

## Article VI Specialized Agencies Convention

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### Article VI OFFICIALS

**SECTION 18.** *Each specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply. It shall communicate them to the Governments of all States parties to this Convention in respect of that agency and to the Secretary-General of the United Nations. The names of the officials included in these categories shall from time to time be made known to the abovementioned Governments.*

#### **A. Introduction**

1. Like UN officials, the officials of the Specialized Agencies are granted privileges and immunities in accordance with specified categories, to be determined by each agency. The criteria used to define who is encompassed by the general category of ‘officials’ are devised in quite general terms: except for individuals who are both recruited locally and assigned to hourly rates, the privileges and immunities provided for in Art. VI and VIII are in principle granted to all members of the staff of the Specialized Agencies.<sup>1</sup> This holds true regardless of whether the staff was hired on a continuing, fixed-term or temporary appointment.
2. Almost unavoidably, practice among Specialized Agencies differs considerably when it comes to devising the various categories falling under the notion of official. This is demonstrated by the Annexes to the Specialized Agencies Convention and the institutions’ constituent instruments, particularly as far as the definition of senior officials (or executive

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<sup>1</sup> As explained in the ILC study on ‘The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat’, UN-Doc. A/CN.4/L.118 and Add.1 and 2, Yearbook of the International Law Commission, 1967 Vol. II (hereinafter ‘YILC 1967 Vol. II’), the Specialized Agencies follow UN practice in this regard, notably the criteria set out in UNGA Res 76(I), from 7 December 1946. See YILC 1967 Vol. II, 313, para 105.

heads) is concerned.<sup>2</sup> In some cases, headquarters, but mostly regional and field office agreements add ambiguity to the understanding of the status of officials, in that the same official may be granted extended privileges and immunities, or auxiliary courtesies and facilities, depending on the legal framework applying in the host country under consideration.<sup>3</sup>

3. It is observed that within the various categories of official personnel any differentiation among staff on the basis of nationality or rank is not meant to occur. This was made clear by the UN Secretary-General when referring to UNGA Res 76(I), which specified the categories of UN officials.<sup>4</sup> Notwithstanding, as will be shown below, practice has revealed that in some instances – exemption from taxation being a case in point - such unintended distinction has resolutely been made.

## **B. Key elements**

4. The various categories of officials are specified in lists that are sent to the States Parties to the Convention on a periodic (usually annual) basis. These lists include the officials' name, grade, nationality and duty station.<sup>5</sup> Host States, nonetheless, receive special lists that are updated throughout the year in accordance with the movements of staff.<sup>6</sup> On the basis of the lists submitted by the Specialized Agencies, the competent authorities of the States Parties to the Convention issue special identity cards (*cartes de légitimation*), in replacement of the cards issued to ordinary aliens. These identity cards contain the photograph of the holder and

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<sup>2</sup> See eg Annex XII regarding the IMO specifically determines that '[i]f the Organization changes the titles of any of the Director posts at any time, the holders for the time being of such posts shall continue to be accorded the privileges and immunities, exemptions and facilities referred to'.

<sup>3</sup> It should be noted that a significant number of States have failed to ratify the Specialized Agencies Convention, which means that *ad hoc* agreements must be concluded with host States for the establishment of regional offices, the organization of conferences or meetings, or the execution of technical cooperation projects. Entailing the need to negotiate and make compromises, such agreements may in the end contain some deviations from the standards of the Specialized Agencies Convention.

<sup>4</sup> See eg UN Office of Legal Affairs, Letter to the Permanent Representative of a Member State on 'Privileges and Immunities of United Nations Officials who are Nationals or Residents of the Local State – Privileges and Immunities of Clerical Staff – Interpretation of Section 17 of the Convention on the Privileges and Immunities of the United Nations, 3 July 1964, as quoted in (1964) UNJYB 265.

<sup>5</sup> YILC 1967 Vol. II (n 1), at 313, para 107.

<sup>6</sup> *ibid.* By 1985, the practice of the IAEA, for instance, was to inform the Government of Austria of every arrival and departure of its officials immediately (See the ILC study on 'The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat', UN-Doc. A/CN.4/L.383 and Add.1-3, Yearbook of the International Law Commission, 1985, Vol. II(1)/Add.1, 199, para 127 (hereinafter 'YILC 1985 Vol. II(1)').

provide an indication to the police and other authorities of the category of the official concerned and, concomitantly, of the extent of privileges and immunities applying in a given situation. It should be noted that the provision's requirement that the names of officials are communicated to Governments is perceived as an administrative measure of convenience, and not as a condition to the recognition on an individual's status as official.

5. It is not excluded that categories of officials which have not explicitly been named by the Specialized Agency as enjoying privileges and immunities, could actually be equated with categories that have been named. On a comparative note, the Director General of the OPCW, for instance, was held by the ILO Administrative Tribunal to fall within the categories of 'official', 'officer' and 'staff member' for purposes of *locus standi* before the Tribunal.<sup>7</sup> Such officials may perhaps also enjoy privileges and immunities under customary international law, although in that case proof of near-universal and virtually uniform state practice and *opinio juris* needs to be offered.
6. In a few instances, the categorization of certain functionaries of international organizations as officials is not a straightforward process. This is particularly the case for the Executive Directors of the World Bank and the IMF, whose status and functions reflect the dual capacity with which they act in the framework of these organizations. On the one hand, their roles denote characteristic features of the category of 'officials' of the organization, but on the other hand Executive Directors also act as representatives of Governments. In the *travaux préparatoires* of the Convention, it was considered that while, *sensu stricto*, Executive Directors did not come within the category of 'officials', they were so considered for the purposes of the Specialized Agencies Convention.<sup>8</sup> Thus, the provisions contained in Art. V (addressing the privileges and immunities of representatives of *members*) do not apply to these individuals. It should in any case be noted that, under certain conditions, the Headquarters Agreement between the United Nations and the US envisages the possibility to

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<sup>7</sup> Administrative Tribunal of the International Labour Organization, Judgment N° 2232, 16 July 2003, *Bustani v. Organisation for the Prohibition of Chemical Weapons (OPCW)*, available at <[www.ilo.org/dyn/triblex/triblexmain.fullText?p\\_lang=en&p\\_judgment\\_no=2232&p\\_language\\_code=EN](http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2232&p_language_code=EN)> last accessed 29 May 2015. It is noted that the case did not concern the person's privileges and immunities.

<sup>8</sup> Final Report of Sub-Committee 1 of the Sixth Committee of the General Assembly of the United Nations on 'Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN-Doc. A/C.6/191, 15 November 1947, 8, para 21. (hereinafter 'Final Report of the Sixth Committee, 1947'). From the report it follows that the choice was based on the fact that Executive Directors act predominantly as representatives of the interests of all Members and that they receive their salaries from the international organizations and not from their Governments.

grant diplomatic privileges and immunities to Executive Directors, as a corollary of their role as ‘principal resident representatives of members’.<sup>9</sup>

7. In general, there is a lack of uniformity among the various Specialized Agencies with respect to the specification of the various categories of officials. Ultimately, one needs to consult the various constituent instruments of the Specialized Agencies, as well as the headquarters, regional and field offices agreements, even where host States have acceded to the Specialized Agencies Convention,<sup>10</sup> to find this specification. In some instances, divergent practices are also a function of the prerogatives granted to a particular official in a given circumstance. This can imply that status divergences can arise among *prima facie* similarly situated officials engaged in technical assistance operations (see MN 9, 10), or simply traveling for conferences or meetings to represent the agency in different countries or with different agencies. In Austria, for instance, an official acting in representation of a Specialized Agency in a meeting of, or convened by UNIDO, would enjoy the privileges and immunities provided in Art. IV of the General Convention,<sup>11</sup> and not those envisaged by the Specialized Agencies Convention. Similar prerogatives are granted to officials acting in representation of a Specialized Agency in a meeting convened by FAO, in Italy.<sup>12</sup>
8. Where UN member States have not ratified the General Convention and have not concluded a headquarters agreement with a Specialized Agency, the status of an official of such an agency, and the extent of its ensuing privileges and immunities, may be in doubt, even if the State exercising its jurisdiction over the official is a member of the agency. The status of an official of the IMF (who happened to be the head of the organization) in the United States is a case in point: While the United States has ratified the General Convention, it has not

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<sup>9</sup> Art. V Section 15 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 11 UNTS 11, provides for two possibilities in this connection: para 3 grants diplomatic privileges and immunities to ‘every person designated by a Member of a specialized agency, as defined in Article 57, paragraph 2, of the Charter, as its principal resident representative, with the rank of ambassador or minister plenipotentiary, at the headquarters of such agency in the United States’; next to this, para 4 extends such a grant to ‘other principal resident representatives of members to a specialized agency ... as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned’.

<sup>10</sup> This was concluded by Michaels in a comparative study of various headquarters, regional and field offices agreements, undertaken by the end of the 60ies. See D B Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (Martinus Nijhoff Publishers 1971), 71-79 and 194-215.

<sup>11</sup> See Art. XI Section 33 Agreement between the United Nations and the Republic of Austria regarding the Headquarters of the United Nations Industrial Development Organization (UNIDO), 600 UNTS 94.

<sup>12</sup> See Art. XII Section 25 Agreement between the Government of the Italian Republic and the Food and Agriculture Organization of the United Nations regarding the Headquarters of the Food and Agriculture Organization of the United Nations, 1409 UNTS 521.

ratified the Specialized Agencies Convention nor has it concluded a headquarters agreement with the IMF. It is of note that in a 2012 decision the New York Supreme Court equated a non-US official of the IMF acting in his private capacity with a US citizen and on that ground refused to accord immunity to the former.<sup>13</sup>

## Particular issues

### Technical assistance experts

9. Although the status of technical assistance experts as officials has raised some contention in the past, the majority of Governments have recognized it by now.<sup>14</sup> As clarified by the UN Secretary General as early as 1951,<sup>15</sup> this category of officials is not to be confused with that of ‘experts on missions’, referred to in most of the Annexes to the Specialized Agencies Convention in line with Art. VI of the General Convention. Indeed, the latter category encompasses those individuals who serve on committees of, or perform missions for the Specialized Agency, without qualifying as officials coming within the scope of Art.VI (see below MN 68, 69).
10. Officials of the Specialized Agencies involved in the provision of technical assistance might require a particular framework of privileges and immunities to adequately account for the sometimes harsh conditions under which they operate. The Specialized Agencies Convention, however, does not make such a specification and technical assistance agreements can differ on the matter – with earlier analyses revealing that in some instances the prerogatives granted to these experts were even of a lesser scope.<sup>16</sup>

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<sup>13</sup> *Nafissatou Diallo v. Dominique Strauss-Kahn*, Index No. 307065/11, 11 June 2012, Supreme Court New York, 9. The decision is quoted in (2012) UNJYB 537-544 (‘The United States of America, through its political processes, can make laws, ratify treaties or issue judicial pronouncements which require a non-citizen employee of a specialized agency, here on our soil as part of the fabric of international governance, to behave, in their private conduct, in a lawful way failing which to be answerable in courts of law or other tribunals under the same standards as their next door American neighbours. [I]t is hardly an assault on long standing principles of comity among nations to require those working in this country to respect our laws as Americans working elsewhere must respect theirs’). Note that in this case, the IMF official was the agency’s managing director. As he was not acting in an official capacity when allegedly committing the acts, he would not benefit from diplomatic status anyway (SEE MN 97-99 where an explanation is provided as to why this is the case).

<sup>14</sup> YILC 1985 Vol. II(1) (n 6), at 199, para 129.

<sup>15</sup> In a Circular Note sent to interested Governments on 9 May 1951, which can be found in YILC 1967 Vol. II (n 1), at 264, para 242.

<sup>16</sup> D B Michaels (n 10), at 80-91 and 216-221.

## **Employment relationships between the Specialized Agencies and their employees**

11. In earlier case-law, the contractual relationships between international organizations and employees were scrutinized by national courts, which set out to ascertain the extent of immunity from jurisdiction enjoyed by the organization. Central to the analysis in these cases was often whether such relationships were of a private or public law character, and thus whether the person concerned was an official of the organization. If he/she was, the *iure imperii* test applied and absolute immunity was recognized. If, on the other hand, the employee was linked to the organization on the basis of a *private law* relationship, the latter's immunity was restricted.<sup>17</sup>
12. It is questionable, however, whether concepts such as acts *iure imperii/gestionis* as used in the field of State immunity apply in an institutional context. In response to recent labour claims against the UN that were seemingly based on such differentiation, the Legal Counsel of the UN argued that a 'commercial activity' exception under the General Convention does not exist, and that there is rather the possibility to resort to alternative modes of dispute settlement, as provided for in Art. VIII Section 29(a).<sup>18</sup> Both observations apply in the framework of the Specialized Agencies Convention.
13. Ultimately, differentiating between officials and contractual service providers for the purposes of asserting the competence of national courts to adjudicate disputes in which the organization claims immunity might be justified in cases where *access to justice* is not institutionally guaranteed to service providers.<sup>19</sup> Whilst officials will have access to internal dispute settlement mechanisms, such as the Specialized Agencies' Administrative Tribunals,

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<sup>17</sup> See, for example: *United States v. Porciello*, Corte di Cassazione, 1977; *Agence de Coopération Culturelle et Technique v. Housson*, Cour d'appel de Bordeaux, France, 18 November 1982, *AS v. Iran-United States Claims Tribunal*, Local Court of the Hague, The Netherlands, 8 June 1983, all quoted in A Reinisch, *International Organizations Before National Courts* (CUP 2000) 110, 189, 194, respectively. As also noted by the author, in various other judicial decisions, the employment relationships were rather considered through the lens of functional immunity (see, *inter alia*, *X. v. European Patent Organization*, Labour Court Berlin-Charlottenburg, Germany, 22 February 1994, State Labour Court Berlin, 12 September 1994, referred in *ibid.*, at 210)

<sup>18</sup> Note Verbale of the Legal Counsel of the United Nations, Note to the Minister of Foreign Affairs of [State] to the United Nations concerning certain labour claims filed against the United Nations Logistics Base in [City] in the Court of [City] by five former individual contractors, 20 November 2012, as quoted in (2012) UNJYB 459-461.

<sup>19</sup> See A Reinisch (n 17), especially at 383-385.

that is not necessarily the case with service providers: this will depend on whether the competence of such tribunals is provided for in the private law contract concluded.<sup>20</sup>

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<sup>20</sup> *ibid.* See also K Schmalenbach, Commentary on Art. IX Section 31 Specialized Agencies Convention, MN 19-22, for further reference.

## Privileges and Immunities of Officials

### SECTION 19

*Officials of the specialized agencies shall:*

- (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;*
- (b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations;*
- (c) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;*
- (d) Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;*
- (e) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;*
- (f) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.*

#### A. Introduction

14. The present section, together with Art. VI Sections 20 and 21, provides for the typical privileges and immunities that are accorded to officials of international organizations, which emerge as partial exemptions from specific areas of law and judicial procedures. Immunities accorded to officials are essentially *ratione materiae*, in that they attach to the intrinsic nature of the acts performed by officials. Immunities enjoyed by diplomats, in contrast, are both *ratione materiae* and *ratione personae*, owing to the representative function performed by diplomats.<sup>21</sup> Art. VI Section 21, however, constitutes an important exception to the

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<sup>21</sup> As explained by D B Michaels, the purpose of diplomatic privileges and immunities is different from that underlying the privileges and immunities of international officials: while the former are intended to ‘free a national representative from the territorial jurisdiction of the state to which he is accredited, through which he passes, or in which he negotiates’, the latter are intended to ‘free the international organization, vis a vis its personnel, from the



general rule that immunities of officials of international organizations are *ratione materiae* (see below MN 94-99).

15. Pursuant to Art. X Section 39, supplementary agreements (headquarters agreements) concluded between States parties and a Specialized Agency could, as *lex specialis*, extend or curtail the privileges and immunities of officials of (particular) Specialized Agencies. In practice, however, such headquarters agreements – which are not always concluded for that matter (eg there is no headquarters agreement between the United States and the IMF)<sup>22</sup> – do not normally extend or curtail such privileges and immunities.<sup>23</sup> The same holds true when it comes to regional and field offices agreements, where, nevertheless, exceptions to the rule appear to occur more frequently.<sup>24</sup>
16. In interpreting the present section, it is important to keep in mind that the privileges and immunities prescribed herein are meant to advance the interests of the Specialized Agencies, and not those of the officials themselves, as emphasized in Art. VI Section 22.

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jurisdiction of any one of its members or third countries, including the individual's home state'. See D B Michaels (n 10), at xvi, and also 21-25.

<sup>22</sup> See <[www.state.gov/documents/organization/169274.pdf](http://www.state.gov/documents/organization/169274.pdf)> last accessed 29 May 2015.

<sup>23</sup> There are some notable exceptions, however. For instance, the Agreement between the International Atomic Energy Agency and Austria regarding the Headquarters of the International Atomic Energy Agency (IAEA), 339 UNTS 110, and the Austrian Headquarters Agreement with UNIDO (n 11), are particularly generous in what concerns the grant of privileges and immunities to officials, as will be opportunely demonstrated below. With regard to the entitlements accorded to (non-national) officials, Art. XII Section 37 of UNIDO's Headquarters Agreement, envisages, in addition to those contained in Art. VI Section 19 of the Specialized Agencies Convention: immunity from seizure of personal and official baggage; immunity from inspection of official baggage; various tax exemptions (see below); and access, on a preferential basis, to the labour market in accordance with Austrian law to spouses and dependent relatives living in the same household as the official, among others. The FAO Headquarters Agreement with Italy (n 12), is also noteworthy in this context: Art. XIII Section 27 specifically prescribes immunity of officials from preventive arrest (except in situations of *flagrante delicto* and of crimes with imprisonment sentences of not less than two years), and other prerogatives alike some of those contained in UNIDO's Headquarters Agreement.

<sup>24</sup> In comparing various agreements providing for the establishment of regional, field, sub-regional and other offices of permanent duration of the Specialized Agencies, concluded between 1947 and 1967, D B Michaels noted that many included a provision whereby the host Governments committed to granting to such offices and their staff the privileges and immunities provided for in the Specialized Agencies Convention, with variations being identified on the extent of prerogatives accorded and the personnel categories recognized. See D B Michaels (n 21), at 74-78. Extensions of privileges and immunities of officials of regional and field offices can be found as well in more recent agreements. To provide a few examples, Art. IX Section 1(c) Agreement between the Government of the Russian Federation and the International Monetary Fund regarding the Resident Representative Office of the International Monetary Fund in the Russian Federation, which entered into force on 9 November 2004, available in (2004) UNJYB 107-113, specifically provides for immunity from seizure of the officials' personal baggage (which, however, does not apply to nationals of the Russian Federation, as established in the last para of Art. IX Section 1). Also, Section 2(c) of the Exchange of notes constituting an agreement between the Kingdom of the Netherlands and UNESCO concerning the privileges and immunities of the staff of UNESCO-IHE and their family members, which entered into force on 1 January 2006, available in (2006) UNJYB 63-65, grants to the administrative and technical staff of UNESCO, together with members of their family forming part of their household, the same privileges and immunities as the host State accords to administrative and technical staff of the diplomatic missions established therein in accordance with the Vienna Convention.

Hence, Art. VI Section 19 contains a set of prerogatives considered reasonable and appropriate to ensure the independence of officials in the exercise of their functions. This is reinforced by the requirement that officials themselves respect the international character of their position and remain independent when performing their tasks. The privileges and immunities prescribed in Art. VI Section 19 thus reflect the needs of the Specialized Agencies by providing them with the means to shield themselves against indirect interference from States intending to exercise jurisdiction over, or apply their laws to the agency's officials.

## **B. History and drafting of the provision**

17. Prior to the Second World War, international officials 'enjoyed the radiance of the diplomat'.<sup>25</sup> Indeed, officials of the League of Nations were granted diplomatic privileges and immunities on the basis of Art. 7 para 4 of the Covenant of the League. Similarly, the subsequent *Modus Vivendi* for the League of Nations and the International Labor Office at Geneva, adopted in 1921,<sup>26</sup> specified that non-Swiss officials of the Secretariat of the League and the International Labor Office were to be assimilated to the diplomatic corps at Berne, and thus, to be accorded the same privileges and immunities as the latter.<sup>27</sup> However, at the time of the establishment of the League of Nations Committee of Experts for the Progressive Codification of International Law, *i.e.* in late 1924, doubts were raised as to the rightness of the absolute identity of privileges and immunities between diplomatic agents proper and League officials.<sup>28</sup>

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<sup>25</sup> D B Michaels (n 21), at 12. As described by the author, precedents from the nineteenth century, where international public unions and international commissions (both functional and riparian commissions) were established, indicate that, functionaries of the former did not enjoy specific privileges and immunities, whilst functionaries of the latter, notably of the functional commissions, were invested with prerogatives of a diplomatic character. As to the riparian commissions, concepts evolved overtime: while functionaries of the well-known Rhine River Commission were entitled to special safeguards and guarantees of neutrality, functionaries of later commissions were granted the privilege of 'inviolability' and full independence of territorial authorities, which, as observed by the author, can ultimately be said to have amounted to diplomatic privileges and immunities. See *ibid.*, at 32-36.

<sup>26</sup> 1921 *Modus Vivendi*, United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. II, 1961, 127, embodied in a letter from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations, dated 19 July 1921.

<sup>27</sup> M Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (Kraus Reprint Co. New York 1972) 15.

<sup>28</sup> ILC, UN-Doc. A/CN.4/304, Preliminary report on the second part of the topic of relations between States and international organizations, Yearbook of the International Law Commission 1977, Vol. II(1), 143.

18. The understanding of the Committee of Experts found its echo in the constitutions – or the agreements sustaining the creation – of the majority of international organizations that were being established after the Second World War. While the provisions regarding the privileges and immunities of officials were based to a large degree on the *Modus Vivendi*<sup>29</sup> referred to above, there was a clear tendency to modify League practice in certain aspects. In particular, the drafters wished to avoid any general grant of *diplomatic* privileges and immunities to officials.<sup>30</sup> Instead, the constitutional instruments of the international organizations established after the war only accorded privileges and immunities to officials to the extent required for the independent exercise of their functions.<sup>31</sup> This functional necessity-based rationale was replicated in Art. VI Sections 19 and 20 of the Specialized Agencies Convention, as it was deemed to protect in ‘quite sufficient’ terms the officials of the Specialized Agencies.<sup>32</sup> Ultimately, only in cases deemed ‘really necessary’<sup>33</sup> were *diplomatic* privileges and immunities accorded to international officials, as will be seen below.

### C. Key Elements

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<sup>29</sup> As supplemented by the *Modus Vivendi* of 1926 (n 26), at 134. See Report of the Preparatory Commission of the United Nations, UN-Doc PC/20, 23 December 1945, 61.

<sup>30</sup> M Hill (n 27), at 101. Other difficulties experienced by the League with respect to the granting of privileges and immunities to officials, as identified by Michaels, include: the lack of an internationally recognized official passport or travel document whereby it would be possible to identify the international character of the holder and ensure the entitlements inherent in his/her status; and Governments’ discriminatory treatment of national vis-à-vis non-national officials, particularly with respect to taxation and facilities issues. See D B Michaels (n 21), at 56.

<sup>31</sup> Art. XII of the Constitution of UNESCO, from 1945, determines that ‘[t]he provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities, shall apply in the same way to this Organization’, while in accordance with Art. 105(2) of the UN Charter ‘[r]epresentatives 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.’ With regard to the ILO, Art. 40(2) of its Constitution, from 1946, prescribes that ‘[d]elegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.’ This provision was followed with slight changes, notably with regard to the categories of personnel referred to, in Art. 67(b) of the WHO’s Constitution, from 1948, in Art. 27(b)(ii) of the WMO’s Convention, from 1950, and in Art. XV(B) of the IAEA’s Constitution, from 1956. Still, as can be deduced from these provisions, there is no specification with regard to the nature and scope of the privileges and immunities so granted.

<sup>32</sup> Final Report of Sub-Committee 1 of the Sixth Committee of the General Assembly of the United Nations on ‘Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies’, UN-Doc. A/C.6/191, 15 November 1947, 10, para 27 (hereinafter ‘Final Report of the Sixth Committee, 1947’).

<sup>33</sup> Report of the Preparatory Commission of the United Nations, UN-Doc. PC/20, 23 December 1945, 62. See also UNGA Res A/RES/22(I)D, adopted in 13 February 1946, in the framework of the coordination of the privileges and immunities of the United Nations and the Specialized Agencies.

***‘(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;’***

19. Immunity from legal process for acts performed in an official capacity applies to actions brought against officials in civil cases, as well as to criminal prosecution. This immunity is perceived as a *conditio sine qua non* for the effectiveness of the activities of international organizations.<sup>34</sup> It prevents individual States from interfering in the work of the Specialized Agencies, which after all is mainly carried out by the agencies’ officials. In the *travaux préparatoires*, it was considered in this respect that the present provision – which follows closely the correspondent provision of the General Convention – was meant to allow officials ‘to pursue their official duties, feeling confident that they are protected from all personal liability in regard thereto before municipal tribunals unless immunity is waived’.<sup>35</sup>
20. Headquarters Agreements typically contain a similar provision.<sup>36</sup> A few of them expressly grant immunity from legal process irrespective of nationality.<sup>37</sup> It is irrelevant to consider the official’s nationality in this context, however, since, when acting in their official capacity, officials are in effect acting on behalf of the international organization itself.<sup>38</sup>
21. In view of the need to preserve the independence of their operations, Specialized Agencies maintain that any *a priori* assessment of whether a certain act has been performed in an official capacity should be done by them rather than by domestic courts.<sup>39</sup> This understanding follows the ICJ’s early assertion that ‘it is essential that in performing his duties [the official] need not have to rely on any other protection than that of the

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<sup>34</sup> C W Jenks, *The Headquarters of International Institutions: A Study of their Location and Status* (London: The Royal Institute of International Affairs 1945) 40.

<sup>35</sup> Final Report of the Sixth Committee, 1947, 8, para 22.

<sup>36</sup> See, eg, Art. 22(a) Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, 357 UNTS 3; Art. 17(a) Agreement between Switzerland and the International Labour Organisation regarding the Headquarters of the ILO in Switzerland, signed on 11 March 1946, 15 UNTS 378; and Art. 17(a) Agreement between the World Meteorological Organization and Switzerland to govern the legal status of the World Meteorological Organization in Switzerland, 211 UNTS 277.

<sup>37</sup> See Art. 17(a) of both the WMO and the ILO Headquarters Agreements (n 36) and Art. 15 of the WIPO Headquarters Agreement with Switzerland (not registered with the UN).

<sup>38</sup> Memorandum of the General Counsel of UNRWA, 1968, reproduced in ILC study on ‘The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat’, UN-Doc. A/CN.4/L.383 and Add.1-3, Yearbook of the International Law Commission, 1985, Vol. II(1)/Add.1, 171, para 55.

<sup>39</sup> YILC 1967 Vol. II (n 1), at 313, para 109. On the UN position in this regard, see T Iwata and R Bandyopadhyay, Commentary on Art. V Section 18(a) General Convention, MN 51-57, for further reference.

Organization.<sup>40</sup> In earlier jurisprudence, this rationale was not, however, immediately grasped. In *Westchester County on Complaint of Donnelly v. Ranollo*,<sup>41</sup> for instance, a US court ruled that the chauffeur of the UN Secretary General, who had exceeded the legal speed limit while driving the latter to a conference, was not entitled to immunity. The Court justified its decision as follows:

‘To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual’s function has no relation to the importance or success of the Organization’s deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would in effect create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment.’<sup>42</sup>

22. Holding that entitlement to immunity should be based on the trial of the issue of fact, the Court made its own appreciation of whether the UN official was discharging such functions as were necessary for the efficient functioning of the UN,<sup>43</sup> even if this implied bypassing the UN’s own appreciation that the official *was* entitled to immunity, owing to the official character of its conduct.<sup>44</sup>
23. The question whether it is appropriate for a domestic court to bypass the organization’s determination of an official’s immunity was also at issue in a later decision of the Philippine Supreme Court.<sup>45</sup> The case involved an official of the Asian Development Bank, charged with defamation. While the lower court dismissed the two criminal cases, without notice to the prosecution, following the endorsement of the official’s immunity by the Philippine Department of Foreign Affairs (DFA), the Supreme Court quashed the decision, based on the understanding that:

‘courts cannot blindly adhere and take on its face the communication from the DFA that petitioner is covered by any immunity. The DFA’s determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts. In receiving *ex-parte* the DFA’s advice and in *motu proprio* dismissing

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<sup>40</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) ICJ Rep 174, 183. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, (1999) ICJ Rep 62, especially para 60.

<sup>41</sup> Decision of the City Court of New Rochelle, New York, 67 NYS 2d. 31, 8 November 1946 (hereinafter ‘Ranollo case’). It should be noted that while the defendant’s name seems to be Ranollo, it appears in a letter from 29 November 1946 of the then UN Secretary-General as ‘Ranallo’, as explained in L Preuss, ‘Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case’, in (1947) 41 *The American Journal of International Law* 555, 555.

<sup>42</sup> *ibid.*, at 34.

<sup>43</sup> *Ranollo case* (n 41), at 35.

<sup>44</sup> The interpretation that the conduct at stake had been performed in an official capacity was upheld by the UN Legal Counsel Oscar Schachter in one of the court’s hearings, as reported by L Preuss (n 41), at 556.

<sup>45</sup> *Jeffrey Liang (Huefeng) v. People of the Philippines*, G.R. No. 125865, 28 January 2000.

the two criminal cases without notice to the prosecution, the latter's right to due process was violated ... The needed inquiry in what capacity petitioner was acting at the time of the alleged utterances requires for its resolution evidentiary basis that has yet to be presented at the proper time. At any rate, it has been ruled that the mere invocation of the immunity clause does not *ipso facto* result in the dropping of the charges.<sup>46</sup>

24. Arguably, the – somewhat audacious – decisions of both courts were owed to the perception, still held by some in present times (note that the Philippine Supreme Court's decision is from 2000), that the regime of privileges and immunities provides international officials, protected by their organizations, with the space to act with *de facto* impunity.<sup>47</sup>
25. It is observed in this respect that the ICJ in the well-known *Cumaraswamy* opinion did not exclude the possibility of a national court setting aside an assessment made by the UN Secretary-General regarding the official character of an act performed by an UN agent, although the Court recognized that priority should be given to its assessment. According to the ICJ:

‘When national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning this immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.’<sup>48</sup>

26. However, if every national court would be able to scrutinize at the outset immunity questions – without regard being paid to the organization's own assessment – conflicting decisions would necessarily accrue, thus undermining the very purpose of immunity from legal process. It should moreover be noted that, apart from the question of immunity, there is, in the first place, the question of the exercise of jurisdiction by domestic courts over disputes involving (official) institutional affairs. Although there are indeed various cases where a certain degree of judicial review of acts of international organizations has been carried out by domestic courts, the latter have inherent jurisdictional limitations under international law, which hamper the possibility of them playing a more significant role in the settlement of claims against international organizations. This is demonstrated by the surprising decision of a Bangladeshi court involving the World Bank: in an employment

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<sup>46</sup> *ibid.*

<sup>47</sup> That such perception is still noticeable was signalled by D Petrovic, in ‘Privileges and immunities of UN Specialized Agencies in field activity’, paper presented at a Conference held in Geneva on the Practical Legal Problems of International Organizations: A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights, March 2009, 15. To prove it wrong, the author noted that in the internal systems of a few Specialized Agencies, the legal precedent has been created whereby immunities are lifted with a view to executing national judgements in some areas, such as family pension alimony, or are generally lifted upon request of the competent national authority or the official himself; *ibid.*, at 16.

<sup>48</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion (1999) ICJ Rep 62, para 61.

dispute where the plaintiff's service had been terminated, the High Court expressly issued an order to the World Bank to reinstate the claimant in her post, thereby bypassing the decision of the chief administrative officer of the World Bank, the World Bank's assertion of immunity, and also the judgement of the World Bank Administrative Tribunal on the matter – which solely awarded pecuniary compensation.<sup>49</sup>

27. This does not mean, however, that national courts may not have some say on the matter of institutional immunity and, in particular, on whether a certain conduct was performed in an official capacity. As has been noted, domestic courts 'must have at least *some* basic competencies to interpret organizational immunities – otherwise they would (strictly speaking) not be entitled to confirm or award an absolute standard of immunity, either.'<sup>50</sup> (See MN 33 below).

### **The concept of 'official capacity'**

28. Most of the legal controversies stemming from the application of the present sub-section regard the question of whether a given official's act should be considered as an act performed in an official capacity.<sup>51</sup> In response to an inquiry by UNIDO on the matter, the UN Office of Legal Affairs asserted that there was no precise definition of the expressions 'official capacity', 'official duties' or 'official business', in that these concepts were to be substantiated in each particular context, through a functionalist lens.<sup>52</sup> It even doubted the desirability of advancing such a definition, 'since it would not be in the interest of the Organization to be bound by a definition which may fail to take into account the many and

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<sup>49</sup> *Ismet Zerin Khan v. World Bank and Others*, High Court of Dhaka, Suit/Case No. 48, 28 April 2010, as quoted in R Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges', in (2012) *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, 112-114. See also World Bank Administrative Tribunal Decision No. 293, *Ismet Zerin Khan v. International Bank for Reconstruction and Development*, 20 May 2003.

<sup>50</sup> T Neumann and A Peters, 'Switzerland', in A Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013) 251.

<sup>51</sup> Although most of the cases herein referred to (MN 30-38) do not regard the conduct of officials of the Specialized Agencies, the questions addressed may as well be relevant in the latter contexts.

<sup>52</sup> The letter was addressed to the Legal Liaison Officer of UNIDO in 1977 and is reproduced in the ILC study on 'The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat', UN-Doc. A/CN.4/L.383 and Add.1-3, Yearbook of the International Law Commission, 1985, Vol. II(1)/Add.1, 171, 172. A more extended account of the UN's understanding of the concept of 'official capacity' is offered in T Iwata and R Bandyopadhyay, Commentary on Art. V Section 18(a) General Convention, MN 38-50.

varied activities of United Nations officials'.<sup>53</sup> What is certain, however, is that municipal law interpretations of 'official capacity' have not been generally relied upon by the Specialized Agencies.<sup>54</sup>

29. Various claims against officials tend to dismiss the official character of the conduct complained of by pointing to free-standing unlawful acts or to conduct that was merely incidental to the official activities of the international organization's official. Such acts may not be considered to be functionally necessary to advance the interests of the organization. However, the vast majority of decisions have upheld immunity in such cases, as long as the conduct concerned could be identified as having been performed in the course of/in relation to official functions. These decisions have thus held that official acts are deemed certainly apt to include wrongs committed in the course of the performance of official functions.<sup>55</sup>

## **I - Employment disputes**

30. In employment disputes where suits are brought against higher officials, or the organization itself (and even the organization's staff association<sup>56</sup>), the outcome is often that acts of higher officials, such as acts allegedly involving employment discrimination, harassment or denial of a merited position, are qualified as acts performed in an official capacity for which immunity is enjoyed, because they constitute activity that is essential for the fulfilment of their functions.
31. Precedents in US court decisions involving diverse international organizations have confirmed this. For instance, in *Brzak v. United Nations*,<sup>57</sup> a case involving the UN and three of its former senior officials, the Court ruled that the complaints raised regarding office management, the allocation of work assignments, and the decisions to withhold promotions, all involved acts tantamount to 'personnel management decisions falling within

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<sup>53</sup> *ibid.*

<sup>54</sup> YILC 1985 Vol. II(1) (n 6), at 199, para 131.

<sup>55</sup> The language is borrowed from the case *Bertolucci v. European Bank for Reconstruction and Development*, [1997] UKEAT 276\_97\_2207, referred *infra* at MN 32.

<sup>56</sup> In *Trempe v. Assoc. du personnel de l'OACI et al.* and *Trempe v. Conseil de L'OACI et al.*, Nos. 500-05-061028-005 and 500-05-063492-019, District de Montréal, Canada, 2 November 2005 (quoted in (2005) UNJYB 511-513), a Canadian case involving *inter alia* the Staff Association of the ICAO, the Court of Appeal considered the Staff Association's conduct as being covered by the Specialized Agency's immunity.

<sup>57</sup> *Cynthia Brzak and Nasr Ishak v United Nations, Kofi Annan, Wendy Chamberlin, Ruud Lubbers, et al.*, 551 F. Supp. 2d 313 (S.D.N.Y. 2008), 597 F.3d 107 (2d Cir. 2010).



the ambit of the defendants' professional responsibilities'.<sup>58</sup> With respect to the only claim understood as not relating to the exercise of official functions, i.e. the claim of battery, immunity eventually remained unanswered by the Second Circuit on grounds that it lacked subject matter jurisdiction.<sup>59</sup>

32. Such an understanding was also confirmed in UK courts, for example, in the case of *Mukoro v. European Bank for Reconstruction and Development*,<sup>60</sup> where the Employment Appeal Tribunal asserted that administrative activities such as the selection of staff for employment were to be considered as 'official activities'.<sup>61</sup> In response to the allegation that the claimant's job application had been rejected on grounds of racial discrimination, the Tribunal clarified that the selection of staff was to be considered an official act regardless of the way in which it had been performed and of its consequences. In this vein, it is the act of selection – and not the allegedly unlawful discrimination – that matters for the purposes of establishing the official character of the activity complained of.<sup>62</sup>
33. It is noteworthy that the international character of the officials' functions and the prerogatives that come with it, notably, immunity from legal process, are sometimes not fully grasped and endorsed by States, even when signatories to the General and the Specialized Agencies conventions. Recently, a State hosting the regional office of a UN programme requested it to adapt its staff contracts to the State's labor legislation and to subject the organization's officials to the jurisdiction of local courts whenever employment disputes would arise.<sup>63</sup> The appointment, dismissal and management of staff, however, are

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<sup>58</sup> *ibid.*, at 113. The understanding that 'personnel management' lies within the functional duties of higher officials had also been upheld in the earlier *Donald v. Orfila* case, whereby a claim had been brought against the Secretary-General of the Organization of American States for interfering with the claimant's employment contract and inflicting emotional distress intentionally (see US District Court DC, 30 July 1985, affirmed, US Court of Appeals DC Cir., 18 April 1986, as quoted in A Reinisch (ed), *International Organizations Before National Courts* (CUP 2000) 207.

<sup>59</sup> *Brzak v. United Nations* (n 57), at 113, 114. For a more detailed description of cases involving the UN, see T Iwata and R Bandyopadhyay, Commentary on Art. V Section 18(a) General Convention, MN 44-50.

<sup>60</sup> *Mukoro v. European Bank for Reconstruction and Development*, Employment Appeal Tribunal, 19 May 1994, [1994] UKEAT 813\_92\_2303; ICR 897; 107 ILR 604.

<sup>61</sup> *ibid.*, at 612.

<sup>62</sup> *ibid.* An equivalent point was made in a subsequent case against the same bank and two of its officials: *Bertolucci v. European Bank for Reconstruction and Development*, Employment Appeal Tribunal, [1997] UKEAT 276\_97\_2207.

<sup>63</sup> See Inter-office memorandum to the United Nations Resident and Humanitarian Coordinator and United Nations Development Programme (UNDP) Resident Representative of [State] concerning the non-applicability of [State] Labour Laws to the United Nations, April 2012, as quoted in (2012) UNJYB 454-457.

normally reserved to the international organization concerned, and employment disputes are to be solved through its internal dispute settlement mechanisms.

## II - Criminal offences

34. Some courts have held that immunity cannot attach to the commission of a crime, on the ground that this cannot be considered an official act of the organization, whereas other courts have upheld immunity in such cases. In *Rendall-Speranza v Nassim*, for instance, a US court upheld the immunity of an official of the IFC accused of battery,<sup>64</sup> following the IFC's contention, as *amicus curiae*, that the official's conduct was appropriate under IFC policy, inasmuch as it was aimed at preventing IFC files from being stolen.<sup>65</sup> Although one can hardly grasp how a battery claim can still be justified on grounds of functional necessity, the Court's decision to uphold the immunity of the official was possibly owed to the IFC's intervention confirming the official character of the acts complained of.<sup>66</sup>
35. In contrast, in the aforementioned defamation case involving an official of the Asian Development Bank, *Liang (Huefeng) v People*, the Philippine Supreme Court held that 'the commission of a crime is not part of official duty'<sup>67</sup> owing to its *ultra vires* character. Invoking earlier jurisprudence, the Supreme Court asserted, in particular, that:
- 'slandering a person could not possibly be covered by the [headquarters] agreement because our laws do not allow the commission of a crime, such as defamation, in the name of official duty. The imputation of theft is *ultra vires* and cannot be part of official functions. It is well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice or in bad faith or beyond the scope of his authority or jurisdiction.'<sup>68</sup>
36. The approach advanced by the Philippine Court is understandable. The invocation of immunity on the basis of functional necessity cannot be meant to function as a shield of criminal conduct carried out by officials. Hence, based on the understanding that officials are not constitutionally empowered to perform criminal activities, the Court equated the latter activities with *ultra vires* conduct. It should at any rate be noted that *ultra vires* conduct normally refers to conduct which, albeit unlawful, is still attributable to the international organization as it constitutes an act or omission carried out by an official

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<sup>64</sup> *Rendall-Speranza v Nassim*, 107 F.3d 913, 915, DC Cir 1997.

<sup>65</sup> *ibid.*, at 915 and 919.

<sup>66</sup> C H Brower, 'United States' in A Reinisch (n 50), at 315.

<sup>67</sup> *Jeffrey Liang (Huefeng) v. People of the Philippines*, G.R. No. 125865, 28 January 2000.

<sup>68</sup> *ibid.*

purportedly or apparently performing official functions. These situations are to be distinguished from those where private actions or omissions are performed by individuals who happen to be agents of an international organization.<sup>69</sup> Drawing a line between both scenarios is not always a straight-forward process, and while the Philippine Supreme Court framed the conduct at stake in the latter terms, other courts may, as seen above, still find a sufficiently close link between the official's unlawful conduct and his/her functions to be able to uphold institutional immunity.

### **III - Traffic violations or parking offences**

37. Travelling directly from home to the Specialized Agency and back is not considered an official act, within the meaning of Art. VI Section 19(a),<sup>70</sup> unless the official was driving on authorized official business.<sup>71</sup> On the other hand, driving is undoubtedly considered to be official conduct when performed by chauffeurs employed by the Specialized Agencies.
38. Specialized Agencies have alerted officials to the fact that, in the occurrence of violations of traffic or parking regulations, they are not exempted from paying the apposite fines and that these matters should be settled on a personal basis.<sup>72</sup> In the event that functional immunity can be claimed, the Specialized Agencies at times waive immunity; some opt to consider requests for waivers on a case-by-case basis, whereas others usually accede to such requests.<sup>73</sup>

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<sup>69</sup> See the ILC's Articles on the Responsibility of International Organizations, with commentaries, in Report of the Law Commission on the Work of its Sixty-Third Session, Official Record of the General Assembly, 66th Sess., Supp. 10 (A/66/10), 2011, in particular, paras 3 and 4 of the Commentary to Art. 8.

<sup>70</sup> This was clarified by the UN Office of Legal Affairs with regard to UN officials, in a letter addressed to the Legal Liaison Officer of UNIDO, from 1977, quoted in YILC 1985 Vol. II(1) (n 6), at 171, para 57.

Cf. Art. 13(1)(a) of The European Bank for Reconstruction and Development (Immunities and Privileges) Order 1991, enacted in the United Kingdom, which grants to officials of the Bank 'immunity from suit and legal process, even after the termination of his mission or service, in respect of acts performed by him in his official capacity including words written or spoken by him, except in respect of civil liability in the case of damage arising from a road traffic accident caused by him.' Arguably, the introduction of such an exception is explained by the understanding that travelling to and from the Bank constitutes official conduct.

<sup>71</sup> To provide one example, in 2009, an ILO official who was returning from an official mission in Turin was fined for having exceeded the speed limit. According to the ILO, the official was in the exercise of its functions, and thus, the agency requested that the ticket be cancelled.

<sup>72</sup> An example of this is an Information Circular of a Specialized Agency distributed among staff members at Headquarters and established offices, on file with the authors.

<sup>73</sup> WHO constitutes an example of the former and, as mentioned in YILC 1985 Vol. II(1) (n 6), at 205, para 199, FAO would be an example of the latter case.

### **Scope of immunity from legal process**

39. As far as the scope of immunity from legal process is concerned, Specialized Agencies have been confronted with the question whether court summons for the appearance of officials as witnesses in judicial proceedings against third parties are covered by immunity. Already in a case dating back to 1965, a Specialized Agency made clear that immunity from legal process did indeed extend to officials giving any information with respect to the business of the organization. According to the Specialized Agency concerned, this extension would apply regardless of whether the proceedings had been brought against the official himself or a third party.<sup>74</sup>
40. Such an approach is generally followed by Specialized Agencies. It is based on the understanding that immunity from legal process entails the privilege of non-disclosure of information acquired in the performance of official functions. It also emerges as a natural corollary of the confidentiality and inviolability of institutional archives and documents that may well contain information in respect of which officials are certainly not entitled to testify in court. In an older assessment of the practice of the Specialized Agencies in this regard, the ILC noted that in cases where an official was requested to appear as witness, the agencies generally preferred to allow the official to make a written deposition on a voluntary basis, instead of conceding to a court appearance.<sup>75</sup> The IMF, for example, has exceptionally allowed its officials to appear in court as witnesses, noting that in such instances the officials' immunity is not prejudiced: the IMF accedes to court requests on a purely voluntary basis, and does so for the purpose of serving a public good.<sup>76</sup> In the case of the WHO, immunity from legal process is moreover interpreted as extending to the exercise of functions as a jury,<sup>77</sup> and can also be invoked in certain non-judicial processes such as

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<sup>74</sup> YILC 1967 Vol. II (n 1) 313, para 111.

<sup>75</sup> YILC 1967 Vol. II (n 1) 317, para 144.

<sup>76</sup> Communication with the IMF on file with the authors. As also clarified by the agency, where Fund officials have testified as part of criminal proceedings, the testimony has not been given under penalty of perjury, as that would suggest a waiver of the immunity from judicial process. Rather, special arrangements have been made with the prosecution and the judge for testimony to be given under oath (where the official had committed to tell the truth) but not under penalty of perjury.

<sup>77</sup> Communication with WHO (on file with the authors). However, this understanding is not shared by the UN, to mention one example.

national parliament requests for the participation of officials in parliamentary inquiries and discussions over legislation.<sup>78</sup>

41. It is pertinent to raise the question whether immunity from jurisdiction extends to immunity from personal arrest or detention, *i.e.* inviolability. While the question of inviolability is omitted in the present subsection, that is not the case with regard to the immunities granted to representatives of members and experts on mission, who are expressly entitled to both immunity from legal process and immunity from personal arrest or detention.<sup>79</sup> Such an omission could be interpreted to mean that officials are not recognized the prerogative of inviolability. Accordingly, one could argue that both representatives of members and experts on mission fall back on their own Governments in cases requiring arrest or detention, whereas granting officials with inviolability would, in practice, entail *impunity* in particular cases. However, this is not the understanding that has been put forward by the UN.<sup>80</sup> Recently, in a legal opinion of the Secretariat of the UN addressing a threat of detention of UN officials raised by a member State, Art. V Section 18(a) of the General Convention – which is akin to the present subsection – was precisely invoked (apart from Art. 105 of the UN Charter) to negate the possibility of detention of officials.<sup>81</sup>
42. Having discussed the scope of immunity from legal process, it is also important to inquire whether it continues after the official has ceased his or her functions. In *Zoernsch v Waldock and Another*,<sup>82</sup> a case involving officials that were already retired at the time of the judicial proceedings, UK Courts held that the immunity of officials subsists after retirement from post. This is in line with the views already expressed by the time the Convention was adopted, namely, that the purposes of Art. VI Section 19(a) could only be fulfilled if immunity continued after the officials had ceased their functions as officials.<sup>83</sup> The Austrian Headquarters Agreements with both UNIDO and IAEA specifically provide for such an

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<sup>78</sup> See G L Burci, Commentary on Art.III Section 4 Specialized Agencies Convention, MN 34-37.

<sup>79</sup> See, respectively, Art. V Section 13 of the Specialized Agencies Convention, and the pertinent paragraphs of the various annexes to the Specialized Agencies Convention.

<sup>80</sup> Such an understanding is, for example, reflected in UNGA Res 36/232, on ‘Respect for the privileges and immunities of officials of the United Nations and the specialized and related agencies’, 18 December 1981.

<sup>81</sup> ‘Note to the Ministry of Foreign Affairs of [state A] concerning a request to [State B] staff members of the United Nations to leave the country or face possible detention’, May 2012, as quoted in (2012) UNJYB 457-459.

<sup>82</sup> *Zoernsch v Waldock and Another*, 1 WLR 675, 1964, 41 ILR 438.

<sup>83</sup> Final Report of the Sixth Committee, 1947, 8, para 22. As noted in the report, such an understanding derives from the wording of the Section as a whole.

extension,<sup>84</sup> and so does FAO's Headquarters Agreement with Italy<sup>85</sup> and WIPO's Headquarters Agreement with Switzerland.<sup>86</sup>

### **Legal proceedings instituted by the Specialized Agency against its officials**

43. In principle, immunity also extends to civil or criminal proceedings instituted by the Specialized Agencies themselves against their officials in municipal courts, but such immunity can easily be waived by the agency. The agencies may notably institute proceedings where internal administrative investigations reveal that officials have been involved in financial irregularities or fraudulent/corrupt practices.
44. As misconduct by officials is of serious concern, internal investigations have been strengthened within the IMF and the World Bank (and other international financial institutions) since 2006, following the adoption of a uniform framework for preventing and combating fraud and corruption.<sup>87</sup> Under this framework, both Specialized Agencies are required to set up an Investigative Office responsible for conducting investigations with respect to, *inter alia*, allegations of misconduct on the part of the organizations' staff members. Referral of the investigative findings to national authorities is specifically envisaged, provided that it is considered appropriate and an internal authorization to that end is granted.<sup>88</sup> Certainly, the extent to which proof that was obtained by the Specialized Agency can be further used by judicial authorities in their own investigations and court proceedings will depend on the procedural law of the State concerned.
45. Referral to local authorities does not necessarily mean that these will proceed with their own judicial investigations. The WHO has reported that while some cases have led to

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<sup>84</sup> Art. XII Section 37(a) Agreement between the United Nations and the Republic of Austria regarding the Headquarters of the United Nations Industrial Development Organization (n 11) determines that UNIDO officials shall enjoy '[i]mmunity from legal process of any kind in respect of words spoken or written, and of acts performed by them, in their official capacity, such immunity to continue notwithstanding that the persons concerned may have ceased to be officials of the UNIDO'. Art. XV Section 38(a) of the IAEA Headquarters Agreement (n 23) uses the same wording, *mutatis mutandis*.

<sup>85</sup> See Art. XIII Section 27(c) FAO Headquarters Agreement (n 23).

<sup>86</sup> See Art. 15 WIPO Headquarters Agreement (n 37).

<sup>87</sup> The document is available at <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/30716700-EN-UNIFORM-FRAMEWORK-FOR-COMBATTING-FRAUD-V6.PDF>> last accessed 29 May 2015.

<sup>88</sup> As specified in the World Bank Staff Manual, sub-section 06 of section 08, personnel information that can be disclosed includes investigative records, operational documents, investigative materials and information in the Bank Group's possession.

criminal prosecution and conviction by local courts, other complaints fell into oblivion without any explanation being given by local authorities.<sup>89</sup>

46. It should be noted that local court action merits careful consideration by the Specialized Agency concerned. It requires it to balance various elements, on the one hand its institutional interests, the cost of legal action, the use of the Specialized Agency's staff resources to pursue the case (which, as noted by the WHO, can be highly cumbersome and time-consuming), and on the other hand the deterrent effect of judicial proceedings, as well as the chances of recovery and/or criminal conviction.

#### **D. Conclusion**

47. Specialized Agencies mostly rely on local authorities to uphold institutional immunity. While the latter often match such expectation, the discussion above has shown that in some instances national courts are less receptive to vindicating the immunity of an official allegedly involved in wrongful acts. In reality, whether a given conduct fell within the *chapeau* of functional necessity can sometimes be subject to contention, particularly when upholding immunity brings with it the perception that the official acted with *de facto* impunity. Be that as it may, Specialized Agencies are expected to undertake a fair judgment in that regard and are accordingly imposed the duty to waive their officials' immunity when the circumstances so demand (see below MN 105ff). Where, notwithstanding, the propriety of the Specialized Agency's judgement is called into question, the latter is required to provide for appropriate modes of dispute settlement<sup>90</sup> (see below Section 31(a)). At the end of the day, if properly applied, these mechanisms seem to guarantee a befitting balance of the interests at stake<sup>91</sup> - one which, in any case, would hardly be achieved were national courts to decide upon functional immunity questions on their own.

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<sup>89</sup> Communication with WHO on file with the authors.

<sup>90</sup> See K Schmalenbach, Commentary on Art. IX Section 31(a) Specialized Agencies Convention for further reference.

<sup>91</sup> For a discussion on the balance between institutional immunity and the right of individuals of access to justice see A Reinisch, Commentary on Art. II Section 2 General Convention, MN 29-49.

*(b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations;*

### **History and drafting of the provision**

48. The precedent of exempting officials from income tax on their salaries, regardless of nationality, was set by the British authorities with regard to officials of the League of Nations, while it was operating in London between June 1919 and October 1920.<sup>92</sup>
49. Rather than establishing a specific regime for the exemption from income tax on official salaries of the Specialized Agencies, the present section refers instead to the system in force in the UN, which determines that officials shall 'be immune from taxation on the salaries and emoluments paid to them by the United Nations.'<sup>93</sup> This solution aimed to counteract the objections of a few member States to the General Convention's provision, which had indicated the possibility of making reservations due to their Parliaments' unwillingness to grant such privileges to officials who were their nationals.<sup>94</sup> Hence, whatever the outcome of this matter would be within the UN regime, it was agreed that the position of officials of the Specialized Agencies should be akin to that of UN officials.<sup>95</sup>

### **Key elements**

50. Immunity from taxation is deemed essential for the administration of international organizations and the cohesiveness of the international civil service,<sup>96</sup> in that the adoption of diverse modes of taxation at different levels would run counter to the principle of equal payment for equal work. Indeed, if Governments were free to tax the salaries of Specialized Agencies' officials who were their own nationals or residents in their territory, this would

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<sup>92</sup> M Hill (n 27), at 14.

<sup>93</sup> Art. V Section 19(b) General Convention.

<sup>94</sup> Final Report of the Sixth Committee, 1947, 9, para 23. It should be noted that the delegations of Canada, Egypt and the USSR placed it on record that they could not commit their Governments to granting tax exemption to officials of their own nationality and that the delegation of the United States made a general reservation of the attitude of its Government with respect to this matter when it came to their own nationals (see pp. 9 and 20 of the Report).

<sup>95</sup> *ibid.* For an overview of the discussions held within the 5<sup>th</sup> and 6<sup>th</sup> Committee of the First Part of the General Assembly of the United Nations, see J L Kunz, 'Privileges and Immunities of International Organizations', (1947) 41 *American Journal of International Law* 828, 860, 861.

<sup>96</sup> C W Jenks, *International Immunities* (London, Stevens; New York, Oceana Publications 1961) 123.



create a situation whereby some officials would have tax-free salaries, whereas other officials doing the same tasks, for the same nominal salary, would be subjected to income tax.<sup>97</sup> Varied forms of taxation would moreover place an additional administrative burden on the organization, which would have to pay higher salaries or a special allowance to compensate for any inequalities.<sup>98</sup> On another note, granting such possibility to host Governments would place them in a privileged position *vis-à-vis* the international organization (when compared to other State members contributing to the common budget), in dissonance with the principle of equality of States.<sup>99</sup> In sum, immunity from taxation is meant to safeguard, on the one hand, member State equality and, on the other hand, the equality of treatment of officials.

51. Despite the important principles on which Art. VI Section 19(b) is grounded, national discrimination has found its way into headquarters agreements and the constituent instruments of some Specialized Agencies, thereby constituting a significant exception to the principle of exemption from taxation. The Swiss headquarters and, where applicable, executing agreements with WIPO, ILO and WMO attest to this.<sup>100</sup> In the case of the IMF and the World Bank – which, as mentioned above, have not concluded headquarters agreements with the United States – exemption from taxation in the United States is solely granted to officials (*i.e.* Executive Directors, Alternates, officers, or employees) who are not local citizens, local subjects, or other local nationals, as established in both agencies' Articles of Agreement.<sup>101</sup> It should be noted that, according to US law, the salaries of aliens who are permanent residents of the United States are tax-exempt.<sup>102</sup> In contrast with the Articles of Agreement of the IMF and the World Bank, the Austrian headquarters

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<sup>97</sup> Report of the Preparatory Commission of the United Nations, UN-Doc PC/20, 23 December 1945, 62-63.

<sup>98</sup> C McCormick Crosswell, *Protection of International Personnel Abroad: Law and Practice Affecting the Privileges and Immunities of International Organizations* (New York Oceana Publications 1952) 70.

<sup>99</sup> J L Kunz (n 95), at 854. See also UNGA Res 78 (1), 7 December 1946 requiring equality of treatment of UN officials in the following terms: '[i]n order to achieve full application of the principle of equality among Members and equality of personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in the matter.'

<sup>100</sup> See Art. 16(f) WIPO Headquarters Agreement (n 37). The ILO and WMO Headquarters Agreements (n 36) together with their executing agreements, follow this pattern: with regard to the ILO, see Art.17(b) combined with Art. 9(d) of the Arrangement for the Execution of the ILO Headquarters Agreement; regarding the WMO, see Art. 17(b) read in conjunction with Art. 7(c) of the Plan of Execution of the WMO Headquarters Agreement.

<sup>101</sup> Art. IX, Section 9(b) of the IMF Articles of Agreement and Art.VII, Section 9(b) of the IBRD Articles of Agreement.

<sup>102</sup> See Sections 893 and 894 of the Internal Revenue Code of the United States. See also the explanation provided by E Okeke, Commentary on Annex VI Specialized Agencies Convention, International Bank for Reconstruction and Development, MN 48.

agreements with the IAEA and UNIDO, as well as the Spanish Headquarters Agreement with the UN World Tourism Organization (UNWTO), grant tax exemptions regardless of the nationality of the official.<sup>103</sup>

52. The imposition of income tax on the salaries and emoluments of national officials has been reported to occur as well in various States around the world hosting regional offices, on the basis of local legislation.<sup>104</sup> This is possible since States may have made reservations to the present section (or equivalent provisions contained in bilateral agreements), and some have not ratified the Specialized Agencies Convention or signed regional office agreements with Specialized Agencies at all. Undoubtedly, such state of affairs can only undermine the path towards a genuinely international character of international officials.<sup>105</sup>
53. Even if the constituent instruments of some Specialized Agencies, such as the Articles of Agreement of the IMF and the World Bank, contain discriminatory tax regimes, this does not necessarily grant Convention States hosting regional offices the possibility to bypass Art. VI Section 19(b) under the argument that the Articles of Agreement prevail. Art. VI Section 19(b) (read in conjunction with Art. V Section 18(b) of the General Convention), whilst providing for an unqualified exemption from taxation, may just be the apposite source of international law to argue for an extension of the scope of the privileges and immunities granted by the abovementioned treaties. This was made clear by the IMF in a recent case where a State hosting a regional office attempted to subject the income of locally employed nationals to taxation. According to the host State, the wording of Annex V para 2 of the Specialized Agencies Convention could only be interpreted to mean that the regime contained in the IMF's Articles of Agreement prevailed over the Convention, thereby justifying a tax levy on the income of national employees working at the organization's regional office. Noting that the country in question had adhered to the Specialized Agencies Convention with respect to the IMF, the IMF asserted that the proposed interpretation would render such State's adherence meaningless from a substantive viewpoint, in that it would only give effect to prerogatives already provided for in the organization's constituent instrument. Grounded on the Convention's *travaux*

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<sup>103</sup> See, respectively, Art. 38(d), Art. 37(d) read in conjunction with Art. 39, and Art.15(2).

<sup>104</sup> YILC 1985 Vol. II(1) (n 6), at 201.

<sup>105</sup> K Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff 1964) 122.

*préparatoires*, the IMF observed that the Convention was precisely meant to go further than the scope of privileges and immunities embodied in the organization's constituent instrument, and thus, provide an additional set of entitlements to its officials. The arguments raised by the IMF were ultimately endorsed by the host State.<sup>106</sup>

54. Where taxation has, in any case, been imposed, be it in headquarters States or regional offices States, internal mechanisms have been institutionalized by Specialized Agencies in order to counteract the subjection of their officials to national income taxation, and thus, to ensure equality in the conditions of service. Accordingly, the salary scale of the Specialized Agencies' officials is expressed in both gross and net terms. Gross salaries are subject to 'staff assessment', which is a form of internal tax managed by the UN and the Specialized Agencies. The amount of the staff assessment is then credited to the organizations' Tax Equalization Fund. When staff members are subject to national income taxation on their Specialized Agencies' earnings, they will be reimbursed from the Fund, which enables them to deduct from the tax applicable to their salaries the total amount of their contributions to their Specialized Agency.<sup>107</sup> In the case of the IMF, the tax equalization adjustments applied imply that staff members paid on a net-of-tax basis who are subject to US national, state, or local income tax on their Fund earnings will be paid a 'tax allowance' by the Fund.<sup>108</sup> The World Bank also provides such 'tax allowance' to its staff, and, in the case of short-term consultants, the Bank will 'gross up' their salary.

### **Scope of tax exemptions**

55. The fact that divergent systems of taxation prevail in different countries makes it quite a tormenting task to identify what benefits can exactly be considered to fall under the privilege of tax exemption. To start with, Specialized Agencies themselves do not have a common understanding of what the term 'salaries and emoluments' means. A generic

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<sup>106</sup> On the IMF's position in this respect, see J Lester and P Morris, Commentary on Annex V Specialized Agencies Convention, International Monetary Fund, MN 14-19.

<sup>107</sup> The UN General Assembly established the Tax Equalization Fund in UNGA Res A/RES/973(X)A, 15 December 1955. This mechanism was subsequently introduced by the various Specialized Agencies, following an agreement reached on 10 October 1960 by the Administrative Committee on Co-ordination of the United Nations and the Specialized Agencies. See eg Resolution No. 41/61 of the FAO Conference from 1961, and Executive Board decisions of the WHO EB29.R12. and EB31.R42. from 1962 and 1963, respectively.

<sup>108</sup> This information is available at the IMF website <<https://www.imf.org/external/np/adm/rec/policy/salary.htm>> last accessed 29 May 2015.

understanding has been advanced by the ILO according to which the term includes anything of financial value derived from the organization, except pension benefits (see *infra* MN 58 with regard to the latter).<sup>109</sup> More details can be found in a list provided by the WHO to staff employed in its US regional office containing a non-exhaustive enumeration of what is reportable as an earning from the organization, which may usefully apply within the framework of other Specialized Agencies. Apart from the officials' gross salary, WHO earnings include, as applicable: post adjustment; housing subsidy; dependent's allowance; education grant; non-resident allowance; language allowance; overtime pay; home leave costs; terminal entitlements; indemnity payment; mobility allowance; hardship allowance; non-removal allowance; travel on appointment; installation allowance; removal of household effects; family visit travel and separation travel.<sup>110</sup>

56. The Austrian Headquarters Agreement with UNIDO is similarly detailed as regards the types of tax exemptions accorded to non-Austrian officials. These include exemption from taxation of salaries, emoluments, indemnities, pensions, income and property of officials (under certain conditions); exemption from inheritance and gift taxes (under certain conditions), from vehicles tax and engine-related insurance tax.<sup>111</sup>
57. As noted, understandings may, however, differ. For example, although the WHO's and UNIDO's normative frameworks applying in the abovementioned countries exempt the taxation of indemnity payments, when it comes to sums awarded in legal proceedings against a Specialized Agency, the ILO Administrative Tribunal recently decided that the liability of such sums to national taxation did not entitle the complainant to claim a tax refund from the organization of which she was an official.<sup>112</sup>
58. In what particularly regards the liability to taxation of pensions paid to officials, such as payments due to the termination or suspension of their services, or indemnities for sickness or accidents, solutions differ depending on the tax legislation of the official's country of tax residence. It can for example be noted that Staff Retirement Plan benefits paid to World Bank officials who are US citizens or who are US residents for income tax purposes are

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<sup>109</sup> YILC 1985 Vol. II(1) (n 6), at 201, paras 152, 153.

<sup>110</sup> Communication with WHO (on file with the authors).

<sup>111</sup> See Art. XII Section 37 UNIDO Headquarters Agreement (n 23).

<sup>112</sup> Administrative Tribunal of the International Labour Organization, Judgment No. 3138, 4 July 2012, 16, 17.

subject to taxation in the US,<sup>113</sup> whereas benefits paid to UNIDO officials by the organization's Pensions Fund are exempted from taxation in Austria regardless of nationality.<sup>114</sup> The first pattern is followed in Canada with regard to ICAO officials and, in the case of UNWTO officials in Spain, the latter pattern has been implemented.<sup>115</sup> In France, the question gave rise to an arbitral award involving retired UNESCO officials, where the term 'salaries and emoluments' was ultimately interpreted by the Tribunal as not covering retirement pensions.<sup>116</sup> The decision was not immune to criticism however, and recent agreements celebrated between France and international organizations now include an express tax exemption for retired officials.<sup>117</sup>

59. As has been noted, in order to avoid any 'anomalies' in the taxation of pensions it is important that the calculation of the rate of pension as a proportion of the official's salary takes into account the subjection of the latter to income taxation.<sup>118</sup>
60. In addition to the modes of taxation mentioned above, it has been reported that various member States have attempted to impose Value Added Tax (VAT) upon officials, as well as stamp, car or road taxes, and parking or landing fees.<sup>119</sup> In the Specialized Agencies' view, however, this practice is inconsistent with the present provision.

## **Contributions to social security**

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<sup>113</sup> This information is available at <[http://siteresources.worldbank.org/INTPENSIONADMIN/64199911-1186074642661/22545385/US\\_Income\\_Tax\\_and\\_the\\_SRP\\_Net\\_Plan.pdf](http://siteresources.worldbank.org/INTPENSIONADMIN/64199911-1186074642661/22545385/US_Income_Tax_and_the_SRP_Net_Plan.pdf)> last accessed 29 May 2015.

<sup>114</sup> See Sections 37(d) and 39(a)(i) UNIDO Headquarters Agreement (n 23).

<sup>115</sup> See, respectively, Art. 24 Agreement between the International Civil Aviation Organization and Canada regarding the Headquarters of the International Civil Aviation Organization (ICAO), 96 UNTS 155 and Art. 15(2) and 17(1) Agreement between Spain and the World Tourism Organization concerning the legal Status of that Organization in Spain, 1047 UNTS 86.

<sup>116</sup> *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Arbitral Award of 14 January 2003, XXV United Nations Reports of International Arbitral Awards (2006) 231-66, paras. 40-51. The provision at stake was Art. 22(b) of the UNESCO Headquarters Agreement (n 36) since France had not acceded to the Specialized Agencies Convention at the time. After asserting that the ordinary meaning of the terms of the treaty would not lead to an interpretation granting tax exemption, the Tribunal moved on to an interpretation based on the intention of the parties and also on subsequent practice, only to arrive at the same conclusion.

<sup>117</sup> G B Burdeau, 'France' in A Reinisch (n 50) at 121.

<sup>118</sup> C W Jenks, (n 96), at 124.

<sup>119</sup> D Petrovic (n 47), at 14. To mention one example, Tunisia has recently upheld the imposition of VAT upon officials of the ILO, which has been increasingly present in the country since the Revolution in January 2012. In response to a Note Verbale produced by the ILO office in February 2013 requesting the issuance of identity cards for all ILO officials, the Tunisian authorities noted that officials of Tunisian nationality and foreign officials who resided permanently in Tunisia could not be exempted from the VAT, according to the general legal principle of equality of all Tunisian citizens regarding tax liability.

61. The question has been raised as to whether mandatory contributions to social security are to be considered as a form of direct *taxation* from which officials are exempted under the present provision. With regard to UN officials, the UN has consistently considered in its practice and policy that mandatory contributions for social security systems under national legislation constitute a form of direct taxation on the UN and are therefore contrary to the General Convention.<sup>120</sup> This view is shared by Specialized Agencies such as the IMF, the World Bank and UNIDO.<sup>121</sup>
62. Officials of Specialized Agencies participating in the United Nations Joint Staff Pension Fund<sup>122</sup> are not normally required to contribute to the social security system of the State in which their organization is headquartered. The fact that such institutional protection is in fact provided to officials is especially relevant in the cases of, for instance, Switzerland, France and Austria, where the obligation to contribute to national social security schemes would otherwise arise.<sup>123</sup> The exemption is implicit in the Swiss Headquarters Agreement with WMO<sup>124</sup> and also the Austrian Headquarters Agreement with UNIDO.<sup>125</sup> In the case of the Spanish Headquarters Agreement with UNWTO<sup>126</sup> and the British Headquarters Agreement with the IMO, the exemption of officials from domestic social security contributions is not granted to national officials.<sup>127</sup>
63. With regard to officials operating in regional offices, the situation may not be so clear-cut, alike the imposition of income tax, referred to above (see MN 38). While the recently

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<sup>120</sup> See, *inter alia*, ‘Draft note verbale for the United Nations Development Programme to be addressed to the Ministry of Foreign Affairs of a Member State in respect of a national law requiring mandatory contribution to the national health scheme’, 23 March 2005, as quoted in (2012) UNJYB 439, 440.

<sup>121</sup> See E Okeke, Commentary on Annex VI Specialized Agencies Convention, International Bank for Reconstruction and Development, MN 43-45 and, in what respects UNIDO, see ‘Inter-office memorandum regarding a legal opinion on social security arrangements in respect of project personnel at [UNIDO International Centre]’, as quoted in (2012) UNJYB 496-500.

<sup>122</sup> The United Nations Joint Staff Pension Fund was established by the UN General Assembly in 1949 to provide retirement, death, disability and related benefits for staff of the UN and other members. All Specialized Agencies but the IMF, the World Bank and UPU are member organizations of the Fund.

<sup>123</sup> YILC 1967 Vol. II (n 1) 315, para 118.

<sup>124</sup> For example, Art. 2 of the Plan of Execution of the WMO Headquarters Agreement prescribes the following: ‘[t]he World Meteorological Organization is exempt from all compulsory contributions to social providence funds in general, such as unemployment insurance, accident insurance, etc., on the understanding that the World Meteorological Organization will ensure, in so far as possible and on conditions to be agreed upon, the affiliation to Swiss insurance systems of those of its staff members who are not covered by an equivalent insurance scheme of the Organization itself.’

<sup>125</sup> See Sections 27 and 28 UNIDO Headquarters Agreement (n 23).

<sup>126</sup> See Art. 18(1)(5) of the UNWTO Headquarters Agreement (n 115).

<sup>127</sup> See Art.11(1) Agreement Between the International Maritime Organization and the Government of the United Kingdom of Great Britain and Northern Ireland Regarding the Headquarters of the Organization, 677 UNTS 3.

concluded Austrian Agreement with the World Bank regarding the establishment of liaison offices in Vienna exempts Bank staff from all compulsory contributions to any social security scheme of the Republic of Austria,<sup>128</sup> the ILO has reported that officials employed by the agency in its Branch Offices – which are of a smaller size and, as a matter of policy, exclusively or quasi-exclusively staffed with nationals from the country of the duty station – are typically not entitled to such an exemption, which entails that the ILO is considered liable for the payment of the officials’ contributions.<sup>129</sup>

### **The official’s household**

64. In countries hosting Specialized Agencies such as Switzerland, the tax-exempt income of officials has been taken into account in order to determine the tax rate of their spouses, and thereby appraise the actual economic means of the household. The application of higher taxation rates on the income of the spouses of officials has been interpreted as a form of indirect taxation of the official’s income to which no reference is made in the Specialized Agencies Convention.<sup>130</sup> The question has thus been raised as to whether such practice constitutes a breach of the present section.<sup>131</sup>
65. The matter has been subject to judicial scrutiny by the – then called – European Court of Justice, which, despite the *sui generis* nature of the EU, has inspired national judicial decisions involving officials of other international organizations, including the UN.<sup>132</sup> In the *Humblet* case,<sup>133</sup> the Court found the abovementioned practice to constitute a form of indirect taxation, and thus, an infringement of the applicable Protocol on Privileges and Immunities. In the later case of *Van der Zwalmen and Massart v. Belgian State*,<sup>134</sup> the Court generally maintained such line of reasoning, but determined that under some circumstances,

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<sup>128</sup> See Art. 12 Agreement between the Republic of Austria and the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency regarding the establishment of liaison offices in Vienna, 21 July 2010, as quoted in (2011) UNJYB 5-15.

<sup>129</sup> Communication with the ILO (on file with the authors).

<sup>130</sup> Other forms of indirect taxation have been reported in the United Kingdom, the headquarters of the IMO, where official salaries have been taken into account for the establishment of tax rates on non-exempt private income (Working Paper prepared by the UN Office of Legal Affairs, 16 June 1976, on file with the authors).

<sup>131</sup> Already in May 1976, the matter was discussed in a meeting specially convened in Geneva for that purpose, by the legal advisers of the Swiss based international organizations, including the ILO, WHO, WIPO and WMO, without any conclusion being reached, however (Working Paper prepared by the UN Office of Legal Affairs, 16 June 1976, on file with the authors).

<sup>132</sup> See for some examples R van Alebeek and A Nollkaemper, ‘The Netherlands’, in A Reinisch (n 50), at 202, 203.

<sup>133</sup> *Humblet v. Belgian State*, Case 6/60, ECR [1960] 1125.

<sup>134</sup> *Van der Zwalmen and Massart v. Belgian State*, Case C-229/98, ECR [1960] I-7113.

the income of an EC official could be taken into account for the purposes of granting a tax advantage (in that case, a marital allowance, the granting of which was income-dependent) to his/her spouse. It can be noted that the approach taken in the *Humblet* decision is followed by, at least, the WHO, and other international organizations such as the WTO.<sup>135</sup>

66. The abovementioned question of the equality of treatment of officials is of course also pertinent in this context. Accordingly, where such forms of indirect taxation are applied regardless of the understanding just described, Specialized Agencies will be required to set up an internal mechanism to reimburse the officials affected by the specific tax rate concerned. Recognizing that most national tax systems effect distinctions among individuals on the basis of marital status and number of dependents, the IMF provides its officials, regardless of nationality, with a Spouse and Child Allowance, to account for such differentiation in their net-of-tax salary systems.<sup>136</sup>

***(c) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;***

67. Art. VI Section 19(c) grants officials, their spouses and relatives dependent on them freedom of entry. In this way, officials are enabled to enter freely upon their international responsibilities and to travel to different countries without loss of time.<sup>137</sup> Immunity from immigration restrictions does not curtail the application of immigration laws, and thus, the right of States parties to impose normal travel and documentary requirements, such as the issuance of visas or entry permits. What it does mean, however, is that these documents should be issued without any kind of restriction – on the basis not only of immigration laws but also administrative action.<sup>138</sup> This exemption moreover entails that no distinctions are made on the basis of nationality in the issuance of visas.
68. Immunity from alien registration has been interpreted as inhibiting police or immigration services' requests that officials register in a State, or demands for the capture of bio-data,

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<sup>135</sup> Communication on file with the authors.

<sup>136</sup> This information is available at the IMF website <<https://www.imf.org/external/np/adm/rec/policy/salary.htm>> last accessed 29 May 2015.

<sup>137</sup> See K Ahluwalia (n 105), at 134.

<sup>138</sup> Final Report of the Sixth Committee, 1947, 7, para 19. For a detailed description of the UN's understanding of 'immigration restrictions', see T Iwata and R Bandyopadhyay, Commentary on Art. V Section 18(d) General Convention, MN 101-104.



such as through iris scans or fingerprinting.<sup>139</sup> Accordingly, in response to new regulations adopted in Hungary requiring the issuance of identity documents with fingerprinting for the entry, accreditation and documentation of officials and respective family members in the country, the ILO, FAO and UNHCR produced a joint Note Verbale in 2011 requesting that the regulations be amended to fully exempt officials and their family members from fingerprinting, in the same manner as members of diplomatic missions and their families.<sup>140</sup>

69. Similar provisions to the present section may be found in various headquarters agreements of the Specialized Agencies, such as those of UNIDO, FAO and ICAO.<sup>141</sup> With regard to the ILO and WMO, exemption from immigration restrictions and alien registration is solely granted to officials.<sup>142</sup> In a few headquarters agreements, such as that of WIPO and WMO, the principle of national discrimination has been applied in the grant of this prerogative.<sup>143</sup>
70. The expression ‘relatives dependent on them’ is interpreted by the UPU as encompassing not only children but also other individuals such as the father, mother, sister or brother of the official, for whom a dependency allowance is payable on the basis of UPU Staff Regulations.<sup>144</sup> In the IAEA Headquarters Agreement with Austria, the immunity under discussion is further extended to other members of the officials’ households.<sup>145</sup> In accordance with an exchange of notes between the IAEA and the Austrian Government, the term refers to ‘all persons employed to provide personal service to the person enjoying privileges likewise normally living under the same roof.’<sup>146</sup>
71. It is noted that some Specialized Agencies follow the practice of providing employment facilitation to the spouses of officials. The IMF is one such case: an IMF official who is neither an American nor a Permanent Resident in America is authorized to work for the IMF in the USA on a G4 visa, requested by the IMF. The official’s spouse typically holds a

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<sup>139</sup> *ibid.* at MN 106. As has been noted by the ILO, this interpretation is still valid in cases where national authorities attempt to impose, under anti-terrorism regulations, certain formalities (such as the obligation to provide fingerprints and a facial photograph) to international officials upon arrival – as was the case in Japan by 2008 (communication with the ILO on file with the authors).

<sup>140</sup> Communication with the ILO on file with the authors.

<sup>141</sup> See Section 37(i) UNIDO Headquarters Agreement (n 23), Section 27(f) FAO Headquarters Agreement (n 23) and Section 20(b) ICAO Headquarters Agreement (n 115).

<sup>142</sup> See Art. 14 of both Specialized Agencies’ headquarters agreements (n 36).

<sup>143</sup> See Art. 16(b) WIPO Headquarters Agreement (n 37) and Art. 14(c) WMO Headquarters Agreement (n 36).

<sup>144</sup> YILC 1985 Vol. II(1) (n 6), at 204, para 184.

<sup>145</sup> Section 38(f) IAEA Headquarters Agreement (n 23).

<sup>146</sup> IAEA note of 10 December 1958 and Government of Austria’s note of 27 February 1959, Doc. ZI. 285. 847-RR/59, as quoted in K Ahluwalia (n 105), at 135.

G4 Dependent visa and, with the help of the IMF, normally obtains from the US authorities authorization to work in the USA.<sup>147</sup>

72. Immunity from immigration restrictions and alien registration has not, in general, raised much contention<sup>148</sup> and where incidents have arisen, they have usually been settled after consultations with local authorities, to the satisfaction of the Specialized Agencies.<sup>149</sup>

***(d) Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;***

73. Art. VI Section 19(d) accords officials with an exemption from foreign exchange restrictions. Such a prerogative was considered necessary in view of the financial commitments that officials have in countries other than their own.<sup>150</sup> In most cases a similar privilege is provided for in the headquarters agreements of Specialized Agencies,<sup>151</sup> although in some agreements, such as that of UNWTO<sup>152</sup> and FAO,<sup>153</sup> a differentiation is made among officials on the basis of nationality. Such differentiation is also contained in the Articles of Agreement of both the IMF and the World Bank.<sup>154</sup>
74. The abovementioned provision contained in the FAO Headquarters Agreement, as well as the corresponding sections of the UNIDO Headquarters Agreement<sup>155</sup> and the IAEA Headquarters Agreement,<sup>156</sup> are particularly detailed and accord officials with the freedom to acquire or maintain in the respective host States or elsewhere foreign securities, foreign currency accounts, and other movable and, under the same conditions applicable to nationals, immovable property. Moreover, at the termination of their assignment with their

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<sup>147</sup> Communication with the IMF on file with the authors.

<sup>148</sup> YILC 1967 Vol. II (n 1), at 315, para 123. This was recently confirmed by several Specialized Agencies.

<sup>149</sup> For examples of cases that have arisen with respect to the officials of some Specialized Agencies, see YILC 1985 Vol. II(1) (n 6), at 204, paras 181-183.

<sup>150</sup> K Ahluwalia (n 105), at 138.

<sup>151</sup> See, for example, Section 19(d) UNESCO Headquarters Agreement (n 36) and Section 20(e) of the Canadian Headquarters Agreement with ICAO (n 115). The World Bank and the IMF Articles of Agreement (Art. VII, Section 8(ii) and Art. IX, Section 8(ii), respectively) grant officials with the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members, while the IOIA does not include any provision on this matter.

<sup>152</sup> Section 16(1)(c) UNWTO Headquarters Agreement (n 115).

<sup>153</sup> Section 27(h) FAO Headquarters Agreement (n 23).

<sup>154</sup> Respectively, Art. IX Section 8(ii) and Art. XVII Section 8(ii).

<sup>155</sup> Section 37(l) UNIDO Headquarters Agreement (n 23).

<sup>156</sup> Section 38(h) IAEA Headquarters Agreement (n 23).

agencies, officials are granted the right to take out of the host States, through authorized channels and without prohibition or restriction, their funds, in the same currency and up to the same amounts as they had brought into the host State.

75. In general, the application of the present section has not raised special problems. Sporadic issues have been reported with respect to FAO officials operating in the field, who have had difficulties in converting accumulated local currency when leaving the country at the end of their functions.<sup>157</sup>

*(e) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;*

76. Art. VI Section 19(e) was included to avoid the difficulties encountered by the League of Nations and the ILO in 1940 when it came to repatriating their officials in the absence of any clear international norms on the matter.<sup>158</sup> It has been interpreted as entailing the following elements in the event of an international crises: unqualified immunity from detention as an enemy alien or prisoner of war; the right to proper treatment pending repatriation; and the right to depart freely and in a dignifying way to a different duty station, an international headquarters or to the home country when appropriate repatriation facilities can be arranged.<sup>159</sup> The latter would also imply that priority is given to officials, their spouses and relatives dependent on them with respect to the various means of transportation available.<sup>160</sup>

77. As to which circumstances are encompassed by the term ‘international crisis’, examples include situations such as the Suez crisis in 1956 (where the majority of officials of the WHO office in Alexandria were repatriated) but could also refer to natural disasters of an international character, such as, arguably, the 2004 Indian Ocean tsunami, owing to its magnitude and the significant number of countries hit.<sup>161</sup>

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<sup>157</sup> YILC 1985 Vol. II(1) (n 6), at 204, para 186.

<sup>158</sup> C W Jenks (n 96), at 130.

<sup>159</sup> *ibid.*

<sup>160</sup> K Ahluwalia (n 105), at 139.

<sup>161</sup> Such an interpretation was put forward by the ILO in response to a request for clarifications made by the Ministry of Foreign Affairs and Trade of Samoa in 2013.

78. The corresponding provision in the General Convention (Art. V Section 18(f)) is substantially similar, although a minor change was made in the present sub-section: whereas the former refers to the privileges of ‘diplomatic envoys’, the latter refers to ‘officials of comparable rank of diplomatic missions’.<sup>162</sup> Headquarters agreements reflect such minor change as well: while the FAO agreement, for example, contains the same expression as the General Convention,<sup>163</sup> the latter UNESCO agreement<sup>164</sup> followed the Specialized Agencies provision in this regard. As seen above in the commentaries to Art. VI Section 19(d) (see MN 73ff), some headquarters agreements such as that of FAO envisage as well the repatriation of assets upon termination of employment in a given duty station.
79. Specialized Agencies’ practice reveals that most of them have not resorted to the present provision, or entered into standing arrangements with member States regarding repatriation, except for arrangements made on an *ad hoc* basis.<sup>165</sup> On occasion, FAO has for instance followed the United Nations Security Management System (UNSMS),<sup>166</sup> which, after the host Government, is responsible for the security and protection of UN agencies’ officials, eligible family members, premises and property. Particular arrangements may exist with a few Specialized Agencies, however. For instance, the IMF participates in the UNSMS in accordance with its own legal framework, including the Agreement between the UN and the IMF from 15 November 1947, which recognizes the IMF's status as an independent international organization. Hence, while the UNSMS security regulations generally govern IMF officials abroad, specific IMF rules may take precedence, as determined by the IMF.<sup>167</sup> As has been pointed out, it is essential that any organized arrangements fully apply the rights described above not only in countries of transit but also in duty stations.<sup>168</sup>

***(f) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.***

80. Unlike Art. VI Sections 19(d)(e), the privileges accorded to Specialized Agencies’ officials in Art. VI Section 19(f) Specialized Agencies Convention are of a less extensive scope than

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<sup>162</sup> Final Report of the Sixth Committee, 1947, 9, para 24.

<sup>163</sup> Section 27(i) FAO Headquarters Agreement (n 23).

<sup>164</sup> Section 22(f) UNESCO Headquarters Agreement (n 36).

<sup>165</sup> YILC 1985 Vol. II(1) (n 6), at 204, paras 188, 189.

<sup>166</sup> *ibid.*, para 188.

<sup>167</sup> Communication with the IMF (on file with the authors).

<sup>168</sup> C W Jenks (n 96), at 130.

those normally granted to diplomatic agents, which are deemed to be based on international comity. This is somewhat reflective of the less self-evident character of the grant of customs exemptions and import facilities to international officials.<sup>169</sup> Accordingly, contrary to diplomatic officials, the Specialized Agencies' officials are required to pay duty for all furniture and effects imported other than those which were brought in at the time of first taking up their post in a given country. The time frame within which officials are entitled to import free of duty their furniture and effects upon arrival is of approximately six to eighteen months, depending on the customs regulations of the State concerned and the particular circumstances of the case.<sup>170</sup>

81. In the discussions held in the Sixth Committee with respect to the interpretation of Art. VI Section 19(f), it was agreed that, for reasons of equity and logic, the exemption provided for should be granted as well to officials returning to the country in question following a long absence on official duties elsewhere.<sup>171</sup> In light of Art. 9(a) of the Arrangement for the Execution of the ILO Headquarters Agreement, a 'long absence' would be tantamount to, at the minimum, three years. Art. VI Section 19(f) has moreover been interpreted as meaning that an official sent to a new post for a reasonable period of time is also exempted from the duties envisaged therein.<sup>172</sup> Such is also the scope of the corresponding provision in the IOIA, which does not make a specific reference to the first moment of taking up the post in the US.<sup>173</sup>
82. Headquarters agreements provide for customs exemptions and import facilities in a similar vein as Art. VI Section 19(f), although many exclusively grant such prerogatives to non-national officials, such as the Headquarters Agreement of ICAO (Art. 20(f) and 24) and the Arrangement for the Execution of the ILO Headquarters Agreement (Art. 9(a)). This distinction is made as well with respect to officials of the World Bank and the IMF.<sup>174</sup> The UNESCO Headquarters Agreement rather differentiates between formerly resident and non-resident officials (Art. 22(g)).

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<sup>169</sup> K Ahluwalia (n 105), at 127.

<sup>170</sup> YILC 1967 Vol. II (n 1), at 316, para 129.

<sup>171</sup> Final Report of the Sixth Committee, 1947, 10, para 25.

<sup>172</sup> C McCormick Crosswell (n 98), at 72.

<sup>173</sup> See 22 U.S. Code § 288b.

<sup>174</sup> *ibid.*

83. Among the ‘effects’ which may be imported duty-free by officials, motor vehicles are usually included in bilateral agreements. The UNIDO Headquarters Agreement with Austria, among other headquarters agreements, envisages a particular set of extended import privileges to officials in Section 37(o): apart from the right to import furniture and effects in one or more separate shipments, and thereafter to import necessary additions to the same, officials are also granted the right to import one automobile and one motorcycle every four years, as well as limited quantities of certain articles for personal use or consumption.<sup>175</sup> These privileges are nonetheless solely granted to officials other than those of Austrian nationality (see Section 39) – the latter being granted the import privileges contained in the General Convention, which are akin to those prescribed in the present sub-section for that matter. The question has been raised as to whether a non-national official holding a resident permit in the State concerned would be entitled to enjoy import privileges under the Headquarters Agreement.<sup>176</sup> In its response, UNIDO clarified that the distinctions made in this agreement were only made on a nationality basis, and thus, Section 37(o) would apply in its entirety to officials holding residency in the State concerned.

### **Additional issues**

#### ***Privileges and immunities of Experts (other than officials coming within the scope of Article VI) serving on committees of, or performing missions for, a Specialized Agency***

84. In contrast to Art. VI of the General Convention, the Specialized Agencies Convention does not contain an express provision on the privileges and immunities of experts on mission, or persons having official business with the Specialized Agencies.<sup>177</sup> Sub-Committee I of the Sixth Committee of the UN General Assembly on the Coordination of Privileges and Immunities of the United Nations and the Specialized Agencies considered that this was justified given that not all Specialized Agencies would require privileges and immunities of

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<sup>175</sup> Section 27(j) FAO Headquarters Agreement (n 23) provides for a substantially similar provision.

<sup>176</sup> UNIDO ‘Interoffice memorandum regarding United Nations Industrial Development Organization (UNIDO) Headquarters Agreement – Import privileges of staff members holding a [State] residency permit’, as quoted in (2008) UNJYB 460, 461.

<sup>177</sup> The sole reference to these individuals in the text of the Convention is contained in Art. VIII Section 29, regarding their entitlement to expedited visa and travel facilities.

the kind.<sup>178</sup> Notwithstanding, it was not excluded that in particular cases individual Specialized Agencies would grant such prerogatives, provided that there were good and sufficient reasons to do so.

85. Art. VI Section 22 General Convention accords certain privileges and immunities to experts on missions for the UN which are broadly similar to those granted to officials.<sup>179</sup> While the initial prospect of the Sub-Committee was that any privileges and immunities accorded to experts on mission for the Specialized Agencies would always be less than those provided for in Art. VI,<sup>180</sup> this was eventually not the case: both in headquarter agreements<sup>181</sup> and in most of the Annexes to the Specialized Agencies Convention,<sup>182</sup> the prerogatives therein envisaged are identical to most of those accorded to experts on missions under the General Convention. Notably, and with minor changes, these refer to: immunity from personal arrest or seizure of personal baggage; immunity from legal process of every kind, in respect of words spoken or written or acts done in the performance of official functions; diplomatic facilities in respect of currency and exchange restrictions and in respect of personal baggage; and to the inviolability of papers and documents.<sup>183</sup> In addition to these, Art. VIII Section 29 of the Specialized Agencies Convention entitles experts to expedited visa and travel facilities, similar to those accorded to officials holding UN *laissez-passer*.

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<sup>178</sup> Final Report of the Sixth Committee, 1947, 12, para 30.

<sup>179</sup> For a detailed discussion see T Iwata and R Bandyopadhyay, Commentary on Art. VI Section 22 General Convention.

<sup>180</sup> The reasoning of Sub-Committee I was that Art. VI had been designed to cater for cases of experts sent on peace and security missions in disturbed locations, a context which would necessarily demand a higher extent of immunities when compared to those required by experts sent by specialized agencies, dealing with more technical issues.

<sup>181</sup> See, for example, Art. XIII UNIDO Headquarters Agreement (n 23).

<sup>182</sup> See the annexes of the ILO, FAO, ICAO, UNESCO, WHO, IMO, WIPO, IFAD and UNIDO.

<sup>183</sup> It should be noted that the latter privilege is not mentioned in Annex IV of UNESCO and that both the annexes of the IMO and WIPO (Annex XII, para (a)(v) and Annex XV, para 2(v), respectively) envisage, in addition, the right to use codes and to receive documents and correspondence by courier or in sealed dispatched bags for communications with the respective agency, which is also granted in Section 22 of Art. VI of the General Convention.

**SECTION 20.** *The officials of the specialized agencies shall be exempt from national service obligations, provided that in relation to the States of which they are nationals, such exemption shall be confined to officials of the specialized agencies whose names have, by reason of their duties, been placed upon a list compiled by the executive head of the specialized agency and approved by the State concerned.*

*Should other officials of specialized agencies be called up for national service, the State concerned shall, at the request of the specialized agency concerned, grant such temporary deferments in the call-up of such officials as may be necessary to avoid interruption in the continuation of essential work.*

#### **A. Introduction**

86. The exemption of officials from national service obligations touches upon the question of sovereignty of States over their citizens, and thus, calls for a balancing exercise between the interests of the international community and those of States. In this vein, exemption from military service is not prescribed in the present section as an obligation imposed upon States: it is rather envisaged as the product of consultations to be held between the Specialized Agency and the State of which the official is a national, with the objective of, on the one hand, responding to the State's interests and necessities of training and, on the other hand, minimizing to the extent possible any disruption of the organization's work.<sup>184</sup>

#### **B. History and drafting of the provision**

87. The possibility to exempt officials from national service obligations in the States of which they are nationals can be traced back to the 1926 *Modus Vivendi* between the League of Nations and Switzerland. It was specified in Art. II thereof that such an exemption would be

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<sup>184</sup> Final Report of Sub-Committee 1 of the Sixth Committee of the General Assembly of the United Nations on 'Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN-Doc. A/C.6/191, 15 November 1947, 10, para 26. (hereinafter 'Final Report of the Sixth Committee, 1947'). As explained in the report, the provision follows closely the understanding put forward in the Report on the Headquarters Agreement between the United Nations and the United States. As has appositely been noted, although the principle of geographical distribution is typically taken into account in the recruitment of officials, it is almost unavoidable that a big number of them is recruited locally. The functioning of the Specialized Agencies would surely be greatly affected if such a significant number of officials would have to directly respond to calls for the performance of national service obligations. See K Ahluwalia (n 105), at 122, 123.



granted provided that ‘the exigencies of training and the interests of the country’ would so permit. An important development can be found in an informal arrangement between Canada and the ILO for its temporary wartime location in Montreal, from 1941, whereby freedom from military service was granted to officials irrespective of nationality.<sup>185</sup> The extension of such a privilege to the organization’s staff, among the other privileges and immunities contained in the arrangement, has been characterized as the most advanced configuration by the time of World War II.<sup>186</sup>

88. The General Convention followed such an approach, thereby providing for the freedom from national service obligations of UN officials without any qualification.<sup>187</sup> In contrast, Art. VI Section 20 was devised differently. It emerges as a compromise in view of the reservations that had been made by certain States with regard to the corresponding provision in the General Convention.<sup>188</sup>

### **C. Key Elements**

89. Art. VI Section 20 Specialized Agencies Convention envisages a procedure whereby only the Specialized Agencies’ officials whose names are placed upon a list compiled by the executive head and approved by the State of which they are nationals, are exempted from national service obligations. A supplementary provision is included, whereby other officials (than those included in the lists) called up for national service may be granted temporary deferments at the request of the Specialized Agency, with a view to interrupting to the minimum the continuation of essential work. Although the compilation of lists of officials seems essential, it is not common practice of the Specialized Agencies to do so.<sup>189</sup>
90. Despite the concessionary character of the present Section, unqualified immunity from national service obligations has been provided for in particular headquarters agreements, in line with the General Convention. That is the case of ICAO’s Headquarters Agreement with

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<sup>185</sup> M Cohen, ‘The United States and the United Nations Secretariat: A Preliminary Appraisal’, (1953) 1 *McGill Law Journal* 173.

<sup>186</sup> *ibid.*

<sup>187</sup> See Art. V Section 18(c) General Convention.

<sup>188</sup> Final Report of the Sixth Committee, 1947, 10, para 26. Both the delegation of the USSR and the delegation of the United States made reservations as to the attitude of their Governments with regard to this matter (see pp. 10 and 20).

<sup>189</sup> YILC 1967 Vol. II (n 1), at 315, para 120. Despite the date of the ILC study referred to, this fact has been confirmed by the ILO in 2014 (communication with the ILO on file with the authors).

Canada (Art. 20(c) read in conjunction with Art. 24).<sup>190</sup> Most agreements, such as the Swiss Headquarters Agreement with WIPO (Art. 16(a)),<sup>191</sup> contain distinctions on the basis of nationality in a way akin to Section 20 of the Specialized Agencies Convention: total exemption from national service obligations is solely accorded to non-nationals, without there being any compromise clause, whereas a compromise should be sought for nationals. In yet other agreements, such as UNESCO's Headquarters Agreement with France, officials whose names are placed upon a list compiled by the Director-General and approved by the national authorities are assigned to special duties in case of mobilization instead of being completely exempted from military obligations.<sup>192</sup>

91. Cases where Specialized Agencies have been called upon to take action under Art. VI Section 20 Specialized Agencies Convention have mainly dealt with officials holding the nationality of the organizations' headquarters States. UPU experience with Swiss authorities has proved to be challenging at times, in that requests for dispensation of officials have not always been acceded to.<sup>193</sup> It is worth noting that some agencies, such as the WHO, the IMF and the IAEA, have simply adopted a liberal leave policy for officials responding to national service obligations, instead of following the procedures of the current provision.<sup>194</sup> The WHO, for example, may grant leave of absence to an official on the basis of an application to that end, for a period normally not exceeding one year. Such absence will be charged as either leave without pay or as annual leave, and thereafter to leave without pay. Upon application, following the official's release from national service, he or she will normally be able to resume active duty in the organization maintaining the terms of appointment that existed prior to entering military service.<sup>195</sup>
92. Apart from military service, jury service constitutes as well a compulsory civic duty. As has been explained by the ILO, the agency's officials are normally not exempted from such a duty. Notwithstanding, in cases where an ILO official receives a jury summons and there is

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<sup>190</sup> ICAO Headquarters Agreement (n 115).

<sup>191</sup> WIPO Headquarters Agreement (n 37).

<sup>192</sup> See Art. 23(1) UNESCO Headquarters Agreement (n 36).

<sup>193</sup> ILC study on 'The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat', UN-Doc. A/CN.4/L.383 and Add.1-3, Yearbook of the International Law Commission, 1985, Vol. II(1)/Add.1, 203, paras 177-180.

<sup>194</sup> *ibid.*

<sup>195</sup> See rules 655.1 and 660. of the WHO Staff Regulations and Staff Rules, 1 July 2013.

a significant and concrete reason not to release him or her (as, for example, the official's absence would seriously jeopardize the functioning of its unit), the practice of the agency is to contact the permanent mission concerned in order to obtain cancellation of the summons, in line with the second part of Art. VI Section 20. Such requests are, however, frequently denied, except for senior officials.<sup>196</sup>

**SECTION 21.** *In addition to the immunities and privileges specified in sections 19 and 20, the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.*

#### **A. Introduction**

93. Art. VI Section 21 Specialized Agencies Convention accords to the Specialized Agencies' executive head (or any official acting on his/her behalf during his/her absence from duty) 'high officer treatment'. As such, the immunities granted to high-ranking officials constitute an important exception to the general rule (mentioned above in the commentaries on Art. VI Section 19, MN 14ff) under which officials' immunity is granted *ratione materiae*. In fact, executive heads of the Specialized Agencies are accorded complete immunity, *i.e.* both *ratione materiae* as well as *ratione personae*, akin to the immunities enjoyed by diplomatic agents under international law.

#### **B. Key elements**

##### **The status of 'executive head'**

94. The number of individuals entitled to the immunities provided in Art. VI Section 21 Specialized Agencies Convention is strictly limited, and is determined on the basis of function and status of the official. The annexes to the convention (complemented by headquarters agreements) further extend 'high officer treatment' to other individuals: in the

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<sup>196</sup> Communication with the ILO (on file with the authors).

case of the International Labour Office of the ILO (Annex I, para 2) and the FAO (Annex II, para 3), to the Deputy Director-General and the Assistant Director-General;<sup>197</sup> with regard to WHO (Annex VII, para 3), not only to the former but also to the Regional Director; regarding UNESCO (Annex IV, para 2), WIPO (Annex XV, para 1), UNIDO (Annex XVII, para 2) and UNWTO (Annex XVIII, para 6), solely to the Deputy Director-General, or Deputy Secretary-General, with regard to the latter;<sup>198</sup> with respect to ICAO, to the President of the Council (Annex III, para 1);<sup>199</sup> in the case of IFAD (Annex XXI, para 1), to the Vice-President of the Fund; finally, the IMO (Annex XII) applies Art. VI Section 21 as well to the Secretary-General, the Deputy Secretary-General, to the Secretary of the Maritime Safety Committee and to the Directors of the Administrative Division, the Technical Co-operation Division, the Legal Affairs and External Relations Division, the Conference Division and the Marine Environment Division. The IAEA, in Section 20 of its Agreement on Privileges and Immunities, grants diplomatic immunity to the Director-General and to a Deputy Director-General or an official of equivalent rank of the Agency.

95. Also, inasmuch as the clauses of the Specialized Agencies Convention apply to the organizations' regional offices,<sup>200</sup> the heads of offices in the field enjoy, as well, the treatment accorded in the present section. Indeed, they assume the function of representing the Specialized Agency in a manner that is equivalent to the representative functions of heads of diplomatic missions with respect to their countries,<sup>201</sup> and are responsible, within the limits of the authority delegated to them, for all aspects of the organization's activities in the country. Even if the host State concerned is a signatory to the Specialized Agencies Convention, it is the practice of some organizations, such as FAO or the World Bank, to specify this assimilation in regional office agreements.

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<sup>197</sup> With regard to the FAO, Section 29(iii) FAO Headquarters Agreement (n 23) further includes: 'Regional Representatives, senior members of the Office of the Director-General, Directors and Deputy Directors of Divisions and such additional senior officers as may be designated by the Director-General on the grounds of the responsibilities of their positions in FAO.'

<sup>198</sup> Art. 19(1) UNESCO Headquarters Agreement (n 36) further refers to the Deputy-General.

<sup>199</sup> Art. 19 ICAO Headquarters Agreement (n 115) further includes among the category of senior officials the Secretary General, the Deputy Secretary-General, the Assistant Secretaries General and officers of equivalent rank, as well as any other individuals designated by the Secretary General and accepted by the host Government.

<sup>200</sup> See Art. X Section 39 Specialized Agencies Convention. See also B Moradi, Commentary on Art. X Section 39 Specialized Agencies Convention for further reference.

<sup>201</sup> D Petrovic, in 'Privileges and immunities of UN Specialized Agencies in field activity', paper presented at a Conference held in Geneva on the Practical Legal Problems of International Organizations: A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights, March 2009, 11.

96. Some headquarters agreements go further than the present provision in the status granted to executive heads. In the UNWTO Headquarters Agreement,<sup>202</sup> the UNIDO Headquarters Agreement<sup>203</sup> and the FAO Headquarters Agreement,<sup>204</sup> for example, executive heads, or senior officials acting on their behalf, are assimilated to Ambassadors who are heads of diplomatic missions accredited to the headquarters State.<sup>205</sup>
97. In contrast, the agreements establishing the World Bank and the IMF do not accord special treatment to their respective executive heads –the World Bank President and the IMF Managing Director. As far as the IMF is concerned, while it accepted the Convention through Annex V to the Convention,<sup>206</sup> this Annex does not refer to the IMF executive head, but only to the Fund itself, as well as to its members, Governors, Executive Directors, alternates, officers and employees. These are the persons listed in Section IX(8) of the IMF Articles of Agreement, which indeed does not include the executive head, and – moreover – does not confer immunity *ratione personae* but only immunity *ratione materiae*.<sup>207</sup> On the other hand, it could be argued that the reference to ‘Executive Directors’ subsumes the IMF Managing Director, or alternatively that the latter is covered by Section 21 anyway, without the need arising for further specification in the Annex or the Articles of Agreement.
98. However that may be, the issue was raised in a civil case brought in the United States against a former IMF Managing Director, who had been accused of sexual impropriety. In a 2012 decision, the New York Supreme Court held that he was not entitled to immunity on the ground that the IMF Articles of Agreement, Annex V to the Specialized Agencies Convention (by which the IMF accepted the Convention), the 1947 UN-US Headquarters Agreement,<sup>208</sup> customary international law, nor the IOIA provided for absolute immunity

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<sup>202</sup> Art. 14(1) UNWTO Headquarters Agreement (n 115).

<sup>203</sup> Section 38(a) UNIDO Headquarters Agreement (n 23).

<sup>204</sup> Section 28(a)(i) FAO Headquarters Agreement (n 23).

<sup>205</sup> In these agreements, other officials in professional rank of P-5 or above are assimilated to members of foreign diplomatic missions.

<sup>206</sup> See Executive Board Document No. 433, 5 April 1949.

<sup>207</sup> See Section IX(8) IMF Articles of Agreement (‘[a]ll Governors, Executive Directors, Alternates, members of committees, representatives appointed under Article XII, Section 3(j), advisors of any of the foregoing persons, officers, and employees of the Fund shall be immune from legal process with respect to acts performed by them in their official capacity’). See also Policy Statement by the IMF Managing Director, dated 17 June 2002, clarifying the scope and limitations of the immunities recognized under Section IX(8) of IMF Articles of Agreement, stating that functional immunity is bestowed on any ‘official’ of the Organization. See decision no. A11780, available at <[www.imf.org/external/pubs/ft/sd/index.asp?decision=DN11](http://www.imf.org/external/pubs/ft/sd/index.asp?decision=DN11)> last accessed 29 May 2015.

<sup>208</sup> Section 15 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (n 9) admittedly provides for personal immunity of specialized agency representatives,

for an IMF Managing Director.<sup>209</sup> The latter Act, which governs the privileges and immunities of all international organizations in the US, including their officials, indeed only provides for immunity *ratione materiae*.<sup>210</sup>

99. It remains questionable, however, whether in the face of uncertainty in more specific agreements and statutes, the Specialized Agencies Convention, which does unambiguously provide for personal immunity of the executive head of a Specialized Agency, should not be resorted to for purposes of interpretation and clarification.<sup>211</sup> Nonetheless, ideally, the IMF Articles of Agreement are amended to this effect, or at least a specific IMF statement is adopted.<sup>212</sup>

### Scope of privileges and immunities

100. Unlike Art. VI Sections 19(c) and (e), which extend the grant of privileges and immunities to relatives dependent on officials, the present section, in seemingly narrower terms, solely entitles the minor children of executive heads to such an extension. In its turn, the relevant provision of the VCDR, *i.e.* Art. 37.1,<sup>213</sup> can also be seen to apply to a broader range of subjects, as it refers to the ‘members of the family of a diplomatic agent forming part of his household’.<sup>214</sup> The Specialized Agencies’ staff regulations may use different expressions in this connection, although they more often refer to ‘dependent children’. With regard to WIPO, for example, the term encompasses ‘a child for whom a staff member provides the main and continuing support, and who is less than 18 years of age, or less than 21 years of

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modelled on diplomatic immunity, but this immunity only applies to ‘[p]rincipal resident representatives of members of a specialized agency’, members being *Member States*.

<sup>209</sup> *Nafissatou Diallo v. Dominique Strauss-Kahn*, Index No. 307065/11, 11 June 2012, Supreme Court New York. The decision is quoted in (2012) UNJYB 537-544. As regards customary international law, it may be observed that there might simply be no norm of customary international law which governs the privileges and immunities of executive directors of specialized agencies in the first place, let alone that such a norm would have specific content.

<sup>210</sup> 22 USC, para 288d (b): ‘[o]fficers and employees (...) shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such (...) officers, or employees’.

<sup>211</sup> D Gallo, ‘The Immunities of the International Monetary Fund’s Executive Head: The Quest for Legal Certainty in the “Strauss-Kahn Affair”’, in (2012) 9 *International Organizations Law Review* 227-248 (submitting that the 1947 Convention ‘must clearly be taken into account in cases like this, where the founding agreement of a specialized agency [IMF] to which the U.S. is a party does not provide sufficient elements to conclude with absolute certainty whether the Managing Director of that organization is entitled to personal immunity or not’, and that ‘the use of the Convention as an interpretive tool is even more justified when we consider that, so far, 120 States have ratified the Convention and only 114 of them have ratified its Annex V...’).

<sup>212</sup> *ibid.*, at 248.

<sup>213</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95.

<sup>214</sup> See T Iwata and R Bandyopadhyay, Commentary on Art. V Section 21 General Convention, MN 179.

age if in regular attendance at a school, university or similar educational institution’ – conditions which do not apply in case of a child ‘physically or mentally incapacitated for substantial gainful employment’.<sup>215</sup> As further clarified, a dependent child may also be a step-child or a legally adopted child.<sup>216</sup>

101. The scope of privileges and immunities granted to the individuals mentioned in this section is to be determined in light of international law provisions addressing the privileges and immunities of diplomatic envoys. The VCDR is of course a major reference point in this regard, although it should not be regarded as applying automatically.<sup>217</sup> Indeed, resort may be made as well to custom, international usages and the practices of host States.

102. Apart from the prerogatives already specified in Art. VI Sections 19 and 20, executive heads of the Specialized Agencies are thus accorded additional privileges and immunities, a few of which will be mentioned below. Firstly, the person of the executive head is inviolable, which means that he/she will not be liable to any form of arrest or detention in the hosting State. Inviolability also extends to the private residence of the executive head, his/her papers, correspondence and property.<sup>218</sup> In what concerns tax exemptions, it is noted that VAT is not usually imposed upon certain goods imported for personal use, although, at times, distinctions may be made on the basis of nationality.<sup>219</sup>

103. As in the Specialized Agencies Convention, the relevant provisions contained in headquarters agreements generally refer to the privileges and immunities envisaged in diplomatic law. Notably, the UNESCO headquarters agreement sets out nationality-based distinctions in the concession of diplomatic immunities: in accordance with Art. 19(3) of the agreement,<sup>220</sup> full jurisdictional immunity cannot be claimed by executive heads, or senior officials acting on their behalf, with regard to matters extraneous to their official duties. As

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<sup>215</sup> Staff Regulations and Rules of the International Bureau of WIPO, Administrative Manual Part A, 5 May 2014, Regulation 3.2.

<sup>216</sup> *ibid.*

For a comparison, see Rule on definitions 1.02, para d., of the World Bank Staff Manual, available at <[http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual\\_WB\\_web.pdf](http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual_WB_web.pdf)> last accessed 29 May 2015.

<sup>217</sup> Arguing in this sense G Menetrey, ‘Les privilèges fiscaux des fonctionnaires internationaux’, in (1973) 4 *Revue de Droit Administratif et de Droit Fiscal* 233.

<sup>218</sup> See Art. 29 and 30 of the VCDR.

<sup>219</sup> ILC study on ‘The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat’, UN-Doc. A/CN.4/L.383 and Add.1-3, Yearbook of the International Law Commission, 1985, Vol. II(1)/Add.1, p. 201, paras 148-151.

<sup>220</sup> See Art. 19(3) UNESCO Headquarters Agreement (n 36).

has been noted, States hosting regional offices can sometimes refrain as well from granting diplomatic privileges and immunities to heads of office who are nationals of that State.<sup>221</sup>

104. In line with Art. 39 para 2 VCDR, diplomatic privileges and immunities, as prescribed in the present section, are granted to the Specialized Agencies' executive heads during their appointment with the institutions. Once such appointment is over, they continue to enjoy the prerogatives granted in Art. VI Section 19(b) Specialized Agencies Convention on the basis of functional necessity.

**SECTION 22.** *Privileges and immunities are granted to officials in the interests of the specialized agencies only and not for personal benefit of the individuals themselves. Each specialized agency shall have the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the specialized agency.*

#### **A. Introduction**

105. The assertion of officials' immunity for acts performed within the scope of their functions is understood as a tool in the hands of international organizations to ensure the protection of their officials.<sup>222</sup> Yet, as essential as such a principle may be, it is one that should certainly be measured against other interests, to start with, the general interest that the privileges and immunities regime be administered in accordance with notions of justice, equity and fairness. Hence, officials are granted 'immunity from national jurisdiction, but not from the substance of the claim'.<sup>223</sup>

106. It should be noted that neither the VCDR nor international law in general impose a comparable duty upon States when it comes to waiving the immunity enjoyed by their diplomats or consuls.<sup>224</sup>

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<sup>221</sup> Communication with the World Bank (on file with the authors).

<sup>222</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, (1999) ICJ Rep 62, para 60.

<sup>223</sup> A Miller, 'The Privileges and Immunities of the United Nations', in (2009) 6 *International Organizations Law Review* 98.

<sup>224</sup> E Denza and H Fox, 'Legal Framework for Diplomatic Diplomacy', in I Roberts (ed), *Satow's Diplomatic Practice* (OUP 2009) 296.



## B. Key Elements

107. Any decision to waive the immunity of an official necessarily entails a preliminary judgement on whether the act under contention relates to the exercise of official functions: only in the latter case will the question of immunity arise, as already seen with regard to Art. VI Section 19(a) Specialized Agencies Convention. Where such an act is perceived by the Specialized Agency as having been performed within the official's private sphere, there is no question as to the official's entitlement to immunity and local authorities will be so informed.<sup>225</sup> Where the act is otherwise imbued with an official character, the official's immunity must be waived, provided the criteria of the present section are met, for it to be possible to subject the contentious conduct to national adjudication. It has been argued that with regard to individuals falling within the scope of Art. VI Section 21 Specialized Agencies Convention – who are granted jurisdictional immunity like diplomatic envoys – waiver of immunity in respect of private matters should be the standard decision.<sup>226</sup>
108. The authority to decide upon any waiver of immunity normally rests on the executive head of the Specialized Agency.<sup>227</sup> Waiving the immunity of an official not only constitutes a right accruing to, but also a serious obligation imposed upon the Specialized Agencies, as a means to counterweight the immunities accorded by the convention.<sup>228</sup> When striking such a balance, the highest standards of good faith must be met,<sup>229</sup> with necessary regard being paid to the need to ensure that justice follows its course in the given case. Fundamentally, the notion that the privileges and immunities enjoyed by officials are solely granted in the interests of the Specialized Agencies, and not for the personal benefit of the former, serves as a benchmark in this discretionary exercise. Inasmuch as waivers of immunity ultimately constitute a decision for the head of the organization to make, it is not only possible that an official's immunity is waived without his consent, but it can also occur that a waiver of

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<sup>225</sup> Practice might differ in a few instances: In the WHO, for example, decisions regarding the issue of waiver are normally communicated to the Ministry of Foreign Affairs. See communication with the WHO (on file with the authors).

<sup>226</sup> C W Jenks, (n 96), at 118.

<sup>227</sup> When it comes to waiving the immunity of the head of the Specialized Agency, other organs come into play: for instance, in the case of UNIDO, this competence rests with the Industrial Development Board (see UNIDO Staff Regulations, Amend.22, 9 January 2014, Regulation 1.7) and with regard to the IMF and the World Bank, it rests with the Executive Board (although both agencies' Articles of Agreement or Staff Manuals do not contain any provision in this respect, the competence of the Executive Boards derives from the authority they are granted under the Articles of Agreement).

<sup>228</sup> E Denza and H Fox (n 224), at 296.

<sup>229</sup> C W Jenks, (n 96), at 169.

immunity is refused even when the official has manifested his/her willingness to renounce his/her immunity.<sup>230</sup>

109. In all cases, including those involving matters of a private law character, the Specialized Agency is required to determine whether maintaining the official's immunity would impede the course of justice and whether waiving his/her immunity would not jeopardize the interests of the institution.<sup>231</sup> It is important that an individual review of the factual circumstances is undertaken by the agency concerned. Hence, general waivers of immunity made in advance do not seem to be permitted by the present section.<sup>232</sup> Moreover, it should be noted that a waiver of immunity is always limited to a concrete judicial proceeding. Accordingly, for further proceedings involving the official (for instance, in case a party to a judicial proceeding intends to seek execution of a judgement against the official), a separate request for a waiver is required.

110. In the case of the WHO, whenever officials are subjected to a legal proceeding, they are required to report the fact straightaway, in order for the institution to subsequently review the case and notably to determine whether the act at stake was of an official or private character. This decision is then communicated in writing to the Ministry of Foreign Affairs, which is responsible for notifying the judicial authorities of the State concerned.<sup>233</sup> This is, as well, the standard practice of FAO.<sup>234</sup> UNIDO also communicates almost exclusively with ministries of foreign affairs on these matters, if necessary through the permanent mission to UNIDO of the country concerned. When requested by the ministry, it can

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<sup>230</sup> M Hill (n 27), at 25, 26

<sup>231</sup> Final Report of Sub-Committee 1 of the Sixth Committee of the General Assembly of the United Nations on 'Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN-Doc. A/C.6/191, 15 November 1947, 13, para 32. For an overview of institutional interests to consider, see T Iwata and R Bandyopadhyay, Commentary on Art. V Section 20 General Convention, MN 189-194.

<sup>232</sup> See 'Request by the Government of a Member State that United Nations Technical Assistance Experts Sign a Declaration Under an Act in State Security', as quoted in (1973) UNJYB 166, 167. As clarified in this legal opinion of the Secretariat of the UN, the State's request that technical assistance experts sign a declaration under an Act in State Security could not be accommodated by the institution, in that it would imply acceptance of its penal provisions, and thus, would entail a general advance waiver of immunity from legal process for which neither the UN Secretary-General nor the Director-General of FAO had any decision-making authority under the General and the Specialized Agencies Conventions.

<sup>233</sup> As clarified by the WHO, only in very urgent cases (such as when there are court hearings within a few days) will the organization, either directly or through a local office, copy the communication to the court concerned. See communication with the WHO (on file with the authors).

<sup>234</sup> See communication with FAO (on file with the authors).

provide information directly to judicial authorities. Other Specialized Agencies such as the World Bank have direct communication with judicial authorities.<sup>235</sup>

111. Waivers of immunity are meant to be express, and thus, failure to assert immunity in a timely manner cannot be interpreted as an implied waiver of immunity.<sup>236</sup> Other misconceptions have been identified in this connection and are worthy of clarification: as consistently upheld by various Specialized Agencies, entering into Court or arbitration proceedings does not constitute an implied waiver of immunity. The same understanding applies to the inclusion of dispute settlement clauses in agreements concluded by the agencies.
112. Where immunity is not waived, the obligation arises for the Specialized Agency to offer an appropriate means for the settlement of the matter. Indeed, even where the assertion of an official's immunity is not deemed to impede the course of justice, it does not follow that fair and objective remedies should not in any case be provided for. In accordance with Art. IX Section 31(b) Specialized Agencies Convention, the settlement of the dispute will depend on the mechanisms devised by the corresponding Specialized Agency.
113. The waiver of an official's immunity by his/her Specialized Agency is not, however, self-evident: Inasmuch as the immunity granted to officials derives from the international organizations' immunity, official acts will be imputed to the latter and not to the individual officials. Hence, claims against officials for acts performed in the course of official functions will normally be taken up by the Specialized Agency as claims against the organization itself. By implication, in a hypothetical claim (initially directed at an official) involving a commercial contract where a provision on arbitration had been included for the settlement of disputes, such provision would apply automatically. Otherwise, where no such clause exists, any mode of settlement can be resorted to, in accordance with Art. IX

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<sup>235</sup> In the particular event that an IMF official is arrested or detained while traveling on mission, on assignment to resident representative posts or field offices, or at headquarters, the IMF has described a number of steps to follow with a view to assessing whether or not the acts were performed in an official capacity. According to an IMF policy statement, it has the right to: visit and converse freely with the official; to be apprised of the grounds for the arrest or detention; to assist the official in arranging for legal assistance; and to appear in legal proceedings to defend any interest of the Fund affected by the arrest or detention. The Managing Director's decision will be notified to the judicial authorities. In case the act is seen as being covered by immunity from legal process and the authorities of the State concerned fail to respect it, it is foreseen that the Executive Board may consider the application of sanctions to the member State for breach of its obligations under the IMF's Articles of Agreement. See Managing Director, 'Policy Statement on Immunity of Fund Officials', expressly supported by the Executive Board, Decision No. A-11780, 17 June 2002.

<sup>236</sup> A Miller (n 223), at 93, referring to acts constituting waiver of immunity of the UN.

Section 31(a) Specialized Agencies Convention.<sup>237</sup> In any case, as has been noted by FAO, the risk that a claim will be directed at individuals serving on Specialized Agencies is reduced, in that most decisions affecting third parties are taken collectively by the institutional body and not by any individual member.<sup>238</sup>

114. A particular regime has been envisaged for third-party claims directed against officials engaged in technical assistance cooperation. Based on the understanding that technical cooperation is provided for the benefit of the recipient State, various Specialized Agencies involved in such undertakings, *inter alia*, the WHO, the World Bank, FAO and UNIDO, include ‘hold-harmless clauses’ in their technical assistance agreements with the recipient Governments aimed at shifting liability to the latter when it comes to third-party claims. Accordingly, the Government will be held responsible for any claim stemming from technical assistance operations brought by third parties against, among others, a Specialized Agency’s official,<sup>239</sup> except where the Government and the Specialized Agency agree that the claim or liability arose from gross negligence or willful misconduct of the official.<sup>240</sup> On the basis of an *a contrario* interpretation, it can be said that the Specialized Agency will be required to respond to the consequences of the acts of officials whenever they are performed with gross negligence or willful misconduct in technical assistance operations. Only in the latter case will any question concerning the officials’ immunity arise.

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<sup>237</sup> See, referring to UN policy in this regard, the Report of the Secretary-General, ‘Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946’, adopted by the Fifth Committee of the UN General Assembly, at its Forty-ninth session, UN-Doc. A/C.5/49/65, 24 April 1995, 12. See also K. Schmalenbach, Commentary on Art. IX Section 31(a) Specialized Agencies Convention for further reference.

<sup>238</sup> Privileges and immunities for individuals serving on bodies established by these organizations: Review of the legal regime and practice of organizations in the United Nations system, Doc. FCCC/TP/2007/2, 30 July 2007, 11.

<sup>239</sup> For an example of a case where a ‘hold-harmless clause’ has been applied with regard to an UNIDO technical assistance expert, see K. Schmalenbach, Commentary on Art. IX Section 31 Specialized Agencies Convention, MN XY.

<sup>240</sup> With regard to UNIDO, see Art. XI(2) of the Standard Basic Cooperation Agreement of UNIDO, available at <<http://www.unido.org/en/overview/legal/model-agreements.html>> last accessed 29 May 2015, whereby: ‘Assistance under this Agreement being provided for the benefit of the Government and people of ..., the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims, which may be brought by third parties against UNIDO, its officials, or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Government and UNIDO have agreed that a claim or liability arises from the gross negligence or willful misconduct of the above-mentioned individuals’. The model adopted by UNIDO is akin to that adopted by the aforementioned Specialized Agencies, and follows closely the standard provisions used by subsidiary bodies of the United Nations, such as UNDP or UNICEF, in standard basic assistance agreements.

**SECTION 23.** *Each specialized agency shall co-operate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuses in connexion with the privileges, immunities and facilities mentioned in this article.*

#### **A. Introduction**

115. Art. VI Section 23 Specialized Agencies Convention emerges as a counterpart to the privileges and immunities provided to officials of the Specialized Agencies in Art. VI Sections 19-21. Based on the understanding that ‘any excess or abuse of immunity and privilege is as detrimental to the interest of the International Organization itself, as it is to the countries who are asked to grant such immunities’,<sup>241</sup> it imposes upon Specialized Agencies the duty to cooperate with local authorities in order to facilitate the proper administration of justice, secure the observance of police regulations and ensure a well-functioning regime of privileges and immunities by preventing the occurrence of abuse.

#### **B. History and drafting of the provision**

116. The principle that the granting of privileges and immunities to officials should be counterweighted by the collaboration of Specialized Agencies with State authorities dates back to the 1926 *Modus Vivendi* between the League of Nations and Switzerland. Next to according specific privileges and immunities to League officials, Art. VII of the *Modus Vivendi* stated that ‘the organisation of the League of Nations at Geneva will endeavour to facilitate the proper administration of justice and execution of police regulations at Geneva’.<sup>242</sup>

117. The matter was addressed more comprehensively in a Memorandum of the ILO<sup>243</sup> which, apart from prescribing in clause 18 the duty of cooperation between the organization and its

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<sup>241</sup> Report of the Preparatory Commission of the United Nations, UN-Doc PC/20, 23 December 1945, 62.

<sup>242</sup> Official Journal of the League of Nations, 1926, 1422-1224. The text of the 1926 *Modus Vivendi* with the Swiss Federal Council is reproduced in M Hill (n 27), Annex II and the quoted passage is at 139.

<sup>243</sup> The Memorandum was reproduced as General Note: Third Item on the Agenda: *The Status, Immunities and Other Facilities to be Accorded to the International Labour Organization*, in the ILO Official Bulletin, Vol. XXVII, No. 2, 10 December 1945, 197-223.

member States' authorities, also envisaged the establishment of an appropriate international tribunal for the settlement of disputes. The wording used in the Memorandum's clause was closely followed by both Art. V Section 21 General Convention and the present Section, with the main difference being that the former was general in scope (applying to officials as well as to the international organization itself) whereas the provision of the Specialized Agencies Convention (as well as that of the General Convention) only refers to the privileges and immunities of officials.<sup>244</sup>

### C. Key Elements

118. Art. VI Section 23 Specialized Agencies Convention makes it clear that albeit immune from local jurisdiction under the terms of Art. VI Section 19(a), officials are not exempted from the obligation to abide by substantive local legislation. Internal rules of the Specialized Agencies refer to such official's duty in a similar fashion: For example, WIPO Regulation 1.12 requires staff members to comply with local laws and honor their private legal obligations;<sup>245</sup> the IMF Board code of conduct prescribes, with regard to Executive Directors, that '[i]n their conduct outside the workplace, they should also ensure that they observe local laws so as not to be perceived as abusing the privileges and immunities';<sup>246</sup> UNIDO Regulation 1.7 determines that '[t]he immunities and privileges attached to the Organization ... furnish no excuse to the staff who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations'.<sup>247</sup>
119. Whilst Specialized Agencies' officials are bound to comply with certain standards of behaviour, it is up to the Specialized Agencies, in cooperation with local authorities, to ensure that they actually do so. Headquarters agreements do not fall short of prescribing such a duty in substantially equivalent terms.<sup>248</sup> At times, headquarters agreements as well as country office agreements specifically require the Specialized Agency concerned to set

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<sup>244</sup> C W Jenks, (n 96), at 42, 43.

<sup>245</sup> See Staff Regulations and Rules of the International Bureau of WIPO, Administrative Manual Part A, 5 May 2014.

<sup>246</sup> See Code of Conduct for the Members of the Executive Board of the International Monetary Fund, EBS/00/108, Rev. 1, Decision No. 12239-(00/71), 14 July 2000, as amended by Decision No. 13146-(03/114), 12 December 2003.

<sup>247</sup> UNIDO Staff Regulations, Amend.22, 9 January 2014.

<sup>248</sup> See eg Art. 20 UNWTO Headquarters Agreement (n 115); Section 28 ICAO Headquarters Agreement (n 115); Art. 23 WMO Headquarters Agreement (n 36); and Art. 26 UNESCO Headquarters Agreement (n 36).

up rules and regulations, applicable to officials and others, as may be considered necessary and appropriate to prevent any abuse of privileges and immunities.<sup>249</sup> One such regulatory framework may well relate to the establishment of procedures for enforcing the private legal obligations of staff members.

120. Complaints received from local police authorities can give rise, if necessary, to disciplinary measures being undertaken against the official concerned.<sup>250</sup> FAO's Manual specifies instances of 'unsatisfactory' conduct on the part of a staff member possibly leading to disciplinary action, including: serious violations of any applicable national law; neglect or avoidance of just claims for debts or comparable obligations; and insubordination, such as impertinence to a superior officer or refusal to obey instructions.<sup>251</sup> UNIDO, in its turn, may initiate internal disciplinary procedures in the case of serious or repeated traffic violations.<sup>252</sup>

121. Other examples of cooperative engagement by the Specialized Agencies include occasional reminders directed at officials of their responsibility to enroll their domestic servants in the social security system, and to pay the contributions thereto,<sup>253</sup> and administrative initiatives aimed at ensuring that officials pay established debts.<sup>254</sup> The latter does not mean, however, that the Specialized Agency will be willing to observe court orders requesting it to make deductions from salaries or terminal emoluments of staff members with the aim to settle their debts: In the case of the IMF, it will only do so where the staff member's indebtedness has been determined by a final judgment or admitted by him/her.<sup>255</sup> For its part, the World Bank does not comply with wage garnishment orders, but in light of an internal policy adopted in 1998 on Spousal and Child Support, it does deduct court-ordered spousal and/or

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<sup>249</sup> See, as examples of the former, Section 33(a) FAO Headquarters Agreement (n 23) and Section 48(a) IAEA Headquarters Agreement (n 23) and, as an example of the latter, Art. XII (5) of the Agreement between the Government of the Lao People's Democratic Republic and the International Fund for Agricultural Development (IFAD) on the establishment of the IFAD's country office, concluded on 23 July 2012, available in the (2012) UNJYB 121-127.

<sup>250</sup> YILC 1967 Vol. II (n 1), at 317, para 146.

<sup>251</sup> FAO Manual, 22 August 2003, Section 330.1.52(e)(g)(h).

<sup>252</sup> Communication with UNIDO (on file with the authors).

<sup>253</sup> YILC 1985 Vol. II(1) (n 6), at 206, para 203. Art. 18(3) UNWTO Headquarters Agreement (n 115) specifically provides that officials of the Organization employing persons who are not Spanish nationals or permanent residents in Spain shall comply with the social security obligations which employers are bound to discharge under Spanish legislation.

<sup>254</sup> YILC 1967 Vol. II (n 1), at 317, para 146.

<sup>255</sup> YILC 1985 Vol. II(1) (n 6), at 206, para 205.

child support payments from a staff member's wages when he or she was unable to prove compliance with such obligations.<sup>256</sup>

122. Cooperative engagement with national authorities also entails the observance of a principle of abstention by Specialized Agencies and their administrative tribunals, when called upon to examine and interpret any ambiguities in national court decisions.<sup>257</sup> In a case involving a World Bank official whose salary had been reduced to comply with court-ordered family-support obligations, the World Bank Administrative Tribunal strongly upheld this principle, and straightforwardly remarked that 'it [was] not for the Bank to instruct the courts of the state [concerned] as to the correct meaning of terms in the decrees of those courts.'<sup>258</sup> It is quite important that the Specialized Agencies liaise with local authorities, particularly when it comes to providing necessary information where possible violations of local laws are at stake, for instance, information about the official's salary, pension and benefits, for the purposes of spouse/child support claims. In particular cases, this could entail acquiescing to court requests for the appearance of staff members as witnesses on matters related to their official duties or, at least, allowing for written depositions as an alternative<sup>259</sup> (see Art. VI Section 19(a) Specialized Agencies Convention at *supra* MN 25, 26).
123. Such types of policies constitute important steps for the Specialized Agencies to comply with their duty of cooperation and prevention of the occurrence of any abuses in connexion with the privileges, immunities and facilities provided to officials. The Convention lacks a concrete definition of 'abuse',<sup>260</sup> which hampers a concrete understanding of what measures should be taken up by Specialized Agencies for cooperation purposes. It is, however, noteworthy that the fear of abuse of certain prerogatives has substantiated the design of particular institutional regimes, thereby hinting at what may be encompassed by the notion of abuse. One such example is found in the recommendation that the UN insured against

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<sup>256</sup> See the explanations contained in the World Bank Information Package on Domestic Relations and World Bank Group Families, from 8 June 2011, especially paras 3.6-3.9, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTSTAFF/EXTTHR/0,,contentMDK:21618203~pagePK:64233720~piPK:444052~theSitePK:444049,00.html>> last accessed 29 May 2015.

<sup>257</sup> This was made clear by the World Bank Administrative Tribunal – which concurred with the understanding of the International Monetary Fund Administrative Tribunal for that matter – in Decision No. 325, *E v. International Bank for Reconstruction and Development*, 12 November 2004, para 26.

<sup>258</sup> *ibid.*, para 39.

<sup>259</sup> As reported in YILC 1985 Vol. II(1) (n 6), at 206, para 205, the IMF has exceptionally acceded to such requests.

<sup>260</sup> See C Ryngaert and A S Barros, Commentary on Art. VII Section 24 Specialized Agencies Convention, MN 10-12.



third party liability in the event of motor vehicle accidents, given their frequency. Indeed, the regime was set up under the following considerations: ‘[i]t is the intention of the United Nations to prevent the occurrence of any abuse in connection with privileges, immunities and facilities granted to it under Articles 104 and 105 of the Charter and the General Convention’, and thus, ‘[t]he General Assembly instructs the Secretary-General to ensure that the drivers of all official motor-cars of the Organization and all members of the staff who own or drive motor-cars shall be properly insured against third party risks.’<sup>261</sup> Specialized Agencies such as the WHO, UNIDO and FAO followed suit. From this example it can be said that asserting immunity from legal process in cases involving motor cars owned or driven by officials could lead to cases of abuse.

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<sup>261</sup> UNGA Res 22(I) E, ‘Resolution relating to the insurance against third party risks of motor-cars of the Organization and of members of the staff’, UN-Doc. A/RES/22(I), 13 February 1946.