

# **PRIVILEGES AND IMMUNITIES GRANTED IN THE HEADQUARTERS AND HOST AGREEMENTS**

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**A Thesis Submitted in Partial Fulfillment of the  
Requirements for the LL.M. Degree of Faculty  
of Law, University of Khartoum**

**April ۲۰۰۶**

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## **Dedication**

**This Thesis is dedicated to the memory of my  
late mother, Amna Merghani Mohamed**

## **Abbreviations**

AAAID	Arab Authority for Agriculture Investment and Development
ASEAN	Association of South East Asian Nations
AU	African Union
BADEA	Arab Bank for Economic Development
CEN-SAD	Community of Sahel- Saharan States
COMESA	Common Market for Eastern and Southern Asia
ECCAS	Economic Community of Central African States
EC	European Community
ECOSOC	Economic and Social Council of the United Nations
EEC	European Economic Community
EU	European Union
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICSID Dispute	International Centre for Settlement of Investment
IDA	International Development Association
IFC	International Finance Corporation
IGOs	International Governmental Organization
ILO	International Labor Organization

IMF	International Monetary Fund
IOC	International Olympic Committee
ITU	International Telecommunication Union
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
OCHR	United Nations Office for Coordination for Humanitarian Affairs
OIC	Organization of the Islamic Conference
ONHCR Rights	United Nations High Commissioner of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO Organization	United Nations Educational, Scientific and Cultural Organization
UNFEPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WFP	World Food Programme
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization



## **Acknowledgment**

I would like to express my sincere appreciation and gratitude to my supervisor, Professor Akolda Man Tier, the head department of International and Comparative Law, Faculty of Law, University of Khartoum, for his constructive comments and support.

My sincere thanks go to other venerable staff members, who have illuminated the road for seekers of knowledge. Grateful acknowledgment is also made for the learned advocate Ali Mohamed Osman Yassin, the former Minister of Justice in providing me with some references, and to Sayed Abdel Hafiz Abdel Aziz, head of translation section at Ministry of Justice for his comments in language.

I am indebted to the Ministry of Justice for offering me scholarship to pursue my postgraduate studies. I would like to express my sincere gratitude to my colleagues in LL.M programme.

I owe my deepest gratitude to my father, brothers, sister and friends for their moral support and encouragement. Lastly, thanks are due to the staff of the libraries of the Faculty of Law, University of Khartoum and Ministry of Justice.

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# Preface

At the advent of the twentieth century, and in particular in the period between the two World Wars I and II, particularly commencing from 1940, the overwhelming trend in defining international law, is the call for taking into consideration developments to which the international community has been subjected. These pertain to the increase in the number of international organizations; for such organizations have become an original partners in the international community, which operate with states, for the achievement of peace, welfare, security, development and otherwise. This led to recognition of their legal status and the recognition of their enjoyment of such immunities as may be necessary for exercising their functions and protection of their officials and representatives. Besides, the international organization concludes quarters agreements with states in whose territories the headquarter or any of the offices may lie. Such agreements specify the relation between the organization and the authorities in that host state.

This dissertation is an attempt to examine the privileges and immunities granted by headquarters and host agreements. It discusses the principles involved in the light of their historical developments. It is divided into five Chapters. Chapter One is about the evolution of international organizations. It is intended to serve as a preliminary clarification for the subject of this dissertation. Chapter Two is about the status of international organizations. Chapter Three attempts to identify the privileges

and immunities granted to international organizations as the main consequences of the legal personality. Chapter Four examines the headquarters agreements in Sudan. Finally Chapter Five contains the conclusions of the dissertation, and tenders some recommendations.



## **Abstract**

The thesis discusses the privileges and immunities granted to organizations under international conventions, in particular headquarters agreements concluded between the international organizations and the state on the territory of which the quarters of the organization are situated. It endeavours to trace the historical development of the establishment of the international organizations, the manner of their establishment, the controversy about defining the international organization, the types and the various divisions.

An International organization is one of the persons of public international law, as a result of the changing circumstances in the international relations due to the appearance of international organizations, and to the jurisprudential promotion in respect of persons of international law, which has discarded the concept of the persons of international law being restricted to states alone. The thesis discusses the legal status of international organizations, the recognition of the legal status, and respect of privileges and immunities, which are required by functions of international organizations. The immunities of international officials and the immunity of funds of the international organizations, the quarters, documents and business are provided in the instruments establishing the organization.

Likewise the thesis discusses enjoyment, by the international organizations, of legal status in domestic laws and its capacity to acquire estates and conclude contracts. The instruments of the international organizations provide for this

capacity, and particularly in such agreements, the organization may conclude with states, in whose territory the quarters are situated. Such capacity has been referred to by the International Court of Justice in its Advisory Opinion concerning the compensation for damages which the United Nations had sustained in Palestine. The capacity of the international organization to exercise the rights recognized in the domestic law, particularly in the states parties to the organization result from this status.

The thesis considers in detail the subject of the immunity necessary for exercising function of the international organization and protection of the officials and representatives, as one of the effects of the recognition of the legal status for an international organization. It dealt with general conventions and protocols in this respect such as the Privileges and Immunities of the United Nations 1946 (The General Convention), and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

The quarters agreements signed by the Sudan with regional organizations grant privileges and immunities to the organization and its employees. Also there are privileges and immunities pertaining to country offices of the UN, the specialized agencies and other organizations, and the legal status of national and foreign NGOs, operating in the Sudan, and which have signed agreements of quarters with the governments.

The thesis concludes that the agreements concerning international organizations in the Sudan lack many safeguards, since they are not provided for in some of these agreements. The

principles concerning granting immunities have to be included therein.

The thesis recommends the establishment of a mechanism at the national level to be responsible for revision, establishment, co-ordination and evaluation of the work of international organizations resident in the Sudan, and to submit periodical reports to competent bodies, and that the state has to use its right to waive such immunities, whenever it deems that such immunities impede the progress, in order to guarantee the sovereignty of the state and its territory.

## خلاصة البحث

'يعني هذا البحث بمناقشة الإمتيازات والحصانات التي تمنح بموجب الاتفاقيات الدولية للمنظمات وعلي وجه الخصوص اتفاقيات المقر المبرمة بين المنظمة الدولية والدولة التي يقع في إقليمها مقر المنظمة. حيث يسعى للتعريف بالتطور التاريخي لنشأة المنظمات الدولية وكيفية إنشائها، والجدل حول تعريف المنظمة الدولية وأنواعها وتقسيماتها المختلفة.

تطرق هذا البحث إلي اعتبار المنظمة الدولية من أشخاص القانون الدولي العام نتيجة للظروف المتغيرة للعلاقات الدولية التي ترجع إلي ظهور المنظمات الدولية، وإلي التطور الفقهي بخصوص أشخاص القانون الدولي الذي عدل عن مفهوم اقتصار أشخاص القانون الدولي على الدول فحسب، حيث ناقش الوضع القانوني للمنظمات الدولية من حيث الاعتراف بالشخصية القانونية لها واحترام الحصانات والإمتيازات التي تقتضيها وظائف المنظمات الدولية وحصانات الموظفين الدوليين وحصانة أموال المنظمة الدولية ومقرها ووثائقها وأعمالها الأمر الذي أصبح معترفاً به حيث ينص عليه في الأدوات المنشئة للمنظمة.

كذلك ناقش البحث تمتع المنظمة الدولية بالشخصية القانونية في القوانين الداخلية وأهليتها في تملك العقارات وإبرام العقود، حيث درجت موثيق المنظمات الدولية على النص علي هذه الأهلية خصوصاً في الاتفاقيات التي تبرمها المنظمة مع الدول التي يقع مقرها في إقليمها. ولقد أشارت إلي هذه الأهلية محكمة العدل الدولية في رأيها الاستشاري الخاص بتعويض الأضرار التي لحقت بمنظمة الأمم المتحدة في فلسطين. ويترتب علي هذه الشخصية أهلية المنظمة الدولية لمباشرة الحقوق المعترف بها في القانون الداخلي خصوصاً في الدول الأعضاء في المنظمة.

تناول البحث بإسهاب موضوع الحصانة اللازمة لمباشرة وظائف المنظمة الدولية وحماية موظفيها وممثليها كأثر من آثار الاعتراف للمنظمة الدولية

بالشخصية القانونية، وتناول الاتفاقات والبروتوكولات العامة في هذا الصدد مثل اتفاقية حصانات وإمميزات الأمم المتحدة واتفاقية حصانات وإمميزات الوكالات المتخصصة.

وفيما يتعلق بالسودان تم استعراض نماذج لاتفاقيات المقر التي وقعها السودان مع المنظمات الإقليمية والإمميزات والحصانات التي منحت بموجب تلك الاتفاقات للمنظمة وللعاملين بها كذلك الإمميزات والحصانات الخاصة بالمكاتب القطرية لمنظمة الأمم المتحدة والوكالات المتخصصة والمنظمات الأخرى، والوضع القانوني للمنظمات التطوعية الوطنية والأجنبية العاملة بالسودان وتلك التي وقعت اتفاقات مقر مع الحكومة.

خلص البحث إلى أن الاتفاقيات الخاصة بالمنظمات الدولية المقيمة بالسودان تنقصها الكثير من الضوابط تتمثل في أن هناك أحكاما لم ينص عليها في بعض تلك الاتفاقيات مثل كيفية الإنهاء والتعديل، وأن المبادئ الخاصة بمنح الحصانات يجب أن تضمن فيها. كذلك يجب على المنظمات التي لم تكتسب أصفة الدولية أن تعمل وفق ما يقتضيه القانون في هذا الصدد.

ووصي البحث بإنشاء آلية علي المستوى القومي تكون مسؤولة عن مراجعة عمل المنظمات الدولية المقيمة في السودان ورصده وتنسيقه. و عن تقويم نشاطها ورفع تقارير دورية لجهات الاختصاص بذلك، وأن تستعمل الدولة حقها في إسقاط تلك الحصانات متى ما رأت أن هذه الحصانات تعوق سير العدالة وذلك لضمان كفاءة سيادة الدولة علي إقليمها.

# CHAPTER ONE

## EVOLUTION OF INTERNATIONAL ORGANIZATIONS

### 1. INTRODUCTION

International organizations have developed rapidly in recent years. In order to see the present position, it is necessary to glance back briefly to see the historical background of the creation of the international organizations and the first forms of it. This chapter will address the early origins and the present positions of the international organizations. Taking into account the definitional aspects of the term and the difference between international and supranational organizations.

The term “international organization” is usually used to describe an organization set up by agreement between two or more states<sup>1</sup>. An international organization can also be defined as “a body that promotes voluntary cooperation and coordination between or among its members.”<sup>2</sup> International organizations exist in a variety of forms, and the term is capable of reflecting different situations. Commentators are in general agreement that for an entity to qualify as an international organization, it must have the following characteristics<sup>3</sup>: First, its membership must be composed of states and/or other international organizations. Secondly, it must be established by treaty. Thirdly, it must have an autonomous will distinct from that of its members and be vested with legal personality. Finally, it must be capable of adopting norms addressed to its members. The Yearbook of International Organizations, which aims at identifying and listing all inter-governmental organizations, defines such bodies as being based on a formal instrument of

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<sup>1</sup> Peter Malanczuk, Akehurst, Modern Introduction to International Law, 92(1999).

<sup>2</sup> <http://www.carleton.ca/ces/EULearning>, as accessed 10/10.

<sup>3</sup> Philippe Sands and Pierre Klein, Bowett's Law of International Institutions, 16(2001).

agreement between the governments of nation states, including three or more nation states as parties to the agreement, and possessing a permanent secretariat performing ongoing tasks<sup>ξ</sup>. The view of the Economic and Social Council of the United Nations concerning intergovernmental organizations is implicit in its Resolution 288 (X) of 27 February 1950 which reads: "Any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the purpose of these arrangements".

## 2. HISTORICAL DEVELOPMENT

In the past, states were the main actors in the international plane. Writing in 1912, in his famous treatise on international law, L. Oppenheim still found that: "Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law"<sup>ο</sup>. Until the period between the two world wars, writers found no difficulty in defining public international law, in one formulation or another, as the law that governs the relations between states amongst each other<sup>τ</sup>. The international community is not confined to the relations between states. New actors have emerged, a response to the evident need arising from international intercourse and in the sense of the development of relations between different people. The term international community is used to refer to the interaction of all important actors on the world stage. Non-state actors appeared such as international organizations, otherwise known as intergovernmental organizations (IGOs). These IGOs are formed between two or more state governments. IGOs only allow states as

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<sup>ξ</sup> [www.un.org/as](http://www.un.org/as) accessed in 2010.

<sup>ο</sup> L. Oppenheim, *International Law. A Treatise*, 2<sup>nd</sup> edn 1912, Vol. 1 (Peace) 19, as cited in Peter Malanczuk supra note 1 at 91.

<sup>τ</sup> *Id.*, at 1.

members. The non-state actors include to some extent individual personalities such as political leaders and other notables who have an impact on international life, and who may be subject of rights conferred and duties imposed by international law.

International law has matured into a complete legal system covering all aspects of relations among states, and also, more recently, aspects of relations between states and their federated units, between states and persons, between persons and several states, between states and multinational corporations, and between international organizations and their states members<sup>y</sup>. Nor is that all. A new international law is developing which governs relations between an international organization and its employees, and between international organizations themselves<sup>^</sup>.

#### **(i) EARLY ORIGIONS:**

The institutions of the consul, an official of the state whose essential task was to watch over the interests of the citizens of his state engaged in commerce in a foreign port, was known to the Greeks and the Romans<sup>^</sup>. But the consul was not representing his state in specific negotiation, for this purpose ambassador was used, and the situation continued until replaced by the institution of a permanent diplomatic ambassador. Diplomatic representation became more widespread as the system expanded and political and economic relationship multiplied<sup>^</sup>. These developments in international intercourse show that diplomatic relations and bilateral negotiation were inadequate when a problem concerns more than two states. The need of an international

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<sup>y</sup> Thomas M. Franck, Fairness in International law and Institutions, ° (1997).

<sup>^</sup> *Id.*, at °.

<sup>^</sup> Philippe Sands and Pierre Klein, supra note<sup>y</sup> at 1.

<sup>^</sup> Malcom N. Shaw, International Law, 442 (1996).



conference representing the interests of all states emerged. The first major instance of this occurred with the Peace of Westphalia in 1648, which ended the thirty-year old religious conflict of central Europe and formally established the modern secular nation–state arrangement of European politics<sup>11</sup>.

The French wars of Louis XIV were similarly brought to an end by an international agreement of interested powers, and a century later the Napoleonic wars were terminated by the Congress of Vienna in 1815.<sup>12</sup> The Congress of Vienna of 1815 had seen the initiation of the “concert system” which, for the purpose of any study of international organization, constituted a significant development.<sup>13</sup> Until the outbreak of the First World War, world affairs were to a large extent influenced by the periodic conferences that were held in Europe. The Paris Conference of 1856 and the Berlin gathering of 1878 dealt with the problems of Balkans, while the 1884–5 Berlin conferences imposed some order upon the scramble for Africa that had begun to develop<sup>14</sup>. The Hague Conferences of 1899 and 1907 constituted an effort to secure, on a multilateral basis, agreement on different aspects of the law relating to the conduct of warfare on land and on sea, and the duties of neutral states<sup>15</sup>. The conclusion of a conference would normally be accompanied by a formal treaty or convention, or, where no such binding agreement was desired or obtainable, by a memorandum or minutes of the conference<sup>16</sup>. The practices show that to convene an ad hoc conference for each problem is not practical for many reasons, essentially because meetings took place as occasion required, Another

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<sup>11</sup> Id., at 442.

<sup>12</sup> Malcom N. Shaw, supra note 9, at 442.

<sup>13</sup> D.W.Bowett, the Law of International Institutions, 2 (1982).

<sup>14</sup> Malcom N. Shaw, supra note 9, at 443.

<sup>15</sup> Philippe Sands and Pierre Klein, supra note 3, at 3.

<sup>16</sup> D. W. Bowett, supra note 12, at 3.

thing was the conferences were not debating forums in the same way as the assemblies of the League of Nations and the United Nations. The attempt to secure regular meeting was, however, a significant recognition that “pace” of international relations demanded some institution for regular multilateral negotiations<sup>14</sup>.

## (ii) THE NINETEENTH CENTURY

### (a) The Private International Unions:

The nineteenth century witnessed a considerable growth of private international unions which are the so-called international non-governmental associations; their interest had international character. The World Anti-Slavery Convention of 1840 was perhaps the first of these “private” conferences, many of which led to the establishment of some permanent machinery of association. Between 1840 and the beginning of the First World War something like 400 permanent associations or unions came into existence<sup>15</sup>. Examples of these Unions, the International Law Association (founded in 1873), the International Literary and Artistic Association (1878), the International Chamber of Commerce (1899) and the International Committee of the Red Cross (founded in 1863). The last mentioned organization plays an important role in supervising the application of four Geneva Conventions on the laws of war.

These non-governmental organizations (NGOs), also called “civil society” organizations, are groups formed by individuals working across national borders to affect public policy. Many demonstrate by their membership the artificiality of a rigid distinction between “public’ and

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<sup>14</sup> Philippe Sands and Pierre Klein, supra note 3, at 3.

<sup>15</sup> Id., at 4.

“private” unions based upon functions; membership sometimes comprise states, municipal authorities, national groups and societies and private individuals<sup>19</sup>. Recent progress in technology, coupled with globalization’s emphasis on international cooperation, has allowed the effectiveness of these organizations to grow drastically. NGOs have had significant impact on environmental affairs, such as Green peace’s advocacy work on climate change, Amnesty International’s advocacy on human rights, and the International Campaign to Ban Landmines.

International NGOs have proliferated considerably in the past two decades and are engaged in a broad variety of different areas, ranging from politics, the legal and judicial field, the social and economic domain, human rights and humanitarian relief, education, women, to the environment and sport.<sup>20</sup> The work done by these organizations was, and remains of considerable value in influencing governmental activities and stimulating world action, and led to the establishment of a public union. In this sense the International Congress of Weights, Measures and Moneys in 1867 was the forerunner of the Metric Union, the International Association of the Legal Protection of Labour that of ILO, and the International Literary and Artistic Association that of International Bureau of Literary and Artistic Property<sup>21</sup>, renamed since 1974 as the World Intellectual Property Organization (WIPO).

#### (b) THE PUBLIC INTERNATIONAL UNIONS:

Similar developments happened between governments themselves in the administrative rather than the political field. Public international unions appeared. They were set up by multilateral treaties.

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<sup>19</sup> Philippe Sands and Pierre Klein, supra note 3, at 2.

<sup>20</sup> Peter Malanczuk, supra note 1, at 97

<sup>21</sup> Philippe Sands and Pierre Klein, supra note 3, at 1.

There is no general definition accepted for this type. In general, however, they were permanent associations of governments or administrations, (i.e. postal or railway administration), based upon treaty of multilateral rather than a bilateral type and with some definite criterion of purpose.<sup>12</sup> Commerce required the internationalization of rivers and the establishment of international rivers commissions, as in the case of Rhine (1831/68), the Scheldt (1839) and the Danube (1866/68)<sup>13</sup>. These unions were restricted to dealing with specific areas and not comprehensive, covering transportation, communication like the International Telegraph Union established in 1865 as the forerunner of the International Telecommunication Union and the Universal Postal Union in 1874, both of which are now United Nations specialized agencies. In 1903 the International Office of Public Health was established in Paris, with a much wider competence, and can be regarded as the predecessor of the World Health Organization.<sup>14</sup> In economic cooperation the International Copyright Union (1886), and the International Institute of Agriculture (1905) were established. The outstanding problem was in the coordination of the activities of these unions.

### **(iii) THE TWENTIETH CENTURY:**

#### **(a) THE LEAGUE OF NATIONS:**

In the twentieth century global comprehensive organizations appeared. The League of Nations was created after the First World War at the Paris Conference in 1919 under the Treaty of Versailles. It followed the call in the last of President Wilson's Fourteen Points for the establishment of "a general association of nations... under specific

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<sup>12</sup> D. W. Bowett, supra note 12, at 6.

<sup>13</sup> Peter Malanczuk supra note 1, at 22.

<sup>14</sup> D.W.Bowett, supra note 12 at 8.

covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike”<sup>10</sup>.

The League’s goals included disarmament; preventing war through collective security; settling disputes between countries through negotiation and diplomacy; and improving global welfare. The diplomatic philosophy behind the League represented a fundamental shift in thought from the preceding hundred years. The old philosophy, growing out of the Congress of Vienna (1814), saw Europe as a shifting map of alliances among nation-states, creating equilibrium of power maintained by strong armies and secret agreements. Under the new philosophy, the League was a government of governments, with the role of settling disputes between individual nations in an open and legalist forum<sup>11</sup>. The main organs of the League were the General Assembly, the Council and the Secretariat. Article 21 of the Covenant of the League offered coordination between public unions through the direction of the League. This Article provided that “There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent”<sup>12</sup>. In the event, therefore, the League never became the effective coordinator of the activities of these many administrative unions<sup>13</sup>. The League system failed for a variety of institutional and political reasons, and ceased its activities after failing to prevent the Second World War and it was replaced by the United Nations.

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<sup>10</sup> Id., at 11.

<sup>11</sup> [http://en.wikipedia.org/wiki/League\\_of\\_Nations](http://en.wikipedia.org/wiki/League_of_Nations), as accessed in 10/11/10.

<sup>12</sup> Article 21 of the Covenant of the League of Nations.

<sup>13</sup> D. W. Bowett, *supra* note 1, at 11.

(b) THE UNITED NATIONS:

The United Nations arose as an attempt to remedy the defects of the League system; it is the most important global organization, with universal membership of states. Today, nearly every nation in the world belongs to UN, and membership totals 191 countries. It grew out of series of war-time declarations and conferences which ended with Sanfrancisco Conferences of 1945, which finally adopted the UN Charter. The Charter of the United Nations is not only the multilateral treaty which created the organization and outlined the rights and obligations of those states signing it; it is also the constitution of the UN, laying down its functions and prescribing its limitations<sup>79</sup>.

In the wake of the United Nations, a number of other international organizations were established, all raising questions of their status within the community of nation states<sup>80</sup>. No one ignores their role in different fields. The UN has six principal organs, these being the Security Council, General Assembly, Economic and Social Council, Trusteeship Council, Secretariat and International Court of Justice.

(c) THE SPECIALIZED AGENCIES:

The failure of the League of Nations, contrasted with the relative success of organizations such as the International Labor Organization or the International Office of Public Health, emphasized the need to recreate such specialized organizations as entities legally distinct from, but at the same time closely tied to, the newly-born universal "political" organization<sup>81</sup>. The main idea was to ensure the existence of these organizations even if the political organization disappears.

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<sup>79</sup> Malcom N. Shaw, *supra* note 9, at 449.

<sup>80</sup> Timothy Hillier, *Principles of Public International Law*, 4 (1999).

<sup>81</sup> Philippe Sands and Pierre Klein, *supra* note 7, at 77.

This is the term used to define those organizations established by inter-governmental agreement and having wide international responsibilities in economic, social, cultural and other fields that have been brought into relationship with the United Nations<sup>72</sup>. The UN hosts a large number of so-called Specialized Agencies within the UN family. There are about 16 independent organizations, including the financial institutions of the World Bank group, and the others include the International Civil Aviation Organization (ICAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other organizations. These specialized agencies are autonomous organizations joined to the UN through special agreements. Some of these agencies are the continuation of pre-existing organizations under the same name as in the case of ILO or UPU, for instance, or under a different designation, as in the case of the International Telecommunications Union, which succeeded in 1947 the International Telegraphic Union.

The specialized agencies relationships with the UN are established by agreements concluded under Articles 67 and 63. Article 67 reads as follows: "The various specialized agencies, established by intergovernmental 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 the provision of article 63". According to the Charter these agreements are concluded between the Economic and Social Council of the United Nations (ECOSOC) and the specialized agencies. Most of the specialized agencies have no power to take decisions binding on their members, but

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<sup>72</sup> Malcom N. Shaw, supra note 9, at 709.

their constituent treaties often provide for interesting means of putting pressure on member states to act in a particular way.<sup>77</sup>

(d) ECONOMIC AND FINANCIAL ORGANIZATION:

There are a number of international economic and financial organizations with independent character. These organizations are considered specialized agencies of the UN, and sometimes called related organizations. They are the International Bank for Reconstruction and Development (IBRD, the World Bank) established in 1944 under the Bretton Woods Conference with the International Monetary Fund (IMF). The World Bank expanded from a single institution to an associated group of coordinated development institutions. It becomes a Group, encompassing five closely associated development institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Cooperation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The Bank was originally concerned with reconstruction after the Second World War and is nowadays primarily occupied with granting loans to developing countries to finance particular projects to improve the infrastructure and economic development in the south in general.<sup>78</sup> Now we have the new World Trade Organization (WTO) which came into being in 1995, successor to the General Agreement on Tariffs and Trade (GATT) which was established in the wake of the Second World War. The WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably.

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<sup>77</sup> Peter Malanczuk, *supra* note 1, at 787.

<sup>78</sup> *Id.*; at 787.



#### (e) AUTONOMOUS ORGANIZATIONS:

Besides those institutions mentioned above, there is another category of global organizations which are not fully part of the UN system. These organizations are created within the framework of a treaty intended to establish substantive rules regulating conduct within specialized area. The establishment of these organizations can scarcely be said to have resulted from systematic approach to substantive or institutional development<sup>70</sup>. Rather these organizations are products of the somewhat ad hoc character of international law-making<sup>71</sup>.

#### (iv) REGIONAL ORGANIZATIONS:

Regional institutions are the means of connecting neighboring nations together according to the same languages, race, common interest and shared values. Regional organizations are a kind of unions. The states involved consider it as a means to consolidate and coordinate their relations and cooperation in different fields, defend their interests and political and regional status against any foreign aggression. According to the role played by the regional organizations to maintain peace and security, the United Nations Charter in Chapter VIII states that nothing in this Charter precludes the existence of regional arrangement or agencies. Moreover, there are political regional organizations, some of which are supposed to interact with the United Nations in one formulation or another, as envisaged in Article 92 of the Charter<sup>72</sup>. Besides these kinds of organizations there are many organizations of limited competence, so-called “sub-regional”

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<sup>70</sup> Philippe Sands and Pierre Klein, supra note 7, at 110.

<sup>71</sup> Id.

<sup>72</sup> Id, at 94.

organizations working in the different fields, in economic, defence and security.

(a) EUROPE:

The European Union (EU) is a family of democratic European countries, committed to working together for peace and prosperity. The historical roots lie in the Second World War. The EU is, in fact, unique. Its Member States have set up common institutions to which they delegate some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level.<sup>7^</sup> There are five EU institutions, each playing specific roles which are: European Parliament, elected by peoples of member states; Council of European Union, representing the governments of the Member States and it is the main decision –making body of the EU; European Commission; Court of Justice; and Court of Auditors. Besides these institutions there are a number of agencies and other bodies which complete the system.

(b) AFRICA:

In Africa the Organization of African Unity (OAU) was established in 1963 in Ethiopia. In 1999, the Heads of the States and Governments of the Organization of African Unity issued a Declaration (the Sirte Declaration) calling for the establishment of an African Union (AU). The main objectives of the AU were inter alia, to promote unity and solidarity among African states and to promote international cooperation within the framework of the United Nations. There are seven organs of the AU, which are: The Assembly, the supreme organ of the Union, composed of Heads of States and Governments or their duly accredited

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<sup>7^</sup> <http://www.europa.eu/int/abc> as accessed in 11/07/09.

representatives; the Executive Council; the Commission; the Permanent Representative Committee, composed of permanent representatives of member states accredited to the Union; Peace and Security Council; Pan African Parliament, the Economic, Social and Cultural Council and the Court of Justice. There are a number of Specialized Technical Committees which address sectoral issues, and there are also financial institutions. Within the African region there are a variety of regional economic communities particularly the Community of Sahel–Saharan States(CEN\_SAD) established in 1998, Economic Community of Central African States(ECCAS) established in 1983, and Common Market For Eastern and Southern Africa(COMESA) founded in 1993.

(c)THE ARAB WORLD:

The idea of setting up an Arab organization to gather the Arab countries together was elaborated during the Second World War, due to Arab, regional and international changes. The League of Arab States (also known as the Arab League) is a regional, political organization of comprehensive aims, created in 1945. The supreme organ of it is the Council of the League, and the other organs are the Permanent Secretariat and the Secretary –General.

Following the pattern of the UN system, the League has also set up a number of specialized agencies, among which are the Arab Educational, Cultural, Scientific Organization (1964), the Arab Labor Organization (1965), the Arab Organization for Agriculture Development (1970), the Arab Monetary Fund (1975), the Arab Atomic Energy Agency (1982) and the Arab Industrial Development and Mining Organization (1990). The functions of these various agencies are widely similar, at regional level to those of their equivalents in the UN system.

(d) The AMERICAN CONTINENT:

The Organization of American States (OAS) emerged after World War II and built upon the work already done by the Pan- American Union and the various inter- American conferences since 1890.<sup>39</sup> It consists of two basic treaties: the 1947 Inter- American Treaty of Reciprocal Assistance (the Rio Treaty), which is a collective self-defence system, and the 1948 Pact of Bogotá, which is the original Charter of the OAS and which were amended in 1967 by the Buenos Aires Protocol<sup>40</sup>. The Charter of the OAS states the organs in Chapter VIII. These organs are the General Assembly, the Secretary General, Councils of the Organization, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, Specialized Conferences and Specialized Organizations. Besides these organs there are other agencies and entities.

(e) ASIA:

Asia is characterized by a singular lack of regional organizations as compared with Europe, the Americas and Africa.<sup>41</sup> The most significant regional organizations concerned with political and economic matters are the Association of South East Asian Nations (ASEAN) which was formed in 1967 in Bangkok. The highest decision-making organ of ASEAN is the Meeting of the ASEAN Heads of States and Governments. The structure and machinery as stated in the Bangkok declaration are the Annual Meeting of Foreign Ministers, the Standing Committee, Ad-hoc Committee of Specialist and the National Secretariat. There are major political accords of ASEAN. Kofi Annan the

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<sup>39</sup> Malcom N. Shaw, *supra* note 9, at 768.

<sup>40</sup> *Id.*, at 768.

<sup>41</sup> Philippe Sands and Pierre Klein, *supra* note 7, at 277.

Secretary-General of the United Nations in his address to the Indonesian Council of World Affairs in Jakarta 16 February 2000 stated that “Today, ASEAN is not only a well-functioning, indispensable reality in the region. It is a real force to be reckoned with far beyond the region. It is also a trusted partner of the United Nations in the field of development...”<sup>42</sup>

## **3. INTERGOVERNMENTAL AND SUPRANATIONAL ORGANIZATIONS**

There are many types of international organizations, but one way of categorizing is to distinguish between intergovernmental organizations, and supranational organizations. Most international organizations are of the traditional types, meaning that they are in essence based on inter-governmental cooperation of states which retain control of the decision making and finance of organization<sup>43</sup>. Decisions and agreements reached in this type of organization however are enforceable, and the member remains independent. The crucial aspect is of an IGO is that the members do not surrender any power or sovereignty to it.

A supranational organization has the following characteristics:

- (1) It has power that its member states do not have because they surrender those powers to it,
- (2) It may enact rules that preempt the laws and regulations of its member states;

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<sup>42</sup> <http://www.aseansec.org/>, as accessed in 11.11.00

<sup>43</sup> Peter Malanczuk *supra* note 1, at 90.

(3) It can grant rights and privileges to the nationals of its member states, which those nationals may directly invoke<sup>44</sup>. A supranational organization is different because member states do surrender power in specific areas to the organization. Decisions taken by the supranational organization must be obeyed by the member states. The only existing international organization which currently meets all of these criteria in a sufficient degree is the European Community, or in other words, since the treaty of Maastricht; the European Union which is often described as an entity sui generis in the contemporary pattern of the international organization of states<sup>45</sup>. European Community law claims absolute priority over any conflicting national law of the member states.<sup>46</sup>

## 4. CONCLUSIONS

International community affairs is not confined to one state or group of states according to their interests as it has been in the past. Institution emerged representing all states small or big to take care of the common concerns of the international community according to international legal order.

The evolution and proliferation of the international organizations since the First World War (whether public or private, global or regional) till nowadays show their crucial role in different fields. States establish and develop organizations to achieve objectives that they can not achieve on their own, so the role of IGOs depends on interests of their member states. The primary utility of IGOs in providing states with a forum for discussion helps to facilitate cooperation, and the multilateral nature of IGOs lends an air of impartiality that enhances their

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<sup>44</sup> <http://www.law.berkeley>, as accessed 10/1/00.

<sup>45</sup> Peter Malanczuk supra note 1, at 96.

<sup>46</sup> Id., at 96.

effectiveness. The Secretary General of the United Nations, Kofi Annan in his address to the Indonesian Council of World Affairs in Jakarta 16 February 2000 stated that: “The United Nations once dealt only with Government, by now, we know that peace and prosperity cannot be achieved without partnerships involving Governments, international organizations, the business community and civil society. In today’s world, we depend on each other.”<sup>εY</sup>

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<sup>εY</sup> <http://www.aseansec.org/>, as accessed in 10/11/00.






## CHAPTER TWO

### PERSONALITY OF THE INTERNATIONAL ORGANIZATIONS

#### 1. INTRODUCTION:

States are the original and major subjects of international law. Their personality derives from the very nature and structure of the international system. Developments during the twentieth century, notably the formation of the League of Nations 1919 and the United Nations in 1945, have meant that international legal personality extends beyond individual sovereign states<sup>88</sup>. In this chapter we consider one of the common institutional problems, the legal personality of the international organization, and its consequences.

#### 2. PERSONALITY AND RECOGNITIONS:

The problem of including new actors in international legal system is reflected in the very concept of legal personality, the central issues of which have been primarily related to the capacity to bring claims arising from violation of international law, to conclude valid international agreement, and to enjoy immunities from national jurisdiction<sup>89</sup>. International organization created by states, have legal personality with respect to international rights and obligations. It is an entity distinct from its members. The recognition and acceptance of international legal personality is due to an increasing role that the intergovernmental organizations play in international affairs and relations. The criteria of

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<sup>88</sup> Timothy Hiller, Principles of Public International Law, 88(1999).

<sup>89</sup> Ian Brownlie, Principles of Public International Law, 678(1983).

legal personality in organization may be summarized as follows: First, permanent associations of states with lawful object equipped with organ. Secondly, a distinction, in terms of legal powers and purposes, between the organization and its member states. Finally, the existence of legal powers exercisable on international plane and not solely within the national systems of one or more states.<sup>60</sup> In the following we consider the principle of legal personality in international and domestic laws.

### **(i) INTERNATIONAL LAW:**

The attribution of international legal personality to the international organization is included in the constituent instruments and in the bilateral instrument aiming at governing the status of the organization in the host country. The constituent instrument may provide express statement that the organization is a separate international person. For example, Article 8 (1) of the Statute of the International Criminal Court 1998 provides that: “the Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purpose”. The attribution of international legal personality simply means that the entity upon which it is conferred is a subject of international law and that it is capable of possessing international rights and duties.<sup>61</sup> The vast majority of treaties establishing international organizations concluded after the Second World War likewise limits the recognition of legal personality to the domestic sphere of member states.<sup>62</sup> According to the UN Charter, there is no express provision giving the organization personality under international law, but Article 42 empowers the United Nations to make certain types of treaties with Members’ states, a power which could not exist if the United

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<sup>60</sup> Id., at 779.

<sup>61</sup> Philippe Sands and Pierre Klein, Bowetts’s Law of International Institutions at 473.

<sup>62</sup> Id., at 471.

Nations had no international personality. The origin of legal personality in international law can be found in Article 104 of the United Nations Charter which provides that: “the organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of functions and the fulfillment of its purposes”. This means that the UN enjoys legal personality under the municipal laws of its member states. The legal personality of the United Nations in international law and the national laws of the UN members is also stated in Article 1 of the Convention on the Privileges and Immunities of the United Nations 1946. This Article provides that: “the UN shall possess juridical personality, it shall have the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings”. States parties to this Convention commonly give effect to the legal personality of the UN in their national legal systems through legislation. According to Article 109 (4) of the 2000 Interim Constitution of the Sudan the treaty after ratification becomes part of the national laws without need to enact a new law.

An international organization may be deemed to possess a range of implied powers. Such powers are those deemed necessary for fulfillment of its functions. This can be found in the opinion of the International Court of Justice, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons, in view of their health and environmental effects which would be tantamount to disregarding the principle of specialty; for such competence could not be deemed necessary implication of the constitution of the organization in the light of the purposes assigned to it by its members states<sup>67</sup>. Also in the Advisory Opinion of the I.C.J on the Reparation for Injuries Suffered in the

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<sup>67</sup> Timothy Hiller, supra note 1, at 91.

Services of the United Nations Case, “following the assassination of count Bernadotte, a UN official, in Jerusalem in 1948, the General Assembly requested the ICJ to give an Advisory Opinion on whether the United Nations had as an organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or the persons entitled through him? The Court held unanimously, in respect of (a) that the UN had such capacity vis a vis members of the organization and non members; and similarly by 11:4 in respect of question (b).<sup>84</sup> The ICJ had also declared that: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community ... the Court has come to the conclusion that the United Nations is an international person. That is not the same thing as saying that it is a state, which certainly is not, or that its legal personality and rights and duties are the same as those of state... what it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims”<sup>85</sup>. The attribution of international personality to an organization endows it with separate identity, distinct from its constituent elements; it means that the international organization was a subject of international law and capable of having international rights and duties and of enforcing them by bringing international claims. The precise scope of those rights and duties will vary according to what may reasonably be seen as necessary, in view of the purposes and functions

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<sup>84</sup> Martin Dixon and Robert McCorquodale, Cases and Materials On International Law, 146(2000).

<sup>85</sup> Timothy Hiller, supra note 1, at 10.

of the organization in question, to enable the latter to fulfill its task<sup>o1</sup>. This means that personality refers to functions and powers of the organization which are exercised on international plane.

## **(ii) NATIONAL LAW:**

The vast majority of constituent instruments proclaim the power of international organizations to act as autonomous legal persons in national legal orders<sup>o2</sup>. The national legal personality means to give effect to the international organization in the domestic legal order. Article 133 of the OAS Charter states that: “The Organization of American States shall enjoy in the territory of each member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purpose”. This limitation can be found in conventions or protocols on privileges and immunities, and headquarter agreements. Instrument providing for an organization’s personality in domestic sphere usually specify that the organization has the capacity to conclude contract, acquire and dispose of movable and immovable property and to institute legal proceedings, these being viewed as essential to the proper functioning of any intergovernmental organization<sup>o3</sup>. In case that there is no provision of that kind in the instrument, the international organization enjoys an independent legal personality in domestic legal order, for the purpose of discharging its functions. The recognition of the organization’s legal personality is limited to the members in the organization. Non- members are under no obligation to give effect to a legal personality deriving from an international instrument to which they are not parties. However the legal personality of the international organization is recognized in national

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<sup>o1</sup> Philippe Sands and Pierre Klein, *supra* note 4 at 473.

<sup>o2</sup> *Id.*, at 477.

<sup>o3</sup> *Id.*, at 477.

courts of non- members states by the application of their conflict of laws rules, or by other principles such as “comity”<sup>9</sup>.

## **3. THE CONSEQUENCES OF ATTRIBUTION OF A SEPARATE LEGAL PERSONALITY:**

### **(I) UNDER THE INTERNATIONAL LAW:**

#### **(a) CAPACITY TO CONCLUDE TREATIES:**

The treaty making power can be determined by reference to the constitution or other rules of the organization. This power may be stated expressly or conferred by reasonable implication as a competence required enabling the organization to fulfill its objects. It must fall within the overall field of competences of the organization.

Article 6 of 1986 Vienna Convention on the Law of Treaties between States and International Organization makes a general recognition. This Article provides that: “The capacity of an international organization to conclude treaties are governed by the rules of that organization”. Article 3 of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies states that: “The specialized agencies shall possess juridical personality, they shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings”. In practice the UN Charter states this power in a number of provisions, for example, the relationship agreements between the UN and the specialized agencies under Article 57 and 63, agreements under Article 43 and the conventions concerning privileges and immunities referred to in Article 105(3). The organ vested with the treaty making-power is clearly a

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<sup>9</sup> Id, at 488.

matter of rules of the organization. For example, the conclusion of relationship agreements between the UN and the specialized agencies vested in the ECOSOC. The organization is bound by the agreement concluded by any of its organs even if the organ has exceeded its own power, as defined by the rules of the organizations. Article 46(2) of 1978 Vienna Convention provides that: “ An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance”. The United Nations, together with other organizations, has concluded headquarter agreements with states and agreements on cooperation with other organizations, although the constituent instrument contains no express authority for these types of agreement.<sup>11</sup> In practice, organizations readily assume a treaty –making power.

(b) OTHER POWERS:

As we mentioned above, the scope of legal capacities of the organization may vary from one organization to another according to the function of the organization, but the capacity to conclude treaties is recognized by many international organizations. The legal capacity may extend beyond that , for the fulfillment of the objects of the organization. The first, and most obvious example is the power to maintain an international force under a United Nations command utilizing a United Nations flag,<sup>12</sup> such as United Nations peace keeping and peace enforcement operations.

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<sup>11</sup> Ian Brownlie, supra note 2 at 182.

<sup>12</sup> Philippe Sands and Pierre Klein, supra note 4 at 180.



## **(ii) UNDER NATIONAL LAWS:**

### **(a) CONTRACTS:**

The instrument attributing legal personality to international organizations in domestic legal order, grants them the capacity to enter into a contract, to acquire and dispose of immovable property and to initiate legal proceedings. Others include, for instance, the capacity to issue official identity or travel documents, to run specific system of registration for vehicles, or to adopt rules aimed at governing activities taking place in the organization's headquarters district<sup>11</sup>.

### **(b) PRIVILEGES AND IMMUNITIES:**

The exercise of the functions attributed to the international organizations require the concession of privileges and immunities from states. There are some privileges and immunities attaching to the organization, such as immunity from jurisdiction, inviolability of premises and archives, currency and fiscal privileges, and freedom from communication. These will be considered in detail in the coming chapter 3.

## **(iii) LIABILITY AND RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS:**

For an international organization to fulfill its objectives, it must have the right to sue. The capacity to bring international claims when it is necessary to discharge its functions was recognized in the Advisory Opinion in the Reparation case. The right to institute proceedings before domestic courts is conferred to the organizations in the international and

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<sup>11</sup> Id., at 486.

national instruments. The principle of responsibility and liability is clearly recognized in the statement of the UN Secretary General: “The international responsibility of the United Nations for the activities of the United Nations forces is an attribution of its international legal personality and its capacity to bear international rights and obligations”.<sup>13</sup> The responsibility may emerge from a breach of the rules governing the activities of the organization, or to the domestic legal order or to international law.

(a) DOMESTIC LEGAL ORDER:

The international organizations must comply with the legislation in force in the countries on the territory of which they are carrying out their activities. Breaches of these legislations should entail the liability of the organization in accordance with the relevant domestic laws. In practical terms, liability may arise either under contracts concluded by international organizations, and to which a national law is applicable or in circumstances where tortuous acts are attributable to an organization irrespective of any contractual link<sup>14</sup>.

(b) INTERNATIONAL LAW:

The international organizations must comply with the international law. International organizations are responsible under international law for breaches of international norms binding upon them. The International Law Commission has stated that its draft Articles on state responsibility are without prejudice of “any question that may arise in regard to the responsibility under international law of an international organization, or

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<sup>13</sup> Id., at 14.

<sup>14</sup> Id., at 17.

of any state for the conduct of an international organization.”<sup>10</sup> We understand from this that the rules governing the responsibility of states may apply equally to the international organizations. As the UN Secretary-General put it, the international responsibility of the UN is: “ a reflection of the principle of state responsibility widely accepted to be applicable to international organizations, that damage caused in breach of an international obligation and which is attributable to the state or to the organization, entails the international responsibility of the state or to the organization, and its liability in compensation.”<sup>11</sup>

#### **4. CONCLUSIONS:**

International organizations are set up for specific purposes. For these reasons they have legal personality as a relative concept. The legal personality is confined to specific rights, duties and powers of the organization. Powers may vary from one organization to another. The United Nations can take military action in certain circumstances but the WHO cannot. The consequences of the attribution of legal personality to the international organizations are clearly stated in the terms of express and implied powers laid down in the constituent instruments. This attribution endows the organization with a separate identity, distinct from its constituent elements. Responsibility of the organizations for wrongful acts is a consequence of international personality.

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<sup>10</sup> Id., at 019.

<sup>11</sup> Id., at 020.

# **CHAPTER THREE**

## **PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS**

### **1. INTRODUCTION:**

One of the main consequences of the legal personality of the international organization is immunity. Its purpose is purely a functional one related to specific tasks of the organization and serves to secure its ability to perform them. The exercise of the functions attributed to the international organizations requires the concession of privileges and immunities from states. Privileges and immunities agreements of international organizations are concluded between all the parties of the international organization. These agreements state the rules which decide the legal status of the organization in the territory of each state party. In addition, they states the immunities granted to the officials of the organization. In this chapter we address the rationale of immunity, the differences between diplomatic immunities and immunities granted to international organizations, the law of international immunities and specific aspects of immunities.

### **2. THE RATIONALE OF INTERNATIONAL IMMUNITY:**

In order to function effectively, international organizations require a certain minimum of freedom and legal security for their assets, headquarters, and other establishments and for their personnel and representatives of member states accredited to the

organizations<sup>75</sup>. International immunity is necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members. International immunities are the legal device through which international action escapes national control. They are of course open to certain possible abuses, but the remedy of such abuses is the development of appropriate forms of international control<sup>76</sup>. In Mendaro v. World bank<sup>77</sup>, the US Court of Appeals held that the reason for the granting of immunities to international organizations was to enable them to pursue their functions more effectively and in particular to permit organizations to operate free from unilateral control by a member state over their activities within its territory<sup>78</sup>. This became a matter of a common form included in any constitution of international organization. In the report to the President on the results of the San Francisco Conference by the chairman of the United States delegation, the Secretary of State, aptly interprets the general spirit of these various constitutional provisions in the following terms<sup>79</sup>: "The United Nations being an organization of all of the member states is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has a seat. The problem also exists, however, in any country in which officials of the United Nations are called upon from time to time to perform official duties. The United Nations shares the interest of all members in seeing

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<sup>75</sup> Ian Brownlie, Public International Law, 702(2003).

<sup>76</sup> C. Wilfred Jenks, International Immunities, 18(1961).

<sup>77</sup> 92 ILR, pp. 92-97 (1983), as cited in Malcolm N. Shaw QC, International Law, 1207(2004).

<sup>78</sup> Malcolm N. Shaw QC, International Law, 1207(2004).

<sup>79</sup> C. Wilfred Jenks, supra note 7, at 18.

that no state hampers the work of the organization through the imposition of any necessary local burdens”.

## **3. DIPLOMATIC IMMUNITY AND INTERNATIONAL IMMUNITY:**

The principle of immunity of diplomatic, consular and special missions is supported by the maxim immediatur legatio, or let the embassy be free from impediment<sup>yy</sup>. The law of diplomatic immunity is contained in 1961 Vienna Convention on Diplomatic Relations. Most of the provisions of the Convention seek to codify customary law, and can therefore be used as evidence of customary law even against states which are not parties to the convention<sup>yy</sup>. Diplomatic immunities are considered the basis of the international immunities. However certain major differences exist between them<sup>yy</sup>: First, international immunities may well be most important in case of relations between an official and his own national state, whereas a national of receiving state is, for the purposes of diplomatic immunity, accepted as a member of a foreign mission only by express consent and with a minimum privileges and immunity in respect of official acts only. Secondly, whereas the diplomat who is immune from the jurisdiction of the receiving state is under the jurisdiction of his own sending state, no comparable jurisdiction exists where an official of an international organization is concerned. Finally, whereas observance of diplomatic privileges and immunities is ensured through the

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<sup>yy</sup> [www.epd.uji.es/](http://www.epd.uji.es/), as accessed in 191110.

<sup>yy</sup> Peter Malanczuk, Modern Introduction to International Law, 123(1999).

<sup>yy</sup> D.W.Bowett, The Law of International Institutions, 340(1982)

operation of the principle of reciprocity, an international organization has no such effective sanction.

#### 4. THE LAW OF INTERNATIONAL IMMUNITIES:

The origin of the law concerning the immunities of the international organizations can be traced back to the nineteenth century. Article 1(1) of the Covenant of the League of Nations provided that “Representatives of the members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities”. The Covenant went further in paragraph (2) to grant immunities to the buildings and other property occupied by the League or its officials or representatives. Developments in this field were continued. The Charter of the United Nations states the same in Article 100. This Article provides that “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”. The Charter goes further in paragraph (2) to grant to the representatives of states and officials of the organization such privileges and immunities necessary for the exercise of their functions. It is now usual for the constitutions of international organizations to contain provisions conferring certain immunities on the organizations themselves, representatives of their member states, and persons acting on behalf of the organizations<sup>50</sup>. It is uncertain to what extent international organizations enjoy immunities under customary law, in practice the matter is usually regulated by treaties<sup>51</sup>. Where the international corporation’s constitution enumerates its immunities

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<sup>50</sup> C. Wilfred Jenks, *supra* note 3, at 1.

<sup>51</sup> Peter Malanczuk, *supra* note 6, at 126.

and privileges the list is exhaustive and customary international law cannot be invoked to extend it<sup>yy</sup>.

**(i) GENERAL CONVENTIONS, AGREEMENTS AND PROTOCOLS ON IMMUNITIES:**

There are now a series of general conventions, agreements and protocols dealing with immunities of international organizations. The main conventions are the General Convention on the Privileges and Immunities of the United Nations which was signed in 1946 (The General Convention), and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, These conventions supplemented the general provisions in the Charter. The last mentioned convention is applicable subject to variations set forth in special annex for each agency the final form of which is determined by the agency concerned. These two conventions formed a model for later agreements made by other organizations such as the League of Arab States, the Organization of American States, the Council of Europe, Western European Union, and to a far lesser extent, the three European communities (ECSC, EEC, Euratom)<sup>ya</sup>. In certain cases the privileges and immunities of an organization are defined in a protocols annexed to or accompanying its constitutional instrument. This is the position in the case of the Organization for European Economic CO-Operation and the European Economic Community<sup>yq</sup>.

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<sup>yy</sup> F.A. Mann, *Studies in International Law*, pp. 280 as cited in Arab Corporation for investment and Agriculture Development v. Ahmed Elriah, (1983) SLJR 89.

<sup>ya</sup> D. W. Bowett, *supra* note 8, at 347.

<sup>yq</sup> C. Wilfred Jenks, *supra* note 7 at 2.



The question arises in the absence of a treaty obligation as to how the state grants privileges and immunities to the international organization. The situation has, indeed, arisen in the Congo in which the UN placed a force in the territory of Republic before it became a member of the UN<sup>^</sup>. Whilst it may be difficult to argue that privileges and immunities vest by virtue of a rule of customary international law, as in the case of diplomatic privileges and immunities, it may well be that once a state has consented to the presence of the United Nations on its territory for a particular purpose it is bound, by principle of good faith, to extend such privileges and immunities as are necessary for the proper functioning of the UN and the achievement of that purpose<sup>^</sup>.

## **(ii) HEADQUARTERS AND HOST AGREEMENTS**

These general conventions, agreements and protocols are supplemented by headquarters and host agreements between international organizations and states in whose territory they maintain headquarters or other offices.<sup>^</sup> The UN, for example, has concluded headquarters agreements with the United States for the UN Headquarters in New York and with Switzerland for UN Office in Geneva in 1947. The headquarters and host agreements, in addition to covering much of the same ground as the general conventions, agreements and protocols, also include special provisions concerning such matters as freedom of access to the headquarters for persons connected with or having business with the organization, police protection and public utility services for the

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<sup>^</sup> D. W. Bowett, supra note 1, at 348.

<sup>^</sup> *Id.*, at 348.

<sup>^</sup> *Id.*, at 3.

headquarters premises, the law applicable to headquarters premises and similar matters<sup>^r</sup>.

### **(iii) NATIONAL LEGISLATIONS**

These agreements whether multilateral or bilateral impose legal obligations on states under international law, so it is necessary for the states to implement these obligations by passing municipal legislation. Legislation governing international immunities designed primarily to give effect to these varied international instruments has now been enacted in a large number of countries<sup>^s</sup>. For example in the United Kingdom the applicable legislation is the International Organizations (Privileges and Immunities) Act 1968 and 1981. In Sudan it is the Immunities and Privilege Act, 1966.

## **◦. SPECIFIC ASPECTS OF IMMUNITIES**

### **(i) IMMUNITIES ATTACHING TO THE ORGANIZATION**

#### **(a) JURISDICTIONAL IMMUNITY:**

The UN has a complete immunity from all legal process<sup>^o</sup>. Section 2 of the General Convention on the Privileges and Immunities of the United Nations provides that: “the United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except in so far as in any particular case it has expressly waived its immunity”, and further specifies that ‘it is however,

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<sup>^r</sup> Id, at 1.

<sup>^s</sup> Id., at 10.

<sup>^o</sup> Peter Malanczuk, supra note 1, at 121.

understood that no waiver of immunity shall extend to any measures of execution". The specialized agencies convention, regional agreements and headquarters agreements all contain the same provision. The immunity covers the organization concerned, its property and assets. It is equally applicable to proceedings in personam and in rem<sup>^1</sup>. . Waiver of immunity must be express. Article 3 of the International Monetary Fund provides that :”it shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by terms of any contract”. The justification for this comprehensive immunity is primarily the undesirability of having courts of many different countries determine, possibly in different senses, the legality of acts of the organization. There may well be in some countries the further need to protect the organization against prejudice in national courts, or baseless actions by individuals<sup>^y</sup>.

#### (b) PREMESIS AND ARCHVES

The General Convention provides in Article 3 that “The premises of the United Nations shall be inviolable”. The same idea is stated in article 9 of the Specialized Agencies Convention, and in many agreements like OAS in article 3 and in the headquarters agreements. It is designed to protect the dignity and freedom of formal deliberations, to preserve the confidential character of informal consultations which are constantly in progress on premises of international institutions, to permit international officials to discharge their daily duties with complete independence

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<sup>^1</sup> C. Wilfred Jenks, supra note 3, at 38.

<sup>^y</sup> D. W. Bowett, supra note 8, at 349.

and to make effective the inviolability of international archives<sup>^^</sup>. Agreements on international immunities do not deal with the conditions under which the authorities of the state where the premises are located may have access thereto. Headquarters agreements normally contain a provision on the subject. Article 9 (a) of the United Nations Agreement with the United States provides that: "Federal, state or local officer or official of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary General". Concerning the inviolability of archives the General Convention in Article 4 provides that : "The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable". Without such inviolability the confidential character of communications between states and the organization, or between officials within the organization would be endangered<sup>^^</sup>.

### ( c) CURRENCY AND FISCAL MATTERS

Many organizations now dispose of considerable funds, and in view of geographical deployment of their activities, the mobility of such funds is often essential to the proper functioning of the organization<sup>^^</sup>. The General Convention recognizes that "the UN may hold funds, gold or currency of any kind and operate accounts in any currency, and shall be free to transfer its funds, gold or currency from one country to another without being restricted by financial controls, regulations or moratoria of any kind". The fiscal

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<sup>^^</sup> C. Wilfred Jenks, *supra* note 3, at 46.

<sup>^^</sup> D. W. Bowett, *supra* note 4, at 301.

<sup>^^</sup> *Id.*, at 301.

immunities of international organizations may conveniently be considered under three heads : exemption from direct taxation; exemption from custom duties and prohibitions and restrictions; and exemption, where administratively practicable, from excise duties and sales taxes.<sup>91</sup>

#### (d) COMMUNICATION FACILITIES

The freedom of communications rests on three principles stated in Articles 9 and 10 of the General Convention. The same principles are found in the Specialized Agencies Convention and several headquarters agreements. The principles are stated as follows: First, no censorship shall be applied to the official correspondence and other official communications of the United Nations. Secondly, the United Nations have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic courier and bags. Finally, the United Nations shall enjoy in the territory of each member for its official communications treatment not less favourable than that accorded by the government of the member to any other government, including its diplomatic mission, in the matter of priorities, rates and taxes on mail, cables, telegrams, radiogram, telephotos, telephone and communications<sup>92</sup>.

#### (ii) IMMUNITIES ATTACHING TO THE PERSONNEL

The instruments which define the legal status of the international organizations, provide for privileges and immunities

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<sup>91</sup> C. Wilfred Jenkks, supra note 3, at 09.

<sup>92</sup> Id., at 17.

attaching to individuals related to it. The purpose of this privileges is to protect them from the vagaries of each state's domestic legal system and to facilitate their mission.

(a) REPRESENTATIVE OF MEMBER STATES

The General Convention specifies in Article 4 immunity from legal process in respect of word spoken or written and all acts done by them in their capacity as representatives. The Article goes further to provide immunity from arrest, seizure of personal baggage, immigration restrictions, the right of communication, and exemption of custom duties in respect of personal baggage. The representatives are not accredited to the host state, but to the organization. As a rule, the host state therefore does not have to give its agreement to the designation of members' representatives<sup>97</sup>. The United Nations Agreement with the United States and the ILO Agreement with Switzerland both contain provisions concerning the position of the representatives of governments not recognized by the host government<sup>98</sup>. The United Nations Agreements provides in Article 20 that: "In case of members whose governments are not recognized by the United States, privileges and immunities need be extended to such representatives, or persons on the staff of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residence and offices, and in transit on official business to or from foreign countries". The presence of representatives of members on the territory of the host state imposes on it a special duty of

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<sup>97</sup> Philippe Sands and Pierre Klein, Bowetts Law of International Institutions, 201(2001).

<sup>98</sup> C. Wilfred Jenks, supra note 7, at 11.

protection. This has been reinforced by the 1978 UN Convention for the Prevention and Punishment of Internationally Protected Persons which applies to the officials of the organization<sup>90</sup>. The position of the representatives of members is primarily a branch of the law of diplomatic and governmental immunities rather than the law relating to the status of international organizations<sup>91</sup>.

## (b) OFFICIALS OF THE ORGANIZATION

Jurisdictional immunity varies according to the rank of the official<sup>92</sup>. Hence, it is usual to find the chief administrative officer and his or her deputies or assistants accorded full diplomatic immunity, whereas all other officials enjoy immunity from legal process only in respect of their official acts<sup>93</sup>. In Arab Monetary Fund v Hashim,<sup>94</sup> the defendant contended that he was immune from the process of recovery of an alleged bribe because he was an employee of an international organization. The Court of Appeal dismissed the submission on the ground that such immunity existed for official acts only<sup>95</sup>. Exemption from taxation on salaries paid to officials is a further privilege found in the General Convention in Article 14(b), and in the Specialized Agencies Convention. Notable exceptions include the UN and United States headquarters Agreement, which are completely silent on the point<sup>96</sup>. Such provisions are clear reminders that privileges and immunities conferred upon international organizations officials do

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<sup>90</sup> Philippe Sands and Pierre Klien, supra note 26 at 201.

<sup>91</sup> C. Wilfred Jenks, supra note 3, at 89.

<sup>92</sup> D. W. Bowett, supra note 8, at 300.

<sup>93</sup> Philippe Sands and Pierre Klien, supra note 26 at 202.

<sup>94</sup> 1996 1 Lloyd's LR 289, as cited in Martin Dixon and Robert McCorquodale, Cases and Materials on International Law, 301 (2000).

<sup>95</sup> Martin Dixon and Robert McCorquodale, Cases and Materials on International Law, 301 (2000).

<sup>96</sup> Philippe Sands and Pierre Klien, supra note 26 at 200.

not by any means grant them a license to ignore the national legislation in force in the state within which they carry out functions, and that the organizations concerned are under a positive duty to ensure that such legislation is complied with by their personnel<sup>112</sup>.

(c) HOLDERS OF JUDICIAL OFFICES

The essential basis of international judicial immunity coincides with that of judicial immunity in the common law<sup>113</sup>. It is essential for all courts that the judges who are appointed to administer the law should be permitted to administer it independently and freely without favour and without fear<sup>114</sup>. The instruments establishing the international courts or tribunals recognize the principle of immunity. The Statute of the International Court of Justice provides in Article 19 that “the members of Court when engaged on business of the Court shall enjoy diplomatic privileges and immunities”. Article 32(1) provides that salaries, allowances and compensation paid to judges by the Court shall be free of all taxation, and go further in article 32(3) to provide that “the agents, counsel and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties”. Conferring diplomatic immunities and privileges to the holders of judicial offices was adopted in the 1946 Agreement between the Court and Netherlands Government as a host state. In 1946 by resolution 90(1), the General Assembly made certain recommendations to secure to the judges an extension of these diplomatic privileges to

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<sup>112</sup> Id., at 207.

<sup>113</sup> C. Wilfred Jenks, supra note 3, at 93.

<sup>114</sup> Id., at 93.



any country where they resided for the purpose of holding themselves permanently at disposal of the Court, to secure transit facilities for the judges and also to secure for agents, counsel and advocates before the Court transit facilities and immunities provided in the General Convention for representative members<sup>110</sup>.

#### (d) INTERNATIONAL ARMED FORCES

In principle, when an international organization places an armed force in the territory of a state with its consent, the need for immunities and privileges is even greater than that of the friendly state which does so. Moreover, there is no customary international law applicable to this relationship of organization and host state, since the phenomenon of the truly international armed forces is a novel one<sup>111</sup>.

### 9. CONCLUSION

International organizations in order to operate effectively and to fulfill their mission without being impeded in any way, require some privileges and immunities. These immunities include the immunities attaching to the organization and to the personnel employed by the organization. There is no general law applicable to the relations between the international organizations and host states. In this case, the immunities and privileges of the international organizations are subject to the specific agreement between the organization and host state. In the situation of the UN the privileges and immunities are provided for in the Charter and in the subsequent supplementary agreements. The customary

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<sup>110</sup> D. W. Bowett, *supra* note 1, at 309.

<sup>111</sup> *Id.*, at 311.

international law gave no such entitlement to international organizations.

## **CHAPTER FOUR**

### **HEADQUARTERS AND HOST AGREEMENTS IN SUDAN**

#### **1. INTRODUCTION**

Headquarters and host agreements are those agreements which are concluded between the international organizations on one side and states on whose territory they maintain headquarters and other offices on the other side. These agreements deal with the relations between the organization and the authorities in the hosting state. The hosting state may be or may not be a party to the organization. Headquarters agreements are different from the privileges and immunities agreements of the international organizations. The latter ones are concluded between all the parties to the international organization, and stating the rules which decide the legal status of the organization in the territory of each state party. In addition, it states the immunities granted to the officials of the international organization. The headquarters and host agreements, beside covering much of the same ground as the general conventions and agreements like 1946 Convention on Privileges Immunities of the United Nations, also include special provisions concerning such matters as freedom of access to the offices for persons connected with or having business with the organization, police protection and public utility services for the headquarters premises, the law applicable to the premises or offices and similar matters.

The two types of agreements are provided for in the constitution of the international organization. They complement either the rules stated in the constitution, or regulate the activities of the organization. In this chapter, we deal in short with headquarters agreements regime in Switzerland, and the situation in Sudan with some examples, so as to reveal the contradiction in practice between the headquarters and host agreements, and the country agreements.

## **2. HEADQUARTERS AGREEMENTS IN SWITZERLAND**

### **(i) INTERNATIONAL GOVERNMENTAL ORGANIZATIONS:**

Switzerland has a long tradition as a host country to international organizations. The oldest of these, the International Telegraph Union, which is now the International Telecommunication Union (ITU), was founded in Berne in 1868. The privileges and immunities enjoyed by international organizations in Switzerland and by permanent representations in Geneva (permanent missions, special missions, etc.) rest in Switzerland on a legal foundation based on the following: headquarters agreements concluded with various international organizations, decisions of the Federal Council based on its constitutional jurisdiction, the 1961 Vienna Convention on Diplomatic Relations applied by analogy by the decision of the Federal Council of March 31, 1948 and, May 20, 1958, the practice of the Swiss government in respect of questions left open by the Convention referred to above and for administering the system of privileges and immunities contained in the Convention and the Convention on Special Missions<sup>109</sup>. With respect to international organizations established in Switzerland the basic reference

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<sup>109</sup> [www.eda.admin.ch](http://www.eda.admin.ch), as accessed in 201110.

document is always the headquarters agreements, which determines the privileges and immunities of the organization and its officials. For the UN, of example, it is the Agreement on Privileges and Immunities of the United Nations Organization concluded between the Swiss Federal Council and the Secretary General of the United Nations in 1946.

## **(ii) INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS :**

A number of well-known international organizations of non-state character also have their headquarters in Geneva, such as the International Committee of the Red Cross (ICRC) which was founded in 1864 in Geneva, and the International Olympic Committee (IOC), which was founded in Lausanne in 1915. In addition, there are a total of about 230 non-governmental organizations based in Switzerland<sup>108</sup>. The special status of the ICRC as guardian of humanitarian law has been widely recognized at the international level. Its role and international legal personality were formally acknowledged in 1990, when the UN General Assembly granted the organization observer status<sup>109</sup>. The ICRC has concluded agreements with more than 60 host governments on its status and that of its staff. As a rule, the privileges and immunities granted to the ICRC are similar to those accorded to intergovernmental organization<sup>110</sup>.

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<sup>108</sup> Id.,

<sup>109</sup> [www.icrc.org](http://www.icrc.org) as accessed in 201110.

<sup>110</sup> Id.,

## **۳. HEADQUARTERS AGREEMENTS IN SUDAN:**

There are many organizations and institutions which have concluded headquarters and host agreements with the government of the Sudan. The basic reference document is always the headquarters agreements, which determines the privileges and immunities of the organization and its officials. There are many types of these agreements we will note briefly.

### **(i) United Nations and its Specialized Agencies:**

The UN system has been a major partner of the Sudanese people for several decades. It has been working to save lives and reduce human suffering, providing essential social services, supporting and enhancing national capacities and resilience along with supporting and strengthening grass root peace building mechanisms<sup>۱۱۱</sup>. The UN operates through all of the Sudan, using an area-based approach to identify and focus upon priority areas for humanitarian, recovery and developmental interventions<sup>۱۱۲</sup>. The UN family is led by the office of the Resident and Humanitarian Coordinator for Sudan and comprises the following agencies<sup>۱۱۳</sup>: Food and Agriculture Organization (FAO), United Nations Office for Coordination of Humanitarian Affairs(OCHA), United Nations High Commissioner for Human Rights (OHCHR), United Nations Development Programme (UNDP), United Nations Population Fund(UNFPA), United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund(UNICEF), United Nations Industrial Development Organization(UNIDO), United

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<sup>۱۱۱</sup> [www.unsudanig.org](http://www.unsudanig.org), as accessed in ۱۸/۰۱/۰۶.

<sup>۱۱۲</sup> Id.,

<sup>۱۱۳</sup> Id.,

Nations Emergency Mine Action Programme in Sudan, World Food Programme(WFP) and World Health organization(WHO). The status of the UN is based on Article 104 of the Charter which provides that: “the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”, and Article 105 which provides that: “ 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 and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”. Accordingly, the General Assembly adopted resolution on the 13 February 1946 the General Convention on the Privileges and Immunities of the United Nations which entered into force on 1 January 1961. On 21 November 1947, the General Assembly of the United Nations approved the Convention on Privileges and Immunities of the Specialized Agencies and it entered into force on 1 January 1961. Sudan acceded to the two conventions in 1957<sup>114</sup>. Whilst it may be difficult to argue that privileges and immunities vest by virtue of a rule of customary international law, as is the case with diplomatic privileges and immunities , it may well be that once a state has consented to the presence of the United Nations on its territory for a particular purpose it is bound, by the principle of good faith, to extend all such privileges and immunities as are necessary for the proper functioning of the UN and achievement of that purpose.<sup>115</sup>

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<sup>114</sup> Legislative Supplement to the Sudan Gazette No. 910, 1957.

<sup>115</sup> D.W.Bowett, The Law on International Institutions, 320 (1970).

The same argument would be valid for any international organization. In practice, the privileges and immunities granted by the government of Sudan to the UN and its Specialized Agencies are based on these agreements beside the country office agreements. Below we take an example of the country office agreement between the government of Sudan and the Food and Agriculture Organization of the United Nations (FAO).

FAO had concluded an agreement with the Sudan for a country office of the organization on 31 May 1977. Sudan ratified the agreement in 1978<sup>113</sup>. The basis of this agreement is Article 16 (2) of the FAO constitution which provides that: "Each member nation and associate member undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation". According to Article 4 of the agreement between FAO and Sudan, the government of Sudan applies to the organization, its officials, assets whatever are the privileges and immunities of the Specialized Agencies. In special, the non-Sudanese employees or the foreigners domiciled in Sudan are exempted from custom duties and restrictions of the exportation to their personal needs. In addition to the privileges and immunities stipulated in the agreement, the country representative is accorded such privileges and exemptions like that granted to the heads of mission in international law and custom. Article 9 clarifies that the provisions of this agreement are complementary to the 1947 Convention on Privileges and

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<sup>113</sup> Legislative Supplement to the Sudan Gazette ,No. 3010 July 1978.



Immunities of the Specialized Agencies, so the application of each shall not narrow the other. Beside privileges and immunities the government of Sudan provides the office and accommodation to the country representative of the organization. The office and accommodation shall be inviolable. The privileges and immunities may be waived in case such immunity would impede the course of justice.

The United Nations and its Specialized agencies are not fully exempted from the national legislations. The exemptions are provided for example to direct taxation, immigration restrictions, alien registration requirements, and the related matters which means that it is not granted full exemptions from the national laws.

**(ii) REGIONAL ORGANIZATIONS:**

There are some regional organizations which have concluded headquarters agreements with the government of the Sudan such as the Arab Authority for Agricultural Investment and Development (AAID), which was established by the member states of the League of Arab States in 1976. It has a legal entity as an independent financial agricultural investment institution. The AAID concluded host agreement with the government of Sudan. In this part we address two examples in some details. the Arab Bank for Economic Development in Africa (BADEA), and the recent headquarter agreement, the COMESA Court of Justice

**(a) THE ARABIC BANK FOR ECONOMIC DEVELOPMENT IN AFRICA(BADEA):**

The Bank is a financial institution funded by the governments of the member states of the League of Arab States which signed the Establishing Agreement on 18<sup>th</sup> February 1974. Sudan ratified this agreement on 22 October 1974<sup>117</sup>. According to Article 2 of the Establishing Agreement the headquarters is in Khartoum. Article 3 provides that: “the Bank is an independent international institution enjoying full international legal status and complete autonomy in administrative and financial matters”. It is governed by the provisions of its establishing agreement and the principles of international law.<sup>118</sup> The privileges and immunities of the Bank are stated in Chapter 4. Headquarter agreement which was concluded between the Bank and the Sudan on 20 November 1970. the Agreement was ratified in May 1978<sup>119</sup>. The immunities and privileges granted to the Bank according to the headquarter agreement are as follows:

**First:** immunities attaching to the Bank: In general the Establishing Agreement provides in Article 37 that: “The Bank, its funds, property and assets shall be immune, in the territories of its members, from nationalization, attachment, expropriation, seizure, search and any other form of enforcement as a result of a decision by the executive or judicial powers. The funds of the Bank shall be free from any foreign exchange controls. The immunities set forth above shall be equally applicable to the deposits of the Bank”. Article 2 of the headquarter agreement provides that: “the premises of the Bank shall be inviolable”, and goes further to state that, the officials of the government shall not enter the premises to

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<sup>117</sup> Legislative Supplement to the Sudan Gazette, Provisional Order No. 9, 10 March 1974.

<sup>118</sup> Article 3(2) of the Establishing Agreement.

<sup>119</sup> Legislative Supplement to the Sudan Gazette, Provisional Order No. 17, 10 May 1978.

perform any official duties without the consent of the Director General of the Bank. The government must take all the means required for the immunity of the premises. Concerning the inviolability of archives the agreement provides in Article ٣ that “The archives of the Bank shall be inviolable”. Concerning communication facilities Article ٣٩ of the Establishing Agreement states that: “the Bank shall enjoy immunity for communication in the territory of any or all members. They shall be accorded by each member all the privileges that are accorded to the official communications of other members”. This was asserted in the headquarter agreement. In addition, the Bank has the right to use diplomatic bag. The diplomatic bag of the bank shall not be opened or detained. Article ٤ provides for immunities from taxation that “the Bank, its funds and monies shall be immune from all taxation, all customs duties and restrictions on imports of goods necessary to carry out its functions. This shall not apply to any dues payable for services actually rendered to the Bank.

**Secondly:** immunities attaching to personnel; The Agreement states the immunities attaching to personnel in Article ١٢ to ١٧. It classifies the personnel in three categories: First, the representative of member states in their mission to and from the Bank: They shall be immune from legal process with respect to acts performed by them in their official capacity, shall not be liable to any form of arrest or detention, be accorded the same immunities from immigration restrictions and alien registration requirements, and the same facilities as are accorded to diplomatic agents concerning their personal luggage. These privileges and immunities are not granted to the representative of the Sudan in

the Bank meetings. Secondly, the Bank employees, experts and advisors, shall be immune from legal process with respect to acts performed by them in their official capacity, be accorded and their families the same immunities from immigration restrictions and alien, shall be immune from taxation on or in respect of salaries and emoluments paid by the Bank, shall be granted the same treatment in time of international crisis to return home as is accorded to the diplomatic agents, exemption from custom duties for their personal luggage. Thirdly, the Director General, his wife and minor children are accorded the same privileges and immunities granted to the head of mission in Sudan. The board of directors, international staff and their families are accorded the same facilities as are accorded to diplomatic representatives of comparable rank, and according to what is applied to the United Nations employees.

The Agreement does not differentiate between the Sudanese employees and others. This contradicts the 1906 Privileges and Immunities Act, whereas the Agreement grants to the Sudanese employees full privileges and immunities, the Act prevents this in Article 2(c) which provides that: “..provided that no such immunities or privileges shall be conferred to any Sudanese or any person domiciled in the Sudan.” This means that they are not granted immunities and privileges set forth in Part III of the Schedule. This was asserted in the 1986 Income Tax Act. Article 2(b) and Schedule 1 annexed to it provides that “diplomatic representative, consular, international organizations employees and their families are exempted from the income taxes to the extent that is stipulated in the 1906 Immunities and Privileges Act or any

regulations or orders". In any case, the Agreement when ratified according to the constitution prevails over any national law.

(b) COMESA COURT OF JUSTICE:

COMESA Court of Justice is considered one of the main organs of the Common Market of Eastern and Southern Africa (COMESA). It was established under Article 1(c) of the Treaty Establishing the COMESA. Chapter 9 of this Treaty deals with the court in detail. In general, it is concerned with the interpretation and application of the establishing treaty. According to Article 14 the seat of the court shall be determined by the Authority. The Authority is composed of the heads of states or governments of the member states. They issued a decree that Khartoum will be the seat of the court. Sudan ratified the Treaty Establishing COMESA by Provisional Order on 21 September 1994, and on 26 April 2004 signed the Host Agreement with the COMESA concerning the seat of the Court of Justice of the COMESA, and ratified the Agreement on 8 December 2004. Like the UN and other independent international institutions the COMESA Court depends, beside this agreement, on a separate agreement to regulate the privileges and immunities of the Court, and persons involved with the work of the court. Article 13 of the Host Agreement provides that, the host agreement, the Treaty Establishing COMESA, and the agreement on Privileges and Immunities adopted by the member states of the Preferential Trade Area for Eastern and Southern African States on 20<sup>th</sup> December 1983 complement each

other. In case of contradiction, the provision of the Treaty and the Agreement on Privileges and Immunities will prevail.

The immunities and privileges as stated in the statute of the Court are as follows:

**First:** immunities attaching to the Court: The inherent international nature of the work of the Court demands guarantees of privileges and immunities both inside and outside Khartoum. Sudan obligation was to provide the office and residential accommodations. According to Article 1 of the Agreement the Court has an international legal personality to acquire or dispose of movable and immovable property. Article 2 provides for the inviolability of the seat of the Court and the officials of the government of the Sudan are not allowed to enter the seat without the permission of the President of the Court. The archives and premises of the Court are accorded the same privileges as the diplomatic mission accredited to Sudan. Article 3 provides for exemption from taxes like the sending state accredited to Sudan, and in particular exemption from indirect taxes, prohibition and restriction on importation or exportation. Article 4 provides for facilitating communications not less favorable than that accorded to any other government or to diplomatic mission of a sending state accredited in Sudan.

**Secondly:** immunities attaching to the personnel: The second part of the Agreement defines the scope of the privileges and immunities accorded to different categories of personnel. Article 5 provides for privileges and immunities of representatives of member states, agents and parties. Article 6 provides for privileges and immunities of the president, judges, registrar officials and staff. Representatives of member states, or any organ

or institution of COMESA, or at any conference convened by the Court of Justice shall enjoy immunity from personal arrest or detention, and from seizure of their personal baggage, inviolability of official papers and documents. An agent shall enjoy immunity in respect of words spoken or written by them concerning a case before the Court or the parties to the case. In addition, their papers and documents relating to the proceedings shall be exempted from both search and seizure. They are entitled to travel in the course of duty without hindrance.

As to the privileges and immunities of the president, judges, registrar officials and staff, in general the president, registrar, judges and the officials of the court shall be accorded in respect of themselves, their spouses and children under the age of twenty one, the like immunity from suit and legal process, exemptions from taxes as is accorded to a diplomatic agent of a sending state accredited to Sudan. Exemption from income taxes only in respect of emoluments received by them as officials of the Court. In particular the sort of privileges and immunities which must be afforded include immunity from suit and legal process in respect of words spoken or written and acts done by them in the course of the performance of their official duties, immunity from personal arrest ,detention, seizure or inspection of their personal and official baggage, immunity from national service obligation, immigration restrictions and alien registration, the same reparation facilities in time of crisis like that accorded to diplomatic agents of a sending state accredited to Sudan.The general service staff who are internationally recruited are granted the same privileges and immunities.

This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the public whose interest is that judges shall be at liberty to exercise their functions with independence and without fear of consequences.

Finally the agreement provides in Article ١٢ for waiver of privileges and immunities when necessary to ensure that they do not operate to impede the course of justice, stressing that privileges and immunities are granted in the interest of the good administration of justice and not for the personal benefit of individuals themselves.

### **(iii) NON GOVERNMENTAL ORGANIZATIONS**

The voluntary works have two types national and foreign work. The first law which regulated the work of the NGOs in Sudan after the independence is the ١٩٥٧ Societies Registration Act. After the drought and desertification period in the ١٩٨٠<sup>s</sup>, foreign voluntary organizations appeared to work in Sudan. This obliged the government to enact laws in order to facilitate their mission. The government enacted the ١٩٨٦ Relief and Rehabilitation Commission Act and the ١٩٨٨ Foreign Voluntary Work Organization Act. The ١٩٩٥ Humanitarian Aid Commission Act repealed the three mentioned laws<sup>١٢</sup>. Recently in ٢٠٠٦ the Voluntary and Humanitarian Work Organization Act was enacted. The NGO whether national or foreign must be registered in the Ministry of Humanitarian Affairs. The national laws are applicable to these organizations. According Section ٩ (٣) of the ٢٠٠٦ Act and the ١٩٩٩ Foreign and National Registration Regulations, the foreign NGO after the fulfillment of the registration requirement, must sign the country agreement with the Ministry. The obligations

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<sup>١٢</sup> Article ٢ of the Humanitarian Aid Commission Act, ١٩٩٥.



of the organization in the country agreement can be summarized as follows; It shall adhere to laws and regulations of the government of the Sudan and shall instruct its employees to do likewise, ensure that its activities in Sudan are of a humanitarian non-profit making, non political nature and serving people in need regardless of their religion, race, ethnicity beliefs and political conviction. The obligation of the government is to evaluate organizations operations in accordance with the provisions of their Technical Agreement; facilitates the granting of visas; residence, work and travel to expatriate staff; facilitate the exemption from all custom duties, taxes and quay charges on all goods imported by the organization for the purpose of achieving its objectives set forth in the plan of operations. Similarly , expert staff are allowed to import personal effects free of customs duties and taxes within six months period as from the date of their arrival to the country, and re-export these personal effects upon completion of their assignment. The government shall also levy no taxes or fees on the salaries, allowances or other remuneration for personal services paid by the organization to its personnel of non-Sudanese nationality. The government shall ensure that no fund or commodity furnished by the organization will be utilized for any purpose other than that required for maintaining its operation and implementing its projects.

In practice, some of these NGOs signed host agreements. Examples, Eldawa Islamic Organization, one of the great islamic voluntary organizations established in ١٩٨٠, has a host agreement with the government of Sudan. Also the Humanitarian Aid and Development Organization is a foreign NGO registered under the ١٩٥٧ Societies Registration Act. On ١٨<sup>th</sup> December ٢٠٠٢ it signed a

host agreement with the government of Sudan. The government granted privileges and immunities according to this agreement to the organization and its officials. The immunities attached to this organization and its officials are like those issued to the international organizations. According to Article 2 of the 1978 Convention on the Law of Treaties Between States and International Organizations or Between International Organizations which reads: "The present Convention applies to treaties between one or more states and one or more international organizations, and treaties between international organizations", it is not an international agreement. The government has the right to repeal it without any obligation under the international law, because these organizations have no international legal personality. Besides, such immunities as may be granted, like the exemption from taxation, custom duties and removal of immigration restrictions have a harming effect on the financing of the state. Another thing is the assimilation of privileges and immunities of the representative of the diplomatic missions with those who work in NGOs which is not a right thing.

Regarding international NGOs, there are many of them with development programs obliged to establish offices or missions in those countries where they are active like Medecins Sans Frontieres (MSF). But the status of ICRC in Sudan is like that of the intergovernmental organizations. When the United Nations or any of its specialized agencies and the International Committee of the Red Cross work in the humanitarian field they must sign technical agreement with the Ministry of Humanitarian Affairs according to Section 12 of the Act. For their country offices they sign host agreement with the government.

#### **(IV) NATIONAL LEGISLATION**

National legislation governing international immunities was designed to give effect to the international agreements concluded by the government. Sudan has had an Act which provides immunities and privileges in respect of foreign diplomatic missions and international organizations since 1906. According to Section 2 of the 1906 Immunities and Privileges Act, conferment of privileges and immunities is vested in the Council of Ministers. The Section goes further to provide that such privileges and immunities are granted to the international organization itself, high officers of the international organization, other officers and servants of the international organization. Other privileges and immunities are granted in accordance with any treaty or international agreement having effect in Sudan as to the international organizations and their officers. Article 3 provides that: "the Council of Ministers may also by order grant any immunity and privilege, in accordance with international agreement having effect in Sudan, to any other persons falling within the terms of such agreement and being sent or otherwise coming, to the territory of the Sudan as an advisor or expert or on any other special mission from international organization, or as an advisor or expert in a delegation or otherwise in a conference or any meeting of an international organization or as agreed with other state.

Parts I and II of the Schedule annexed to this Act specify the privileges and immunities as follows:

Immunities which attach to the organization comprise immunity from suit and legal process; inviolability of official archives and premises occupied as offices; exemption of relief from taxes and

rates; exemption from custom duties on the importation of goods directly imported for official use; exemption from prohibitions and restrictions on importation or exportation in the case of goods directly imported or exported for official use, and the right to avail itself, for telegraphic communications sent by it and containing only matters intended for publication by the press or for broadcasting at any reduced rates applicable for the corresponding service in the case of press telegrams.

As regards immunities attached to personnel, they comprise the following: higher officers of international organizations must be immune from suit and legal process, inviolability of property and residence, exemption or relief from taxes and custom duties; other officers and servants must be immune from suit and legal process in respect of things done in the course of performance of official duties, exemption or relief from taxes and custom duties.

#### **4. CONCLUSION**

The inclusion of such provisions in a headquarters agreement can be of great value to both the international organization and the government concerned<sup>111</sup>. They formulate a clear principle on which the international organization can rely in relation to the host state, and that state can rely in relation to other states in respect of all matters relating to the international organization<sup>112</sup>. The purpose of this privileges is to protect the personnel from the vagaries of each state's domestic legal system, and to facilitate their mission in the territories of each member state. They are granted for the discharge of the official work only.

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<sup>111</sup> C. Wilfred Jenks, International Immunities, 20 (1969).

<sup>112</sup> Id.,

The states in granting the immunities must make a balance between the interest of calling up the foreign capitals to finance different projects, and the benefit not to grant great privileges and immunities to the organization officials whether foreigners or nationals. National staff are subject to national laws.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

This dissertation attempted to provide a brief analysis of the privileges and immunities granted to the international organizations, in particular to the international organizations under headquarters agreements. It is divided into four chapters and a conclusion. Chapter One was about the evolution of international organizations. Chapter Two about the personality of international organizations. Chapter Three attempted to examine the privileges and immunities of the international organization, whereas Chapter Four spoke about headquarters agreements in Sudan.

The introductory chapter was intended to serve as a preliminary clarification of the subject of this dissertation. It is highlighting the historical development of the international organizations. Originally, only States were members of international community. International and Inter-Governmental Organizations (IGOs) slowly emerged as subjects of international law. The chapter addresses the early origins of international organizations which can be traced back to the institutions of the counsel, ambassadors, permanent diplomatic ambassadors, international conferences, and private and public international unions. The first international organization is considered to be the International Telecommunication Union which was founded in 1865. In the twentieth century global, comprehensive organizations appeared. In the aftermath of the First World War the League of Nations was created. Then United Nations arose as an attempt to

remedy the defect of the League system after the Second World War. The Specialized Agencies were recreated and new ones appeared. These autonomous organizations joined the UN through special agreements. Economic and financial organizations are considered specialized agencies and sometimes they are called related organizations. Regional organizations were established as a means of connecting neighbouring states. There are at present a large number of international organizations, amounting to more than 100, which cover a wide range of subjects, having international and regional connotations, and are concerned with coordination between states in efficient way. Then the chapter attempted to clarify the definitional aspects of the term "international organization" and types of it. The Non-governmental organizations (NGOs), also called "civil society" organizations, are set up by individuals or groups and governed by the law of the country where the NGO is incorporated, for example, Amnesty International and Greenpeace. States are usually not parties of NGOs. Some NGOs are entrusted with functions typical of states for example, ICRC. Supranational organizations are a type of intergovernmental organization having special characteristics. It has been concluded that the crucial role of international organizations in different fields reflect their proliferation. Peace and prosperity can not be achieved without partnership of the whole community including international organizations.

Chapter Two dealt with the personality of international organization. States are the original and major subjects of international law. Their personality derives from the nature and structure of the international system. The attribution of international

legal personality to IGOs is due to increasing role they play in international affairs. IGOs have international legal personality necessary to carry out their functions. Sources of legal personality are the constituent treaty and the case law. Legal personality of international organization is usually conferred by treaty or other constitutive instrument. It may be provided expressly or by implication. Powers are not limited to what is conferred by constituent treaty, but extend to what is necessary to perform functions effectively. In the Reparation case, UN had implied claim for loss suffered by staff. The attribution of legal personality endowed the organization with separate identity, distinct from its constituent elements. The consequences of this attribution give the organization specific rights, duties and powers. Under international law it has the right to conclude treaties, to acquire and dispose of immovable and movable property, and institute legal proceedings. Treaty making power of IGO is usually conferred under constituent treaty but some IGOs do not have treaty making powers like Benelux. Under the domestic legal order the organization is granted the right to conclude contracts, to acquire and dispose movable and immovable property and to initiate legal proceedings.

Then the chapter emphasizes that the scope of legal capacities of the organization may vary from one organization to another according to its function. Besides, the concession of privileges and immunities from states are granted to enable the organizations to exercise their functions. It has been concluded that the attribution of legal personality to the organization entails international responsibility and liability under international and national laws. International responsibility of the organization is a



reflection of the principle of state responsibility widely accepted to be applicable to international organizations.

Chapter Three attempted to identify privileges and immunities granted to international organizations as one of the main consequences of the legal personality. Privileges and immunities agreements are agreements which are concluded between the parties of the international organization, stating the rules which decide the legal status of the organization in the territory of each state party and the immunities granted to the officials of the international organization. The rationale of international immunity is to free the organizations from national control and to enable them to discharge their responsibilities impartially on behalf of all their members. Then the chapter spoke about the diplomatic immunity as a basis of international immunity, the difference between it and the immunity granted to the international organizations. It went further to illustrate the origin of the law concerning the immunities of international organizations. This can be traced back to Article 9 of the Covenant of the League of Nations 1919. The same was stated in Article 100 in the Charter of the United Nations. This general provision of the Charter was supplemented by the 1946 Convention on Privileges and Immunities of the United Nations (The General Convention), and the 1947 Convention on Privileges and Immunities of the Specialized Agencies. These two conventions formed a model for later agreements made by other organizations. Now every constitution of an international organization contains provisions conferring certain immunities to the organization and its officials.

Then the chapter went in to details on specific aspects of immunity, the immunities attaching to the organization, and those attaching to the personnel. It has been concluded that where the international organization constitution enumerates its immunities and privileges the list is exhaustive and customary international law cannot be invoked to extend it.

Chapter Four attempted to examine the headquarters agreement in Sudan. First it started to speak about the Switzerland's host country policy. Switzerland has a long tradition as a host country to IGOs and NGOs, and it is a seat of many UN agencies. Its policy as a host country aims to offer optimal conditions to international organizations and conferences through a range of specifically targeted measures. Then the chapter spoke about the international organizations which have a seat in Sudan. The main examples were the Arab Authority for Agricultural Investment and Development (AAAID), and the Arab Bank for Economic Development in Africa (BADEA). These two institutions were established by the member states of the Arab League in the 1970s. Their seats are in Khartoum. The recent headquarter agreement is that of the COMESA Court of Justice. The establishment of the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) is a major event in the history of COMESA as an organization and in the development of COMESA Community Law and Jurisprudence. The Court was established in 1994 under Article 7 of the COMESA Treaty as one of the organs of COMESA. To ensure the independence of the Court, Article 9 (2) (c) of the COMESA Treaty provides that the Council shall give directions to all other subordinate organs of

COMESA other than the Court in the exercise of its jurisdiction. The Seat of the Court has been temporarily hosted within the COMESA Secretariat from 1998 but in March, 2003, the COMESA Authority decided that the Seat of the Court should be in Khartoum, in the Republic of Sudan. Although it has not been established. The UN and its Specialized Agencies have country offices in Sudan through agreements.

Then the chapter stated the laws regulating the work of NGOs in Sudan whether national or foreign. It goes further to clarify the difference between the country agreement, which is signed between the Government, and the foreign NGOs, and headquarters and host agreements. Likewise this chapter states that some NGOs which conclude quarter agreements, do that solely in order to obtain privileges and immunities, a thing which is illegal.

According to the foregoing conclusions, the following recommendations are suggested to be observed in the host agreement regime in Sudan:

1. The headquarters agreement must include the following principles:
  - i. provisions of general character concerning the freedom and independence of international organization;
  - ii. provisions stating that immunities conferred upon persons are not designed for their personal benefit and that the competent authority has a right and duty to waive them if satisfied that the immunity would impede the course of

justice and can be waived without prejudice to the interest of the organization;

- iii. Provisions of cooperation with national authorities to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse; and
- iv. Provisions of appropriate modes of settlement of disputes to which immunities are applicable.

ϣ. The government must make a balance between the interest of calling up the foreign capitals to finance different projects, and the benefit not to grant great privileges and immunities to the organization officials whether foreigners or national.

ϛ. The government under host agreements must have the right to evaluate the performance of the organization to see the benefit of its existence in its territory as a hosting state.

ξ. Improving the implementation of the existing headquarters agreements and extending the scope of certain provisions. It must include provisions concerning the amendment and termination of the agreement.

ο. There must be a provision in the Labour law to regulate the working of the national staff in the international organizations resident in Sudan. The 1997 Labour Act contains no provisions regulating this matter. So these organizations recruit nationals without the permission of the competent authorities like the Ministry of Labour and Administrative Reforms, and Ministry of Interior.

- ٦. National staff working in international organization must be subject to the national laws.
- ٧. There must be some restriction in the ٢٠٠١ Non-Sudanese Employment Act concerning the recruitment of non Sudanese in international organizations having host agreements in Sudan.
- ٨. Concerning the NGOs, the government must abide the laws regulating their works.

Many steps towards the improvement of the system of international organizations resident in Sudan should be taken. There is a need for the establishment of permanent technical national mechanism within the context of national arrangement. This mechanism must be responsible for coordination, follow-up, reviewing, and evaluation of the work of international organization resident in Sudan. It has to submit regular reports to the competent authorities.

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