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Review

Immunities and privileges of International Organizations and the international civil service

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A fundamental principle of public international law and the law of the international civil service bestows a certain degree of immunity and some privileges to members of the international civil service (those serving in the United Nations system). Therefore it follows that negligence of a member of the international civil service cannot be judged at the same level as that of a member of the public, particularly in relation to professional duties discharged. This is because the international civil service is granted immunity from liability for acts committed and opinions given in the course of their employment, provided such acts related to the performance of official duties. The special position occupied both by an international Organization of nations and its employees in the national courts is due to an explicit recognition of "rootlessness" and international character of both the Organization and its international civil service which, if brought into subjugation by national jurisdictions and legislation, would be rendered destitute of independence in their work for the international community. This article discusses the nature of international organizations and their staff, the types and degree of immunity they enjoy, the difficulties posed by the grant of such immunities and instances of waiver of such immunity.

Key words: International civil service, international organizations, diplomatic immunity, waiver of diplomatic immunity, absolute immunity, qualified immunity, negligence.

INTRODUCTION

Negligence of professionals that gives rise to civil liability is grounded on principles of tort law[i]. However, negligence of a member of the international civil service (a person serving in the United Nations system) cannot be judged at the same level as the international civil service is granted immunity from liability for acts committed and opinions given in the course of their employment, provided such acts related to the performance of official duties. The natural extension to this principle is that the Organization in which the international civil servant is employed is also granted immunity from interference by local judicial bodies and local regulations with the work of the diplomatic corps in a country as such would stultify their mission (Mendaro vs. World Bank, 1983).

The separation between the United Nations and its professional staff has always been blurred due to the fact that the above principle can also be applied the other way around, that is, in the context of legal rights and liabilities

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of the international civil service, The immunity granted by the host country to the Organization also applies to the staff. Therefore, when discussing professional negligence of the international civil service the relevance would rest with the concept of immunity rather than principles of negligence. This article focusses on the reception of members of the international civil service and specialized agencies[ii] of the United Nations they serve, in particular their status as respondents in national courts.

The position of an international organization or an employee of such an organization as plaintiff or applicant in a national court does not entail much debate since they usually have independent legal status as persons and can enter into contracts[iii], enforce obligations entered into with others and be sued in tort for negligence. However, as will be seen later in this article, not all international organizations nor their employees, possess independent legal status. A need for inquiry particularly arises in the issue of an international organization being called before national court as defendant or respondent, in view of the special immunities and privileges accorded to these organizations.

Organizations themselves, as well as their employees have been called up by national courts from time to time as parties to litigation. In this respect, besides the inherent legal personality of the international organization, the employees of the Secretariat of that organization also have en "essential novelty"[iv] where men and women of various nationalities form the international civil service of that organization, mostly as internationally recruited staff. International civil servants so recruited also have a somewhat different standing in national courts in relation to any issue arising from the discharge of their professional duties within the scope of their employment. Article 100 of the United Nations Charter provides that in the performance of their duties, the Secretary General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They are required to refrain from any action which might reflect on their position as international officials responsible only to the Organization. Article 103 of the Charter identifies as the paramount consideration in the employment of staff the securing of the highest standards of efficiency, competence and integrity. The special position occupied both by an Organization and its employees in the national courts is due to an explicit recognition of "rootlessness" and international character of both the Organization and its international civil service which, if brought into subjugation by national jurisdictions, would be rendered destitute of independence in their work for the international community.

International civil servants are recruited for their superior skills and knowledge and are usually expected to perform tasks that are normally beyond the capabilities of the ordinary person. This imputes to the international civil servant an elevated standard of care as much as is attributed to members of particular professions such as medicine law and accountancy. However, here the distinction ends, as unlike the other categories mentioned; they are accorded immunity from judicial process in respect of professional duties performed. There is a line drawn, however, precluding this category of employee from shielding himself absolutely from the law. The delicate balance between immunity and liability was brought to bear in the 1976 decision of the Criminal Court of the City of New York in *People* v. *Mark S. Weiner*[v] where the court held that, in an instance where a United Nations security officer used undue force on the plaintiff, immunity from suit would be so unconscionable that it violated on its face the concepts of fundamental fairness and equal treatment of all persons who sought judicial determination of a dispute[vi]. In the early French case of *Avenol* v. *Avenol*[vii] involving the Secretary General of the League of Nations who claimed diplomatic immunity from a suit for maintenance filed by his former spouse, the court held that immunity of League officials was functionally and territorially limited to the exercise of functions performed for the League and within the territory of the country in which such official duties were performed.

This article will discuss the nature of the international civil service and also international status as well as that of the employers of international civil servants. It will contain a discourse on immunities and privileges of international organizations as employers, their employees and instances and ramifications of waiver of such immunities and privileges. Finally, it will address issues which are perceived to be dichotomous and which present problems of a general application with regard to principles of immunity at international administrative law.

NATURE AND FUNCTIONS OF AN INTERNATIONAL ORGANIZATION

National profile

In determining the status of an international organization, the most basic question at issue for the courts would be, "what is an international organization? Unfortunately, there is no specific answer to this question as no overarching definition has been developed identifying what an international organization is in precise terms. One commentator is of the view that at best, we might recognize one if we see it (Klebbers, 2002). The main reason for the difficulty in reaching a precise definition or identifying all encompassing characteristic of an international organization is that it is *in limine* a social creation (Abdullah, 1977). Moreover, the creators of an international Organization do not set off to create it with a pre approved blueprint. Rather, they carve it to accord with their needs.

The two main characteristics of a specialized agency of the United Nations are: that it is created by States, or more specifically, as States themselves are abstractions, by duly authorized representatives of States; and they are created by treaty, which is a written agreement signed by the States' Parties to it and governed by international

law (Vienna Convention on the Law of Treaties, 1969). States can only act by and through their agents[viii]. Different government departments or instrumentalities of State bear responsibility for different international organizations[ix]. The third characteristic that distinguishes an international organization as a "club" of States without just being the spokesperson or mouthpiece of those States is that it is expected to have a "will" of its own. Any organization's independent will, recognized by the government of the host country in which that organization is situated for purposes of its activities within the country, is usually encapsulated in a provision which states that the Organization has an identity of its own, and is capable of entering into contracts[x]. This having been said, an international organization, be it a specialized agency or other body, is by no means sovereign in its own right, although courts have on occasion referred to sovereign rights of an organization merely to seek a compromise between absolute acceptance of parity between a State and an organization and absolute refusal of an international organization's ability to perform *acta jure imperii* (governmental acts)[xi]. An international organization's identity before courts having national jurisdiction would strictly be restricted to the nature of the organization and the type of work it carries out. Any special privilege accorded to an international organization by agreement or treaty would therefore be applicable only in relation to an international organization's scope of work[xii]. Conceptually, it has been argued that in an instance of national litigation involving an international organization, courts would, in the event the litigious issue pertains to the work of that organization, apply the "functional theory" in an *acta jure gestionis* (commercial act), which means that the organization concerned will not be viewed as having special immunities or privileges. In the 1953 case of Re International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables and Radio Inc., and other cable companies[xiii] the US Federal Communications Commission was confronted with the argument of the plaintiffs - the World Bank and the IMF – that the purpose of granting privileges and immunities to organizations located in the jurisdiction of a State where national law applied to contracts is to protect such organizations from unfair and undue interference including excessively high rates. The defendant (radio and cable) companies argued that there was no evidence or reason to allow the banks lower-than-commercial rates. The rationale that can be drawn from this case is that the purpose of immunity will be destitute of effect if courts were asked to determine the legality of an organization's work if such inquiry were to obstruct the work of that organization.

A question arises as to what extent or within what parameters must a court apply the principle of functional immunity to commercial acts of an international organization. Courts have veered from one extreme, coming close to recognizing absolute immunity as in the case of Broadbent v. Organization of American States[xiv] to linking key activities of an organization, such as its interpretation and translation services to *acta jure imperii* (sovereign act) on the basis that language services were integral to the main functions of an organization[xv].

International profile

Violations of international law, however founded, entail responsibility and accountability. This seminal principle, enunciated by the 1927 *Charzow Factory Case*[xvi] also established that there would be an obligation to make reparation in one form or another[xvii]. This principle of responsibility, which applies without any question to States[xviii] has been questioned in its application to international organizations. The author's view is that what applies to States must also apply to international organizations, not simply because international organizations are formed by and through States and are representatives of States but also because there is accepted precedent which equates the position of the United Nations to that of a State. In the *Reparation for Injuries case*[xix], where the United Nations sought a legal claim against an entity considered responsible for the deaths of mediators in the issue concerning the establishment of the State of Israel, The UN sought a legal opinion from the International Court of Justice, which opined that the United Nations was to be regarded as having international legal personality thereby having the right to bring an action. Regrettably, the Court did not give the reasoning behind its opinion.

Klebbers[xx] makes mention of the "will theory" (or subjective theory) where the court will determine legal capacity of an international organization with an evaluation of the "will" of the creators of the Organization in question, as against the "objective theory" of personality which would be based on certain accepted principles as to the nature of the international organization concerned. Since international law is based on the freely expressed consent of States, the argument has been adduced that international law should apply as recognizing international organizations which are composed of States as having similar status as that of States[xxi]. The situation became clearer on the subject of international responsibility of an international organization with the voluminous cases arising out of the collapse of the International Tin Council (ITC) in the mid nineteen eighties. One of the similarities between the ITC and An international organization was that in neither of the statutory instruments establishing the two organizations was the word "responsibility", making it difficult for the courts to determine the "will" of the founding fathers. The International tin Council, comprising 32 members, was an organization which bought and sold tin on the international market with a view to sustaining a stable market in tin and maintaining consistent prices. It ran out of financial resources in 1985, collecting in the

United Kingdom alone a debt of several hundred million pounds. The litigation for recovery which followed addressed issues of responsibility as well as immunity. Choice of law issues and issues of jurisdiction were also given some attention along with the main consideration as to who or what the ITC was: whether it was to be treated as a company in winding up proceedings so as to enable creditors to go after the "shareholders"; or whether it was an international organization with immunity from judicial process. In *MacLaine Watson* v. *International Tin Council*[xxii], one of the several cases involving the ITC, the High Court refused to apply an agency situation between sovereign States which established the ITC and the ITC itself, on the ground that the relationship between the two was created by international treaty which was not enforceable by English courts. If this decision were to be applied to an international organization's position as an agent of States, the approach of the courts would be interesting, particularly if they interpreted an international organization to be an agent of the Contracting States in the event a specific treaty is not signed by States for the purpose. In the *MacLean Watson* case, on appeal the Court of Appeals upheld the High Court' s position that an international treaty was not the business of national courts in England. On further appeal to the ultimate appellate body by Maclean Watson, the House of Lords rejected the claim that the member States were an integral part of the ITC and that they should be held responsible. The court held that the ITC was a separate legal entity distinct from its members and that contracts entered into by it did not bind non-parties (member States).

AN INTERNATIONAL ORGANIZATION BEFORE THE COURTS

Although a precise definition may not exist, it cannot be doubted that a specialized agency of the United Nations or any other international organization can be delimited and delineated. The most fundamental delimitation lies in the body of law that governs the Organization. An international organization is primarily governed by international law, being recognized by the United Nations Charter as a specialized agency of the United Nations. It is also governed by two major agreements, one between the United Nations and an international organization and the other between the government of the host country in which that organization's headquarters are located and the particular international organization. Both accord the organization legal legitimacy sufficient for a common law court to follow the principle enunciated in the House of Lords that:

> English law will only recognize a foreign entity as having legal personality and therefore a capacity to sue or be sued if such body has been accorded legal personality under the law of a foreign State recognized by this country...[xxiii]

This principle was followed in the United States in a continuation of the case pursuant to the defendant taking up domicile in the United States and filing action for bankruptcy before the Arab Monetary Fund could bring an action against him. The bankruptcy court judge followed the reasoning of the House of Lords and held that, while recognizing that although the United States was not a member of the Arab Monetary Fund, and therefore the fund could not be subjected to the national court's jurisdiction, nonetheless the Fund was a juridical person under United Arab Emirates law and therefore its capacity would flow to the United States under customary international law[xxiv].

Can an international organization be recognized as having legal capacity, firstly in the host country which is home to an international organization's headquarters and secondly in any of that organization's member States? The Headquarters Agreement between ICAO and Canada[xxv], in Article 2, explicitly provides that ICAO shall possess juridical personality and shall have the legal capacities of a body corporate including the capacity to contract; to acquire and dispose of movable and immovable property; and to institute legal proceedings. With regard to the question as to whether ICAO can be sued in Canada, Article 3 of the Agreement provides that the Organization, its property and its assets[xxvi], wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign states. Canada's recognition of ICAO as having legal capacities of a body corporate is consistent with Article 104 of the United Nations Charter which provides that the United Nations shall enjoy in the territory of each of its member States such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.[xxvii] The question which naturally arises from these provisions is "what effect does the Headquarters Agreement between an international organization and the Government of the host country have as a legally enforceable document before the local courts"? In the 1988 Applicability of the Obligation to Arbitrate Case[xxviii], where the International Court of Justice had to consider whether United States anti-terrorism legislation necessitated the closure of the Palestine Liberation Organization's observer mission to the UN in New York, the Court held that the United States was obligated to respect its obligation, contained in Article 21 of the UN Headquarters Agreement with the United States, that the United States had to enter into arbitration in case of a dispute on the interpretation of the Agreement. The court laid particular emphasis on the fact that provisions of a treaty must prevail over the domestic law of a State Party to that treaty[xxix]. Therefore, there is no room for doubt that an international organization is able to conduct business both in the host state and in the territories of any of its member States as a juridical person.

However, there are instances where an international organization does not have the credentials given by agreement that it has the capacity to act as a juridical

person. In such an instance there could well be non-recognition as a legal person under domestic law. It is a pre requisite for an international organization to have the status as a legal or juridical or juristic person[xxx] to enter into legal relationships. There have been instances where, in the face of a lack of express recognition of the juristic personality of an international organization, national courts have treated them as non-entities, and recognized as having no legal capacity. In such instances, the international organization concerned will be deemed not to exist[xxxi].

An international organization's immunities and liabilities

At customary international law, the position of an international organization regarding immunity from suit and other judicial process is unclear [xxxii] and falls within applicable treaty provision, such as the United Nations Charter, Article 105 of which clearly stipulates that the United Nations Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes. Immunities of the United Nations system are also addressed in the *General Convention on the Privileges and Immunities of the United Nations* of 1946, which sheds some light as to the rights and liabilities of the United Nations and its various entities[xxxiii]. An international organization's legal liability within the host country may well hinge on the recognition by the government of that country that an international organization shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign States. Should the matter of an international organization's immunity be brought before a court within the host country, it might well look into the true worth of the statement.

Immunity of foreign States in a local jurisdiction has undergone an interesting metamorphosis, from the recognition of personal sovereignty to acceptance of more abstract concepts of State sovereignty. The immunity accorded to an international Organization by the host country would impute to the Organization the independence and equality of a State, which municipal courts would be reluctant to impugn or question unless with the consent of an international organization[xxxiv]. Principles of sovereign immunity go back to the early 19th century where the jurisdiction of a State was recognized as being mutually exclusive from the Sovereign immunity of a State [xxxv]. In the well known *Pinochet* case [xxxvi], Lord Browne-Wilkinson observed that it was a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. The immunity applies both to criminal as well as civil liability[xxxvii]. English law is quite clear on the above proposition and is best illustrated by the point made by Lord Millett in the case of *Holland* v. *Lampen-Wolfe*[xxxviii] decided in 2000 that:

State immunity...is a creature of customary international law and derives from the equality of sovereign states. It is not a self imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself[xxxix].

Immunity from jurisdiction of the courts does not mean exemption from the legal system of the State in which the Organization resides. Although the two concepts are similar and the former meant that the courts had to respect the sovereignty of foreign states, it was merely a procedural tenet that could not always impugn the constitutional roots of an internal legal system[xl].

It must be noted that international and domestic instruments implicitly prohibit sovereign immunity in cases of tortious liability involving civil wrongs. The Canadian *State Immunity Act* of 1982, in Section 6, allows for compensation for civil wrongs caused in Canada, resulting in death, damage to tangible property or personal injury. An analogy can be observed in the *European Convention on State Immunity* of 1972, which in Article 11 admits of redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the forum, and if the author of the injury or damage was present at the time of the act. Similarly, The United Kingdom *State Immunity Act*, in Section 5, provides that a State is not immune in respect of proceedings relating to death or personal injury, or damage to or loss of tangible property, caused by an act or omission in the United Kingdom[xli].

The conceptual basis for granting international organizations immunity regarding their professional activities was well brought out in the 1983 case of *Mendaro* v. *the World Bank*[xlii] where the US Court of Appeal held that the reason for granting immunities to an international organization is to enable them to pursue their functions more effectively and particularly to permit organizations to operate unfettered by unilateral control of a State over activities conducted within its territory [xliii]. In *Iran-US Claims Tribunal* v. *AS* [xliv] The Dutch Supreme Court acknowledged that immunity in its absolute form gives an international organization a guarantee that it could perform its functions without being controlled by domestic policy and law[xlv]. The Swiss Labour Court held in *ZM* v. *Permanent Delegation of the League of Arab States to the UN*[xlvi] that it is incontrovertibly at customary international law that international organizations, whether universal or regional, enjoy absolute jurisdictional immunity and that they can only carry out their tasks assigned to them if they were not deprived of this immunity[xlvii].

The above discussion seemingly establishes that jurisdictional immunity is awarded to international organizations as a matter of course. The real issue however, with respect to immunity particularly that of an international organization as recognized by the government of the host

country, is the extent to which immunity will be granted as per existing norms of international law. For example, the Headquarters agreement between ICAO and the Government of Canada (the host country) merely stipulates that ICAO will have the same immunity from suit and every form of judicial process as is enjoyed by foreign States. The operative question is "what is the immunity that is enjoyed by foreign States in the host country in this context?" Is it an absolute form of immunity or a qualified immunity? This brings to bear the relevance of early doctrinaire distinctions drawn by jurisdictions of Belgium and Italy, where courts recognized two forms of immunity based on the type of activity carried out. The first applied to sovereign acts of a government or *jure imperii* and the second applied to acts of a commercial nature or *jure gestionis*. This distinctive approach often referred to as the doctrine of restrictive or relative immunity is applied unreservedly by courts of many countries while others, including the host country [xlviii] , apply the restrictive immunity doctrine only in principle.[xlix].

The approach taken by courts to acts of sovereign authority and acts of a private character in the context of restrictive immunity will largely depend on whether the act in question was a commercial act performed on the basis of a private relationship such as a contract. Another criterion might well be whether an act in question was performed on behalf of a State or Organization by an individual[l]. Courts in Australia and the United Kingdom have used three methods to determine the extent of immunity that should be granted: consideration as to whether granting a general immunity from jurisdiction is justified; creating a list of specific immunities and detailed exceptions; and refusal of immunity in instances where the property of a foreign state has been used for commercial purposes. The United States courts have held that some acts deserve exclusive and absolute immunity, such as internal administrative acts, diplomatic activity and the grant of public loans [li] . In the 1988 case *International Tin Council* v. *Amalgamet Inc*.,[lii] The plaintiff ITC averred that it was not obliged to go in for arbitration on the ground that it was an international organization and action under the litigation was performed by the plaintiff as an act of State. The court found this argument untenable as it could not find a "sovereign" character in the contract in question. This decision can be distinguished from an international organization situation as the ITC had not been given the status of a foreign States as an international organization under its agreement with the host country.

Issues regarding immunities and privileges of international civil servants

Members of the international civil service are protected in their official correspondence through the Vienna Convention on Diplomatic Relations, Article 27(2) of which states that the official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions. Article 31 of the Convention which states that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State and also enjoy immunity from its civil and administrative jurisdiction, makes some exceptions except in the case of a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; and an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.The operative question is whether an international Organization or its staff must wholly be at the mercy of a national court. The argument has been adduced that domestic courts should not have absolute jurisdiction or adjudicatory authority over international organizations since such exercise of authority might cause damage or adversely affect that organization's independence[liii]. The rationale of this argument was accepted by the Quebec Superior Court in 2003[liv] where, in an instance where a former employee of ICAO sued the Organization et al for wrongful dismissal from his position at ICAO, the court recognized the need to grant immunities to international organizations so that they could sustain their independence and freedom.

The court drew a parallel between freedom and independence of the Organization with the notion of immunity, recognizing that neither an international organization nor a State should be subject to the laws and conditions of the courts of another State. The Court acknowledged the bifurcation of immunity into absolute and functional immunity and concluded that ICAO has quasi-absolute immunity[lv] in this particular case. According to the Court, functional immunity would be conferred regarding acts performed by officials of an international organization in the course of their duties and within the scope of their employment.

Article 29 of the Vienna Convention declares inviolable the person of a diplomatic agent against arrest or detention. The United Nations has endorsed this principle in Resolution 53/97 of January 1999 by strongly condemning acts of violence against diplomatic missions and agents. This Resolution followed condemnation in the Security Council of the murder of nine Iranian diplomats in Afghanistan[lvi]. In the 1988 case of *Boos* v. *Barry*[lvii] the US Supreme Court handed down its decision that diplomatic immunity is reciprocal among States based on mutual interest founded on functional requirements and reciprocity[lviii]. This effectively precludes the punishment of a member of the international civil service in a general sense, where the only remedy available to the host State against alleged offences of diplomat or a member of the

international civil service to declare him *persona non grata*[lix].

While this principle is seemingly reasonable, given the service and contribution provided by the international civil service, and the detrimental effect of interference by States of the provision of such services, an absolute application of this principle could tip the balance to the disadvantage of the public. In this context, specific problems have surfaced with regard to the conduct of the members of the international civil service which results in instances of criminal liability such as when a diplomat or member of the international civil service causes motor accidents and injury to third parties through their negligence[lx]. Immunity from civil and administrative jurisdiction of the State in which international civil servants serve in an absolute sense could also cause inconsistencies of the administration of justice. Article 31 (1) of the Vienna Convention addresses this issue effectively by having three exemptions where liability would ensue: where the action relates to private immovable property situated within the host State; in matters of succession and litigation related thereto involving the diplomat as a private person; and with respect to unofficial and professional or commercial activity engaged in by the diplomat concerned. A compelling practical example of these exemptions lies in the United Kingdom. The Memorandum on Diplomatic Privileges and Immunities in the United Kingdom of 1987 takes a stringent stand against any reliance on diplomatic immunity which is calculated to evade a legal obligation.

It must be noted that diplomatic immunity afforded to international civil servants, such as exemptions from social security provisions in force in the host State (as per Article 33 of the Vienna Convention), exemptions from taxes and dues regional or municipal (except for indirect taxes), exemptions from dues regarding personal or public services (as per Article 35 of the Vienna convention) and from customs duties and inspection [as per Article 36(1)] of personal belongings and baggage, extends to members of the family of a diplomatic agent forming part of his/her household (as per Article 37)[lxi].

Such immunities start from the moment the diplomatic agent (or member of the international civil service) and his family enter the territory of the host State[lxii], and last till the persons concerned leave the host country.

The immunity so afforded to diplomatic agents and members of the international civil service does not bind third nations. In a case involving a former ambassador of Syria to the German Democratic Republic, A German Federal Court ruled that benefits of the *persona non grata* rule applied only to the host State and not to other States such as the Federal Republic of Germany in that case[lxiii].

Another point of contention arising from the broad principle of diplomatic immunity pertains to contracts of employment. Although generally, States and instrumenttalities of State come within the purview of local legislation with regard to the hiring and firing of employees, this principle does not apply to diplomatic missions[lxiv]. A point of concern is that such a principle may give rise to absolute discretion being bestowed on a diplomatic mission in disregarding established community rights such as racial, religious, gender and social equality.

Waiver of immunity

The answer to the problem of according undue flexibility to diplomatic agents and members of the international civil service may lie in the practice of waiver of immunity. There are instances where the courts might deem immunity granted by treaty or other agreement to be waived. Waiver of immunity might result either from express agreement between the parties to a contract or by implied acquiescence of the party purporting to enjoy immunity through overt or covert acts. The leading case in this area concerns a 1967 decision (Lutcher V. IADB 1967) where the District of Columbia Circuit Court ruled that the Inter-American Development Bank did not enjoy immunity as any immunity given to the bank had been waived by the Bank by virtue of Article XI(3) of its Articles of Agreement with a Brazilian Corporation who was the other party to the action. An advance waiver, incorporated in a commercial agreement, even though it is calculated to apply only to a particular situation, cannot be deemed invalid and will be generally applicable according to the merits of the case. In *Standard Chartered Bank* v. *International Tin Council and others* [lxv] The Queen's Bench in England rejected the claim that an advance waiver is inapplicable to a dispute if it were meant specifically in the contract to apply to "a particular case", which was interpreted by the court as a particular transaction and not a whole dispute. A choice of forum clause in a specific agreement could also be interpreted as a waiver of immunity from suit that could be effectively performed in advance[lxvi].

Usually, in the case of diplomatic agents and members of the international civil service, only the sending State can waive immunity[lxvii]. In the case of the international civil service the immunity is granted by the host State and can only be waived by the Secretary General or CEO of the Organization served by the staff member concerned. The General Convention on the privileges and Immunities of the United Nations of 1946 sets out the immunities of the United Nations and its personnel and emphasizes the inviolability of its premises, archives and documents. The privileges and immunities blend with the concept of accountability of an international organization which is broader than principles of responsibility and liability for internationally wrongful acts [lxviii]. The latter acts as a harmonious balance between impunity and answerability of the international civil service.

As stated earlier privileges and immunities are guaranteed by Article 105 of the Charter of the United Nations which provides that an international organization shall

enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the members of the United Nations and officials of the Organization enjoy the privileges and immunities that are necessary for the independent exercise of their functions in connection with their official duties in the Organization[lxix]. This fundamental principle is usually enshrined in the Headquarters Agreement between the host State and the United Nations specialized agency concerned. In the 1988 opinion of the International Court of Justice, the Court opined that the United States was obliged to respect an obligation contained in Section 22 of the United Nations Headquarters Agreement with the United States that admitted of arbitration in the determination of domestic legislative power to close an observer mission of the Palestine Liberation Organization[lxx]. In an earlier case decided in 1983 the United States Court of Appeals held that immunities and privileges were granted to the United Nations by a host State specifically to preclude State intervention in the execution of duties by the United Nations in that jurisdiction[lxxi].

CONCLUSION

Diplomatic immunity and privileges are crucial to the harmonious inter relationships between States. Despite the inherent disadvantages of their abuse, which has sometimes resulted in harm to members of the public and business enterprise, it must be noted that the origins of diplomacy date back to the period of darkness preceding the dawn of history (Harold, 1953). It is claimed that anthropoid apes living in caves practised a form of diplomacy in reaching understandings with their neighbours on territorial boundaries pertaining to their own hunting grounds. The compelling need to ensure the preservation of life of an emissary, on the ground that no negotiation could take place if emissaries, however hostile, were murdered on arrival, gave rise to the practice of diplomatic immunity, which is attributed to Australian aborigines, and is mentioned in the Institutes of Manu and in Homeric poems[lxxii]. In the modern world, the institution of the permanent diplomatic mission is the cornerstone of international diplomacy and comity and the diplomat[lxxiii] carries out the function of diplomacy which is generally termed "diplomatic practice"[lxxiv]. these privileges are extremely important if diplomacy is to be effective. The overall aim and objective of diplomacy is to ensure that peace and justice prevails throughout the world and to this end, the institution of diplomacy is a pre-eminent example of the growth of modern civilization. For these reasons the advantages of diplomatic immunities and privileges override their disadvantages.

Conflict of Interests

The author has not declared any conflict of interests.

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Lutcher SA Celulose e Papel v. Inter-American Development Bank, (1967). United States Court of Appeals District of Columbia Circuit. 382 F.2d. 454 (DC Cir. 1967). http://openjurist.org/382/f2d/454/lutcher-sa-celulose-papel-v-inter-american-development-bank

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Vienna Convention on the Law of Treaties, 1969, Article 2(1)(a). http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm

[i] *The Corporate Manslaughter and Corporate Homicide Act* of 2007[i], provides that an organization is guilty of an offence if the way in which its activities are managed or organized causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased[i]. The Act applies *inter alia* to a corporation. The offence is termed "corporate manslaughter", in so far as it is an offence under the law of England and Wales or Northern Ireland; and "corporate homicide", in so far as it is an offence under the law of Scotland. An organization that is guilty of corporate manslaughter or corporate homicide is liable on conviction to a fine and the offence of corporate homicide is indictable only in the High Court of Justiciary. See generally, Ruwantissa Abeyratne, Negligent Entrustment of Leased Aircraft and Crew: Some Legal Issues – *Air and Space Law*, Vol. 35, No.1, 2010, at 33-44. Also, Ruwantissa I.R. Abeyratne, Negligence of the Airline Pilot, *Tolley's Professional Negligence*, Volume 14, Number 4, 1998, 219-231 *Also, R.I.R. Abeyratne* Negligence of the Aircraft Commander and Bad Airmanship - New Frontier, *Air and Space Law*, Vol.XII, No.1; 1987: p. 3-10. *R.I.R. Abeyratne***,** Viagra, Substance Abuse at the Workplace and Negligence of the Airline Pilot, *The Aviation Quarterly*, Part 1; January 2000: p. 35-5. Ruwantissa I.R. Abeyratne, The Application of Multiple Systems of Law to Professional Negligence in Sri Lanka, *Tolley's Professional Negligence*, Volume 12, Number 2, 1996, 46-53. immunity from national courts, on the premise that any

[ii] Article 57 of the Charter of the United Nations provides that the various specialized agencies, established by inter-governmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with provisions of Article 63 of the Charter. Article 63 provides that the Economic and Social Council (ECOSOC) of the United Nations may enter into agreements with any of the specialized agencies, defining the terms on which such agencies may be brought into relationship with the United Nations. Some prominent specialized agencies of the United Nations are the World Health Organization (WHO), the Food and Agriculture Organization (FAO), The International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO).

[iii] For example in the case of the International Civil Aviation Organization, headquartered in Montreal, Canada, The Headquarters

Agreement between ICAO and Canada, in Article 2, explicitly provides that ICAO shall possess juridical personality and shall have the legal capacities of a body corporate including the capacity to contract; to acquire and dispose of movable and immovable property; and to institute legal proceedings. With regard to the question as to whether ICAO can be sued in Canada, Article 3 of the Agreement provides that the Organization, its property and its assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign States. See *Headquarters Agreement Between the International Civil Aviation Organization and the Government of Canada*, ICAO Doc 9591. For further information on the agreement see Michael Milde, New Headquarters Agreement Between ICAO and Canada, (1992) *Annals Air and Sp. L*. Part II, 305-322.

[iv] R. James, The Concept of the International Civil Servant, in *International Administration: Its Evolution and Contemporary Applications* (R. Jordan ed.: 1970), 53

[v]378 NYS 2d 966.

[vi]*Id* . 975.

[vii]*Juge de Paix* Paris 8 March 1935.

[viii]See the Permanent Court of International justice's advisory opinion in *Certain Questions Relating to Settlers in German origin in the territory ceded by Germany to Poland*, [1923] *Publ. PCIJ, Series* B No. 6 at 22.

[ix] See Lord Strang, *The Diplomatic Career*, London:1962, at 107, where it is said that in 1962, some twenty different government departments in the United Kingdom were responsible for different international organizations.

[x] *Supra*. note 5.

[xi]See for example *Branno* v. *Ministry of War*, decision of 14 June 1954 by the Italian Court of Cassation, 22 *ILR* 756-757 where the Court held that NATO's member States are not legally entitled to exercise judicial functions with regard to any public law activity of the North Atlantic Treaty Organization linked with its organization or in regard to acts performed on the basis of sovereignty.

[xii] In *United States* v. *Malekh et.al*., 32 ILR 308-334 (1960) where the defendant, a United Nations employee, was charged with espionage, the US District Court for the Southern District of New York held that neither the defendant nor his employer should have any claims to immunity as espionage was not a part of the functions of the United Nations.

[xiii]22 *ILR* 705-712.

[xiv]63 *ILR* 162-163: US District Court for the District of Columbia, 28 March 1978.

[xv]*Iran-United States Claims Tribunal* v. *A.S.*, 94 ILR 321 - 330.

[xvi]*Case Concerning the Factory at Charzow (Claim for indemnity)*, [1927] Publ PCIJ Series A, Judgment no. 8 at 21.

[xvii]See generally, Christine Gray, *Judicial Remedies in International Law*, Oxford: 1987.

[xviii]The ICJ in the *Barcelona Traction Case* held:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis a vis* another State in the field of diplomatic protection. By their very nature, the former are the concerns of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Barcelona Traction Light and Power Co. Ltd.*, ICJ Reports 1974 253 at 269-270.

[xix]1949 *ICJ Rep*.174.

[xx]*Supra* note 9 at 52-53.

[xxi]See *the Lotus Case* [1927] Publ PCIJ Series A, no. 10.

[xxii]77 ILR 41 per Millett J, Chancery Division of the High Court

[xxiii]*Arab Monetary Fund* v. *Hashim* (no. 3) [1995] 2 All ER 387 at 403.

[xxiv]188 Bankr. 633 at 649 (D. Arizona 1995)

[xxv]*Supra*. note 4.

[xxvi] "Assets" include funds administered by An international organization in furtherance of its constitutional functions.

[xxvii]By virtue of Article 57 of the United Nations Charter, which provides that the various specialized agencies shall be brought into relationship with the United Nations, the acknowledged status of the United Nations as per Article 104 can be applied to An international organization.

[xxviii]*ICJ Reports* 1988, 12; 82 *ILR* 225.

[xxix]*ICJ Reports* 1988, *id.* 33-34.

[xxx]All these terms are used in treaties, legislation and literature on the subject.

[xxxi] See Michael Singer, Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns, [1995] 36 *Virginia Journal of International Law* 53-165 at 67 where the author argues that the issue of legal personality precedes that of jurisdictional immunity.

[xxxii]Malcolm N. Shaw, *International Law* 5 ed. Cambridge University Press: 2003 at 692.

[xxxiii]For the military analogy, see F. Lazareff, *Status of Military Forces under Current International Law*, Leiden: 1971. Also, Ian Brownlie, *Principles of Public International Law*, 4 ed., Oxford University Press:1990, 372. These authors refer to the NATO *Status of Forces Agreement* of 1951, the provisions of which exclusively governed the relations between the State sending troops and the state receiving them. The courts held that the state sending troops to another State has overall jurisdiction of the troops in terms of offences committed in the receiving State, although the latter may prosecute foreign troops in its own soil if an offence were to be committed which was illegal in that State's jurisdiction. However, the overall principle recognized by the courts was that the sending State has primary jurisdiction over its subjects (or troops) sent on mission if the offence committed related to the performance of duty. See also J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, Dordrecht: 1992 at 298.

[xxxiv]See *Ex parte Pinochet* (No.3) [2000] 1 A C 147 at 201 (*per* Lord Browne-Wilkinson) and 268-9 (*per* Lord Millett).

[xxxv] See *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812) where Chief Justice Marshall declared that the jurisdiction of a State, although exclusive and absolute, did not encompass foreign sovereigns.

[xxxvi] *Supra.* note 38.

[xxxvii]*Id* 201.

[xxxviii][2000] 1 *WLR* 1573, also 119 *ILR* 367.

[xxxix]*Id.* 1588.

[xl]*International Association of Machinists & Aerospace Workers* v. *OPEC*, 649 F.2d. 1354 at 1359. Also, *Ramirez v. Weinberger*, 23 ILM 1984 at 1274, *Goldwater v. Carter*, 444 US 996 (1079) and *Empresa Exportadora de Azucar v. Industria Azucarera Nacional SA [*1983] 2 LL.R 171; 64 ILR 368.

[xli] Similar legislation can be found in the *South African Foreign Sovereign Immunity* Act of 1981: Section 6, *Singapore State Immunity Act* of 1979: Section 7. A notable exception is the United States *Foreign Services Immunity Act of 1976*, which includes exceptions relating to a State's discretionary functions and to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contractual rights.

[xlii] Supra, note 2. (717 F.2d. 610).

[xliii]*Id*. 615-617.

[xliv]94 ILR 321.

[xlv] In *Eckhardt* v. *Eurocontro*l No 2, [94.331] 1207 the District Court of Maastricht held that the fact that an international organization is

created by treaty *ipso facto*, gave that organization a right to immunity from jurisdiction based on customary international law to the extent necessary for that organization to perform its functions. For similar views expressed by the courts, see also *FAO* v. *INPDAI* 87 ILR 1, at 6-7, *Mininni v. Bari Institute of the International Center for Advanced Mediterranean Agronomic Studies*, [78.112, 87.28] 1208 and *Makuro* v. *European Bank for Reconstruction and Development [1994] ICR 897*.

[xlvi] 116 *ILR* 643

[xlvii] *Id*. 647.

[xlviii] *The State Immunity Act* of The host country, 1982 does not provide a uniform solution to the dichotomy, nor does it provide specific provision as to whether foreign State immunity would mean absolute immunity or restrictive immunity. Other legislation which have adopted a similar approach are the *European Convention* of 1972, the *United Kingdom State Immunity Act* of 1978, and the *Australian Foreign States Immunities Act* of 1985.

[xlix] *Brownlie, supra*. note 37 at 327-328. In *Alfred Dunhill of London Inc*. v. *Republic of Cuba* 425 US 682 (1976); 15 ILM (1976), 1388, the United States Supreme Court delivered a majority judgment favoring the restrictive approach. The restrictive approach is now incorporated in United States law with effect from 19 January 1977) in the *US Foreign Sovereign Immunities Act* of 1976.

[l] In *Arab Monetary Fund* v. *Hashim*, (No.3) [1991] 2 All E.R. 387, the House of Lords delivered its judgment that although an individual of an international organization, performed within the scope of his employment, cannot be impugned, a private act by the individual can be brought into question by the courts.

[li] The *Victory Transport Case*, *ILR* 35 at 110.

[lii] New York County, 25 January 1988, 524 NYS 2d. 971 (1988); 1989) 80 ILR 31-38.

[liii] August Reinisch, *International Organizations Before National Courts*, Cambridge Studies in International and Comparative Law: 2000 at 388.

[liv] *Trempe* c. *Association du personel de l"OACI et Wayne Dixon* C.S. 500-05-061028-005, *Trempe* c. *OACI et Dirk Jan Goosen*, C.S. 500 - 05 063492-019.

[lv] The court cited a line of cases to support its view on quasi-absolute immunity of An international organization, comprising: *Miller* v. *Canada* [2001] 1. S.C.R. 407; *Re Canadian Labour Code* [1992] 2. S.C.R. 50 and *Canada* v. *Lavigne* [1997] R.J.Q. 405 (CA).

[lvi] SC/6573 (15 September 1998). See also the Statement of the Secretary General of the United Nations SG/SM/6704 (14 September 1998).

[lvii] 99 LEd 2d 333, 346 (1988); 121 ILR at 678.

[lviii] It should be noted that official recognition of this principle can be seen I the 1973 *United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Person*s.

lix Under Article 9 of the Vienna Convention on Diplomatic relations, a receiving State may "at any time and without having to explain its decision" declare any member of a diplomatic staff persona non grata. A person so declared is considered unacceptable and is usually recalled to his or her home nation. If not recalled, the receiving State "may refuse to recognize the person concerned as a member of the mission." While diplomatic immunity protects mission staff from prosecution for violating civil and criminal laws, depending on rank, under Articles 41 and 42 of the Vienna Convention, they are bound to respect national laws and regulations (amongst other issues). Breaches of these articles can lead to persona non grata being used to 'punish' erring staff. See 94 AJIL 2000 at 534 where it is reported that an attaché of the Russian embassy was declared persona non grata for suspected bugging of the State Department of the United States.

[lx] A diplomat or member of the international civil service who is a national or permanent resident of the receiving State will only enjoy immunity from jurisdiction and inviolability in respect of official acts performed in the execution of his professional duties. See Article 38 of the *Vienna Convention on Diplomatic Relations*.

[lxi] Members of technical and administrative staff of a diplomatic agent may also benefit from such privileges.

[lxii] See *R*.v. *Secretary of State for the Home Department ex parte* Bagga, [1991] 1 QB 485; 88 ILR at 404.

[lxiii] 121 *ILR* 352.

[lxiv] *Sengupta* v. *Republic of India*, 64 *ILR* 372.

[lxv] [1986] 2 All ER 257; [1987] 1 WLR 641(1988) 77 ILR 16.

[lxvi] See *Arab Banking Corporation* v. *International Tin Council and Algemene Bank Nederland and Others (Interveners) and Holo Trading Company Ltd. (Interveners*) (1988) 77 ILR 1-8.

[lxvii] *Fayed* v. *Al-Tajir* [1987] All. E.R. 396. Article 32 of the Vienna Convention provides that the sending State may waive the immunity of diplomatic agents and others granted immunity under the Convention.

[lxviii] See Recommended Rules and Practices Drafted by the International Law Association's Committee on the Accountability of International Organizations. Report of the Seventeenth Conference, , New Delhi 2002 at 774.

[lxix] This provision is supplemented by the General Convention on the Privileges and Immunities of the United Nations, 1946 and the Convention on Privileges and Immunities of the United Nations.

[lxx] *ICJ* Reports 1988 at 12. Also at 82 *ILR* at 225.

[lxxi] *Mendaro* v.*World Bank, Supra* note 2. (717 F.2d. 610). See also *Iran-US Claims Tribunal* v. *AS* 94 ILR 321 at 329 where a Dutch court held that immunities and privileges guaranteed that an international organization may carry out its duties without let or hindrance.

[lxxii] *Id.* P. 3

[lxxiii] The terms 'diplomat' or 'diplomatic' are essentially modern and derive their origin from the latin word "diplomas" meaning official documents emanating from the princes. See B. Sen, *International Law Relating to Diplomatic Practice*, Metropolitan Book Co. Ltd.: Delhi, 1950. Introduction. See also, Vienna Convention on Diplomatic Relations, United Nations: New York, 1961, *A/CONF.20/14/Add.1* Article 1 for various definitions pertaining to categories of diplomats.

[lxxiv] *Ibid.*