

# The Necessity of Headquarters Agreement under the Law of International Organisations

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## ABSTRACT

*The authors observed that within the context of the Law of International Organisations, scholars have paid little attention to the concept of Headquarters Agreement in their research, rather more attention is focused on discussion of treaties, conventions, charter and protocols establishing these organisations. The reason is not farfetched. The ratifications of these treaties, conventions etc brings these organisations into existence and determine how disputes arising between the states parties could be resolved. Hence scholarly discussions, comparisons, analysis and counter-analysis, are made on these laws often times without taking into consideration the Headquarters Agreement which is a miniature treaty that comes on later and forms the operational basis or livewire of these international organisations. Headquarters agreements are of necessity concluded at the time when an organization first opens its premises in a particular country. The headquarters is the heart of an organisation and no organisation can effectively operate without a headquarter or seat which will be domicile in a member state and will also enjoy some form of diplomatic flavour for it to function independently without undue interference by the host states or member states and non-states entities over its activities. International Organisations are yet to acquire the status of sovereignty that states have and therefore their rights and privileges in a foreign land cannot be equated with that of a state that enjoy a high level of immunity and privileges under diplomatic and consular law. International organizations consist primarily of sovereign member states that operate across national borders. Therefore an agreement has to be reached with the host state to determine how the organisational' headquarters will operate in that Host State under the concept of Headquarters Agreement. The necessity of this Headquarter agreement will form the basis of our discussion in this article.*  
**Keywords:** Headquarters Agreement, International Organisations, Host State, Immunity, Privileges

## INTRODUCTION

International organization (hereinafter referred to as “organisation”) has been defined in international treaties simply as “inter-governmental organisations” in order to demonstrate that the key characteristic of such groupings is that their membership comprises states. However the international Law Commission in Article 2 of its Draft Articles on the Responsibility of International Organisation refers to “an organisation established by a

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treaty or other instrument governed by international law and possessing its own legal personality”, while noting that international organisations may include as members, in addition to states, other entities”.<sup>1</sup> So there may be a distinction between public international organisation and private or non-governmental organisations and international public companies or transnational corporations.<sup>2</sup> International organization is a union or association of States, or of enterprises or of other national entities set up across national boundaries. Examples of States association include: the United Nations (UN); African Union, (AU), The Organisation of American States (OAS), the European Union (EU); EU and Croatia (Association) etc which are usually wide ranging, open with universal membership, or may have limited or closed membership like the AU or Organisation for Economic Cooperation and Development (OECD). The other are enterprises are transnational corporations (TNCs) such as Coca-Cola Company, Multinational Oil Companies (MOCs), Sony, Nintendo, McDonalds, Toyota, and other national entities include organizations such as Greenpeace, Interpol, Amnesty International; International Olympic Committee, World Organization of the Scout Movement, International Committee of the Red Cross, Médecins Sans Frontières, Oxfam, etc. The last two categories are (international) non-governmental organizations (NGOs), profit-and non-profit-making, while the first category includes international intergovernmental organizations (IGOs) which forms the basis of our discussion in this article. Around 30,000 such organizations are active in about 300 countries and territories all over the world.<sup>3</sup>

International organisations are normally set up by international agreement, usually by formal written agreements, that is by treaties.<sup>4</sup> The terminology used whether it is called convention, charter, constitution, statutes, etc is irrelevant. However an international organisation can be founded by implicit agreement which might be expressed through identical domestic legislation (e.g the Nordic Council) or by a resolution adopted during an inter-state conference (e.g the Comecon).<sup>5</sup>

International organisations falling under international intergovernmental organizations (IGOs) are established by states by means of international treaties. Such instruments fall to be interpreted and applied within the framework of international Law. Accordingly, as a general rule, the applicable or proper or personal law of international organisations is

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<sup>1</sup> Report of the International Law Commission, 2003, A/58/10, p.38. See Malcolm N. Shaw, *International Law*, 6<sup>th</sup> edn. Cambridge: Cambridge University Press, 2008, pp.1296-1296

<sup>2</sup> *Ibid*

<sup>3</sup> Peter Fischer, “International Organisations”, Vienna/Bratislava 2012, p.9

<sup>4</sup> Peter H.F Bekker, *The Legal Position of Intergovernmental Organisation: A Functional Necessity Analysis of their Status and Immunities*, Dordrecht Boston and London, 1994, p. 36. A treaty is a formal written instrument between States (and other subjects of International law). An official definition is contained in Article 2 of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969. It reads: “A treaty is an international agreement concluded between States in written form and governed by International law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

<sup>5</sup> *Ibid.*, See Axel Berg, “Nordic Council and the Nordic Council of Ministers”, in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law*, 1983 Vol. VII, pp.261-263.

international law. In addition, the organisation in question may well have entered into treaty relationships with particular states, through, “headquarters agreement” and these relationships will also be governed by international Law. Those matters that will necessarily be governed by international law will include questions as to the existence, constitution, status, membership and representation of the organisation.<sup>6</sup>

The United Nations for example has concluded headquarters agreement with the United States for the UN Headquarters in New York and with Switzerland for the UN Office in Geneva in 1947. Such agreement for example, provide for the application of local laws within the headquarters area subject to the application of the relevant staff administrative regulations, the immunity of the premises and property of the organisation from search, requisition and confiscation and other forms of interference by the host state, exemption from local taxes except for utility charges and freedom of communication. Similar agreement may cover regional offices of international organisation for example the agreement between the WHO and Egypt in 1951 concerning a regional office of the organisation in Egypt.<sup>7</sup>

### **Meaning of Headquarters Agreement**

According to the Black’s Law Dictionary the term “agreement” refers to “a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the act of two or more persons who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations. Agreement has also been seen as a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right or benefit; it is a promise or undertaking<sup>8</sup>.

The term Agreement is used in the context of international law to refer to a particular type of treaty, namely those drafted by international organisations. It covers treaties concluded by international organisations, either with states or with other international organisations. The majority of treaties made by international organisations actually bear the name agreement. Though majority of treaties between states and arrangements with private parties have also been called agreements which shows that the word has a wider, vaguer meaning in practice. It is generally assumed that only subjects of international law have treaty making capacity. However subject of international arrangement been not the sole factor determining its character. The purpose and substance of the arrangement must also be taken into account. In some cases, agreements are concluded with entities which are not considered as subjects of international law. For example agreement concluded

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<sup>6</sup>Malcolm N. Shaw, above note 1, 2008, pp. 1309-1310. See *Westland helicopters Ltd v. AOI* (1995) 2 WLR 126, 144. See also *re International Tin Council* (1987) Ch. 419, 452 upheld by the Court of Appeal (1989) Ch. 309, 330.

<sup>7</sup>*Ibid.*, pp. 1319-1320

<sup>8</sup>Henry Campbell Black, *A Law Dictionary*, 2nd St. Paul Minn. West Publishing Co. 1910, p.53.

with the authorities of Katanga concerning defence zones in that province of Zaire and on a cease fire.<sup>9</sup> Right from time no international organisation of importance can function without a permanent secretariat which may be situated in a member or non-member<sup>10</sup> country of the organisation usually called the host state. The decision of as to where the Permanent Secretariat or the seat of the organisation is always taken by member states for the best interest and functioning of the organisation. Therefore headquarters agreement (hereinafter referred to as “agreement”) is the special external relationship agreed in writing between an international organisation, commission or its delegation<sup>11</sup> and the host state. The rules governing the relations between the organisation and its host state is usually laid down in what is called its headquarters agreement.<sup>12</sup> Headquarters agreement reflects the specific relationship between an organization and the host country. It addresses in detailed manner those issues which are not covered or are not sufficiently dealt with in the charter or treaty establishing the organization such as agreement on the Privileges and Immunities of the staff, but are necessary for the proper implementation of the provisions set forth in those instruments. The headquarters agreement is usually prepared in the light of its primary purpose of enabling the organisation to fully and efficiently discharge its responsibilities and fulfill its purposes in the host country.<sup>13</sup> Report of the Preparatory Commission for the International Criminal Court, Addendum Part I. Draft Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, New York 8-19 April 2002, PCNICC/2002/1/Add.1. See also General Principles Governing the Headquarters Agreement Section 1(1)(c-e).

Furthermore, Headquarters Agreement concerns the reception of international governmental organisations having either their headquarters or a representation in a host state. Through headquarters agreement, the host governments will seek to protect and promote its political position as a globally attractive location for international organisations. Headquarters agreement, covers two broad areas: firstly, the observance a host country, of its international law obligations with regard to the international organisations established in its territory, namely via the assurance of the relevant privileges and immunities; secondly, the actual act of hosting, i.e. all the actions that could help to make the host state more

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<sup>9</sup> H.G Schermers and N.M Blokker *International Institutional Law: Unity Within Diversity*, 4th edn. Boston and Leiden: Martinus Nijhoff, 2003, pp. 1111-1113

<sup>10</sup> Example of non-member acting as host to international organisation are Austria, host of OPEC and United Kingdom, host state of most Commodity Councils including some of which it is not a member. In addition, Switzerland has long been one of the host state of the UN before it became a member in September 2002.

<sup>11</sup> Headquarters Agreement Between His Majesty’s Government of Nepal and the International Committee of the Red Cross on the establishment of its delegation in Kathmandu Nepal, 20 January, 2003.

<sup>12</sup> H.G Schermers and N.M Blokker above note 3, pp. 1072-1073.

<sup>13</sup> Report of the Preparatory Commission for the International Criminal Court, Addendum Part I. Draft Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, New York 8-19 April 2002, PCNICC/2002/1/Add.1. See also General Principles Governing the Headquarters Agreement Section 1(1)(c-e).

attractive to international organisations. Therefore, the agreement demands that the buildings and offices occupied by any such organisations must be in good condition. Special attention must also be paid to information on the host country, assistance with administrative procedures, information on the safety and security of staff and organisations, accessibility, overcoming mobility issues, and the quality of working environment and life. All of these factors must help to paint a positive picture of the host country to qualify as headquarters.<sup>14</sup>

### **Historical Development of the Concept of Headquarters Agreements**

One major outcome of the post-World War II developments was the formation of multitudes of international organizations to tackle the challenges of ensuring global peace following the failure of the League of Nations and assistance in reconstruction and development following the destruction that is associated with the devastation of World War II. According to Drazen Petrovic, the situation created by the Second World War gave new impetus to the development of international organizations. Not only was the Organization of the United Nations created with a general political mandate, but the then international community saw the need to expand global international cooperation into more focused fields. This resulted in the creation of several international organizations which later became specialized agencies of the United Nations system.

In 1944, the International Civil Aviation Organization (ICAO), the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF) were created in 1945, the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) and, in 1948, the World Health Organization (WHO) and the International Maritime Organization (IMO).<sup>15</sup> Sometime later, the World Meteorological Organization (WMO), the World Intellectual Property Organization (WIPO), the International Fund for Agricultural Development (IFAD), and the United Nations Industrial Development Organization (UNIDO) were established, as was, relatively recently, the World Tourism Organization (UNWTO) among others. In their constitutive instruments these organizations focused on the composition and functioning of their main organs. The idea of a presence outside headquarters was tentatively mentioned, mostly in terms of possible “technical assistance” (for example, in the Constitutions of the FAO, ILO, ITU, WHO, or WIPO). Furthermore, some regional structure, including regional offices, was foreseen by the WHO.<sup>16</sup> The 1950s saw an increased awareness of the need for specialized agencies to establish a more definitive local presence and provide advice closer to the place it was needed. This was particularly

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<sup>14</sup>Belgium’s Headquarters Policy was ratified by the Belgian Council of Ministers on 13th October 2006 available online at [http://diplomatie.belgium.be/en/services/Protocol/privileges\\_immunities/international\\_organisations/zetelakkoorden/](http://diplomatie.belgium.be/en/services/Protocol/privileges_immunities/international_organisations/zetelakkoorden/) accessed 24 June, 2014.

<sup>15</sup>Drazen Petrovic, “Practical Legal Problems of International Organizations: A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” Privileges and Immunities of UN Specialized Agencies in Field Activity (Preliminary paper) 25 June, 2009, pp1-3, available online at <http://www.iilj.org/gal/documents/galch.petrovic.pdf>, accessed 26 June, 2014.

<sup>16</sup> *Ibid.*

true for newly created States. The UN and the specialized agencies were requested by the Economic and Social Council, by its Resolution No. 222 A (IX) of 15 August, 1949 to participate in and coordinate their respective activities within an expanded programme of technical assistance for the economic development of under-developed countries. The purpose of the programme was to strengthen national economies through the interchange of technical knowledge, in particular by having experts visiting those countries.

On the basis of that Resolution, several specialized agencies, together with the United Nations, concluded so-called Basic Agreements for the provision of technical assistance with developing countries. These Agreements provided a general legal framework for technical assistance, mostly with the idea of sending experts for periods of limited duration to the States concerned. This appears to be the beginning of the idea of adopting headquarters agreement by international organizations and host countries.<sup>17</sup> This study therefore aims at examining the relevance or necessity of headquarters agreement in the context of the law of International Organisation by looking at the functional necessity test, privileges and immunities enjoyable by officers and representatives of the Organisation in host State, legal capacity of the organisation, free visa and tax exemption regimes, financial services, currencies, cash and securities, procedure for settlement of disputes, availability of essential public utility/services, facilities in respect of communications and inviolability of the Organisations building, premises, flag, emblem, achieves and official documents.

### **Functional Necessity Arguments**

According to George B. Adams, one of the major factors associated with the smooth functioning of international organizations is the widespread acceptance of the “functional necessity” test in international theory and practice. Under this test, international organizations possess the immunities that are “necessary for the fulfillment of their purposes” and for their independence from member states.<sup>18</sup> Independence is generally understood as “the authority to act with a degree of autonomy, and often with neutrality, in defined spheres.” The functional necessity test was viewed as a means of recognizing the interests of member states particularly the more powerful ones that were unlikely to join an organization they could not influence without leaving an organization so exposed that it would be unable to achieve the ends for which it was formed.<sup>19</sup> Initially, concern for the independence of these organizations that were established in the 1940s and 1950s led to a consensus that international organizations required complete jurisdictional immunity and these jurisdictional immunity can only be actualized through their Headquarters Agreement as decisions bordering on the activities of the organization are only taken from the Secretariat of the Organisation which is domicile in a host state that could be a member or non-member of the organization. However, while the strength and durability of these organizations has since been proven overtime, the basic purpose for granting immunity to international

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<sup>17</sup> *Ibid.*

<sup>18</sup> George B. Adams III, “Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations”, *Fordham Law Review* Vol. 81, 2012, pp.250-251.

<sup>19</sup> Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. Conflict Resol.* 3, 9 (1998).

organizations remains the same: “to secure for them both legal and practical independence, so that these international organizations should be able to fulfill their task.” This goal is reflected in the U.N. Charter, adopted in June 1945, which provides: “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”<sup>20</sup> Similar provisions are included in the charters or basic instruments like the Headquarters Agreement of most other international organizations.<sup>21</sup> For example the Headquarters Agreement between the International Criminal Court and the Netherlands regulates not only the special relationship between the Court and the Netherlands in its capacity as the host country but the agreement is also aimed to safeguard the Court’s independence so that it can effectively operate on Dutch territory. Issues addressed in the Headquarter Agreement include the following: settlement of disputes, privileges and immunities of officials and other involved persons; facilities regarding safety and security; and facilities for communication.<sup>22</sup>

In *Roberto Santiesteban Casanova v. Walter W. Fitzpatrick*,<sup>23</sup> the US Court in determining the status of staff member of Permanent Mission to United Nations, interpreted Article 105 of United Nations Charter and Article V, Section 15 of the Headquarters Agreement and the jurisdiction of Federal District Court held that so far as the petitioner’s claim was based on the law of nations, the Court held that he was not entitled to diplomatic immunity from the time of his entry until he was either agreed upon or rejected in response to this government’s request, for his position was not analogous to that of diplomats awaiting acknowledgment by governments to which they are accredited. The Court also stated that: “It is the Headquarters Agreement, the Charter and the applicable statutes of the United States that govern the determination of the rights, not the Law of Nations. The Law of Nations comes into play and has applicability in defining the nature and scope of diplomatic

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<sup>20</sup> Thomas M. Franck & Michael J. Glennon, *Foreign Relations and National Security Law: Cases, Materials and Simulations* 2nd edn. 1987, p.506. Unlike foreign sovereign immunity, which could extend to any activity that a foreign nation chooses to engage in, the functional immunity of international organizations only applies to those limited activities that the organization was formed to perform.

<sup>21</sup> Marrakesh Agreement Establishing the World Trade Organization Article 8, 15 April 1994, 1867 U.N.T.S. 154; Articles of Agreement of the International Development Association Article 8, 24 September, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249;

<sup>22</sup>The Headquarters Agreement between the ICC and the Government of the Netherlands.

Drafted by the ICC Preparatory Commission and adopted by the Assembly in September 2002, during the final process of its entry into force, the president of the Court will conclude on behalf of the Court.

The interim Headquarters Agreement was agreed to by an exchange of notes between the Dutch Ministry of Foreign Affairs and the Court on 19 November 2002.

The Agreement on Privileges and Immunities of the International Criminal Court is a multilateral treaty providing for privileges and immunities of the Court in all states parties to it. It thereby extends and elaborates upon Article 48 of the Rome Statute.

These states parties differ from the States Parties to the Rome Statute, although it can be hoped that all States Parties to the Rome Statute also become States Parties to the APIC.

<sup>23</sup> Judgement of 16 January 1963, 214 Fed. Supp. 425.

immunity only once it is found that a person is entitled thereto under an applicable agreement or statute.”<sup>24</sup> The Petitioner Casanova, who had entered the United States on 3 October 1962 on a diplomatic passport to serve as an attaché and resident member of the Cuban Permanent Mission to the United Nations, was arrested on 16 November, 1962 on a charge under Title 18, sections 2155(b) and 371, of the United States Code. He sought release from custody on a writ of habeas corpus on the ground of the Court’s lack of jurisdiction over him, contending that he was entitled to diplomatic immunity from arrest and prosecution under the United Nations Charter, the Headquarters Agreement and international law, and contending further that even if his claim to immunity was overruled, the writ, nonetheless, had to be sustained because the Supreme Court of the United States had original and exclusive jurisdiction to try him. By a judgment of 16 January 1963 the District Court (as per Weinfeld, J.) denied the writ. The Court held that Article 105 of the UN Charter did not purport, nor did it confer, diplomatic immunity, and that the “broadest claim that can be made is that it is self-operative with respect to functional activities”.

Even if it were so construed, the Court stated, it would not avail the petitioner, since the crime with which he was charged was not a function of any mission or member of a mission to the United Nations. The Government of the United States, a party to the Headquarters Agreement and to the present controversy, challenged by way of submitting a certificate the petitioner’s claim for diplomatic immunity under section 15 (2) of Article V of the Headquarters Agreement. The certificate pointed out that section 15 (2) expressly provides that immunity there under is accorded only to “such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned” and it denied that any such agreement was ever manifested, although it admitted that an application therefore was made by the Secretary-General pursuant to the request of the Cuban Mission. The Court held this certificate as “evidential but not conclusive” since the question as to whether “immunity exists by reason of the agreement is not a political question but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts.”<sup>25</sup>

### **Privileges and Immunities Enjoyable by Officers and Representatives of the Organisation in Host State**

Some authors have associated the term immunity with legal notions such as guarantees of the necessary standards for functioning while they ascribe to privileges the status of prestige, honour, protocol or courtesy.<sup>26</sup> Both words are most times used interchangeably but the differences between them are identified in the proper forum in which they are used and the applicable law governing their usage. Immunities as distinct from privileges confer no

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<sup>24</sup> Part Three: Judicial Decisions on Questions Relating the United Nations and Related Intergovernmental Organizations, Chapter VIII. Decisions of National Tribunals, Extracts of United Nations Year Book 1963, pp.200-201.

<sup>25</sup> *Ibid*

<sup>26</sup>Year Book of International Law Commission, (1967), Vol. II, p.222., Year Book of International Law Commission, (1989), Vol. II, Part One, p.161.

exemption from local law but give only procedural protection from legal process of adjudication and enforcement.<sup>27</sup> Emmanuegla Illard and Isabellpei Ngel-Lenu, argued that the immunity from jurisdiction of international organisations is generally analysed by comparison with the immunity of States.<sup>28</sup> The principal argument advanced to justify the differences in nature between the two is that international organisations have no territory.<sup>29</sup> Their independence can, therefore, only be guaranteed by a strict approach to their immunity, in particular with respect to the courts of the State in which their headquarters are located. It has been observed that the organisation must benefit ‘in any event from some degree of protection at the place of its seat, which can be guaranteed by immunity formulated in relatively broad, if not absolute, terms’ in their Headquarters Agreement with the host state<sup>30</sup>. Various judicial decisions reflect this idea, typically framing it as a fundamental principle<sup>31</sup>. See Swiss Fed Trib, 22 December, 1992, *Gmuprmerit Fougerolle & Consorts v. CERN*, 2 *Bulletin*. Though this view has been challenged on the grounds that inasmuch as international Organisations are to comply with legislations in force in the countries on the territory of which they are carrying out their activities it is logical that breaching of domestic rules should entail the liability of the Organisation in accordance with relevant domestic laws<sup>32</sup>. Since Headquarters Agreement is an agreement negotiated between an Organisation and the Party that hosts the Secretariat or headquarters seat. This agreement must set out the privileges and immunities which the Organisation and its category of officers shall enjoy in the territory of the host state in order to ensure their ability to function properly and their independence guaranteed.<sup>33</sup> Through Headquarters Agreement Organisations has immunity from suit and other legal processes. However, there are some exceptions to this, including in respect of any contract for the supply of goods or services as mentioned earlier under the functional necessity test. Experts, foreign representatives attending meetings that are convened by an Organisation and staff members of the Organisation will enjoy immunity from jurisdiction for acts done by them in the exercise of

<sup>27</sup>August Reinishe, *International Organisations before National Courts*, Cambridge: Cambridge University Press, 2000, pp.13-14.

<sup>28</sup>Panayotis Glavinis, *Disputes Relating to Contracts Concluded between International Organizations and Private Persons* 122, Paris, 1990, p.120.

<sup>29</sup>Emmanuegla Illard and Isabellpei Ngel-Lenu, “International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass” *International and Comparative Law Quarterly, ICLQ* Vol. 51, January 2002 pp 1-15 at, 4.

<sup>30</sup>See Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?*, 24 *Vand J Transnatl’ L.* 6 89,7 1 O ( 199 1 ). De L’associatisouni Ssed’ Arbitra [Gbeu Lla SA] 259 (1993); 1994 *Revue de L’arbitrage*, [Rev ARB] 175, and note by Panayotis Glavinis. See also Geneva Surveillance Authority for Debt Recovery and Bankruptcy Matters, 9 April, 1997. 1999 REV SUISSE DR INT ET DR EUR 656.

<sup>32</sup>P. Sands and P. Klein, *Bowett’s Law of International Institutions*, London: Sweet and Maxwell, 2001, p. 516. See also August Reinisch, “Accountability of International Organisations According to National Law”, (2005) 36, *Netherlands Yearbook of International Law*, p.3.

<sup>33</sup>In the case of the *United States of America Court of General Sessions, New York County of the State of New York v. Nictolas Coumatos*: judgment of 19th January 1962 1/ Distinction between governmental representatives and United Nations staff members for purposes of immunities Jurisdiction over Acts committed within the premises of the United Nations Interpretation of Articles III, V and VI of the Headquarters Agreement. The defendant, an American citizen employed at the United Nations Headquarters as an inventory clerk on the Payroll of the United Nations, had Been arrested by the New York City Police outside the United Nations Headquarters and indicted for grand larceny Committed in the United Nations Headquarters. He objected to the proceeding on the ground that the Court lacked Jurisdiction by virtue of his position as a United Nations employee and in view of the fact that the crime had taken place on the United Nations premises. By a judgement of 19 January 1962, the Court of General Sessions sustained the indictment and found the defendant guilty. The Court (as per James E.

their functions. Such immunity may sometimes not extend to motor traffic offences.<sup>34</sup> Their purpose of privileges and immunities provided for in Headquarters Agreement is solely to ensure, in all circumstances, the freedom of action of the Organisation and the complete independence of the persons concerned in carrying out of their duties of the organization in the host state is secured.<sup>35</sup>

It is worthwhile to state here that the privileges and immunities that officials of an international organization enjoy do not automatically guarantee their safety and security, the lack of respect of these privileges and immunities can at times result in the perception of a threat against personal security.<sup>36</sup> Privileges and immunities are accorded to the representatives of organisations, not for the personal benefit of the individual representatives or officials of the organisation themselves, but in order to safeguard the independent exercise of their functions in connection with the organisation they represent in host state. Consequently, an organisation not only has the right but is under a duty to waive the immunity of its official or representatives in any case where, in the opinion of the organisation the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.<sup>37</sup>

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Mulcahy, J.) pointed out that, while diplomatic Immunity was extended to some categories of resident representatives of Member States to the United Nations under Article V of the Headquarters Agreement of 26 June 1947 between the United States and the United Nation, officers and employees of the United Nations could only rely on the International Organizations Immunities Act of 1945 whose provisions on immunity from suit and legal process (section 7(b)) are limited to acts performed by them in their official capacity. Noting that the defendant's claim to immunity rested upon article III, sections 8 and 9 of the Headquarters Agreement, the Court addressed itself to the question whether it had jurisdiction over the acts as committed within the premises of the United Nations. It summarized the relevant provisions of articles III and VI of that Agreement and concluded: "Accordingly, it would appear from this agreement that the local law shall have jurisdiction over any acts done or transactions taking place within the Headquarters District which are in violation of such laws and the courts of the appropriate American authorities shall have jurisdiction to try and determine issues between the parties. However, such Federal, state or local laws shall, of course, not be inconsistent with any regulation that has been authorized by the United Nations... "for the court to recognize the existence of a general and unrestricted immunity over suits or transactions, as proposed by defendant, would be to establish a large preferred class of people within our borders who would be immune to punishment inasmuch as the United Nations has no tribunal for the control and punishment of defendants among its personnel. It can at best expel or eject them from the Headquarters District and such persons would escape trial and punishment completely. Such blanket immunity is contrary to our sense of justice and cannot be supported by any reference to the United Nations Charter, Acts of Congress or executive orders of the President". The defendant also argued, on the basis of article III, section 9(a) of the Headquarters Agreement, that even if he was not immune from legal process, the United Nations had to give its consent prior to the indictment and, since its consent was obtained after the indictment, such consent had no effect. The Court held that that section of the Headquarters Agreement was not applicable in the case since the defendant had been arrested outside the United Nations Headquarters (United Nations Judicial Year Book (1962) Part Three). Judicial decisions relating to the United Nations and related intergovernmental organisations. Chapter VIII Decision of National Courts, pp. 294-295. See also 224, N.Y.S 2d 507, United Nations Legislative Series, Legislative Text and Treaty Provisions Concerning, the Legal Status Privileges and Immunities of International Organisations, Vol.1 (STB/LEG/SER.B/10), p.128.

<sup>34</sup> John Hayes *et al*, Report of the Foreign Affairs, Defence and Trade Committee of the House of Representatives of New Zealand on International Treaty Examination of the Headquarters Agreement between the South Pacific Regional Fisheries Management Organisation and the Government of New Zealand on 21 October 2013, p.5. The South Pacific Regional Fisheries Management Organisation was established on 24 August, 2012.

<sup>35</sup> Agreement between the Swiss Federal Council and the Bank for International Settlements to determine the Bank's Legal Status in Switzerland done at Berne on 10 February 1987; text as amended effective 1 January, 2003 by the exchange of letters of 18 December 2002/13 January 2003 Article 19(1).

<sup>36</sup> Drazen Petrovic, above note 15 at p.16.

<sup>37</sup> Convention on the Privileges and Immunities of Specialised Agencies Approved by the General Assembly of the United Nations on 21 November 1947 and came into force on 2 December 1948, See Articles 16 and 22.

It is pertinent to also state that domestic authorities can exercise their jurisdiction over an International Organisation only if the immunity is waived by an organization over the illegal conduct of its official or representative in a host country. This immunity is the very essence of the guarantees of the organizations' independence. It has been a *conditio sine qua non* of headquarters agreements and *ad hoc* arrangements dealing with the issue of privileges and immunities.<sup>38</sup> Hence in the case of *U.S.A. v. Ivan Dmitrievich Egorov and Aleksandra Egorova*<sup>39</sup> which dealt with the effect of visa and diplomatic passport of a United Nations employee who was accused of criminal act not within his official duties and therefore was held not entitled to immunity or Supreme Court's original jurisdiction. The Court held *inter alia* that: "the visa issued to Egorov was not a diplomatic visa but a G-4 visa, which is issued to officers and employees of international organizations, and bore the notation 'Employee of United Nations Secretariat' ...

"The issuance to Egorov of a diplomatic passport is not controlling of his status. The title of 'First Secretary of the Ministry of Foreign Affairs' would entitle him to diplomatic immunity provided that he had been accepted and recognized as such by the United States. Section 252 of Title 22 U.S. Code grants immunity from arrest only to those ambassadors or public ministers of foreign states who have been authorized and received as such by the President ..." The Court, after noting the absence of the United States' acceptance and recognition of Egorov's diplomatic status, pointed to the sovereign right of a government to pass upon the acceptability of diplomatic representatives of foreign governments.<sup>40</sup> With regard to the privileges and immunities to which Egorov was entitled as an employee of the United Nations Secretariat pursuant to the International Organizations Immunities Act,<sup>41</sup> the Court stated: Section 288 d (b) thereof provides that "Representatives of foreign governments in or to international organizations ... and officers and employees of such organizations shall be immune from suits and legal processes *relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees*. The limitation created by the underscored provisions of the said Section precludes Egorov from claiming general immunity." As to Article 105 of the United Nations Charter, urged by Egorov as a further basis for his claim of immunity, the Court also held that he derived no protection there from so far as the charges against him were concerned. The Court then concluded that since Egorov did not have diplomatic status he did not come within the purview of Article III, Section 2, and Clause 2 of the United States Constitution.<sup>42</sup>

The facts of this case is that defendant Egorov, who was an employee of the United Nations Secretariat, and his wife were arrested and charged under Title 18, Sections

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<sup>38</sup> Drazen Petrovic, above note 15 at p.6.

<sup>39</sup> Judgement of 7 October, 1963. 222 Fed. Supp. 106.

<sup>40</sup> See Part Three: Judicial Decisions on Questions Relating the United Nations and Related Intergovernmental Organizations, Chapter VIII. Decisions of National Tribunals, Extracts of United Nations Year Book 1963, pp.202-203

<sup>41</sup> (sections 288-288(f) of Title 22 of the United States Code)

<sup>42</sup> *Ibid.*

371, 794(a) and (c), and 951, of the United States Code. They filed a motion for an order dismissing indictments against them claiming that they were entitled to diplomatic immunity and, in the alternative, that the United States Supreme Court had original and exclusive jurisdiction pursuant to Article III, Section 2, and Clause 2 of the United States Constitution. By a judgement of 7 October 1963 the District Court (as per Rayfield, J.) denied the motion. The defendants based their claim on the fact that the U.S.S.R., exercising its rights as a sovereign power, invested Egorov with immunity by issuing to him a diplomatic passport wherein he was designated as First Secretary of the Ministry of Foreign Affairs; and that the American Embassy at Moscow issued to Egorov and his family non-immigrant visa upon the receipt of Egorov's application in which he stated his aforementioned diplomatic rank<sup>43</sup>. A more recent case was in May 2011, when Dominique Strauss-Kahn, the former head of the International Monetary Fund (IMF), was arrested for allegedly sexually assaulting a housekeeper in his suite at the Sofitel Hotel in Manhattan.<sup>44</sup>

Strauss-Kahn decided not to claim immunity during the criminal proceedings, explaining that "he wanted to clear his name." However, when the housekeeper later filed a civil suit, his lawyers argued to the court that his former status as the head of an international organization protected him from lawsuits, including those based upon "acts done in the executive's personal capacity." The court ultimately rejected the immunity claim because Strauss-Kahn had resigned from his post at the IMF before the suit was filed, and therefore any immunity that he might have enjoyed had expired<sup>45</sup>. The decision thus left open the question of whether Strauss-Kahn would have enjoyed immunity had he not resigned.<sup>46</sup>

The answer may be either way, the offence for which a civil suit arose took place when he was an employee of IMF and therefore the immunity subsists even though he has resigned his position. The waiver of immunity was his personal decision and not that of IMF. Though in another similar circumstance this time based on interpreting the sovereign state immunity provided for under the Vienna Convention on Diplomatic Relations of 1961<sup>47</sup> and not on Headquarters Agreement, the Nigerian ambassador to Kenya, Dr. Chijioke Wilcox Wigwe, was on the verge of going on an unprecedented trial in Kenya for assault, battery and cannibalism. On 11 May, 2011 the ambassador allegedly attacked his wife, Mrs. Tess Iyi. The case was reported to Kenyan police authority. Kenya Police Commissioner Mr. Mathew Itwere formally wrote to the Nigerian government through the Ministry of Foreign Affairs asking the Nigerian government to waive the immunity of Dr. Wigwe to enable the prosecution go ahead. The news was widespread and the Kenya

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<sup>43</sup> *Ibid.*

<sup>44</sup> Russ Buettner, *Bronx Judge Rejects Strauss-Kahn's Claim of Diplomatic Immunity in Sexual Assault Suit*, N.Y. Times, 1 May, 2012, at A23.

<sup>45</sup> See *Diallo v. Strauss-Kahn*, No. 307065/11 (N.Y. Sup. Ct. May 1, 2012), available at <http://www.nycourts.gov/press/DSK-30706511.pdf>.

<sup>46</sup> George B. Adams III, above note 18, p.243.

<sup>47</sup> The Vienna Convention on Diplomatic Relations was adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities held at the Neue Hofburg in Vienna, Austria, from 2 March do 14 April 1961. The Convention, in accordance with its Article 51, came into force on 24th April 1964.

media was awash with shocking images of deep cuts and bruises on Mrs. Wigwe's face, neck, fingers and spine resulting from a quarrel with the ambassador. A women rights group, FIDA Kenya, has also condemned Ambassador Wigwe as being unfit to be Nigeria's High Commissioner in Kenya.<sup>48</sup>

Already, the Kenya police have prepared ground to try him on criminal charges bothering on assaults, battering and cannibalism in line with the country's criminal law. Instead of Nigerian government waiving his immunity from trial as requested from Kenyan authority, he was quickly recalled by the Nigeria government. His recall, according to media report might not be unconnected with the government's plan to give him soft landing as his trial in the foreign country would have serious negative impact on the country's image, though this was made possible by the diplomatic immunity accorded diplomats under the Vienna Convention on Diplomatic Relations for which Nigeria and Kenya are parties to.<sup>49</sup> For instance, Article 31(1) of the convention states that "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State", and Article 34 provides that "the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State" and this did not happen.

### **Confirming the Legal Capacity of the Organisation in Host State**

A Headquarters Agreement also provides for the Organisation to have legal capacity to enable it to function effectively through the ability to enter into contracts of employment, rental agreements, operate bank accounts and similar activities.<sup>50</sup> Under Headquarters Agreement an organisation also has the capacity to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings.<sup>51</sup> This is because when states combine to form an organization, it has the power to perform certain functions which have legal consequences. In the course of performing these functions an inter-governmental organization may incur liabilities to third parties. These third parties may be states, other organizations, individuals and legal persons. The state may be member state of the organization itself or other states, while individuals and other legal persons may be nationals of members' states or not. Therefore it is necessary that Headquarters Agreement specify the legal capacity of the organization so that it can act as a separate legal entity when disputes arise rather than subjecting the individual staff acting on its behalf to the whims and caprices of the law thereby derailing individual self-confidence of the staff

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<sup>48</sup> Sahara Reporter, "Kenya Police Writes Nigerian Government Over Wife-Batterer Ambassador" 27th May, 2011. Available online at [www.Sahara Reporter.com](http://www.Sahara Reporter.com). Accessed 24th June, 2014.

<sup>49</sup> Vanguard News "Allegation of Wife Battering: This is my story– Ambassador Wigwe", 31st May, 2011, available online at <http://www.vanguardngr.com/2011/05/allegation-of-wife-battering-this-is-my-story-ambassador-wigwe/> accessed 27th June, 2014.

<sup>50</sup> John Hayes *et al*, above note 34..

<sup>51</sup> Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, Article XIII of the Convention on the Conservation of Antarctic Marine Living Resources drawn up at Canberra on 20 May, 1980 which entered into force on 7 April 1982 which provides that the headquarters of the Commission for the Conservation of Antarctic Marine Living Resources shall be established at Hobart, Tasmania, Australia. See Article 3

members of the Organisation.<sup>52</sup> Hence in *Certain Phosphate Lands in Nauru Case*,<sup>53</sup> it was stated that separate legal personality is crucial in order that the actions of the Organisation be no more than actions of all member states therefore whoever acts ostensibly in the name of the Organisation being an agent of some or all of the members.<sup>54</sup>

### **Free Visa and Tax Exemption Regimes**

In order to encourage family ties and reunion, most Headquarters Agreement provides that staff members of an International Organisation, along with their officially recognised dependants and dependent children, foreign representatives at Organisation meetings and experts will be provided with visas and will not be charged a fee for them. Visas, where required, shall be granted without wait or delay, and on production of a certificate that the applicant is a person described in the letter of appointment. In addition, the host state governments will facilitate for such persons speedy travel within its territory as well.<sup>55</sup> On the other hand staff members of an international Organisation will be exempted from all forms of taxes on income received from the Organisation though this may not apply to staff members who are citizens or residents of the host state and where they pay income tax, the host government will reimburse the Organisation in order not to be seen as financially benefitting from the contributions of other member governments (who share the costs of the Organisation). Again the idea of reimbursement is to ensure that the integrity of the host state tax system is maintained.<sup>56</sup>

Again the property, premises, assets, and income, including contributions made to an international organisation under the treaty or convention may be exempt from all direct taxes including income tax, capital gains tax and corporation tax by the host State as long as it is within the scope of the official activities of the organisation. A headquarters agreement may also provide that an international organisation shall be exempt from municipal rates as well.<sup>57</sup> There is the belief that considering the facilities of the international organisation, heavy tax burden will sap the financial resources of the organization and may impair its ability to function adequately in terms of financial resources if they are to meet with all their tax obligations to the host state.<sup>58</sup> But contrary to the general position on direct tax

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<sup>52</sup> C.F Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn. Cambridge: Cambridge University Press, 2005, p.407.

<sup>53</sup> *Ibid.*, (1992) ICJ Reports p.240, 258, 271. In this case there was a tripartite administering power in the trusteeship agreements in that case, but the Court implied that one of the states could be held responsible in its own right. In doing so it stressed that the administering authority was not a separate legal entity from the three states.

<sup>54</sup> *Ibid.*, p. 412

<sup>55</sup> Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, above note, 23. See Article 19.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* See Article 8(1) (2).

<sup>58</sup> See Agreement between the Government of the French Republic and the ITER International Fusion Energy Organisation Regarding the Headquarters of the ITER Organisation and the Privileges and Immunities of the ITER Organisation on French territory done at Saint-Paul-Lez-Durance, (Cadarache), 7th November, 2007. Article 5. This agreement came into effect under Article 12 of the Agreement on the Establishment of the ITER International Fusion Energy Organisation for the Joint Implementation of the ITER Project signed in Parties on 21 November, 2006.

exemption, Article 12 of the Interpol Agreement with France states that the Organization shall pay, under general laws and regulations, all indirect taxes included in the price of goods sold or services rendered. However, taxes on turnover ... payable to the national budget and levied on large-scale purchases of movable and immovable property or services intended for the performance of the Organization's administrative, scientific or technical functions and for the publication of documents relating to its activities, shall be reimbursed in accordance with conditions to be determined by agreement between the Organization and the competent French authorities.

The Organization shall be reimbursed for tax on turnover for expenditure on immovable goods incurred from 1 January 2004.<sup>59</sup> Comparatively, in the case of Headquarters Agreement between the Swiss Federal Council and the Bank for International Settlements, it was provided in Article 7(1) that "The Bank, its assets, income and other property shall be exempt from direct and indirect federal, cantonal and communal taxes. With regard to buildings, however, such exemption shall apply only to those owned by the Bank and occupied by its services, and to income deriving there from. The Bank shall not be subject to taxation on the rent it pays for premises rented by it and occupied by its services." Furthermore the Bank shall be exempted from all federal, cantonal and communal dues, except dues charged as the price of actual services rendered and where appropriate, the exemptions mentioned may take the form of reimbursement at the request of the Bank and according to a procedure to be determined by the Bank and the competent Swiss authorities.<sup>60</sup>

### **Financial Services, Currencies, Cash and Securities**

In order to maintain its activities on full gear and fulfill its statutory functions and incidental responsibilities, International Organizations via headquarters agreement may in addition to other privileges and immunities provided in the agreement receive and hold any kind of funds, currencies, cash and securities in the interest of the organization. It may dispose of them freely for any purpose provided in the agreement and hold account in any currency to the extent required to meet its obligations.<sup>61</sup> Without being restricted by financial controls, regulations, or moratoria of any kind, an international Organization may hold funds, gold, or currency of any kind and should be free to transfer its funds, gold, or currency to and from the host country or within same and to convert any currency held by it into any other currency.<sup>62</sup> In exercising its right, the Organization shall pay due regard to any representations or relevant laws and regulations in the host states insofar as the Organisation considers that

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<sup>59</sup> Agreement between the International Criminal Police Organization - INTERPOL and the Government of the French Republic Regarding INTERPOL'S Headquarters in France, dated 3 November 1982 Article 12(1)-(3).

<sup>60</sup> Agreement between the Swiss Federal Council and the Bank for International Settlements to determine the Bank's Legal Status in Switzerland done at Berne on 10<sup>th</sup> February 1987. Article 7(1)(2) (4) (5).

<sup>61</sup> Agreement between the Government of the French Republic and the ITER above note 27, Article 11.

<sup>62</sup> See Agreement between the Government of the Federative Republic of Brazil and the Inter-American Institute For Global Change Research Concerning the Headquarters of the IAI, done at Rio de Janeiro, on April 28 1995, See article 5(5). The States of the Americas met in Montevideo, and signed, on 12-14 May, 1992, an Agreement Establishing the Inter-American Institute for Global Change Research as a regional network of cooperating research which entered into force on 23 June, 1993.

effect can be given to such representations, laws, and regulations without detriment to her interests as an international Organisation.<sup>63</sup> In furtherance of financial objectives in a Headquarters Agreement, host Government are usually enjoined to employ its best endeavours to enable the Organisations obtain the most favourable conditions as regards exchange rates, banking commissions in exchange transactions and to raise funds through the exercise of its borrowing power or in any other manner which it deems desirable<sup>64</sup>. Furthermore Headquarters Agreement also contains loan agreements and financial assistance or support to an organisation by the host states for example under the Loan Agreement with the United States for the Construction of the UN Headquarters, 23 March, 1948 the United States government will make available to the United Nations through the United States Mission to the United Nations, funds in accordance with the *Headquarters Loan Agreement*.<sup>65</sup>

A more recent example is found in the proposal on financial arrangements, administrative and logistical support to the “Green Climate Fund”<sup>66</sup> it was stated in the preparatory documents dealing with Selection of the Host Country of the Organisation (or the Headquarters Agreement) that additional direct financial contributions is to be made by the host Government to support the costs of operations of the organisation<sup>67</sup> and there were expressions of interest submitted by six countries (namely Germany, Namibia, Poland, Republic of Korea, Switzerland and Mexico) to host the headquarters of the Green Climate

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<sup>63</sup>Headquarters Agreement between the Organization of American States and the Government of the United States of America, signed in Washington, on 14 May, 1992, Article 3(1) and (2) of Part Two dealing with the Status of the Organization. Note that the Charter establishing the Organization of American States adopted in Bogota, Colombia, in 1948, entered into force 1951, was amended by the Protocol of Buenos Aires in 1967 and by the Protocol of Cartagena de Indias in 1985.

<sup>64</sup> Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority, United Nations Convention on the Law of the Sea of 10 December 1982, which establishes the International Seabed Authority and Article 156, paragraph 4, of the Convention, provides that the Seat shall be in Jamaica. See Article 16(2)(1)(e)

<sup>65</sup>See the United States and the United Nations; Report by the President to the Congress for the Year 1947. Department of State Publication 3024, International Organization and Conference Series 111, 1, pp. 220-234. Available online at [http://avalon.law.yale.edu/20th\\_century/decad036.asp](http://avalon.law.yale.edu/20th_century/decad036.asp) accessed 26th June, 2014. The United States Representative at the Seat of the United Nations presents his compliments to the Secretary-General of the United Nations and has the honor to notify him that on August 11, 1948, the President of the United States of America signed the Bill (now Public Law 903) authorizing a \$65,000,000 interest-free loan to the United Nations for the construction of the Headquarters of the United Nations in New York. See also the United States Representative to the United Nations Secretary- General United States Mission to the United Nations, UN. 1657/C August 30, 1948.

<sup>66</sup>An organisation that will assist in achieving the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC). The Green Climate Fund was designated as an operating entity of the financial mechanism of the UNFCCC, in accordance with Article 11 of the Convention.

<sup>67</sup>By Decision 3/CP.17 of the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC), Parties were invited to submit to the Board by 15 April 2012 expressions of interest for hosting the “Green Climate Fund” Organisation. See recommended decision of the Board No. GCF/B.01 12/09, “Selection of the Host Country of the Fund”. See the Minutes of the Meeting of the Board held on 23rd - 25th August, 2012 Geneva, Switzerland, p.2, para 3.3.

Fund Organisation with handsome financial commitments.<sup>68</sup> Korea secured the hosting right for the Headquarters of the Green Climate Fund<sup>69</sup> and going by the proposal submitted to the Board, which forms part of substantive Headquarters Agreement. The Republic of Korea agreed to advance to the Organisation, free of charge and, as of the date of entry into force and for the entire period covering the implementation of the Headquarters Agreement, the exclusive use, occupancy and enjoyment of the headquarters, as described in a Supplementary agreement, including facilities and installations within the building or directly connected to it, specified in a Supplementary agreement, as may be required for the occupancy and enjoyment of the Headquarters. Korea will provide the I Tower rent free for the duration of its operations, and major maintenance and repairs to the facilities will also be provided free of charge (equivalent to USD 6 million per annum). In addition, up to USD 1.4 million will be provided initially for office equipment purchases, provision for use a world class conference centre for 20 days per annum for the entire duration of its operations, free of charge (equivalent to USD 0.5 million per annum). Korea, in expression of its firm will to contribute to the Green Climate Fund, provided financial support of USD 2 million in 2012 for start up, and subsequent to hosting the Organisation, an additional USD 1 million per annum until 2019. Through new and additional financial resources, Korea, as the host country, will utilise a total of USD 40 million for the period of 2014 2017 to support capacity building of developing countries in addressing the challenges of climate change<sup>70</sup>.

### **Settlement of Disputes**

Headquarters Agreement contains dispute settlement procedures to be adopted by the Organisation and the host state in the event of a dispute between the two parties relating to the interpretation of the letters of agreement. Most times some headquarters agreement are silent on the particular method but it usually provides that both parties will decide on the method to be applied whenever a dispute arises. Since an International Organisation possess a judicial personality and enters into contract with the host state and third parties like other organisations, Companies, Multinational Corporations and individuals, disputes

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<sup>68</sup>The selection of the Republic of Korea as the host country of the Fund was the outcome of an open and transparent process conducted by the Board. Parties to the UNFCCC were requested to submit to the Board by 15 April 2012 expressions of interest for hosting the Fund, based on the criteria set in a decision of the COP (3/CP.17, paragraph 12). They included the ability to confer and/or recognize juridical personality and legal capacity to the Fund, the ability to provide the necessary privileges and immunities to the Fund, and financial arrangements as well as administrative and logistical support offered to the Fund. Six expressions of interest were received by the Interim Secretariat from Germany, Mexico, Namibia, Poland, Republic of Korea and Switzerland.

<sup>69</sup>At its October 2012 meeting, the Board took a consensus decision to select Songdo, Incheon City, Republic of Korea as the host city of the Green Climate Fund. In accordance with paragraph 22 of the Governing Instrument, this decision was endorsed by decision 6/CP.18 of the Conference of the Parties (COP) at its eighteenth session in Doha, Qatar, in December 2012.

<sup>70</sup>*Ibid.* pp.14-15. The “Agreement between the Republic of Korea and the Green Climate Fund regarding the Headquarters of the Green Climate Fund” was signed in Bonn, Germany, on 2 June, 2013 and in Songdo, Incheon, Republic of Korea, on 10th June, 2013. The Agreement entered into force in accordance with paragraph 5 of Article 20 of the Agreement on 27 August, 2013. See also Article 4(2), (4).

may arise and it is the Headquarters Agreement that will specify the modalities for resolving such disputes. For example Article 25 of the Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, stated that any dispute between the Government and the Commission concerning the interpretation or application of this Agreement or any question affecting the relations between the Government and the Commission which is not settled by consultation or negotiation or by some other mutually acceptable method shall be referred to an arbitral tribunal constituted *mutatis mutandis* as provided for in the Annex to the Convention.<sup>71</sup>

While Article 19 of the Agreement between the Government of the French Republic and the International Fusion Energy Organisation (ITER) has almost similar provision with the Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, though with a much wider connotation<sup>72</sup> it is provided that any dispute arising between the French authorities and the ITER Organisation out of or in connection with this agreement, which could not be settled by negotiations or by any other procedure to be agreed is, unless the parties decide otherwise, subject to arbitration at the request of one of the Parties. The parties shall meet to discuss the nature and conditions of the agreed procedure of the settlement of dispute, with a view to an early resolution. It further provided that the organisation shall provide for the appropriate mechanisms for the settlement of disputes between the ITER Organisation and the Staff. Unlike the former agreement the later took into consideration the possibility of disputes arising from contract of employment by staff members of the organisation.

Some organisation in their Headquarters Agreement usually has an internal mechanism for settlement of disputes arising from contract of employment of its staff for example the Headquarters Agreement between the Swiss Federal Council and the Bank for International Settlements provided in Article 4 that “Disputes arising in matters of employment relations between the Bank and its Officials or former Officials, or persons claiming through them, shall be settled by the Administrative Tribunal of the Bank. The Board of Directors of the Bank shall determine the constitution of the Administrative Tribunal, which shall have exclusive and final jurisdiction. Matters of employment relations shall be deemed to include in particular all questions relating to the interpretation or application of contracts between the Bank and its Officials concerning their employment, of the regulations to which the said contracts refers, including the provisions governing the Bank’s pension scheme and other welfare arrangements provided by the Bank.”<sup>73</sup> The major import of this provision is to ensure that the bank enjoy immunity from jurisdiction and execution by the government of the host state-Switzerland. Though the danger associated with the

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<sup>71</sup>Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, above note 31. Article 25.

<sup>72</sup>Agreement between the Government of the French Republic and the ITER International Fusion Energy Organisation above note 38, Article 19.

<sup>73</sup>Agreement between the Swiss Federal Council and the Bank for International Settlements to determine the Bank’s Legal Status in Switzerland done at Berne on 10th February 1987. See Article 4(1) and (2).

establishment of an internal mechanism for dispute resolution is that such tribunal may not be independent considering that members constituting the panel of judges of the tribunal are likely to come from the high echelon of the organisation and the decision reached may not be subject to appeal thereby interfering with the due process of natural justice. Again the availability of alternative means of dispute resolution, (that is where no particular one is specified) as enshrined in some headquarters agreement, enhances possibility of securing a credible avenue for resolving such disputes were they arise particularly staff conflicts on contract of employment.

In the case of the Headquarters Agreement between Canada and International Civil Aviation Organization (ICAO), which is almost similar with that of Headquarters Agreement between the Swiss Federal Council and the Bank for International Settlements, it was provided that settlement of disputes with the Government of Canada concerning the interpretation or application of the Agreement, which is not settled by negotiation or other agreed mode, is referred for final decision to a tribunal of three arbitrators. One should be named by the Secretary of State for External Affairs, one to be named by the President of the ICAO Council, and the third to be chosen by the two, or, if they fail to agree upon a third, then by the President of the International Court of Justice.

The position of this agreement in terms of dispute resolution arising from implementation of its provision shows a firm will by the drafters to present a formidable and firm approach for settlement of a dispute arising from the intercourse between ICAO and the host State-Canada as both parties are given the opportunity to nominate their arbitrators to represent them at the tribunal in case negotiation and other means of dispute settlement fails.<sup>74</sup> One of the unique features of this agreement is that prohibits any discrimination based on race, sex, language or religion thereby bring a human rights angle into headquarters agreement. Above all, what is realized and common among Headquarters Agreement is that negotiation (an alternative means of dispute resolution) is a preferable method of resolving disputes since the concept of immunity have barred the parties from submitting themselves to the jurisdiction of the local court on disputes arising from the agreement except where this is waived. In addition to the arguments above, an Italian Court held in *Giovanni Porru v. Food and agricultural Organisation (FAO)*,<sup>75</sup> that “acts by which an international organisation arranges its internal structure fall undoubtedly in the category of acts performed in the exercise of its established functions and that in this respect therefore, the organisation enjoyed immunity from jurisdiction”.<sup>76</sup> In another case

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<sup>74</sup>Dobrica Savic, “International Civil Aviation Organization (ICAO)”, “Montreal, November 2005, p.18. See also the Headquarters Agreement between Canada and ICAO, of 14 April 1951, On 16 September 1980 a Supplementary Agreement entered into force. It dealt with ICAO Headquarters premises at 1000 Sherbrooke Street West in Montreal. On 20 February 1992, the 1951 Agreement was terminated and superseded by a new Agreement that entered into force the same day. A new Supplementary Agreement was signed on 28 May 1999 superseding the Supplementary Agreement signed in 1980 in order to reflect the relocation of the Organization’s Headquarters to a new location on 999 University Street on November 1, 1996.

<sup>75</sup> Rome Court of First Instance in its Judgment of 25th June 1969.

<sup>76</sup> Summary of United Nations Judicial Year Book (1969), pp.238-239.

over a claim by a former employee of Intergovernmental Committee for European Migration (ICEM) for terminal emoluments, the Court of Cassation in *Mrs C. v. Intergovernmental Committee for European Migration (ICEM)*<sup>77</sup> held that “acts by which an international organisation arranges its internal structure, including the rules laid down by it in respect of employment relationships with the staff, were manifestations of the organisation’s power under international law” and concluded that “the provisions and measures adopted by the ICEM, also insofar as they regard terminal emoluments, were governed by the organisation’s own system of rules; they were consequently not subject to Italian legal system and were exempt from the jurisdiction of Italian Courts. Accordingly, the court... dismissed the case for lack of jurisdiction.”<sup>78</sup>

### **Availability of Essential Public Utility/Services**

Under most headquarters agreement, it is the responsibility of host government to ensure that Headquarters of an organisation shall be supplied with necessary public utilities to ensure the effective functioning of their operations and in the event of any interruption, or threatened interruption, of any public utility services, the appropriate Government authorities in the host state shall consider the needs of the International Organisation as being of equal importance as those of essential agencies of the host Government and other diplomatic organisations present in the state and shall take steps accordingly to ensure that the work of the organisation is not prejudiced. Host states Government shall arrange for the Headquarters to be supplied by the appropriate authorities with available public services, such as electricity, water, sewerage, gas, mail, telephone, telegraph, drainage, collection of refuse and fire protection, on terms no less favourable than those enjoyed by the host Government and allied diplomatic organisation domicile in the host State.<sup>79</sup> Though International Organisations are supposed to enjoy tax exemption for their host government but in the case of the Green Climate Fund, public utilities and services that are supplied by the Korean Government authorities or bodies under their control were supplied at tariffs not exceeding the rates accorded to diplomatic missions and intergovernmental organizations in the Republic of Korea.<sup>80</sup>

### **Facilities in Respect of Communications**

With the advances in globalization, conventional means of communication such as surface mail, telegram, etc are giving way to faster electronic means of communication. An

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<sup>77</sup> French Court of Cassation in its Judgement of 7 June, 1963.

<sup>78</sup> Decision of 7 June, 1973, File No. 19/70 of Civil Matters before the Supreme Court of Cassation. Summary of United Nations Judicial Year Book (1973), pp.197-198. See also Peter Neumann, “Immunity of International Organisations and Alternative Remedies Against the United Nations”, Seminar on State Immunity, Vienna University International Law, 2006, pp.5-6.

<sup>79</sup> Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia, above note 44, Article 4(4).

<sup>80</sup> The “Agreement between the Republic of Korea and the Green Climate Fund regarding the Headquarters of the Green Climate Fund” was signed in Bonn, Germany, on 2 June, 2013 and in Songdo, Incheon, Republic of Korea, on 10 June, 2013. Article 6(1)(2).

international Organisation, in the territory of a host state for the purpose of its official communications should be treated in not less favourable manner than that accorded by the Government of the host state to any other Government, including their diplomatic mission domicile in the host state. As a matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications, and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the organisation. Headquarters Agreement demands that an organisation has the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags. The organisations should be allowed to erect telecommunication masks and other outdoor electronic devices that transmit instant information to their official premises. The effective functioning of these devices should not be interfered with or blocked by deliberate acts of sabotage. Though appropriate security precautions has to be determined by agreement between a host party and the organisation on the use of such telecommunication devices.<sup>81</sup>

### **Inviolability of the Organisations Building, Premises, Flag, Emblem, Achieves and Documents**

Under headquarters agreements, the buildings, premises, flags, emblems archives and documents of international organisations wherever located are inviolable.<sup>82</sup> They have to be secured from being infringed, breached or violated as a result of any attack due to violence or protest by authorities and citizens of host state or any individual or group whatsoever under any guise. An organisation has the right under the headquarters agreement to display its flag and emblem on its premises and means of transport.<sup>83</sup> This demands that host state governments should provide adequate security to protect the facilities of international organisation from being violated. The Headquarters of the International Organisations shall be inviolable and shall be under the full authority of the organisation's officials or Representatives.

The host State Government under headquarters agreement are expected to take all appropriate steps to protect the headquarters of an organisation against any intrusion or damage and to prevent any impairment of its dignity such that there will be confidence in the officials while carrying out their assignments in host states. To ensure this obtains the buildings or parts of buildings and surrounding land which, whoever may be the owner thereof, that are used for the purposes of the headquarters seat shall be inviolable. Security agents and public officials of the host states may not enter the building or premises housing

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<sup>81</sup> Convention on the Privileges and Immunities of Specialised Agencies Approved by the General Assembly of the United Nations on 21 November 1947 and came into force on 2 December, 1948, See Section IV, Articles 11 and 12.

<sup>82</sup> See Agreement between the Government of the French Republic and the ITER above note 27, Article 3(1)

<sup>83</sup> Headquarters Agreement between the Commission for the Conservation of Antarctic Marine Living Resources and the Government of Australia. Above note 44, Articles 6 and 7.

an international organisation without the express consent and approval of the Organisation's officials.<sup>84</sup> The competent authorities in host states under headquarters agreement shall exercise due diligence to ensure that the tranquility of the Headquarters and free access thereto are not disturbed by the unauthorized entry of any person or group of persons from outside or by disturbances in its immediate vicinity, and the host state shall provide the Headquarters with such appropriate protection as may be required.

Therefore sufficient number of security guards should be made available by the host state on request for the preservation of law and order in the headquarters of an international organisation where they are no contract security operatives hired by the organisation or where there is imminent need for such assistance particularly in societies that may be volatile due to political situation there<sup>85</sup>. Under the Headquarters Agreement between Canada and ICAO, it was provided that the Headquarters premises of the Organization shall be inviolable with the Government of Canada giving it the same protection as is given to other diplomatic missions in Canada. The property and assets of the Organization, wherever located and by whomsoever held, are immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action, except with the consent of and under the conditions agreed to by the Secretary General of the Organization. The Organization has the obligation to prevent the Headquarters premises from becoming a refuge either for persons who are avoiding arrest or for persons who are endeavouring to avoid services of execution of legal process.<sup>86</sup>

According to C.F Amerasinghe, the inviolability of premise and achieves is provided for in all relevant agreements. The inviolability of premise is to be derived from the protection of the building or property specifically from search while the reference to confiscation, sequestration and the like must also put the premise of the organisation outside the reach of the host state. By implication the authorities of the host state may not enter the premise without the permission of the administrative head, even for the purpose of arresting or serving a writ on an individual. This concept requires that inviolability be secured against all persons and not merely the authorities of the host state which implies that the host state must exercise due diligence in the protection of the premise. Achieve unlike premises involve the protection of all documents held by the institution, irrespective of who owns

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<sup>84</sup> Agreement between the Swiss Federal Council and the Bank for International Settlements to Determine the Bank's Legal Status in Switzerland done at Berne on 10th February, 1987. See Article 3(1)(2)(3).

<sup>85</sup> Agreement Between the International Seabed Authority and the Government of Jamaica, above note 57, Articles 5(1) and 6(1)(2).

<sup>86</sup> Headquarters Agreement between Canada and ICAO, of 14 April 1951, On 16 September 1980 a Supplementary Agreement entered into force. It dealt with ICAO Headquarters premises at 1000 Sherbrooke Street West in Montreal. On 20 February 1992, the 1951 Agreement was terminated and superseded by a new Agreement that entered into force the same day. A new Supplementary Agreement was signed on 28 May 1999 superseding the Supplementary Agreement signed in 1980 in order to reflect the relocation of the Organization's Headquarters to a new location on 999 University Street on November 1, 1996.

them. This would seem to ensure the confidentiality of the operations of these institutions where decisions are reached with the help of diverse documents whose ownership may often be unclear.<sup>87</sup> To buttress the above situation with the case of *R. Peter Panuschka v. Peter Schaufler*,<sup>88</sup> it was decided that the service of legal process within the headquarters seat of the International Atomic Energy Agency amount to violability of the headquarters seat and a violation of the immunity of the IAEA and its property from legal process under Article III, Section 9 (a) and Article VIII, Section 19 of the Agreement regarding the Headquarters of the IAEA<sup>89</sup>. The facts of this case is that the Plaintiff, proprietor of a loan office, applied for leave to effect execution by garnishment and assignment of the defendant's salary from the International Atomic Energy Agency in satisfaction of his executable claim for 2,450 schillings, plus six per cent interest from 24 August 1965, 1/3 per cent commission and 233.30 schillings in costs, in accordance with an order of the Commercial Court of Vienna for payment of a promissory note<sup>90</sup>.

The Court dismissed the application and observed that under Article III, Section 9 (a), of the Headquarters Agreement, the service of legal process may not take place within the headquarters seat of the IAEA except with the express consent of, and under conditions approved by, the Director General. A garnishee order would constitute the service of legal process, since it would take effect upon service, and service would therefore have to be effected within the headquarters seat of the IAEA. Article VIII, Section 19, of the Headquarters Agreement further provided that the property of the IAEA should enjoy immunity from every form of legal process except in so far as in any particular case the IAEA should have expressly waived its immunity.

It was, however, understood that no waiver of immunity should extend to any measure of execution. It followed that the IAEA might not be prohibited by the Court from disposing of its property in a given manner; it followed also that the IAEA enjoyed immunity under international law, which it might be waive but which, in the case of a measure of execution, it would not waive. Although this last provision related first and foremost to measures of execution against the IAEA, its wording also covered measures of execution which were directed primarily against other persons but in which the IAEA was in some way involved.<sup>91</sup>

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<sup>87</sup> C.F Amerasinghe, above note 52, pp.330-331.

<sup>88</sup> Commercial Court of Vienna, Judgement of 29 November 1965, Twelfth Division. 12 Cg 802/65-2.

<sup>89</sup> Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Headquarters of the International Atomic Energy Agency adopted in Vienna on 11 December, 1957 and entered into force on 1 March, 1958. See Article III, Section 9(a) and Article VIII, Section 19.

<sup>90</sup> Commercial Court of Vienna of 5 October 1965 (12 Cg 802/65).

<sup>91</sup> See Extract from United Nations Juridical Yearbook 1965, Chapter VIII. Decisions of National Tribunals Part Three. Judicial decisions on questions relating to the United Nations and related inter-governmental organizations. p.246

## CONCLUSION

This paper examined the necessity of Headquarters Agreement under the Law of International Organisations and also examined some elements of the legal environment in which staff members of an international organization could function in their host state. According to Dobrica Savic in considering the advantages associated with having the headquarters of an organization in a state argued that “headquarters with a huge number of officials and many meetings may represent a considerable economic and political interest of the Host State.” These States also acquire a considerable experience in dealing with international organizations. Consequently, it may be inclined to better guarantee privileges and immunities which are necessary for the performance of the organization’s mandate.

Few countries around the world (three major Host States, namely, Ethiopia, Switzerland and the United States)<sup>92</sup> have the privilege of hosting the Headquarters of major international organizations in particular, the UN and its specialized agencies. To act as a host country brings considerable international prestige, possibly increased influence over the activities of the organization, and most definitely considerable responsibility and expense, although the economy of the host country also benefits when employment is created by the activities of the organization, and the budget of the organization and of national delegations is spent in its territory.

The agreements between the host State and the international organization concerning the headquarters of an organization has a fundamental legal significance for the determination of the legal status, immunities, and privileges of the Organization in the territory of the host State, as well as of the status, immunities, and privileges of the representatives of Member States of the Organization and its officials in the Secretariat.<sup>93</sup> Headquarters agreements cover a wide variety of issues concerning the organizations themselves, their Member States, Permanent Missions and their staff, as well as staff members of the organizations, officials and their families. The more recent agreements provide extensive details on issues such as tax and customs treatment; entry, residence and departure of staff; issuance of identity cards; and pensions and social security matters.<sup>94</sup>

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<sup>92</sup> Drazen Petrovic, above note 15, at p.11.

<sup>93</sup> Dobrica Savic, above note 73, at p.15

<sup>94</sup> Ion Gorita Wolfgang Münch, “Review of the Headquarters Agreements Concluded by the Organizations of the United Nations System: Human Resources Issues Affecting Staff “United Nations, Geneva 2004, p.v