *ad hoc* basis (as in the case of military contingents).

48. The activities engaged in by some international organizations are almost entirely operational. This is true of the financial institutions and especially of the international banks such as the World Bank. The activities of others combine both standard-setting and operational elements, as in the case of the United Nations (whose activity remains primarily of a normative kind) and most of the specialized agencies (with the exception of the financial institutions).

49. In the light of the above, the only conclusion is that none of the proposed classifications can by itself provide a general criterion for determining what privileges and immunities should be accorded to international organizations. It is not possible to make a clear distinction between the various categories. At times these categories overlap. Finally, as stated earlier, it is more an enumeration than a classification as such. It is not possible to establish in a precise manner that from a simple classification drawn up on the basis of the criteria enumerated one can derive automatically and for each category of international organization specific and clear-cut legal consequences.

C. Scope of immunity from legal process

50. It would therefore seem that, aside from the difficulties involved in drawing up a list of the privileges and immunities that would be equally applicable to all international organizations, it would not be desirable to draw up such a list, since each international organization has its own characteristics, in accordance with the instrument establishing it, and, consequently, for the fulfilment of its aims and specific functions, a specific and well defined number of privileges and immunities, which do not have to be, and generally are not, the same as those required by another international organization with different aims and functions.

51. In view of the difficulty of defining the general principles or criteria on the basis of which it would be

possible automatically to grant a particular international organization a specific set of privileges and immunities, any norm that is elaborated in this connection must contain general provisions capable of being supplemented or modified according to the specifics of each individual case, so that it may be adjusted to the true functional needs of the international organization concerned, in keeping with the legal instrument establishing the organization.

52. The general agreements on the privileges and immunities of international organizations (the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,¹⁸ for example) are generally supplemented by a headquarters agreement or by a bilateral or multilateral agreement in which the privileges and immunities accorded to a specific international organization are defined, limited or expanded. This formula tends to harmonize the interests of the international organizations and those of States, irrespective of whether a State is host to one or more international organizations.

53. A look at the relevant conventions and at the headquarters agreements and other bilateral and multilateral legal instruments currently in effect shows that a number of criteria have been used, in a more or less general fashion, in granting privileges and immunities to existing international organizations. These criteria are as follows:

(a) The geographical area for which the international organization is responsible;

(b) The political character of the international organization;

(c) The type of functions assigned to the international organization: commercial, financial or even industrial;

(d) The size of the international organization; this is logical, since certain privileges and immunities which are necessary or essential in the case of a large international organization may be omitted without creating major difficulties in the case of a small international organization whose functions are limited.

54. Lastly, it should not be forgotten that there are certain international organizations to which it may not be necessary to grant privileges and immunities, even if they have been established by an agreement between States. This would be true of intergovernmental international organizations established in such a form that they can function exclusively as legal entities under the domestic law of the host State.

55. The United Nations General Assembly itself, in its resolution 22 D (I) of 13 February 1946, pursuant to which the 1947 Convention on the Privileges and Immunities of the Specialized Agencies was drawn up and adopted, included a paragraph reading as follows:

While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of

¹⁸ Hereinafter referred to as the "General Conventions of 1946 and 1947".

their respective functions may require, and that *no privileges and immunities which are not really necessary should be asked for**.

56. Thus the only criterion which is preponderant and appears in general form, both in legal doctrine and in legal instruments of a multilateral, bilateral or unilateral nature, and in the practice followed by the United Nations and other existing international organizations, is that of functional necessity. This, therefore, is the main criterion which the Commission adopted at the outset of this study.

57. In any event, it should be borne in mind that:

(a) Privileges and immunities constitute a right not a courtesy;

(b) They are intimately bound up with the functions of the international organization to which they are accorded;

(c) They should not be used to nullify the grounds on which they were granted and to challenge justice.

This point will be dealt with in connection with the privileges and immunities of international staff members.

58. According to most existing texts (conventions on privileges and immunities, headquarters agreements and so forth), international organizations cannot be judged by any court of ordinary law unless they expressly waive that privilege. Even if they do so, their waiver cannot be extended to measures of execution.

59. Although this exceptional situation may seem excessive, it is expressly limited by the obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in which they may become involved. This obligation is enshrined in all the existing headquarters agreements, such as the Agreement between WHO and Switzerland¹⁹ (art. 23) and the Agreement between UNESCO and France²⁰ (art. 28). The General Conventions of 1946 and 1947 contain similar provisions (art. VIII, sect. 29, and art. IX, sect. 31, respectively). A more explicit provision is to be found in the General Agreement on Privileges and Immunities of the Council of Europe,²¹ which, in article 21, refers to arbitration.

60. In their replies to the questionnaire sent by the Legal Counsel of the United Nations to the specialized agencies and IAEA on 13 March 1978 and to the regional organizations on 5 January 1984, in accordance with decisions of the Commission,²² most of the specialized agencies and IAEA stated—as had the United Nations—that their immunity from legal process had been fully respected and recognized by the competent national authorities.²³

¹⁹ Agreement of 29 September 1955 (see Switzerland, *Recueil systématique du droit fédéral* (Berne, 1970), sect. 0.192.120.281).

²⁰ Agreement of 2 July 1954 (United Nations, *Treaty Series*, vol. 357, p. 3).

²¹ Council of Europe, *The General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949* (Strasbourg [n.d.]).

²² See *Yearbook . . . 1977*, vol. II (Part Two), p. 127, para. 95; and *Yearbook . . . 1983*, vol. II (Part Two), p. 81, para. 277 (f).

²³ See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat" (*Yearbook . . . 1985*, vol. II (Part One/Add.1), p. 145, document A/CN.4/L.383 and Add.1-3).

61. The inference from the replies was that the principle of immunity of international organizations from legal process had been strengthened. In that connection, it is of interest to quote the following from the summary of practice relating to the status, privileges and immunities of the United Nations:

(a) *Recognition of the immunity of the United Nations from legal process*

11. The United States of America became a party to the Convention on the Privileges and Immunities of the United Nations on 29 April 1970. This accession strengthened the legal position of the United Nations with regard to immunity from legal process in the United States, which until that time had been based on domestic legislation and general international law derived, in particular, from Articles 104 and 105 of the United Nations Charter. This action was all the more significant for the Organization as it came at a time when the doctrine of sovereign immunity was undergoing a rapid evolution. A more restrictive doctrine was being developed in many countries, culminating in the enactment of national legislation such as the United States Foreign Sovereign Immunities Act of 1976. Although not directly applicable to international organizations, the changing doctrine of sovereign immunity and in particular the more restrictive approach to the commercial activity of foreign sovereigns will inevitably have an impact on the way national courts view the activities of international organizations. The United Nations, however, has continued to enjoy unrestricted immunity from legal process and has experienced no particular difficulties in this regard, unlike other organizations which do not enjoy the same legal protection under agreements in force.²⁴

62. Because a court situated in the host country of the United Nations, and hence important, is concerned, it is of particular interest to quote the decision of the New York County Supreme Court in the *Matter of Menon* (1973). The estranged wife of a non-resident United Nations employee was challenging the refusal of Family Court judges to order the United Nations to show cause why her husband's salary should not be sequestered to provide support for herself and her minor child. The application was dismissed by the Supreme Court, which declared that "the law specifically exempts a *sovereign** from the jurisdiction of [the United States] courts, unless the sovereign consents to submit itself". The Court further held that the United Nations "holds *sovereign** status and may extend that protection over its agents and employees" and that "the sovereign status of the United Nations, concerning its personnel and its financial agents, is beyond this or the Family Court authority to challenge".²⁵ The opportunity to comment on this decision will arise when the privileges and immunities of officials are discussed.

63. Lastly, another relevant example is the ruling in the case of *Manderlier v. United Nations and Belgian State* (1966), before a Brussels court of first instance. The plaintiff had instituted proceedings with a view to obtaining compensation from the United Nations or the Belgian Government, or from both jointly, for damage he claimed to have suffered "as the result of abuses committed by the United Nations troops in the Congo". The Court dismissed the proceedings in so far as they pertained to the United Nations on the ground that the Organization enjoyed immunity from every form of legal

²⁴ *Ibid.*, p. 161, part A, chap. II, sect. 7, para. 11.

²⁵ See United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 198; cited in document A/CN.4/L.383 and Add.1-3, part A, chap. II, sect. 7, para. 12.

process under section 2 of the 1946 Convention on the Privileges and Immunities of the United Nations.²⁶

64. The specialized agencies and IAEA resort to arbitration to settle any dispute that may be submitted to them in respect of private individuals under ordinary law.²⁷ Purchase contracts with suppliers generally contain an arbitration clause.

65. In addition, the specialized agencies have established and are under the jurisdiction of an *ad hoc* administrative tribunal which has competence to judge disputes that may arise between them and their staff members.

66. Technical assistance contracts drawn up between the specialized agencies and States and co-operation agreements concluded between those agencies or between them and the United Nations generally contain an arbitration clause. The constituent instruments of those organizations provide for possible recourse to the ICJ for an advisory opinion should there be a dispute regarding the interpretation or application of one of the provisions of the aforementioned legal instruments.

67. Some international organizations of a financial character are willing to be sued before a national tribunal in certain circumstances. This is the case, as laid down in their articles of agreement, of IBRD (art. VII, sect. 3), IFC (art. VII, sect. 3) and IDA (art. VIII, sect. 3). However, no judicial action can be brought against them by member States or by persons acting for or deriving claims from such States. The property and assets of the three institutions, wherever they may be situated, are immune from all forms of seizure, attachment or execution in the absence of a final judgment.

68. The replies to the questionnaire sent out to the executive heads of the specialized agencies and IAEA by the United Nations Legal Counsel on 13 March 1978 indicate that the immunity of the majority of the specialized agencies and IAEA from legal process has been fully recognized by the competent national authorities.

69. In proceedings instituted against ILO and IMF, immunity from legal process has always been recognized.²⁸ Various actions have been brought against FAO despite the existence of international agreements granting FAO immunity from legal process. FAO contests the jurisdiction of local courts in actions brought against it. The judgments of the courts of the host country, Italy, do not recognize FAO's immunity even though the headquarters agreement²⁹ refers to "immunity from every form of legal process". The Italian courts endeavour to draw a distinction by claiming that FAO's immunity from legal process extends only to matters which relate to activities undertaken in carrying out the purpose and functions of the organization, i.e. acts *jure imperii*, and not to transactions of a private law

nature which may arise out of other activities, i.e. *jure gestionis*. In any event, no measure of execution has been sought against FAO. Clearly, the FAO governing bodies disagree with that interpretation and maintain that the provisions of the headquarters agreement should be given their full literal meaning. Otherwise, both FAO and other international organizations would be open to litigation detrimental to effective implementation of their programmes.³⁰ Consideration may be given to the possibility of seeking an advisory opinion of the ICJ as to the interpretation of the relevant provisions of the headquarters agreement.

70. In other proceedings instituted against FAO, extrajudicial settlements have been reached. In some cases, execution of the judgment has not been sought.

71. IBRD, IDA and IFC do not enjoy general immunity from suit. Their immunity is limited to actions brought by member States or persons acting for or deriving claims from such States. Other persons may bring actions only in a court of competent jurisdiction in the territory of a member State in which the organization has an office, has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities. No cases have been reported by IBRD, IDA or IFC in which their limited immunity has not been recognized.

72. Regarding the application of immunity "from every form of legal process" under article III, section 4, of the 1947 Convention, most specialized agencies and IAEA reported no special difficulties over interpretation of that provision. IMF has taken the view that the term is to be interpreted broadly and thus extends to the exercise of all forms of judicial power.³¹

73. It is of interest to note that the United States *Foreign Sovereign Immunities Act of 1976* provides expressly that the property of international organizations designated by the President of the United States (IBRD, IDA and IFC are among the organizations designated) "shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign State as the result of an action brought in the courts of the United States or of the States".³²

74. There have been no cases in which the question of immunity from measures of execution has been addressed. FAO reported, however, that the representative of the host country had made a declaration at the session of the FAO Council held in November 1984 on the agency's immunity from legal process and measures of execution in the host country.

75. In that declaration, the said representative drew the distinction alluded to earlier (see para. 69 above) which the Italian courts make between acts *jure imperii* and acts *jure gestionis* but stated that "if someone attempted to carry out measures of execution against FAO . . . the organization would have to appear before the judge in

²⁶ See United Nations, *Juridical Yearbook 1966* (Sales No. E.68.V.6), p. 283; cited in document A/CN.4/L.383 and Add.1-3, part A, chap. II, sect. 7, para. 13.

²⁷ See document A/CN.4/L.383 and Add.1-3, part B, chap. I, sect. 1, para. 9.

²⁸ *Ibid.*, part B, chap. II, sect. 7, para. 43.

²⁹ Agreement of 31 October 1950 (see United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (Sales No. 61.V.3), p. 187).

³⁰ See document A/CN.4/L.383 and Add.1-3, part B, chap. II, sect. 7, para. 48 (b).

³¹ *Ibid.*, para. 52.

³² *Ibid.*, para. 53.

order to point out the existence of its immunity under . . . the Headquarters Agreement".³³

76. In view of that limitative interpretation of the words "every form of legal process" used in its headquarters agreement, FAO considers and maintains that those words also cover immunity from measures of execution.

D. Waiver of immunity from legal process

77. There have been a few cases of agencies waiving their immunity from legal process. Thus, for example, IMF has waived its immunity for the purpose of leases. Bearer notes associated with certain IMF borrowing agreements provide waiver by IMF of its immunity from judicial process and the submission to designated national courts with respect to both actions and execution. UPU has recognized the jurisdiction of Swiss tribunals when faced with litigation cases.³⁴

78. Furthermore, as stated above (para. 64), most of the contracts entered into by the specialized agencies and IAEA provide for settlement of any disputes by arbitration.

E. Property, funds and assets

79. If we start from the principle that the international organizations possess juridical personality, it is readily apparent that the status or régime which is to be accorded to the property of an international organization may be viewed as a logical extension of the rights which that personality entails.

80. One of the prerequisites for the satisfactory performance by an international organization of the functions for which it was established is, as already stated, the enjoyment of absolute autonomy. However, it is difficult to conceive of such autonomy unless the international organization is recognized as having the right to dispose of its own resources.

81. Without an appropriate instrument for action, without the means to be able to act and without the necessary material support, the international organizations would be unable to perform the tasks conferred on them by their constituent and other legal instruments. The resources of the organization provide all of this. In the first place, the resources help to give permanency to the organization in its specific vocation of achieving a particular goal.

82. The resources of international organizations can be compared to the resources of public persons in the sense that they are assigned exclusively to the fulfilment of the organization's purposes, hence the principle of the intangibility and inalienability of the resources of international organizations.³⁵

³³ *Ibid.*, para. 54.

³⁴ *Ibid.*, para. 55.

³⁵ See J. Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 1982), p. 235.

83. Clearly, these characteristics do not belong to international organizations alone; they are also to be found in public services of municipal or international law. The principles of inalienability of property and fiscal immunity have as their sole purpose the preservation of the resources of public entities so as to ensure that services are maintained on a continuous basis.³⁶

84. According to Jean Duffar, assignment justifies in municipal law the non-diversion of the property of public institutions from their function; it explains above all the inalienability of the public domain.³⁷ The property of international organizations also benefits from a protective law by being assigned to a collective end. The general principle may even be adjusted to favour international organizations, since domain implies ownership, while the property of international organizations is protected even when it is not owned by them.

85. All the texts relating to the privileges and immunities of international organizations contain an express reference to premises and buildings. The 1961 Vienna Convention on Diplomatic Relations provides, in article 22, paragraph 3, that

the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The General Conventions of 1946 and 1947, the headquarters agreements between the United Nations and the United States of America³⁸ and between the United Nations and Switzerland,³⁹ among others, contain similar provisions.

86. This seems logical. Even when, without a shadow of a doubt, the premises and buildings of international organizations are governed by the general régime applicable to property, it is obvious that, without the premises and buildings, the activities of an organization would be not only impeded but almost impossible to carry out. Hence the enormous and particular importance accorded to them by means of a special legal régime.

87. The property of an international organization as a whole, according to the practice of States and the legal instruments relating to the various international organizations (constituent instruments, headquarters agreements, conventions, etc.), is considered outside the scope of ordinary property law. The permanent assignment of such property to institutional ends helps to prevent them from being put to a use other than the one intended. They are therefore granted a public law régime, which makes them immune from alienation and attachment.

F. Inviolability of property and premises

88. A most important privilege, and one which, in the practical life of international organizations, is essential to

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 237.

³⁸ Agreement of 26 June 1947 (United Nations, *Treaty Series*, vol. 11, p. 11).

³⁹ Interim Arrangement of 11 June and 1 July 1946 (*ibid.*, vol. 1, p. 163), amended by exchange of letters of 5 and 11 April 1963 (*ibid.*, vol. 509, p. 308).

their full functioning, is the privilege relating to the inviolability of an organization's premises. It is the principle which vouchsafes an international organization its autonomy, its independence and its privacy. The principle is, of course, embodied in almost all the legal instruments relating to the privileges and immunities of the international organizations, whether in the two General Conventions of 1946 and 1947 or in the headquarters agreements or other bilateral or multilateral agreements relating to existing international organizations.

89. The inviolability of the premises of international organizations in international law is, in respect of content, identical to the inviolability of diplomatic premises as expressed in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. However, the principles on which that content is based are different in the two cases. States respect the inviolability of diplomatic premises on the basis of the principle of sovereign equality and reciprocity. In the case of international organizations, one cannot speak of reciprocity; it does not exist. The basis must be sought in the fact that a national, subordinate legal order cannot demand submission of or coerce an international, higher legal order.⁴⁰

90. In the case of the first international organizations to be established, mention was made of "extraterritoriality" in justification of inviolability. Thus, for example, in the agreements concluded by the Swiss Federal Government with some of the international organizations which have their headquarters in Switzerland, that term was used. In such agreements, the Swiss Federal Council recognizes the extraterritoriality of the grounds and buildings of the organization and of all buildings occupied by it in connection with meetings of its assemblies or any other meeting convened by it in Switzerland (art. 4 of the agreements signed with, among others, ILO, WHO and WMO).

91. This theory has been virtually abandoned. The inviolability of the premises of an international organization depends not on an assumed fiction of extraterritoriality or extraterritoriality (which, as stated, is an obsolete doctrine) but on the right of every international organization to the respect and inviolability of its privacy. This is a right inherent in personality.⁴¹

92. The earliest agreements referred only to "premises of the Organization". The latest agreements clarified the term and, of course, the content of the privilege without, however, modifying its scope. Thus article I (i) of the 1961 Vienna Convention on Diplomatic Relations reflects the Commission's view, expressed during the elaboration of the Convention, that "the premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park".⁴² The Vienna Convention states in effect: "The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto . . . used for the purposes of the mission . . .".

93. When entering into an agreement with a host State regarding permanent installations, such as those in New York or Geneva or the headquarters of the regional economic commissions, the United Nations has sought to define, either in the headquarters agreement itself or in a supplementary agreement or annex, the precise limits of the area in which its premises are situated or over which it has control.⁴³

94. Inviolability, as understood thus, in a broad and universal sense, is not always accepted. In particular, States in whose territory some international organizations have their headquarters tend to limit it. A report prepared in 1968 for the European Committee on Legal Co-operation recognized the principle that the premises of an international organization must be inviolable but pointed out that at first glance inviolability of the premises did not seem necessary in the case of international organizations that exercised purely administrative or technical functions and that, in certain cases, inviolability of archives might be sufficient. The said Committee agreed that premises should be understood as including "the land, buildings and parts of buildings, by whomsoever owned, used *exclusively for the exercise of the official functions of the organization*".⁴⁴

95. This same limitation was discussed in the Commission at the tenth session, in 1958, when the draft articles on diplomatic intercourse and immunities (on which the 1961 Vienna Convention was based) were being discussed. At that time, one of the members of the Commission, Mr. Tunkin, opposed the addition of the word "official" since, in his view, "the mission's premises were the premises used for the functions of the mission"; the addition "would merely lead to confusion and might be interpreted as implying that only the offices of the mission were to be regarded as official premises".⁴⁵ Nevertheless, the 1963 Vienna Convention on Consular Relations adopted that wording in article 31, paragraph 2, which limits the inviolability to "that part of the consular premises which is used exclusively for the purpose of the work of the consular post".

96. Although the tendency to limit and differentiate inviolability has strong supporters, there is at least one case in which a court, the Court of Justice of the European Communities, confirmed the theory of universal and uniform inviolability when it ruled that the premises and buildings of the European Atomic Energy Community were not limited to the administrative premises alone and that therefore "an intervention . . . by a national administrative authority in the sphere of interest of a Community institution constitutes an administrative measure of constraint".⁴⁶

⁴³ See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (*Yearbook . . . 1967*, vol. II, p. 229, document A/CN.4/L.118 and Add.1 and 2, part two, A, chap. II, para. 99).

⁴⁴ See Council of Europe, *op. cit.* (footnote 11 above), p. 27, paras. 44-45.

⁴⁵ See *Yearbook . . . 1958*, vol. I, p. 128, 455th meeting, para. 68.

⁴⁶ Case 2.68, *Ufficio Imposte di Consumo di Ispra v. Commission of the European Communities*, order of 17 December 1968, *Reports of Cases before the Court of Justice of the European Communities, 1968* (Luxembourg), p. 437; cited in Duffar, *op. cit.* (footnote 35 above), p. 102.

⁴⁰ Duffar, *op. cit.*, p. 101.

⁴¹ *Ibid.*, pp. 51 *et seq.*

⁴² See *Yearbook . . . 1958*, vol. II, p. 95, document A/3859, chap. II, sect. II, para. (2) of the commentary to article 20 of the draft articles on diplomatic intercourse and immunities.

97. The 1961 Vienna Convention on Diplomatic Relations embodies, in article 1 (*i*), another of the basic characteristics of inviolability in international law, namely that inviolability protects, not ownership, but occupancy of the premises. Thus the words "irrespective of ownership" are used. Similar wording is to be found in the General Conventions of 1946 and 1947 (art. II, sect. 3, and art. III, sect. 5, respectively), which indicates that the same principles are applied to international organizations.⁴⁷

98. In the first study prepared by the Secretariat, in 1967, there is the following very apt comment:

While the Vienna Convention of course does not apply to international organizations, it is indicative of the fact that no distinction is made in the inviolability of those premises which are owned and those premises which are rented or otherwise held on a more temporary basis. In this respect it is declaratory of existing international law.⁴⁸

99. Clearly, the principle as enunciated in the form adopted by the 1961 and 1963 Vienna Conventions, namely as protection of the occupancy, implies the existence of two precise moments: the moment from which inviolability is applicable and required and the moment at which it ceases to be so. The first moment is determined by the beginning of the effective occupation of the premises by the international organization. The second is determined, logically, by the vacation of the premises by the international organization which occupied them. The 1975 Vienna Convention on the Representation of States adopted this principle in article 70, concerning the protection of premises, property and archives, paragraph 1 of which provides: "When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are used by it . . .".

100. The legal literature is almost unanimous in recognizing that all the principles on diplomatic inviolability are applicable to the premises of international organizations. The practice followed by States confirms this. Such inviolability depends on the use of the premises for the purposes of the international organization and the effective occupancy of the premises by the international organization.

101. However, there seems to be a lacuna in relation to the precise determination of the two moments indicated above: the beginning and the end of inviolability. This is due to the absence in the majority of the legal instruments regulating relations between States and international organizations that are currently in force of a procedure establishing obligatory notification at both the moment of occupation and the moment of vacation of the premises or any other space occupied by an international organization. Such notification should of course be made to the competent authorities of the host State. The United Nations, for example, sends an official notification to the authorities of the host country when it occupies or vacates certain premises.

102. Such obligation has been provided for in article 3 of the Harvard Law School draft convention concerning

diplomatic privileges and immunities. According to that draft, the inviolability of premises occupied or used by a mission should be respected and guaranteed by the host State, "provided that notification of such occupation or use had been previously given to the receiving State".⁴⁹ At the ninth session of the Commission, Mr. Ago, noting that it was the practice of the sending State to notify the receiving State concerning the premises it would occupy, suggested that inviolability might begin to operate from the date on which notification by the sending State reached the receiving State.⁵⁰ The Commission did not pronounce on that suggestion. The agreement concluded between the United Nations and the United States in 1966, following the acquisition by the United Nations of premises outside the Headquarters district as originally defined,⁵¹ established the obligatory nature of notification both when the premises begin and when they cease to be occupied. Article II of that agreement states:

Article II

The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately should any of the premises described in Article I, or any part of such premises, cease to be used for offices by the Secretariat of the United Nations. Such premises, or such part thereof, shall cease to be a part of the Headquarters District from the date of such notification.

Article III of the same agreement reaffirms the obligatory nature of the practice:

Article III

The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately of the termination of any subleases of parts of the premises described in Article I and of the possession of such parts by the United Nations. Such parts of such premises shall become a part of the Headquarters District from the date of such occupation.

103. The European Committee on Legal Co-operation, in its report on the privileges and immunities of international organizations, was concerned solely with the precise limits of the premises, which were to be recorded in headquarters agreements and in agreements concerning the temporary occupation of premises.⁵²

104. Generally speaking, therefore, it seems to be acknowledged that the premises of international organizations, like diplomatic premises, are inviolable. Inherent in that inviolability, as a natural consequence, is exemption from any form of search, requisition, attachment, confiscation, expropriation and any other form of coercion or interference, whether administrative, executive, judicial or legislative. No agent of the State's public authority may enter the premises of an international organization, as defined, unless intervention has been requested or authorized by officials of the organization empowered to make such request or grant such author-

⁴⁷ See P. Cahier, *Le droit diplomatique contemporain* (Genève, Droz, 1962), pp. 198-199.

⁴⁸ See document A/CN.4/L.118 and Add.1 and 2 (footnote 43 above), part two, A, chap. II, para. 91 *in fine*.

⁴⁹ Harvard Law School, *Research in International Law. I. Diplomatic Privileges and Immunities*, Supplement to *The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 50-51; cited in Cahier, *op. cit.* (footnote 47 above), pp. 200 and 216, and in Duffar, *op. cit.* (footnote 35 above), p. 135.

⁵⁰ See *Yearbook . . . 1957*, vol. I, p. 53, 394th meeting, para. 25.

⁵¹ See document A/CN.4/L.118 and Add.1 and 2 (footnote 4. above), part two, A, chap. II, para. 100.

⁵² See footnote 44 above.

ization, or the relevant basic legal text waives the principle of inviolability.⁵³

105. The practice of States, of the United Nations and of the specialized agencies and IAEA reflects the doctrine that inviolability not only means that States must refrain from entering the premises of an international organization but also implies the obligation of protecting them from any threat or disturbance from the outside that might affect them. The State is legally bound to extend special protection to the premises of international organizations, as it must to diplomatic premises. Inviolability of the premises obliges the State not only to abstain from certain acts but also to afford active protection of the premises. These principles have been recognized in many headquarters agreements or have been considered obligatory by States; thus, for example, the agreements concluded between the United Nations and the United States of America⁵⁴ (art. VI, sect. 16); the United Nations and France⁵⁵ (sect. II); ECAFE and Thailand⁵⁶ (art. III, sect. 5); ECA and Ethiopia⁵⁷ (art. III, sect. 4); FAO and Italy⁵⁸ (art. IV, sect. 8); FAO and Egypt⁵⁹ (art. II, sect. 4 (c)); FAO and Thailand⁶⁰ (art. V, sect. 7); UNESCO and Cuba⁶¹ (sect. B); UNESCO and France⁶² (art. 7).

106. For its part, the Swiss Federal Government has stated that the protection of the premises of an international organization represents an obligation for Switzerland, even when headquarters agreements concluded by the Confederation contain no particular provision to this effect.⁶³ The State must therefore take the necessary measures to protect the premises of the international organization on the outside and, where appropriate, on the inside. In the latter case, as we have said, intervention must be requested or authorized by an official of the organization concerned. Article 7 of the headquarters agreement between UNESCO and France⁶⁴ expressly states this principle.

107. When inviolability is being granted to the international organization in furtherance of the performance of its functions, it is logical that, in exchange, States should not allow premises occupied by an international organization to be transformed into territory of asylum. The headquarters agreement concluded between the United

Nations and the United States⁶⁵ contains an express provision on this subject in article III, section 9 (b):

(b) Without prejudice to the provisions of the General Convention or Article IV of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavoring to avoid service of legal process.

A similar provision is to be found in article 6, paragraph 3, of the headquarters agreement between UNESCO and France.

108. According to the replies to the questionnaire sent out by the Legal Counsel of the United Nations to the specialized agencies and IAEA, the inviolability of the premises of those organizations has, in general, been recognized. The same is true of the United Nations. The specialized agencies and IAEA have for the most part remained immune from search and from any other form of interference.⁶⁶

109. It is clear, then, that most, if not all, of the currently existing international organizations, as defined, enjoy absolute immunity from legal process in respect of their property. The General Conventions of 1946 and 1947, in article II and article III, respectively, establish the immunity from legal process in respect of property and assets of the international organizations to which they relate. Those texts confer absolute immunity on the property and assets of the said organizations. The competence of the national judge depends on the express waiver of the organization, which cannot, in any event, be of a general nature or extend to any measure of execution.

110. Contrary to what occurs in the case of States (where the extension of immunity is in general determined by case-law), when it comes to international organizations, any limitations to which immunity is or has been made subject derive from a special provision, because immunity is an absolute principle. As shown above, the constituent instruments of organizations of an economic or financial character, such as IBRD, IDA and IFC, provide for the competence of the national judge, in accordance with the conditions established in those instruments. Provision has also been made for the competence of national judges, not without some reticence on the part of international organizations, in the case of lawsuits of lesser importance or accidents caused by vehicles belonging to an international organization.

111. The European Committee on Legal Co-operation has concluded that, even though a degree of immunity from legal process is necessary in the case of international organizations, such immunity should be subject to certain exceptions and guarantees. The Committee has enumerated a number of areas in which there should be such exceptions, as follows:

- (a) Commercial or financial activities carried out by international organizations;
- (b) The participation of international organizations in corporations, associations or other legal entities;
- (c) Patents acquired by international organizations;

⁵³ See footnote 38 above.

⁵⁴ See document A/CN.4/L.383 and Add.1-3 (footnote 23 above), part B, chap. II, sect. 9, paras. 58 *et seq.*

⁵³ See document A/CN.4/L.118 and Add.1 and 2 (footnote 43 above), part two, A, chap. II, para. 109.

⁵⁴ See footnote 38 above.

⁵⁵ Exchange of letters constituting the agreement of 17 August 1951 relating to the holding of the sixth session of the General Assembly in Paris (United Nations, *Treaty Series*, vol. 122, p. 191).

⁵⁶ Agreement of 26 May 1954 (*ibid.*, vol. 260, p. 35).

⁵⁷ Agreement of 18 June 1958 (*ibid.*, vol. 317, p. 101).

⁵⁸ See footnote 29 above.

⁵⁹ Agreement of 17 August 1952 (see United Nations, *Legislative Texts* . . . (footnote 29 above), p. 212).

⁶⁰ Agreement of 6 February 1957 (*ibid.*, p. 220).

⁶¹ Exchange of letters of 30 August and 9 September 1949 (*ibid.*, p. 230).

⁶² See footnote 20 above.

⁶³ See *Annuaire suisse de droit international, 1969-1970* (Zurich), vol. 26, pp. 170-171; also P. Cahier, *Etude des accords de siège conclus entre les organisations internationales et les Etats où elles résident* (Milan, Giuffrè, 1959) (thesis), pp. 259-260.

⁶⁴ See footnote 20 above.

(d) Rights *in rem* to buildings belonging to international organizations or claimed by them, or the use they make of such buildings;

(e) Successions, bequests and gifts benefiting international organizations;

(f) Damage resulting from an accident caused by a motor vehicle or other means of transport belonging to an international organization or being driven on its behalf; and

(g) Counter-claims arising out of the legal relationship or facts on which any claims of organizations may be based.⁶⁷

112. The principle of the immunity of the property and assets used by an international organization to perform its functions and carry out its official activities is accepted, as we have seen, by authors of legal works and by State practice and is fully reflected in many bilateral, multilateral and even unilateral legal instruments currently in force. The principle implies immunity from search, requisition, confiscation, expropriation or any other form of administrative or judicial coercion or interference, even though such immunity may not appear essential in the case of all international organizations. Expropriation is, however, allowed as an exception to the principle of immunity, should it be necessary for purposes of public utility. In such a case, the organization should be warned and consulted before the measure is executed and should receive adequate and fair compensation.

113. The autonomy and independence of international organizations would be ineffectual if they were not empowered to manage and mobilize freely, without let or hindrance, the funds and assets placed at their disposal, so that they may perform satisfactorily the functions entrusted to them.

114. Some authors maintain that while in general the right of international organizations to transfer funds

without being subjected to normal exchange controls is admissible, that right should nevertheless be limited to transfers between member States. On the other hand, there should be no restriction with regard to the currencies in which those funds can be held or transferred.

115. In short, both the legal literature and the practice of States in their relations with international organizations accept that international organizations should be authorized to hold and transfer funds and currencies, operate bank accounts in any currency and convert all currencies in their possession without being subjected to any form of financial control, regulation or moratorium. It is obvious that so considerable a privilege may not seem indispensable to international organizations whose budget is small and whose funds are mostly used in the headquarters country.

116. The General Conventions of 1946 and 1947, of course, both have provisions on this point. The 1947 Convention provides, in article III, section 7:

Section 7

Without being restricted by financial controls, regulations or moratoria of any kind:

(a) The specialized agencies may hold funds, gold or currency of any kind and operate accounts in any currency;

(b) The specialized agencies may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency.

A similar provision is generally found in the headquarters agreements, for example in the agreement between UNESCO and France (art. 17).⁶⁸ In all cases, there is a proviso concerning the exercise of the rights accorded, to the effect that the organization concerned is to pay due regard to any representations made by the Government of any member State "in so far as it considers that these can be complied with without prejudice to its own interests".

⁶⁷ Council of Europe, *op. cit.* (footnote 11 above), p. 24, para. 33.

⁶⁸ See footnote 20 above.

VIII. Part III of the draft articles: articles 7 to 11 submitted by the Special Rapporteur

117. As a corollary to what has been said up to now, the Special Rapporteur suggests that part III of the draft articles should read as follows:

PART III.

PROPERTY, FUNDS AND ASSETS

Article 7

International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived

their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion.

Article 8

1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends.

Article 9

Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country.

Article 10

Without being restricted by controls, inspections, regu-

lations or moratoria of any kind:

(a) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

(b) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

(c) International organizations shall, in exercising their rights under subparagraphs (a) and (b) of this article, pay due regard to any representations made by the Government of any member State party to the present articles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests.

Article 11

Notwithstanding the provisions of article 10, subparagraphs (a) and (b), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned.