

THE EVOLUTION OF THE CONCEPT OF IMMUNITY OF INTERNATIONAL ORGANISATIONS

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ABSTRACT

This article looks at the change in the conceptual foundations of the immunity of international organisations, paying special attention to the nature of the immunity of the first international organisations and the later disappearance of that unique approach. Three distinct stages in the development of the concept of immunity of international organisations can be discerned. In the first stage, the early international organisations were bestowed immunity derived from an augmented concept of neutrality. The second stage witnessed the granting of diplomatic privileges and immunities to certain organisations and their officials. The third stage involved the adoption of the concept of ‘functional immunity’ of international organisations. The article will also engage with the discussions (or lack of them) surrounding the adoption of immunity provisions and study the progression of analytical engagement with the concept of immunity. An examination of these stages will reveal how changes in the conceptual bases of immunity initially came about mostly due to practical considerations and without an analysis of the conceptual transformation that resulted.

Keywords: *international organisations, concept of immunity, immunity from neutrality, League of Nations, United Nations.*

I. INTRODUCTION

The first international organisations were established in the middle of the nineteenth century, at a time when states had absolute immunity.¹ The main concern in that process was ensuring that host states could not interfere in the functioning of those new organisations.² It was thought natural, if not inevitable, to grant immunity to international organisations, guided by the example of state immunity. The initially limited immunities developed over time and expanded on the basis of privileges and immunities of states and their representatives, as it was convenient to refer to this already existing category of law.

The development of the concept of immunity of international organisations happened in several stages. The first stage witnessed the extension of the status of neutrality and independence to some riparian commissions. The second stage started with the establishment of the League of Nations and the granting of diplomatic privileges and immunities to that organisation. The third stage began with the founding of the United Nations and the adoption of the concept of ‘functional immunity’ of international organisations. This article aims to demonstrate how the initial unique concept of immunity disappeared due to the utilisation of previously established concepts, and how immunity later changed along with the development of international organisations.

II. THE IMMUNITY OF EARLY INTERNATIONAL ORGANISATIONS – ‘IMMUNITY FROM NEUTRALITY’

Although later organisations were greatly influenced by the privileges and immunities of states and their officials, the im-

¹ This immunity was first recognised by the US Supreme Court in the *Schooner Exchange* case, where the court concluded that states are exempt “from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality”: *The Schooner Exchange v. M’Faddon & Others*, US Supreme Court, 11 *United States Reports* 144.

² The relevance of guaranteeing independence from the host state was reaffirmed, for example, by the Constitutional Committee of the ILO while discussing the status and immunities to be accorded to the ILO: “international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible”: ILO, General Note (on the Status, Immunities and Other Facilities to be Accorded to the International Labour Organisation by Governments), First Session of the Committee on Constitutional Questions of the Governing Body, 27(2) *International Labour Office Official Bulletin* (1945) p. 199.

munities of the first international organisations were established independently from influence by the rationales and principles behind state immunity. Immunities were granted on the practical basis of simple necessity, to guarantee independence from host states (as organisations did not, and do not, possess territory of their own, and have to function on the territory of a host state). The immunities evolved relatively quickly from the recognition of states that the common benefits achievable by organised cooperation would not be achievable if individual members were permitted to apply their laws at will to the functions and activities of international organisations.³ Also, the host state would have more influence on an organisation based on its territory, which would not be acceptable to the other member states.

Such practical concerns necessitated granting immunities already to the first organisations. For example, the personnel and establishments of the European Commission of the Danube were given immunity in order to guarantee independence in carrying out its functions. This was done by Article 21 of the Public Act of 1865:

“The works and establishments of all kinds created by the European Commission of the Danube [...] shall enjoy the neutrality stipulated by Art. 11 of the said Treaty, and shall be, in case of war, equally respected by all the belligerents.

The benefit of this neutrality shall be extended, with the obligations which spring from it, to the general inspection of the navigation, to the administration of the Port of Sulina, to the staff of the Navigation Cash Office and Seamen’s Hospital, and lastly, to the technical staff charged with the superintendence of the works”⁴

The term ‘neutrality’ may seem puzzling, but subsequent treaties, practice by the host state and writings on the topic point to the conclusion that this ‘neutrality’ resulted in immunity. The concept of neutrality was adapted to fit the context of international organisations and fairly swiftly evolved to a grant of immunity. There are views that this initial grant of neutrality by the Public Act of 1856 already constituted giving the Commission diplomatic immunity. For example, it has been asserted that “this highly important Act announces neutrality for the Commission and all its works and agencies, thus placing the highly complex institution *under the protection of diplomatic immunity in all respects*”⁵ It seems more plausible, however, that the main reason for the states to grant protection to the Commission, predicated on the juridical concept of neutrality, was to safeguard the personnel of the Commission should war break out among the member states.⁶

The concept of neutrality, as it was applied to international institutions and their personnel, was a departure from the classic concept applied to states. The ‘neutrality of institutions’ concept merely granted inviolability and imposed the obligation to grant all belligerents within the jurisdictional area equal rights and equal opportunity to make use of the facilities and the regime of the Commission. The institution was powerless to protect itself and its status. Conferring neutrality on the Commission was also a means to grant independence from the influence and control of a single member state.⁷ As

³ Gordon H. Glenn, Mary M. Kearney and David J. Padilla, “Immunities of International Organizations” (1981–1982) 22 *Virginia Journal of International Law* pp. 266–7. For further discussion on reasons for granting immunities to international organizations, see, e.g., A. Hammerskjöld, “Les immunités des personnes investies de fonctions internationales” (1936-ii) 56 *Recueil des Cours* pp. 151–2; Hugh McKinnon Wood, “Legal Relations between Individuals and a World Organisation of States” (1945) 30 *Transactions of the Grotius Society for 1944* pp. 143–4; C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limited, 1961) pp. xiii, 40–1, 166–7; Niels Blokker, “International Organizations: the Untouchables?” (2013) 10 *International Organizations Law Review* (2013) p. 260; Johan G. Lammers, “Immunity of International Organizations: The Work of the International Law Commission” (2013) 10 *International Organizations Law Review* p. 281 (on what the ILC considered as the justification for privileges and immunities of international organizations).

⁴ Article 21, Public Act of the European Commission of the Danube, 2 November 1865, 45 *British and Foreign State Papers* 98.

⁵ Gordon E. Sherman, “The International Organization of the Danube Under the Peace Treaties”, (1923) 17 *American Journal of International Law* p. 448 [emphasis added]. The same approach is taken in Clyde Eagleton, *International Government* (3rd edition, New York, The Ronald Press Company, 1957) p. 163.

⁶ This view is shared by Linda S. Frey and Marsha L. Frey, *History of Diplomatic Immunity* (Ohio State University Press, 1999) p. 544.

⁷ For another discussion of this concept of neutrality of institutions, see David B. Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (The Hague, Martinus Nijhoff, 1971) pp. 36–7.

Secretan points out, “this method has nothing in common with diplomatic privileges and immunities,” but “the underlying object is the same, namely the protection of the independence of the agents of the international community”.⁸

Accordingly, the protection of international organisations was initially conceived as an adaptation of the pre-existing concept of neutrality to the context of international organisations. Later on, the concept of ‘neutrality of institutions’ developed independently of the neutrality in the context of the law of war. The content and evolution of this concept of ‘neutrality’ becomes clearer by looking at subsequent treaties dealing with the European Commission of the Danube. Article VII of the 1871 Treaty of London, revising certain stipulations contained in the Treaty of 1856, extends the protection of neutrality to other categories of the Commission’s staff and reveals a notion of ‘immunity from neutrality’:

“All works and establishments of every nature created by the European Commission in execution of the Treaty of Paris of 1856 or of the present Treaty, shall continue to enjoy the neutrality which has protected them hitherto and which shall be equally respected in the future and in all circumstances by the High Contracting Parties. The *benefits of such immunity as may spring from this neutrality* shall be extended to the entire administrative and technical personnel of the European Commission.”⁹

It is peculiar to see that it is the “works and establishments” and the “administrative and technical personnel” that are granted the benefits and not the organisation itself. This shows an interesting parallel with state immunity resulting from the ambassador’s protection. Most likely this approach relied on the presumption that if the personnel and premises are protected, the organisations themselves are protected too.¹⁰ Some years later, the need for clarity most likely incited the inclusion of Article 53 in the Treaty of Berlin of 1878, which makes the independence of the Commission explicit:

“The European Commission of the Danube on which Rumania shall be represented is maintained in its functions, and shall exercise them henceforth as far as Galatz in *complete independence of the territorial authorities*. All the treaties, arrangements, acts and decisions relating to its rights, privileges, prerogatives, and obligations are confirmed.”¹¹

This provision (or any other agreement concluded up to this point) did not contain any mention of diplomatic immunities – the immunity and independence of the Commission were seen as resulting from the neutrality of the organisation. Nonetheless, this approach changed. This might have been due to the Romanian Government assimilating the members of the Commission and its non-Romanian personnel to members of accredited diplomatic missions. According to the Secretary-General of the Commission, “the Rumanian Government has recognized that officials of the Commission should be treated as the staff of a diplomatic mission”.¹² As part of this, Commission officials were granted tax exemptions and non-Romanian officials were also given an exception from customs duty. Hammerskjöld also points out that:

“Quant aux membres de la Commission, le Gouvernement roumain semble, d’après les données dont nous disposons, accorder les pleines immunités non seulement aux membres titulaires - ce qui va de soi, eu égard au fait qu’il s’agit de

⁸ Jacques Secretan, “The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities” (1935) 16 *British Year Book of International Law* p. 61.

⁹ Article VII, Treaty of London, 13 March 1871, 16 De Martens, *NRG*, Part II, 273 [emphasis added].

¹⁰ This is also pointed out in Edwin H. Fedder, “The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization” (1960) 9 *American University Law Review* p. 62.

¹¹ Article 53, Treaty of Berlin, 13 July 1878, De Martens, *NRG*, 2nd Series, Tome III, at p. 449 [emphasis added].

¹² Francis Rey, “Les Immunités des fonctionnaires internationaux” (1928) 23 *Revue critique de droit international privé* p. 14.

*diplomates au sens étroit du mot - , mais aussi aux suppléants, qui sont des consuls.*¹³

One can assume that the assimilation of officials of the Commission to diplomats occurred due to the relative ease of adding new entities to a pre-existing category that serves the same purpose, rather than creating a new status, which would require new legislation or rules to implement it.

This approach was solidified with the Convention Instituting the Definitive Statute of the Danube of 1921, which constituted the International Commission of the Danube and provided that “[t]he property of the International Commission and the persons of the Commissioners are entitled to the privileges and immunities which are accorded in peace and war to accredited diplomatic agents”.¹⁴ The approach taken by Romania and the 1921 Convention might have influenced subsequent writers to claim that the Danube Commission was granted diplomatic immunity from the moment of its establishment and to neglect the uniqueness of the actual approach first adopted, i.e. of using the concept of neutrality and deriving immunity from that.

The immunities granted to members of tribunals, too, influenced the development of the immunity of international organisations. For example, the 1907 Hague Convention for the Pacific Settlement of International Disputes granted diplomatic privileges to members of the Permanent Court of Arbitration who did not reside in their own country.¹⁵ Thus, granting diplomatic immunity to non-diplomats was not a new phenomenon when it started occurring in the context of international organisations.

This bestowing of diplomatic immunity in relation to the Danube Commission happened without a theoretical analysis of the compatibility of this concept with the Commission and its needs. There are various major differences between states and international organisations with respect to immunity. Jenks highlighted three such differences. First, the special importance of immunities “in relation to the State of which the official is a national” is unique to international organisations, as “the considerations of principle involved differ profoundly from those applicable to diplomatic immunity”. Second, in the case of immunities of international organisations there is no sending state that can exercise jurisdiction and an equivalent jurisdiction “therefore has to be found either in waiver of immunity or in some international disciplinary or judicial procedure”. Third, Jenks emphasised the role of “sanctions which secure respect for diplomatic immunity are the principle of reciprocity and the danger of retaliation by the aggrieved State” and noted that the same does not apply with respect to international organisations. He concluded that:

In view of such factors as these the functional requirements of international organisations need to be considered on their own merits and not on the basis of automatic assimilation to the functional requirements of diplomatic intercourse.¹⁶

Subsequent organisations to which states chose to grant immunity mostly followed the lead of the Danube Commission, though early on there were some differences in approach. For example, Hammerskjöld notes that the position of

¹³ A. Hammerskjöld, “Les immunités des personnes investies de fonctions internationales” (1936-ii) 56 *Recueil des Cours* pp. 152. In English: “With regard to the members of the Commission, the Government of Romania seems, from the data available to us, to grant full immunities not only to the titular members - which is self-evident, given the fact that they are diplomats in the narrow meaning of the word - but also to alternates, who are consuls.”

¹⁴ Article 37, Convention Instituting the Definitive Statute of the Danube, 23 July, 1921, 26 *League of Nations Treaty Series*, No 647, p. 173.

¹⁵ Article 46, para 4, Hague Convention of 1907 for the Pacific Settlement of International Disputes, Second Peace Conference, The Hague, 1907, *Actes et documents*, Tome I, p. 612. The provision was the following: “Les Membres du Tribunal, dans l'exercice de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques” (“The members of the tribunal, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities”).

¹⁶ C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limited, 1961) p. xxxvii.

the Commission of the Elbe was “*moins généreux*” (less generous), as the Elbe Navigation Act limits granting diplomatic privileges only to the delegates, the Secretary General and the Deputy Secretary General. Nevertheless, the Act further stipulates that “the persons designated by the Commission” will receive all necessary facilities for the performance of their duties.¹⁷

It seems clear that the change in approach – from the unique “neutrality” concept to that of “diplomatic immunity” – did not result from a considered analysis of the needs of international organisations or the repercussions that the change would bring about. It was due to the convenience of utilising a previously established concept – temporary practicality trumped conceptual clarity. This assimilation set the tone when it came to establishing the first universal organisation (in relation to its subject matter) and deciding its immunity regime.

III. THE LEAGUE OF NATIONS' ADOPTION OF "DIPLOMATIC IMMUNITY"

At the time of the establishment of the League of Nations, granting immunities to international organisations was still haphazard and unsystematic.¹⁸ Bestowing immunity on international organisations in the 19th and at the beginning of the 20th century was far from being the rule; there were many organisations, especially the more technical or scientific ones, which existed without any special treatment or rights being accorded to them. For example, neither the Universal Postal Union (established 1874) nor the International Copyright Union (1886) nor their staff or accredited delegates initially had any immunity.¹⁹

However, the League officials were given immunity in Article 7, which stated that “[r]epresentatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities”.²⁰ The reasons for inserting the clause granting diplomatic prerogatives to the League officials into the British draft (which was the basis for subsequent drafts) have not been recorded, and there was apparently no discussion of this provision in the Commission on the League of Nations.²¹ Hill, who wrote an extensive analysis of the privileges and immunities of the League officials, believed that this provision was not based on an analysis of the immunities of earlier international organisations, and that at that time there was no established practice concerning international officials to refer to. He claimed that the decision to give diplomatic privileges and immunities to representatives of member states when attending meetings followed the general practice of granting diplomatic immunity to diplomatic representatives sent to *ad hoc* international conferences.²² As Blokker highlights, “the regime of diplomatic privileges and immunities was readily available, well-known and generally accepted” and a means to immediately provide “these officials with the necessary status and protection to perform their functions”.²³ In all probability, this decision may not have been thoroughly explored during

¹⁷ A. Hammerskjöld, “Les immunités des personnes investies de fonctions internationales” (1936-ii) 56 *Recueil des Cours* pp. 153.

¹⁸ On the history of the League of Nations in general see, e.g., Francis Paul Walters, *History of the League of Nations* (London, Oxford University Press, 1952); Bernard Shaw, *League of Nations* (London, The Fabian Society, 1929); Ruth B. Henig (ed), *The League of Nations* (Edinburgh, Oliver and Boyd, 1973); P. Raffo, *The League of Nations* (London, Historical Association, 1974); Lassa Oppenheim, *The League of Nations and Its Problems: Three Lectures* (London, Longmans, 1919); Alfred E. Zimmern, *The League of Nations and the Rule of Law: 1918-1935* (2nd edn, London, Macmillan, 1939); Gary B. Ostrower, *The League of Nations from 1919 to 1929* (Garden City Park, NY, Avery Publishing Group, 1995); George Gill, *The League of Nations from 1929 to 1946* (Garden City Park, NY, Avery Publishing Group, 1996); Frederick S. Northledge, *The League of Nations: Its Life and Times 1920-1946* (Leicester University Press, 1986); William E. Rappard, “Evolution of the League of Nations” (November 1927) 21(4) *American Political Science Review*; Ruud van den Berg, “Promising or Failing- League of Nations and United Nations Organisation” (1994-1995) 4(2) *Tilburg Foreign Law Review*; Donald S. Birn, *The League of Nations Union 1918-1945* (Oxford, Clarendon Press, 1981).

¹⁹ Treaty relative to the formation of a General Postal Union, Berne, 9 October 1874, 147 CTS 136; Convention for the Creation of an International Union for the Protection of Literary and Artistic Works, 9 September 1886, WIPO Doc. WO001EN.

²⁰ Art 7, para. 4, Covenant of the League of Nations, 28 April 1919.

²¹ Charles Howard Ellis, *The Origin, Structure & Working of the League of Nations* (Boston, Houghton Mifflin Company, 1929; reprinted in 2003) p. 75.

²² Martin Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (Washington, Carnegie Endowment for International Peace, 1947) p. 4.

²³ Niels Blokker, “International Organizations: the Untouchables?” (2013) 10 *International Organizations Law Review* (2013) p. 265.

the haphazard and hasty deliberations that led to the creation of the League.²⁴ As Jenks wrote in 1961, the Covenant provision was so general in character that it “left unsettled a large proportion of the questions which arose in practice, especially since the use of the concept of diplomatic immunities for the purpose of defining international immunities furnished no answer to the novel questions which arose in connection with international organisations and their officials.”²⁵

As in the previously addressed case of the European Commission of the Danube, it was the officials, and not the organisation, who were protected under Article 7.²⁶ Only a later agreement, the second *modus vivendi* agreement,²⁷ granted immunity to the organisation itself. The officials of the League of Nations were given “diplomatic” privileges and immunities, without clarifying what that means. The subsequent *modus vivendi* agreements of 1921 and 1926 concluded with Switzerland, the League’s host state, specified the content of these privileges and immunities (at least in the host country). The agreements in question did not purport to be an official interpretation of the Covenant; they were a practical solution to the problems arising out of the application of Article 7. Yet they influenced the development and understanding of the League officials’ privileges and immunities and their position in other states.

The first, provisional *modus vivendi* of 1921 between the League and the Swiss Government was constituted by a letter of 19 July 1921, from the Head of the Federal Political Department to the Secretary-General, and the acceptance letter by the latter of the propositions. The Swiss Federal Council, mostly due to the small number of League functionaries, decided to apply the existing law of diplomatic immunity to them. This decision to assimilate the functionaries of the League to the members of diplomatic missions of the corresponding rank at Bern was not unprecedented. As mentioned above, the same was done to the officials of the European Commission of the Danube by the Romanian Government.²⁸ The appropriateness of this assimilation can be questioned. As mentioned before, the motivation behind the decision was convenience. It was not the result of a thorough analysis to determine the privileges and immunities that would be required for the independence of the organisation. This assimilation has been seen as the cause for the Swiss Council ignoring “the distinction between those privileges and immunities required by international law and those granted from courtesy” and as resulting in an extension to the League of “exemptions that could not technically be demanded under the covenant.”²⁹ The assimilation was done with the first section of the agreement:

“The staff of the Secretariat of the League of Nations and the International Labour Office shall be accorded the same prerogatives and immunities as are conferred by international law and practice on the staff of diplomatic missions; it shall accordingly be placed on the same footing, *mutatis mutandis*, as the members of diplomatic missions accredited to the Confederation.”³⁰

By the terms of this agreement, the personnel of the Secretariat and of the International Labour Office were divided into two classes, equivalent to those into which the members of diplomatic missions accredited in Switzerland were grouped. The first or ‘extraterritorial’ category was composed of those officials who corresponded to public functionaries. The

²⁴ This is the view taken in Frey and Frey, *supra* note 6, p. 547.

²⁵ C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limited, 1961) p. 1.

²⁶ As Wood highlights, “[l]ittle consideration seems to have been given to an organization’s privileges and immunities, even during the period 1920–1945”: Michael Wood, “Do International Organizations Enjoy Immunity Under Customary International Law?” (2013) 10 *International Organizations Law Review* pp. 291.

²⁷ Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

²⁸ See *supra* footnotes 11, 13.

²⁹ Frey and Frey, *supra* note 6, pp. 548–9.

³⁰ Section I, The provisional *modus vivendi* of 1921 with the Swiss Federal Council, letter of July 19, 1921, from the Head of the Federal Political Department to the Secretary-General of the League of Nations, unofficial translation found in Annex I of Hill, *supra* note 19, pp.121–37.

second category consisted of “technical or manual personnel” and included those who, despite not being assimilated to public functionaries, were engaged and paid by the League and were in the exclusive service of the Secretariat or the ILO.³¹

The subsequent 1926 *modus vivendi*, besides settling the question of the tax exemption of Swiss officials, “summarized and completed” the arrangement of 1921.³² Unlike its predecessor, it was submitted to the League Council for approval and published in the *Official Journal*. Article 1 of the agreement contains the grant of jurisdictional immunity to the League:

“The Swiss Federal Government recognizes that the League of Nations, which possesses international personality and legal capacity cannot, in principle, according to the rules of international law, be sued before the Swiss Courts without its express consent”³³

This was the first explicit provision granting immunity to the organisation itself, instead of merely protecting its officials. On the other hand, the focus of the agreement was still on the staff of the organisation. This is illustrated by the fact that the heading of the agreement referred explicitly to the staff of the League and of the ILO and did not mention the immunities of the League as such. The agreement maintained the division of staff into the aforementioned two categories. Immunity from jurisdiction, both civil and criminal, was granted to agents of the first category, subject to the waiver of immunity. Members of the second category and Swiss nationals of both categories were accorded jurisdictional immunity only for official acts performed within the limits of their functions. The same article concludes by declaring that the League of Nations “will endeavour to facilitate the proper administration of justice and execution of police regulations at Geneva”,³⁴ but due to the non-binding language used, this is not a concrete legal obligation of the League.

Most writers of the inter-war period (and some post-World War II writers) dealt with the immunity of the League, and of other international organisations and their officials as an extension of diplomatic privileges to a new class of persons, and not as a new phenomenon.³⁵ For example, Aufricht asserts that “traditional rules of international law relating to the privileges and immunities of states and their diplomatic agents have been extended to a new class of persons, namely, to public international organizations”.³⁶ The granting of immunity to the League and its officials was willingly accepted. It was seen as necessary for the independent functioning of the organisation. The main controversy was over whether an individual could enjoy diplomatic protection against the state of which he himself is a national.³⁷ Article 7 of the Covenant of the League made no differentiation between functionaries of the League on the basis of their nationality. The *modus vivendi* agreements, however, excluded functionaries who were nationals of the state of residence from some of the benefits of privileges and immunities. Their special treatment was confined to immunity “in respect of acts performed by them in their official capacity and within the limits of their official duties” and their salaries from the League were exempted from

³¹ *Ibid*, pp. 121–2.

³² Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

³³ *Ibid*, Article 1.

³⁴ *Ibid*, Article 7, Article 9.

³⁵ This is the view taken in Cecil J. B. Hurst, “Diplomatic Immunities – Modern Developments” (1929) 10 *British Year Book of International Law*; C. van Vollenhoven, “Diplomatic Prerogatives of Non-Diplomats”, (1925) 19 *American Journal of International Law*; Lawrence Preuss, “Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest” (1931) 25 *American Journal of International Law*; Josef L. Kunx, “Privileges and Immunities of International Organizations” (1947) 41 *American Journal of International Law*; Hans Aufricht, “The Expansion of the Concept of Sovereign Immunity: With Special Reference to International Organizations” (1952) 46 *ASIL Proceedings*; Norman L. Hill, “Diplomatic Privileges and Immunities in International Organizations” (1931-1932) 20 *Georgetown Law Journal*.

³⁶ Aufricht, *supra* note 29, p. 86.

³⁷ This is also pointed out in Niels Blokker, “International Organizations: the Untouchables?” (2013) 10 *International Organizations Law Review* pp. 264–6, as part of a useful summary of six elements prevalent in the early discussions about the immunity of international organizations.

cantonal and municipal direct taxes.³⁸ Limiting their privileges and immunities was the result of considerations of expediency – the practical necessity of securing a *modus vivendi* acceptable to the state of residence.³⁹

The predominant opinion in doctrine during the inter-war period based the immunities of international functionaries on their need for independence in the exercise of their functions and held almost unanimously that states are not authorised to make any distinction between their nationals and those of other states. As the guarantee of immunities was seen as essential to the independence of such officials, there could be no valid reason for making a distinction among them on the basis of their nationality.⁴⁰ This view was understandably also endorsed by international organisations themselves. For example, the Director of the International Labour Office made the following statement:

“The Office and its officials are required to defend common international interests which may sometimes be contrary to the policy or opinion of a particular country. In all cases it is necessary that the action of the Office and its officials should be free from all pressure on the part of an individual state. This is the real meaning of the diplomatic immunities granted to the Office and its officials. It will therefore be seen that there are three points about the immunities: (1) they belong not to the individual but to the office which he fills; (2) they are a right and not a favour; (3) they are granted without distinction of nationality.”⁴¹

Though writers and international organisations supported treating all officials of organisations on a similar basis, certain governments (mostly host states) were reluctant to recognise diplomatic privileges and immunities in favour of their own nationals. This resulted in the problem remaining unsolved until the creation of the United Nations and subsequent treaties on privileges and immunities.

A related issue was the possible denial of justice to third parties. When the country of origin of an international organisation's official coincides with that of his residence, local courts do not have competence to take on the case due to the jurisdictional immunity of the official. Already in the inter-war period, there were fears that creating a class of persons over whom courts cannot exercise jurisdiction may result in a denial of justice to third parties.⁴² However, the common understanding seemed to be that the waiver of immunity is a sufficient tool for counterbalancing the immunity of international officials.⁴³ This was also the opinion in the Institut de Droit International in 1924, when they adopted a resolution stating that:

“*Au cas où les agents de la S. D. N. seraient assignés ou poursuivis devant une juridiction quelconque, l'autorité compétente pour procéder à leur nomination aura qualité pour, se prononcer sur la levée de l'immunité.*”⁴⁴

³⁸ Article 9, Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

³⁹ Preuss, *supra* note 29, pp. 709–10.

⁴⁰ This position with regard to nationals is found, for example, in Preuss, *supra* note 29, pp. 709–10; C. van Vollenhoven, “Diplomatic Prerogatives of Non-Diplomats” (1925) 19 *American Journal of International Law* p. 471; Norman L. Hill, “Diplomatic Privileges and Immunities in International Organizations” (1931-1932) 20 *Georgetown Law Journal* pp. 44–5; and Secretan, *supra* note 8, p. 71.

⁴¹ Report of the Director of the International Labor Office, International Labour Conference, 8th Session, Geneva (1926), Vol II, para. 25 at p. 51.

⁴² This concern has been articulated, e.g. in Secretan, *supra* note 8, p. 71; and in Henri T. P. Binet, “Recent Developments Affecting Diplomatic Privileges and Immunities” (1931) 13 *Journal of Comparative Legislation and International Law* p. 86.

⁴³ E.g., Kunx, *supra* note 29, p. 861; and Secretan, *supra* note 8, p. 72.

⁴⁴ Résolutions concernant l'interprétation de l'art. 7 al. 4 du Pacte de la Société des Nations, Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 180 (Article 4). In English: “In the event that the agents of the S.D.N. are accused or prosecuted in any jurisdiction, the authority who was competent to appoint them, is competent to decide on the waiver of immunity.”

The rapporteur De Visscher, when introducing this Article, stated that “*il faut prévenir les abus*” (abuse must be prevented).⁴⁵ Writing a couple years later, Binet goes so far as to claim that the possibility of the competent authorities refusing to waive the immunity of an official “is surely too remote and improbable to be taken into account” as “[i]nternational institutions, like individual States, have the greatest interest in entertaining the most amicable relations with all States”.⁴⁶ Naive as this opinion might seem, it reflects the trust placed in international organisations (especially the League of Nations) at that time.

Despite the initial acceptance of granting diplomatic immunity to officials of international organisations, discussion soon began over the appropriateness of equating the status of diplomats to the status of such officials. As Blokker notes, there was increasing support for the view that the legal status of officials of international organisations is fundamentally different from that of diplomats, and that privileges and immunities for diplomats could not simply be used for them as well.⁴⁷ The 1924 Vienna session of the Institut de Droit International looked in detail at the basis of diplomatic privileges and immunities of the agents of the League of Nations.⁴⁸ The Report by Adatchi and De Visscher, which formed the basis for discussion, stated that the key difference between diplomats and officials of international organisations was that diplomats exercise “*une fonction d'intérêt strictement national et ne relève que du Gouvernement qui l'a accrédité*” (a function that is strictly of national interest and is the sole responsibility of the Government that accredited them), whereas officials exercise “*une fonction d'intérêt international, c'est-à-dire commun aux Membres*” (a function that is of international interest, i.e. common to all Members). They pointed out the distinct source for the privileges and immunities of organisations, different from that of diplomatic immunity, which is to “*permettre à la Société d'exercer en pleine indépendance les fonctions de pacification et de coopération internationales que lui assigne le Pacte*” (allow the Society to exercise in full independence the functions of pacification and international cooperation, assigned to it by the Pact).⁴⁹ In the discussions, Mr De Lapradelle noted that “*l'extension des privilèges diplomatiques à la S. D. N. doit-elle être poursuivie avec prudence et dans le doute mieux vaut ne pas porter ces immunités aussi loin que celles dont bénéficient les États*” (the extension of diplomatic privileges to the S.D.N. must be pursued with prudence, and in case of doubt it is better to not extend these privileges as far as those enjoyed by the Member States). Mr Mercier added that “*qu'il n'y a pas identité de motif pour conférer aux agents de la S. D. N. les immunités des représentants des États*” (there is no need to confer to the agents of the S. D. N. the immunities of the representatives of the States).⁵⁰

A decade later, Hammerskjöld agreed that “*cette divergence entre les bases secondaires des immunités diplomatiques proprement dites et des immunités accordées aux personnes investies de fonctions d'intérêt international suffit déjà à indiquer que les deux sortes d'immunités ne peuvent point être confondues*” (this divergence between the secondary bases of diplomatic immunities and the immunities granted to persons fulfilling functions in the international interest is already sufficient to indicate that the two kinds of immunities cannot be mixed up), but affirmed that despite their different natures the contents of immunities granted to both states and international organisations must be similarly strong to create the necessary guarantees to enable officials to perform their functions independently in the territory of a foreign state.⁵¹

IV. CREATION OF THE UN "FUNCTIONAL IMMUNITY" MODEL

The granting of privileges and immunities was not uncommon at the time when the establishment of the United Nations

⁴⁵ Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 99.

⁴⁶ Henri T. P. Binet, “Recent Developments Affecting Diplomatic Privileges and Immunities” (1931) 13 *Journal of Comparative Legislation and International Law* p. 86.

⁴⁷ Niels Blokker, “International Organizations: the Untouchables?” (2013) 10 *International Organizations Law Review* p. 265.

⁴⁸ Rapport sur l'art. 7, al. 4: Privilèges et Immunités diplomatiques des Agents de la S. D. N. de MM. Adatchi et Charles de Visscher, Travaux Préparatoires de la Session de Vienne, Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 2. The Report looked at two other questions as well: the extent of the privileges and immunities of the League, and their application to officials of the ILO.

⁴⁹ *Ibid*, p. 3.

⁵⁰ Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), pp. 102–3.

⁵¹ A. Hammerskjöld, “Les immunités des personnes investies de fonctions internationales” (1936-ii) 56 *Recueil des Cours* p. 184.

was being prepared. Many international organisations had been bestowed privileges and immunities, to a large extent based on the example of the arrangements made between the League of Nations and the Swiss Government. These organisations and their experiences provided the precedents to be considered when it came time to elaborate the privileges and immunities of the UN. Quite surprisingly, the Dumbarton Oaks proposals for the UN Charter did not include any provisions about immunity.⁵² However, despite the Preparatory Commission of the United Nations lacking a firm programme of privileges and immunities designed for the organisation, it did make certain recommendations relating to the subject matter.⁵³

First, all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties. Yet they considered that not all officials needed “full diplomatic immunity”, which should be limited to the cases where it is really justified. The Commission considered that any excess or abuse of immunity or privilege would be detrimental both to the interests of the international organisation and to the countries asked to grant such immunities. Second, only immunities and privileges that were “really necessary” should be requested. Third, the Commission recommended that, when the UN concludes contracts with private individuals or corporations, it should include in the contract an obligation to submit disputes arising out of the contract to arbitration. Fourth, privileges and immunities should only be conferred on officials “in the interests of the organization” and not for the benefit of the individual.⁵⁴ These recommendations have been seen as an effort to avoid one difficulty experienced by the League of Nations – the discrimination by governments between the position of the national versus the non-national.⁵⁵ The Preparatory Commission emphasised that the privileges and immunities were not granted in the interests of the individual but to ensure the smooth and efficient functioning of the institutions and that no unnecessary privileges would be given. The recommendations demonstrate that the Preparatory Commission did not envisage absolute immunity for international organisations and that it contemplated safeguards against unaccountability.

The question of the privileges and immunities of the UN appeared on the agenda of the legal problems committee of the San Francisco Conference. The end result was that the Committee recommended the following text for inclusion in the Charter:

“I.(1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.

(2) Representatives of the members of the Organization and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

II. The General Assembly may make recommendations with a view to determining the details of the application of the foregoing provisions or may propose conventions to the Members of the United Nations for this purpose.”⁵⁶

This article was adopted later with only minor changes in wording.⁵⁷ It is significant that this provision avoids the use of the term ‘diplomatic’ in describing the nature and extent of the privileges and immunities that were to be granted.

⁵² Proposals for the Establishment of a General International Organization, Washington Conversations on International Peace and Security Organization, 7 October 1944, available online at: <http://www.ibiblio.org/pha/policy/1944/441007a.html> (accessed 10.01.2015).

⁵³ Preparatory Commission of the United Nations, Study on Privileges and Immunities, *Report* (London, 1946), Chapter VII, Annex A, p. 62.

⁵⁴ *Ibid.*

⁵⁵ Michaels, *supra* note 7, p. 56.

⁵⁶ Commission IV (Judicial Organization), Committee 2 (Legal Problems), Report of the Rapporteur of Committee IV/2, as Approved by the Committee, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945*, Vol XIII, p. 703.

⁵⁷ Article 105, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

The Preparatory Commission had still used the expression ‘diplomatic privileges and immunities’ in their work.⁵⁸ The Legal Problems Committee decided to avoid the term ‘diplomatic’ and substituted that standard for the determination of the privileges and immunities with one that they considered more appropriate for the organisation. The new standard was the necessity of realising the purposes of the organisation and, in the case of its officials and the representatives of its members, providing for the independent exercise of their functions.⁵⁹ The drafters avoided analogy to sovereign immunities and emphasised a standard derived from the needs of the organisation itself.⁶⁰

The use of the phrase ‘diplomatic immunities’ in the League of Nations Covenant had made it possible to apply to the League officials an existing body of law and practice that fulfilled the criteria for safeguarding the organisation and its officials. On the other hand, the negative aspect of the phrase was that it produced a legalistic problem as a result of the common definition of ‘diplomatic.’⁶¹ During the inter-war period, some prominent writers such as Hurst had arrived at the conclusion that it was unfortunate that the phrase ‘diplomatic immunities’ was used in the Covenant. He believed that the phrase was used too loosely and was inadequate to express the real purpose of the provision – placing the individuals covered by Article 7 of the Covenant in a position of non-subjection to local jurisdiction.⁶² It has also been argued that anxiety concerning possible abuse, or the ever increasing number of persons enjoying diplomatic privileges, and the influence of nationalistic considerations, had a role to play in this change of approaches.⁶³ The Legal Problems Committee, like the Preparatory Commission, aimed to restrict the privileges and immunities to those truly necessary.

The draft article proposed by the Legal Problems Committee did not specify which specific privileges and immunities it covered. This was thought to be superfluous. The Committee stated that the “terms privileges and immunities indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials”. The Committee believed that it would have been impossible to establish a list valid for all the member states, while at the same time taking account of the special situation of host states.⁶⁴

On the other hand, the Committee recognised that one of the difficulties with the League Covenant was that the exact nature and extent of diplomatic privileges and immunities remained without definition. Consequently, the Committee opted to insert paragraph II, which gave the GA the right to make recommendations or propose conventions to clarify the content of the privileges and immunities. The Committee contemplated that such recommendations could apply only to host states and possibly take the form of proposing a bilateral treaty, or that a general convention could be created to submit to all the members. The Committee added that these recommendations would not impair the provisions of paragraph I, which would become obligatory for all members as soon as the Charter became operative.⁶⁵

The General Assembly took advantage of this opportunity and in January 1946 referred Chapter VII of the Report of the Preparatory Commission (dealing with privileges and immunities) to the Sixth Committee for consideration and reporting.⁶⁶ As a result, the Sixth Committee submitted six resolutions to the GA, one of which related to the adoption of the General Convention on Privileges and Immunities of the United Nations.⁶⁷ The Sixth Committee examined the respective advantages of the two options

⁵⁸ Preparatory Commission of the United Nations, *Study on Privileges and Immunities* (1946), p. 62.

⁵⁹ Report of the Rapporteur of Committee IV/2, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945*, Vol XIII, p. 704.

⁶⁰ This is highlighted in Alice Ehrenfeld, “United Nations Immunity Distinguished from Sovereign Immunity” (1958) 52 *American Society of International Law Proceedings* p. 88.

⁶¹ Michaels, *supra* note 7, p. 56.

⁶² Hurst, *supra* note 29.

⁶³ Kunx, *supra* note 29, p. 839.

⁶⁴ Report of the Rapporteur of Committee IV/2, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945*, Vol XIII, p. 705.

⁶⁵ *Ibid*, p. 704.

⁶⁶ Sixteenth Plenary Meeting, 19 January 1946, United Nations, *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly* (London, 1946), p. 241.

⁶⁷ GA Resolution No 22(1), 13 February 1946.

for implementing the provisions of Article 105 – making recommendations or proposing conventions to the member states – and decided to recommend the latter, attaching a proposed general convention on the privileges and immunities of the United Nations to the resolution.⁶⁸ Along with the experience of the League of Nations and the two *modus vivendi* agreements, the immunities of states, as an already developed and functional system, served as a convenient model for setting out in detail the privileges and immunities of the UN.⁶⁹

Jenks points to the important role a 1945 ILO Memorandum played in the process, despite it not formally constituting part of the *travaux préparatoires* of the General Convention.⁷⁰ The Memorandum interpreted the League of Nations experience and distilled it down to three basic propositions: (a) that international institutions should have a status which protects them against control or interference by any one government in the performance of their functions; (b) that no country should derive any national financial advantage by levying fiscal charges on common international funds; and (c) that international organisations (though the Memorandum was speaking about the ILO in particular) should be accorded the facilities for the conduct of their official business customarily extended by states to each other. Jenks emphasises that these propositions aim to give organisations “functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members”. This Memorandum greatly influenced the content of the General Convention, though the historical link was never formally recorded.⁷¹

The Sixth Committee reported to the GA that the discussion on the Convention had been “particularly exhaustive and thorough” and that the text submitted had been approved unanimously.⁷² The only controversy that arose in discussing the convention (both in the Sixth Committee and the GA) was over Section 18(b, c), dealing with taxation and national service obligations of UN officials, and Section 30 of the Convention, which dealt with disputes over the application or interpretation of the Convention.⁷³ The core provision dealing with the immunity of the UN appears not to have given rise to any disagreement. This provision is the following:

“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”⁷⁴

The general sentiment in the GA towards the Convention was expressed by the UK representative, who declared that:

“It is important that in setting up this great new international Organization we should not ask for it to possess privileges and immunities which are greater than those required for its efficient organization. [...] On the other hand, equally important is it to ensure that it has adequate privileges and immunities. To give too few would fetter the United Nations Organization

⁶⁸ Annex 22, Privileges and Immunities of the United Nations, Report of the Sixth Committee to the General Assembly, Appendix I, UN doc. A/43/Rev 1 in United Nations, *Plenary Meetings of the General Assembly* (1946) p. 644.

⁶⁹ According to Kunx, this seemed not only “logical in view of the historical development of the problem, but also highly advantageous, because of the relative clarity of international law concerning diplomatic privileges and immunities”: Kunx, *supra* note 29, p. 837.

⁷⁰ ILO, General Note (on the Status, Immunities and Other Facilities to be Accorded to the International Labour Organisation by Governments), First Session of the Committee on Constitutional Questions of the Governing Body, 27(2) *International Labour Office Official Bulletin* (1945) p. 197–223.

⁷¹ C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limited, 1961) pp. 15, 17.

⁷² Except for paragraphs (b) and (c) of section 18, where the US delegate made reservations on the grounds that the right to exempt US nationals from taxation and from national service obligations was a prerogative of the Congress of the USA: *ibid*, p. 642.

⁷³ Appendix I, Report of the Sixth Committee to the General Assembly in United Nations, *Plenary Meetings of the General Assembly* (1946), p. 643; Statement by Sir Hartley Shawcross, representative of the United Kingdom, Thirty-First Plenary Meeting, 13 February 1946, United Nations, *Plenary Meetings of the General Assembly* (1946) pp. 452–3.

⁷⁴ Article II, Section 2, General Convention on the Privileges and Immunities of the United Nations, 1 *UNTS* 15, 13 February 1946.

in the discharge of its tasks. The Charter provides that the immunities and privileges to be granted should be such as are necessary for the fulfilment of its purposes, and that is exactly what this important and historic document does”⁷⁵

It seems surprising that the disparity between the functional immunity imagined by the drafters of the Charter and the unqualified “immunity from every form of legal process” the General Convention provides was not noticed or debated. This could have been the result of jurisdictional immunity of international organisations not being a major concern at that time.⁷⁶ Although states had enlarged their activities on a grand scale by then, international organisations had not. The UN was still a young organisation with limited activities and relatively few employees (at the end of 1949 the Secretariat numbered 4,166 compared to the 41,426 staff members in June 2014).⁷⁷ Many other major international organisations did not even exist. In addition, the post-war situation and the trust accorded to international organisations had their influences. The difference in the approaches – functional and essentially restricted immunity envisaged by the drafters of the Charter versus the absolute immunity provided by the General Convention – might also be due to the Charter being a creation of the states, while the clarification of privileges and immunities was done by an organ of the organisation. Though the General Assembly is composed of the representatives of all member states, the convention was essentially drawn up by the Sixth Committee. The organisation was probably more prone to grant itself as many privileges and immunities as possible, while the states drawing up the Charter preferred a restrictive approach.

V. THE RESULTING ABSOLUTE IMMUNITY

While the UN Charter speaks only of a functional immunity (immunities “necessary for the fulfilment of its purposes”⁷⁸) to be enjoyed by the organisation before national courts, this standard is not clearly defined anywhere.⁷⁹ In doctrine too, the UN and other international organisations are said to enjoy immunity based upon its “functional necessity”. The functional necessity standard is often considered to be “conceptually appealing because it is flexible enough to allow courts to balance the operational needs of international organizations against other important legal principles and public expectations, such as fairness to private litigants and accountability under the rule of law”⁸⁰ However, what appears like a rather restrictive concept of immunity, in practice turns out to be a broad and almost unlimited immunity from the jurisdiction of national courts. This development was most likely influenced by the example of the UN. As mentioned above, the General Convention speaks of ‘immunity from suit’ in an unqualified way, which has been generally understood to mean absolute immunity.⁸¹

Reinisch points out that one reason for the interpretation of functional immunity as absolute immunity could be the fact that multilateral privileges and immunities treaties often provide for an unqualified, hence absolute, immunity even

⁷⁵ Statement by Sir Hartley Shawcross, Thirty-First Plenary Meeting, 13 February 1946, United Nations, *Plenary Meetings of the General Assembly* (1946) p. 452.

⁷⁶ Michael Singer, “Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns” (1995-1996) 36 *Virginia Journal of International Law* pp. 5–56.

⁷⁷ 1949 numbers are found in UN, “The United Nations from 1946 to 1949”, 1950 *Yearbook of the United Nations*, 4; and 2014 numbers in Report of the Secretary-General, “Composition of the Secretariat”, UN Doc. A/69/292, 29 August 2014, p. 13. In comparison, the League of Nations in 1920 had 158 civil servants, which increased to 707 by 1931: “League of Nations Secretariat”, available online: <http://biblio-archive.unog.ch/detail.aspx?ID=245> (accessed 10.01.15).

⁷⁸ Article 105(1), Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

⁷⁹ For a detailed consideration of UN immunity and the alternative methods of addressing claims that have been set up by the UN, see Bruce C. Rashkow, “Immunity of the United Nations: Practice and Challenges” (2013) 10 *International Organizations Law Review* pp. 332–48.

⁸⁰ Steven Herz, “International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity” (2007-2008) 31 *Suffolk Transnational Law Review* p. 474. See further on functional necessity: e.g. Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff, 1994); Singer, *supra* note 59, p. 66; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (4th edn, Leiden, Martinus Nijhoff Publishers, 2003) para. 324.

⁸¹ August Reinisch and Ulf Andreas Weber, “In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement” (2004) 1 *International Organizations Law Review* pp. 59–60. The *de facto* “absolute” immunity of the UN is somewhat mitigated by the fact that article VIII, Section 29, of the Convention requires the United Nations to make provisions for appropriate modes of settlement of disputes “arising out of contracts or other disputes of a private law character to which the United Nations is a party”.

where the constituent instrument speaks of functional immunity, as demonstrated in the case of the UN and its specialised agencies. The more precise and detailed rules of the multilateral treaties (such as the General Convention in relation to the UN) can be seen as interpretations of what “functional” means in respect to jurisdictional immunity.⁸² This view is supported by the UN Office of Legal Affairs, which stated in a 1983 Opinion that:

“Pursuant to Article 105, paragraph 3, of the Charter, the detailed application of this general principle was effected *inter alia* through the Convention on the Privileges and Immunities of the United Nations.”⁸³

The acceptance of the absolute immunity of international organisations is illustrated by the US bestowing certain international organisations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments” at the end of 1945, a time when foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the US.⁸⁴

National courts have also confirmed that the UN enjoys unconditional immunity from every form of legal process under Section 2 of the General Convention. In *Manderleir*⁸⁵, the plaintiff instituted proceedings with a view to obtain compensation from the UN or the Belgian Government 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 UN on the ground that the organisation enjoyed immunity from every form of legal process. The Court stated that even though no provision had been made for settlement of disputes (pursuant to Article VIII, Section 29), Section 2 was applicable and retained its validity and that the immunity of the UN was absolute. The plaintiff also argued that Article 105 of the UN Charter only conferred on the UN such privileges and immunities as were necessary for the fulfilment of its purposes. The Court replied by emphasising that Section 2 of the Convention conferred on the UN a general immunity from legal process, which was not limited to the minimum strictly necessary for the fulfilment of the purposes stated in the Charter. The Court stated that since the Convention and Charter had equal status, the former, dated 26 February 1945, could not limit the scope of the latter, which dated from 13 February 1946.⁸⁶

This judgment was upheld by the Brussels Appeals Court. The Appeals Court held that, in acceding to the General Convention, the signatories to the Charter had defined the necessary privileges and immunities and that the courts would be exceeding their authority if they were to arrogate to themselves the right of determining whether the immunities granted to the UN by that Convention were or were not necessary. The Court also confirmed that the immunity from legal process granted to the UN under the Convention was in no way conditional upon the organisation respecting other obligations imposed by the Convention, more particularly by article VIII, Section 29. It further held that, although it was true that Article 10 of the Universal Declaration of Human Rights stated that everyone was entitled to a hearing by a tribunal, the Declaration was not legally binding and could not alter the rule of positive law constituted by the principle of immunity from every form of legal process formulated in the Convention.⁸⁷ This last argument is of questionable quality, as the Declaration is not

⁸² August Reinisch, *The Privileges and Immunities of International Organisations in Domestic Courts* (Oxford University Press, 2013) pp. 8–9.

⁸³ UN Office of Legal Affairs, “Question of the Application of Section 205 of the United States Foreign Missions Act of 1982 to the Permanent Missions Accredited to the United Nations: Opinion Prepared at the Request of the Committee on Relations with the Host Country”, *UN Juridical Yearbook* (1983) p. 222.

⁸⁴ This was done by the Congress, which enacted the International Organisations Immunities Act [8 U.S.C. § 215, 22 U.S.C. §§288–288fm 26 U.S.C. §§892, 3306(c)(16), 3410(a)(5), 4253(c), 7701(a)(18), 42 U.S.C. § 409 (1976)]. See further, Kathleen Cully “Jurisdictional Immunities of Intergovernmental Organizations” (1982) 91(6) *The Yale Law Journal* 1167. For a more recent consideration of the position of international organizations’ immunity in the US, see Aaron I. Young, “Deconstructing International Organization Immunity” (2012) 44 *Georgetown Journal of International Law* pp. 311–66; and Steven Herz, “International Organizations in U.S Courts: Reconsidering the Anachronism of Absolute Immunity” (2008) 31 *Suffolk Transnational Law Review* pp. 471–532.

⁸⁵ *Manderleir v United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, in United Nations, *Juridical Yearbook 1966* (United Nations: New York, 1968).

⁸⁶ *Ibid*, p. 283.

⁸⁷ *Manderleir v United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, in United Nations, *Juridical Yearbook 1969* (United Nations: New York, 1971) pp. 236–7.

the only treaty containing this right, which may also be considered to be part of customary law.

As examples of other jurisdictions, in *Boimah*⁸⁸ a US court held that “[u]nder the [General] Convention the United Nations’ immunity is absolute, subject only to the organization’s express waiver thereof in particular cases”, and the Swiss Federal Tribunal, in the case of *Groupement d’entreprises Fougerolle*⁸⁹, dismissed an action for annulment of an arbitral award on the ground of CERN’s “absolute immunity from suit”. With some exceptions, the courts are in general not eager to challenge the absolute immunity of international organisations. The concept of immunity has not changed, which is re-affirmed by the work of the ILC that takes the view that organisations should be granted “immunity [...] from every form of legal process, except in the case of an express waiver which, however, should not extend to any measure of execution or coercion”.⁹⁰

VI. CONCLUSION

The concept of immunity of international organisations evolved from an adapted version of neutrality to an absolute immunity from jurisdiction based on ‘functional necessity’. This occurred in three distinct stages. The initial concept, as applied in the case of the European Danube Commission, was formulated by reference to “complete independence from the territorial authority” and “the benefits of neutrality”. In the second stage, from the end of the 19th century onwards, the favourite standard was that of diplomatic privileges and immunities, which were extended to the organisations and their officials by assimilating the officials to the diplomatic representatives of states. The third stage involved the establishment of the UN and the standard of ‘functional immunity’ adopted in the UN Charter. Although ‘functional immunity’ was perceived as a concept with the rationale of limiting the extent of immunity, the subsequent practice of the organisation and its member states has interpreted this as an absolute immunity from jurisdiction. The concept of functional immunity was willingly adopted by other international organisations. This three-stage development has shown how conceptual changes can come about due to practical considerations and without much theoretical discussion along the way.

⁸⁸ *Boimah v United Nations General Assembly*, US District Court, 24 July 1987, 664 *F.Supp.* 69 (EDNY 1987), p. 71.

⁸⁹ *Groupement d’entreprises Fougerolle & consorts v CERN*, Swiss Federal Tribunal, 21 December 1992, 102 *ILR* (1996), pp. 209-15.

⁹⁰ Leonardo Díaz-González, Special Rapporteur, Fourth Report on Relations between States and International Organizations (Second part of the topic), UN Doc. A/CN.4/424, 24 April 1989, Draft Article 7. For a detailed discussion of the work of the ILC on this topic, see Johan G. Lammers, “Immunity of International Organizations: The Work of the International Law Commission” (2013) 10 *International Organisations Law Review* p. 280.