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# THE NATIONAL SECURITY OF THE UNITED STATES AS THE HOST STATE FOR THE UNITED NATIONS

Elisabeth Zoller†

United States concern for national security in regard to the presence of United Nations diplomats and officials on its territory<sup>1</sup> is not wholly new. As early as December 1944, before U.N. members had even inclined for the permanent headquarters of the Organization being in the United States,<sup>2</sup> Attorney General Biddle viewed with misgiving extension of diplomatic privileges to the United Nations Relief and Rehabilitation Administration and its staff because:

The Federal Bureau of Investigation has evidence indicating that in the past the diplomatic representatives of some foreign governments have abused the privilege of diplomatic immunity. In some instances the abuses have been harmless. In other instances, however, diplomatic representatives have distributed propaganda against the established governments of friendly nations to which they were accredited, and in a few cases they have

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<sup>1</sup> See *Soviet Presence in the U.N. Secretariat, Report of the Senate Select Committee on Intelligence*, S. REP. No. 52, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Senate Report]; *Foreign Missions Act and Espionage Activities in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Senate Hearings].

<sup>2</sup> Ironically, the United States apparently was chosen as the host country for the United Nations mainly because of the U.S.S.R. Both the Russians and Chinese expressed their opposition to Geneva which invoked too many unhappy memories. Gromyko stated he was "definitely negative towards Geneva" but also stated privately afterward that this remark applied to Europe as well. See 1 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1437, 1443, and 1453 (1945). [hereinafter U.S. FOREIGN RELATIONS]

even engaged in espionage activities.<sup>3</sup>

Anxiety over national security is by no means an idiosyncrasy on the part of the United States. Any host State to international organizations is exposed to intelligence threats. But, in the United States, the problem is considered as particularly acute due to the large diplomatic community attached to the United Nations.<sup>4</sup> In addition to the foreign missions based in Washington, there are over 1,200 immune residents of so-called unfriendly countries in the New York area.<sup>5</sup> A daunting problem in coping with espionage and subversive activities by persons working in U.N. missions or in the U.N. Secretariat is that reliance on punitive statutes<sup>6</sup> in such cases is to no avail. Punishment is either definitively ruled out, or by an large ineffective.

First, in regard to persons enjoying full diplomatic immunities (e.g., diplomatic agents in U.N. missions), punishment is out of the question since the most that can be done is to compel their departure from U.S. territory. The suggestion has been made that the *persona non grata* procedure<sup>7</sup> which allegedly does not apply in respect to U.N. officials, was equally inapplicable in the case of representatives;<sup>8</sup> that the host State was precluded from requesting the recall of such persons. This is not the place to resolve the dispute which remains a matter of controversy under customary law.<sup>9</sup> For, as far as the United States

<sup>3</sup> *Id.* at 1563.

<sup>4</sup> See 1985 Senate Hearings, *supra* note 1; U.S. Policy in the United Nations: Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomms. on Human Rights and International Organizations, and on International Operations, 99th Cong., 1st Sess., 70-86 (1985) (particularly the statement of Hon. Arkady N. Shevchenko).

<sup>5</sup> 131 CONG. REC. § 13584 (daily ed. October 18, 1985) recording Heritage Foundation, Background, Sept. 9, 1985 (report by Charles M. Lichenstein, Soviet Espionage: Using the U.N. Against the U.S.); see also *Diplomatic Immunity Legislation: Hearing before the Senate Committee on Foreign Relations*, 95th Cong., 2nd Sess. 28 (1978).

<sup>6</sup> The Espionage Act is codified at 18 U.S.C. §§ 792-799.

<sup>7</sup> On the *persona non grata* procedure in general international law, see E. DENZA, *DIPLOMATIC LAW* 40-44 (1976); SATOW'S GUIDE TO DIPLOMATIC PRACTICE 178-86 (Lord Gore-Booth 1979); B. SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 44-45 (1979).

<sup>8</sup> See *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*, [1967] 2 Y. B. INT'L L. COMM'N 178, U.N. Doc. A/Cn.4/L.118, Add.1 & 2, para. 97, n.45 [hereinafter 1967 Secretariat Study].

<sup>9</sup> See *United Nations Conference on the Representation of States in their Rela-*

is concerned, treaty law is overwhelmingly conclusive. Whether we use the somewhat more polite expression *request the recall of a diplomat* rather than the blunter "*declare persona non grata*, the United States has beyond any doubt the right to do so in the case of abuse of residence privileges. This right derives, of course, from the safeguard provision of the International Organizations Immunities Act (Section 8(b)).<sup>10</sup> But it derives, first and foremost, from the unambiguous language of the Headquarters Agreement (Section 13(b)),<sup>11</sup> and of the non-objected reservation appended to the General Convention of 1946.<sup>12</sup> True, certain

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*tions with International Organizations, Official Records, Vol I: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, [hereinafter 1975 Vienna Meetings] at 121-22, 159-74, 289-311, U.N. Doc. A/CONF.67/18 (1975), and Vol. II: Documents of the Conference at 87-89 (art. 9), 155-57 (art. 75), U.N. Doc. A/CONF.67/18/Add. 1 (1975) [hereinafter 1975 Vienna Documents].*

<sup>10</sup> International Organizations Immunities Act, §8(b), Pub. L. No. 79-291, 59 Stat. 669, 672, approved Dec. 29, 1945, codified at 22 U.S.C. § 288e(b) (Supp. III 1985). The text deals with "deportation of undesirables" and reads as follows:

Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this subchapter is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

*Id.*

<sup>11</sup> Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 758, 761-62, T.I.A.S. No. 1676, 11 U.N.T.S. 11 [hereinafter Headquarters Agreement]. The relevant portion of § 13(b) provides:

In case of abuse of such privileges of residence by any such person [*i.e.*, alien] in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 [*i.e.*, transit to or from the headquarters] shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens.

*Id.*

<sup>12</sup> Convention on the Privileges and Immunities of the United Nations, adopted on Feb. 13, 1946, by the General Assembly of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16 [hereinafter General Convention]. The relevant part of the U.S. reservation reads as follows:

Nothing in article IV, regarding the privileges and immunities of representatives Members, in article VI, regarding the privileges and immunities of United Nations officials, or in article VI, regarding the privileges and immunities of experts on missions for the United Nations, shall be construed to grant any person who has abused his privileges of residence by activities in the United States outside his official capacity exemption from the laws and regulations of the United States regarding the continued residence of aliens.

*Id.* For the absence of objections, see *Multilateral Treaties Deposited with the Secre-*

procedures must be complied with, and the request for recall must be motivated by an *abuse*, not by arbitrary whims. In short, this right is not unqualified.<sup>13</sup> The fundamental point remains that the United States cannot be required to accept and tolerate the continued presence in its territory of a member of a mission or delegation who has abused his privileges.<sup>14</sup> In practice, this right has been occasionally implemented.<sup>15</sup>

Second, in regard to individuals enjoying only functional immunities (*e.g.*, most of the U.N. Secretariat), the Espionage Act is certainly an instrumental device in the repression of crime because espionage is obviously not one of the functions performed in the official capacities of international civil servants.<sup>16</sup> Nonetheless, the record over forty years shows that U.N. employees convicted for subversive activities and espionage rarely serve their sentences in American jails. They are most of the

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*tary-General, Status as of 31 Dec. 1986*, U.N. Doc. ST/LEG/SER.E/5 (1987), at 36-40 [hereinafter *Multilateral Treaties*].

<sup>13</sup> See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 467, Comment (d) (Tent. Draft No. 4, 1983) [hereinafter RESTATEMENT (REVISED)], Restatement (Second) of Foreign Relations Law of the United States, § 86, comment (b) indicated that the host State "does not have the unqualified right . . . to insist on [the] recall" of a U.N. representative.

<sup>14</sup> See CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, S. REP. No. 17, 91st Cong., 2d Sess., at 5 (1970) (the unambiguous statement made by Sen. Fullbright):

As a final recourse, under the proposed reservation and present law, the United States can compel the departure from its territory of any one declared *persona non grata*, and thus protect its national security.

*Id.* See also the statement of Hon. John R. Stevenson, Legal Adviser, Department of State:

Under the Headquarters Agreement, the United States retains the right to compel the departure of any member of a mission accredited to the U.N. who abuses the privileges of his residence. We are proposing a reservation that would retain the same right for U.N. officers and employees.

*Id.* at 12.

<sup>15</sup> See, *e.g.*, the decision to expel Ambassador Dinh Ba Thi, Permanent Representative of the Socialist Republic of Vietnam to the United Nations, 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 119, 120 (Diplomatic Note of February 3, 1978) [hereinafter 1978 U.S. DIGEST], and the lengthy debate that ensued before the U.N. Committee on Relations with the Host Country, Report of the Committee on Relations with the Host Country, 33 U.N. GAOR Supp. (No. 26) at 3-16, U.N. Doc. A/33/26 (1978).

<sup>16</sup> See, *e.g.*, *United States v. Coplon*, 84 F. Supp. 472, 474 (S.D.N.Y. 1949); *United States v. Melekh*, 190 F. Supp. 67, 79-80 (S.D.N.Y. 1960); *United States v. Egorov*, 222 F. Supp. 106, 108 (E.D.N.Y. 1963); *United States v. Enger*, 472 F. Supp. 490, 502 (D.N.J. 1978).

time permitted to return to their home country following various diplomatic arrangements.<sup>17</sup>

Absent effective punishment, immune or *semi-immune* residents cannot be seriously deterred from carrying out their detrimental activities. Therefore, the only practical remaining course is to try to prevent espionage by taking protective measures. However, insofar as such measures necessarily bring about restrictions on the status of U.N. representatives and officials, the thorny issue arises as to whether international law authorizes host States to take them.

In contrast to bilateral diplomacy whose rules authorize receiving States to protect their national security interests with both preventive and repressive measures,<sup>18</sup> multilateral diplomacy begins with an apparently overriding duty for host States. In the U.N. context, the starting point of multilateral diplomacy is Article 105 of the Charter which obligates host States to accord to the Organization and its officials, representatives and agents, such privileges as are necessary for the independent exercise of their functions. As far as rights are concerned, they certainly exist. But they are often reduced to one only, namely the right to request the recall of the person involved in some cases of grave and manifest violation of the criminal law of the host State. Apart from this right, many sending States and international organizations would readily concur with the statement made by the Soviet representative at the Vienna Conference of

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<sup>17</sup> For instance, Valentine Gubitchev who was a U.N. official, of Soviet nationality, and who had been, together with Judith Coplon, indicted on charges of violation of espionage laws was eventually permitted to return to the USSR. See 1967 *Secretariat Study*, *supra* note 8, at 268, para. 259; *United States v. Coplon*, 84 F. Supp. 472, 474 (S.D.N.Y. 1949). Similarly, on Apr. 27, 1979, President Carter commuted the sentences imposed on Enger and Chernyayev thus permitting their departure from the United States. See *United States v. Enger*, 472 F. Supp. 490 (D.N.J. 1978). In return the Soviet Government released five dissidents. See 1978 U.S. DIGEST, *supra* note 15, at 113.

<sup>18</sup> The Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95. It embodies several provisions aimed at protecting the national security of receiving States. For instance, under Article 4, a receiving State is not under a legal obligation to receive any diplomat accredited to it by the sending State; it may refuse its *agrément* without even giving reasons to the sending State. Likewise, under Art. 9 a receiving State may without having to explain its decision expel any foreign diplomat having endangered, or likely to threaten its national security. Under Art. 26 a receiving State may also for security reasons limit the freedom of movement and travel in its territory.

1975: "The host State [does] not have the right to limit the immunities and privileges of the representatives of States to an international organization and bring about a restriction of their status."<sup>19</sup>

International practice seemingly invites a more cautious approach. Although general treaty law does not formally reserve the right of host States to protect their national security - since neither the General Convention,<sup>20</sup> nor the Convention of 1947<sup>21</sup> allude to it - special treaty law speaks for itself. The vast majority of host States to international organizations have entered into headquarters agreements that reserve their rights to protect their national security interests. Such is the case of Switzerland with the International Labor Organization (I.L.O.),<sup>22</sup> the World Health Organization (W.H.O.),<sup>23</sup> and the World Meteorological Organization (W.M.O.);<sup>24</sup> of Austria with the International Atomic Energy Agency (I.A.E.A.);<sup>25</sup> of Canada with the International Civil Aviation Organization (I.C.A.O.);<sup>26</sup> and of Italy with the Food and Agriculture Organization (F.A.O.).<sup>27</sup> The headquarters agreement concluded between the United Nations and the United States is no exception to the rule. The national security of the United States is protected by virtue of a proviso - popularly, but improperly called *reservation*<sup>28</sup> - to wit, Section 6

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<sup>19</sup> See 1975 Vienna Meetings, *supra* note 9, at 121, para. 4.

<sup>20</sup> General Convention, *supra* note 12.

<sup>21</sup> Convention on the Privileges and Immunities of the Specialized Agencies, *approved on* 21 Nov. 1947, by the General Assembly of the United Nations, 33 U.N.T.S. 261.

<sup>22</sup> I.L.O. Agreement with Switzerland, Mar. 11, 1946, art. 25(1), 15 U.N.T.S. 382, 392. See also U.N. Legislative Series, Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities, Vol. 2, 138, 142 U.N. Doc. ST/LEG/SER.B/11 (1961) [hereinafter 1961 Legislative Series].

<sup>23</sup> W.H.O. Agreement with Switzerland, Aug. 21, 1948, art. 25(1), 26 U.N.T.S. 332, 344; 1961 Legislative Series, *supra* note 22, at 254, 259.

<sup>24</sup> W.M.O. Agreement with Switzerland, Mar. 10, 1955, art. 24(1), 211 U.N.T.S. 278, 288, 1961 Legislative Series, *supra* note 22, at 309, 313.

<sup>25</sup> I.A.E.A. Agreement with Austria, Dec. 11, 1957, sec. 47(a), 339 U.N.T.S. 152, 169; 1961 Legislative Series, *supra* note 22, at 327, 342.

<sup>26</sup> I.C.A.O. Agreement with Canada, Apr. 14, 1951, sec. 40, 96 U.N.T.S. 156, 178; 1961 Legislative Series, *supra* note 22, at 161, 170.

<sup>27</sup> F.A.O. Agreement with Italy, Oct. 31, 1959, sec. 33(c), 1961 Legislative Series, *supra* note 22, at 187, 200.

<sup>28</sup> A *reservation* to a bilateral treaty is, so to speak, legally unconceivable. For either the reservation is accepted and it becomes an amendment, or the reservation is rejected

of Public Law 80-357 which adopted the Headquarters Agreement: "Nothing in this agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security . . . ." <sup>29</sup>

Once bitterly argued,<sup>30</sup> the validity of the reservation is no longer a matter of dispute. The record over the past forty years, and, in particular, the *modus vivendi* reached by the United States and the Organization in 1953,<sup>31</sup> shows ample evidence that the Organization had eventually to accept the right of the United States to protect its national security interests. Indeed, no international organization can deny the host State the right to protect its national security.<sup>32</sup> The true problem, if any, is not the validity, but the scope of the reservation. Namely, how far does it authorize the United States to go in order to protect its national security? The purpose of this essay is to try to shed some light on this issue.

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and the treaty fails. See *Harvard Research in International Law, Treaties*, 29 A.J.I.L. 870 (Supp. 1935); P.M. IMBERT, LES RÉSERVES AUX TRAITÉS MULTILATÉRAUX: ÉVOLUTION DU DROIT ET DE LA PRATIQUE DEPUIS L'AVIS CONSULTATIF DONNÉ PAR LA COUR INTERNATIONALE DE JUSTICE LE 28 MAI 1951, 12 n.12 (1969). See also Kellog, *Effect of Reservations and Amendments to Treaties*, 13 A.J.I.L. 767 (1919); Wright, *Amendments and Reservations to the Treaty*, 4 MINN. L. REV. 14 (1919-20); D.H. MILLER, RESERVATIONS TO TREATIES: THEIR EFFECT, AND THE PROCEDURE IN REGARD THERETO 76 (1919); Bishop, *Reservations to Treaties*, 103 RECUEIL DES COURS 267 (1961 II).

<sup>29</sup> Pub. L. No. 80-357, Sec. 6, 61 Stat. 756, 767 approved on Aug. 4, 1947.

<sup>30</sup> The official position of the Organization on the U.S. reservation is principally to be found in the memorandum by the U.N. Legal Department on the Admission of Representatives of Non-Governmental Organizations Enjoying Consultative Status, U.N. Doc.E/2397 (ECOSOC), Apr. 10, 1953, reprinted in III U.S. FOREIGN RELATIONS at 257-60 (1952-54). The position of the State Department was in particular thoroughly explained by Meeker, Memorandum of Apr. 15, 1953, reprinted at *id.* at 262-66.

<sup>31</sup> The so-called *modus vivendi* between the Organization and the United States results from a statement made by the Secretary-General in a progress report on the negotiations with the host country, July 27, 1953, and orally reiterated by himself before the Economic and Social Council at its 743rd meeting, July 31, 1953. Basically, a procedure was established to assure that "When such cases were to arise, they would have to be mutually studied . . . and if then, . . . we arrive at different conclusions, the problem will have to be solved under the Agreement, that is to say in practice by arbitration." See 13 WHITEMAN, DIGEST OF INTERNATIONAL LAW 88-91.

<sup>32</sup> Such a right is actually a *premise* in headquarters' agreements, see H.R. REP. NO. 1093, 80th Cong., 1st Sess. 11 (1947); see also RESTATEMENT (REVISED), *supra* note 13, 465, reporters' note 6 & 467, reporters' note 3 (where reference is made to the suggestion "that a bona fide security reservation, subject to procedural safeguards, is implied in every undertaking to admit personnel of or representatives to international organizations." (emphasis added)).



To be sure, the problem is no easy matter because the Agreement does not take place in a *vacuum juris*, but comes into play under the Supremacy Clause of Article 103 of the U.N. Charter.<sup>33</sup> Therefore, the U.N. Charter controls the Headquarters Agreement regardless of the extensive interpretation that may be attached to the reservation. This means that, no matter how far national security interests authorize the United States to go in abridging its obligations *vis-à-vis* the United Nations, the Organization and its Members are entitled with nonderogable rights<sup>34</sup> that shall not be curtailed. These nonderogable rights are the functional privileges and immunities outlined in Article 105(1) and (2) of the Charter:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the 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.

In pursuance of Article 105(3), the functional privileges and immunities were made more detailed and specific in the General Convention of 1946 and in the Vienna Convention of 1975 on the Representation of States in their Relations with International Organizations.<sup>35</sup> It would be far-fetched to consider both of them as setting forth the nonderogable privileges and immunities of the Organization and its member States. For, even if it could be proved that both of them have attained the status of

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<sup>33</sup> Art. 103 of the U.N. Charter provides: "In the event of a conflict between the Obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

<sup>34</sup> On the relationship between derogability and *jus cogens*, see Meron, *On a Hierarchy of International Human Rights* 80 A.J.I.L. 1 (1986). As the author accurately pinpoints: "Rights that are nonderogable . . . are not necessarily *jus cogens*." *Id.* at 15-16.

<sup>35</sup> Both the General Convention, *supra* note 12, and the Convention of 1975, U.N. Doc. A/CONF.67/16 reprinted in 1975 *Vienna Documents*, *supra* note 9 at 203, refer in their Preambles to Art. 105(3) which reads: "The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose." U.N. CHARTER art. 105, para. 3.

customary law,<sup>36</sup> this would not be enough for them to control the Headquarters Agreement.<sup>37</sup> Moreover and in any event, these two Conventions cannot go beyond what Article 105 mandates. And Article 105 is plainly clear: the nonderogable privileges and immunities are only those which are *necessary* for the Organization and its member States to perform their functions. This means that the scope of the reservation depends entirely upon an interpretation of the word "necessary." In other words, the United States out of security concern shall not encroach upon the privileges and immunities that are indispensable for (I) the Organization, (II) its member States, and (III) its officials, to perform their functions.

### I. The Necessary Privileges of the Organization

The necessary privileges of the Organization are neither defined nor enumerated in any international instrument. Article 105(1) of the Charter which alludes to the privileges of the Organization necessary for the fulfillment of its purposes, can hardly be considered as a definition. As to the General Convention, it certainly contains an impressive list of privileges for the Organization. These privileges, however, are not absolute since some of them may be waived,<sup>38</sup> or even refused depending on reservations<sup>39</sup> that States may formulate upon accession. Therefore, the General Convention as a whole is not conclusive as to the nonderogability of the privileges enumerated therein.

The truth of the matter is that the necessary privileges of

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<sup>36</sup> Admittedly, the General Convention has been transformed into customary law, see the suggestion made in the RESTATEMENT (REVISED), *supra* note 13, at 464, reporters' notes 1, which refers to "immunities of international organizations under customary law." As to the Convention of 1975, not only has it not entered into force yet but it has been adopted by voting, not by consensus and against the will of all host States, including the United States. See the observation made by the World Court in the *North Sea Continental Shelf Case*, 1969 I.C.J. 3, 25, para. 26. (Judgment).

<sup>37</sup> The absence of hierarchy between treaty law and customary law is one of the most well-established principle of international law. See E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 86 (1984).

<sup>38</sup> See, e.g., General Convention, *supra* note 12, § 2 in regard to immunity from every form of legal process; or § 8 on exemption from excise duties and from sale taxes.

<sup>39</sup> See, e.g., the reservations formulated by Indonesia and, particularly, by Mexico in regard to acquisition of immovable property, *Multilateral Treaties*, *supra* note 12, at 37.

the Organization are established practices of the Organization.<sup>40</sup> They came into being as experimental truths in pursuance of the premonition by the World Court in the *Reparation* opinion: "The rights . . . of an entity such as the Organization must depend upon its purposes and functions as . . . developed in practice."<sup>41</sup> The practice has developed as the United States on security grounds endeavoured to enforce against the Organization certain restrictive measures which ultimately were to be put into abeyance. In particular, the experience of the McCarthy era has been decisive in regard to the right of access to the Headquarters. Neither *right*, nor *freedom* of access are words to be found in the Headquarters Agreement. Nonetheless, that the thrust of Section 11 on communications and transit is to compel the United States not to impose any impediments on access to the United Nations is not seriously disputable.

From an historical standpoint, unlimited right of access to the Headquarters was the major concern of Congress in 1947.<sup>42</sup> Lawmakers were aware of the possibility under the Agreement (Section 13(b)) of requiring anyone who had abused his privileges to leave the United States; they nonetheless considered unfettered freedom of access to the Headquarters as potentially dangerous. That is why originally the security reservation was passed, namely, "in order to remove any doubt"<sup>43</sup> that the right of access would not prejudice the security of the United States against infiltration on the part of subversive alien elements. To attain that goal, Congress deemed appropriate to make the right of access to the Organization subject to U.S. immigration laws. Concretely speaking, this meant that access to the United Nations, like access to U.S. territory, would be refused to any individual suspected of beliefs and activities contrary to U.S. interests.

At the height of the McCarthy era, an acrimonious dispute

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<sup>40</sup> On established practices of the Organization, see Reuter, *Quelques réflexions sur la notion de pratique internationale spécialement en matière d'organisations internationales*, STUDI IN ONORE DI G. SPERDUTI, 187 (1984).

<sup>41</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 180 (Advisory Opinion) [hereinafter *Reparation*].

<sup>42</sup> See S. REP. No. 559, 80th Cong., 1st Sess., at 2, 7 (1947); H.R. REP. No. 1093, 80th Cong., 1st Sess. at 7, 11 (1947).

<sup>43</sup> S. REP. No. 559, 80th Cong., 1st Sess. at 6 (1947).

opposed the Organization and the Department of State over the validity and the scope of the reservation.<sup>44</sup> After lengthy discussions both parties eventually agreed upon a *modus vivendi* which struck a balance between their respective claims. On the one hand, the Organization had to recognize that the United States had a right to refuse on security grounds the entry into U.S. territory of an individual having legitimate business with the Organization. On the other hand, the United States had to admit that it would not enforce its right without prior consultations with the Organization.<sup>45</sup>

For twenty-five years the *modus vivendi* was scarcely given an opportunity to be applied. It was not invoked in 1974 when the Palestine Liberation Organization (P.L.O.) leader, Mr. Arafat, came to the United States to address the General Assembly. The truth of the matter is that the United States since 1954 had refrained from invoking its right to refuse access to its territory to undesirable aliens having legitimate business with the Organization. As the U.S. representative at the Committee on Relations with the Host Country put it in 1988: "Over the years, visas [have] been issued to *thousands* who otherwise, under United States law, would not have been able to come."<sup>46</sup> Between 1980 and 1986, however, a slightly more restrictive policy took place, but mostly *vis-à-vis* Iran whose new government, in a rather provocative manner, endeavored to send to New York as its representatives, individuals who had been associated with the hostage incident.<sup>47</sup> On these rare occasions where visas were denied, the matter never turned into a diplomatic incident as it appears that in all these cases the requesting State, for reasons of its own, did not pursue the matter making it thus impossible for the Organization itself to insist any further.<sup>48</sup>

On the afternoon of November 8, 1988, a visa request for

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<sup>44</sup> The negotiating record (Mar.-July 1953) of the dispute between the United States and the United Nations is reprinted in III U.S. FOREIGN RELATIONS, at 241-305 (1952-54).

<sup>45</sup> See *supra* note 31 and accompanying text.

<sup>46</sup> Statement made by the U.S. representative at the 136th meeting of the Committee on Relations with the Host Country on 28 Nov. 1988, U.N. Doc. A/43/26/Add. 1 at 3, para. 13 (emphasis added).

<sup>47</sup> *Id.* at 3, 4.

<sup>48</sup> See the statement made by the Legal Counsel at the 136th meeting of the Committee on Relations with the Host Country on 28 Nov. 1988, U.N. Doc. A/C.6/43/7 at 3, para. 10.

Mr. Yassir Arafat, Chairman of the Executive Committee of the P.L.O., was presented to the Secretary-General. The visa request stated explicitly that the purpose of Mr. Arafat's visit was to participate in the work of the forty-third session of the General Assembly. The Secretary-General transmitted the request to the U.S. Mission the day after. Two weeks later, the Department of State announced that the visa application was not approved. As to the legal basis for the visa refusal, the State Department statement was unequivocal: "The Headquarters Agreement, contained in Public Law 80-357, reserves to us the right to bar the entry of those who represent a threat to our security."<sup>49</sup> As to the reasons, they were certainly connected with national security concerns, but only insofar as U.S. national security had been threatened in the past by numerous terrorist attacks of the P.L.O. and its affiliated groups against American citizens. The United States never claimed, nor even insinuated that the presence of Mr. Arafat at the United Nations would per se threaten the security of the country. The sole and true reason of the visa refusal was that: "Mr. Arafat, as Chairman of the P.L.O., knows of, condones, and lends support to . . . acts [of terrorism against Americans]; he therefore is an accessory to such terrorism."<sup>50</sup> As the United States representative at the Host Country Committee explained: "Having evidence that Mr. Arafat knew of and condoned terrorism against the United States, the United States Government denied him a visa."<sup>51</sup> Nobody objected to the materiality of these facts; no one except Israel,<sup>52</sup> however, agreed upon their qualification as legitimate reasons for denying the visa at stake.

True the United States won its case in one respect. Nobody denied it the right to protect its own security. While acknowledging that "[t]here was a difference of opinion between the United Nations and the United States on the legal character and validity in international law of the so-called security reservation

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<sup>49</sup> Department of State, Statement on the Determination by the Secretary of State on the Visa Application of Mr. Yassir Arafat, Nov. 28, 1988 (mimeo).

<sup>50</sup> *Id.*

<sup>51</sup> Statement made by the U.S. representative at the 135th meeting of the Committee on Relations with the Host Country, U.N. Doc. A/43/26 Add. 1 at 4, para. 13 (1988).

<sup>52</sup> See *infra* note 57 and accompanying text.

contained in section 6 of Public Law 80-357,"<sup>53</sup> the Legal Counsel had to recognize the fundamental principle that the United States, as any host State for that matter, had a right to invoke national security grounds in order to bar access to individuals that may threaten national security interests. Should such a right not exist, it would have been superfluous to say: "[T]he host country did not allege that there was apprehension that Mr. Arafat, once in the United States, might engage in activities outside the scope of his official functions directed against the security of the host country."<sup>54</sup> But failing to produce evidence that there was a real and actual threat for U.S. security to let Mr. Arafat address the General Assembly, the United States could not, according to the Legal Counsel, bar Mr. Arafat from access to the United Nations. His opinion was overwhelmingly "endorsed" by the General Assembly in a Resolution of November 30, 1988.<sup>55</sup> Such an opinion of strict law amounts to put the United States, as well as any host State to universal international organizations, with its back against the wall, so to speak. For, whomever is called to speak at the United Nations and its specialized agencies, it will be always extremely difficult, if not impossible, to prove that the presence of such a person at the headquarters of the organization, if only for a few hours, is a serious threat to the national security of the host State. This genuine case of *probatio diabolica* leads to the conclusion that, in law and insofar as transit is concerned, the national security clause reserves for the benefit of the United States a quasi-unenforceable right; or to be more precise, a right that may be enforced, always (of course) as a matter of force, but never as a matter of law.

Be that as it may, nobody actually answered, but by silence, the core of the U.S. argument, namely that the past conduct of Mr. Arafat and his affiliates against Americans was a legitimate reason to deny him a visa. No doubt that the weak side of this argument was to be found in its retributive and punitive charac-

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<sup>53</sup> Statement made by the Legal Counsel at the 135th meeting of the Committee on Relations with the Host Country, U.N. Doc. A/43/26/Add. 1 at 5, para. 20 (1988).

<sup>54</sup> Statement made by the Legal Counsel at the 136th meeting of the Committee on Relations with the Host Country, U.N. Doc. A/C.6/43/7 at 4, para. 11 (1988).

<sup>55</sup> U.N. Doc. A/RES/43/48 (30 Nov. 1988).

ter, although this remark moves the problem somewhat a little further insofar as it amounts to subject the host State to an obligation of magnanimity that other States may ignore at their discretion. Whatever, did the United States realize that its argument was likely to be perceived as a somewhat covert action of revenge? The fact is that, just a few days after the decision had been made, the Secretary of State, Mr. George P. Shultz, hastened to raise the debate and explained:

I feel the negative reaction to the decision that I made on the behalf of the United States only highlights the fact that people tend to forget too quickly the horrors and difficulties and threat of terrorism. It's something we must keep very high on our agenda or civilization will go down the drain.<sup>66</sup>

Thus, through a dramatic appeal to public opinion, the United States was claiming that, in denying a visa to Mr. Arafat, it was not seeking a revenge, but fighting for international morality. Nonetheless, the defense of the great cause failed to convince its European allies despite the fact that the P.L.O. at that time had not yet clearly and unequivocally renounced terrorism. Indeed it was by one hundred and fifty-four yes, two nays (Israel and United States), and one abstention (United Kingdom), that the General Assembly "affirmed" in a Resolution of December 2, 1988 "the right of persons mentioned in section 11 of the [Headquarters] Agreement to enter the United States of America without any impediment for the purpose of transit to or from the headquarters district."<sup>67</sup> To be sure, the resolution is limited in scope since it addresses the right of transit only, and not the right to stay. With respect to the difficulties of producing convincing evidence of threats to national security interests in one case and in the other, the two rights of access should not be put on a par. While automatic or quasi-automatic in one case, the right to enter U.S. territory could easily be subjected to much more stringent conditions in the case of a durable sojourn. Whatever, freedom of access to the headquarters *without any impediment* for the purpose of transit may be explained for the following reasons.

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<sup>66</sup> International Herald Tribune, Dec. 2, 1988, at 3, cols. 3 & 7.

<sup>67</sup> U.N. Doc. A/RES/43/49 (2 Dec. 1988).

Leaving aside the situation of these individuals who work in permanence in or for the Organization - such as the representatives of member States and the officials - and who, obviously, must be granted access to the headquarters, the possibility for the Organization to meet individuals directly or indirectly connected with its activities is necessary for the fulfillment of its purposes. This is so, certainly, because the purposes of the United Nations are so broad that they go beyond mere diplomatic relations, *i.e.*, relations between States only. They necessarily call for possible appearance of private entities before U.N. organs as experts or witnesses. Such was actually the case in 1953 when the United States withheld the issuance of visas to certain aliens seeking to enter the United States for the purpose of acting as consultants on behalf of certain non-governmental organizations before the Economic and Social Council. But this is so, above all, because sociability between peoples of mankind is the very first *raison d'être* of the Organization. The Organization is in the first place a compact between peoples ("We, the people of the United Nations . . .") and "a center for harmonizing the actions of nations."<sup>58</sup> Furthermore, the major achievement of the United Nations is to have transformed into an organization of universal character, a fundamental feature which, in turn, made it an international forum. Therefore, in the same manner that the inviolability of diplomatic envoys is a *prerequisite*<sup>59</sup> for the conduct of relations between States, freedom of access to the Headquarters, at least for the purpose of transit, necessarily becomes a prerequisite for a proper discharge of its functions by the Organization. That is why, in law, the Executive Branch in 1970 retailored the means by which the United States shall protect its national security. It recommended to the Senate Foreign Relations Committee a reservation that provided only for the right of the host country to request the immediate departure from its territory of any individual declared *persona non grata*.<sup>60</sup> That is why, in fact, the United States over the past

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<sup>58</sup> U.N. CHARTER art. 1, para. 4.

<sup>59</sup> The term *prerequisite* was used by the International Court of Justice in the *Hos-tages case*, 1979 ICJ 7, 19, para. 38 (Order), *reiterated in* 1980 ICJ 3, 42, para. 91 (Judgment).

<sup>60</sup> S. REP. NO. 91-17, 91st Cong., 2d Sess. at 4-5 (1970).



twenty years has refrained from invoking its right to refuse access to its territory, hence the Headquarters, to undesirable aliens having legitimate business with the Organization.<sup>61</sup> Freedom of access to the Headquarters has been indeed consolidated by U.S. practice itself as an essential and necessary privilege for the Organization.

Although very broad, the right of access to the United Nations is no more than a right of transit to and from the Headquarters. It does not entail a right to stay. In regard to permanent residence, there are only two categories of persons which, under Article 105 of the U.N. Charter, must be recognized as having a nonderogable right to stay and live in the vicinity of the Headquarters. They are, first, the representatives of the members of the Security Council because that organ "shall be so organized as to be able to function continuously" so that each of its members "shall . . . be represented at all times at the seat of the Organization"<sup>62</sup> and, second, the staff needed for the Organization to be able to work in permanence, for the Organization carries out functions of a permanent character, a distinctive feature that differentiates it from a diplomatic conference. The Headquarters Agreement goes beyond what the Charter mandates since it basically designates as "Resident Representatives to the United Nations," first, the principal representatives of U.N. member States and part of their staff and, second, the principal representatives of members of specialized agencies and part of their staff. It is thus plainly clear that representatives of international entities such as international organizations or national liberation movements invited by the Organization to participate as observers in the sessions and work of the General Assembly have no right to permanent residence and no right to establish a mission.<sup>63</sup> But do they have the right to have an of-

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<sup>61</sup> See Repertory of Practice of United Nations Organs, Art. 105(1) under the heading: "Right of transit and freedom of access to the United Nations Headquarters District or conference area," Supp. No. 3, Vol. IV at 227-28; Supp. No. 4, Vol. II at 378-79; Supp. No. 5, Vol. V at 180-81.

<sup>62</sup> U.N. CHARTER art. 28, para. 1.

<sup>63</sup> Despite its generosity towards sending States, the Vienna Convention of 1975 on the Representation of States in their Relations with International Organizations does not even apply to observers missions. See *supra* note 35. However, the Final Act of the Conference, U.N. Doc. A/CONF.67/15, is supplemented with an Annex which embodies a Resolution urging host States to look for guidance in the 1975 Convention when deter-

fice or, to be more precise, is the right to have an office to be considered as a corollary of the nonderogable right to transit?

The problem was recently raised in connection with the Anti-Terrorism Act adopted by Congress in December 1987,<sup>64</sup> a law which was specifically aimed at the Palestine Liberation Organization (P.L.O.). The Act does not preclude the P.L.O. from access to the U.N. headquarters. It merely declares illegal the establishment or maintenance of an office of the Organization within the jurisdiction of the United States. Surprisingly, none of the various procedural steps taken - whether they are the negotiations between the Organization and the State Department,<sup>65</sup> or the Order<sup>66</sup> and the Advisory Opinion<sup>67</sup> by the World Court - have dealt with the question whether the right of access necessarily entails a right to have an office. The question seems to have gone without saying.<sup>68</sup>

Nonetheless, the question whether the right to have an office must be considered as a necessary corollary of the right of access is not self-evident. When requested in 1975 to set out his views concerning the privileges and immunities to which representatives of the Council for Mutual Economic Assistance (CMEA) would be entitled in the United States, the Legal Council of the United Nations never mentioned it, or even alluded to it. He noted that by its Resolution 3209(XXIX) the Assembly had requested the Secretary-General "to invite the Council for Mutual Economic Assistance to participate in the sessions and work of the General Assembly in the capacity of observer."<sup>69</sup> He expressed the view that, pursuant to this invitation, the representatives of the CMEA would have a right of ac-

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mining the treatment to be accorded to observers missions. See 1975 Vienna Documents, *supra* note 9, at 1980.

<sup>64</sup> Pub. L. No. 100-204, Sec. 1001-1005, Title X, Anti-Terrorism Act of 1987, 101 Stat. 1331, 1406-07, *approved* Dec. 22, 1987.

<sup>65</sup> See the various reports by the U.N. Secretary-General: U.N. Doc. A/42/915 (10 Feb. 1988), U.N. Doc. A/42/915/Add.1 (25 Feb. 1988), U.N. Doc. A/42/915/Add.2 (11 Mar. 1988), U.N. Doc. A/42/915/Add.3 (16 Mar. 1988).

<sup>66</sup> Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, ICJ, Order of 9 Mar. 1988. General List No. 77.

<sup>67</sup> *Id.* ICJ, Advisory Opinion of 26 Apr. 1988. General List No. 77.

<sup>68</sup> See G.A. Res. 42/210 B of 17 Dec. 1987; G.A. Res. 42/229 A, B of 2 Mar. 1988; and G.A. Res. 42/230 of 24 Mar. 1988.

<sup>69</sup> 1975 U.N. JURID. Y.B. 157.

cess to the headquarters, a right to be afforded any necessary protection while in transit and a right to be immune from legal process in respect to their functions. He did not, however, mention any other additional right. He merely presented the above-mentioned privileges and immunities as those which the host State was obliged under existing international instruments to accord to a CMEA delegation. As for the rest, he noted that the host State might, of course, "as a matter of courtesy," extend a wider variety of privileges and immunities to the delegation, but that this was to be negotiated with the host State. In contrast to this strict construction of host States' legal obligations *vis-à-vis* observer missions, there is the broad and generous interpretation which, according to the World Court, applies to headquarters' agreements. In the Advisory Opinion on the *Interpretation of the Agreement between the W.H.O. and Egypt*, the Court underlined that "the very essence" of "the legal relationship between . . . a host State and an international organization . . . is a body of mutual obligations of cooperation and good faith."<sup>70</sup> Alluding more than ten times to the concept of good faith, the Court concluded: "[T]he paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution."<sup>71</sup> Under the Court's rules of interpretation, the right of access should be construed as implying a right to have an office. The concept of good faith is so elastic that it indeed ought reasonably to be construed as encompassing the right to maintain adequate functional facilities, a so-called office. Such is precisely the construction that Judge Palmieri made of the right of access in his opinion in *U.S. v. Palestine Liberation Organization (P.L.O.)* (1988).<sup>72</sup> The Judge explained that the rights of transit to, or from the headquarters district "could not be effectively exercised without the use of offices. The ability to effectively organize and carry out one's work, especially as a liaison to an international organization, would not

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<sup>70</sup> Interpretation of the Agreement of 25 Mar. 1951 between the W.H.O. and Egypt, 1980 ICJ 73, 93, para. 43 (Advisory Opinion).

<sup>71</sup> *Id.* at 96, para. 49.

<sup>72</sup> *U.S. v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

be possible otherwise."<sup>73</sup>

However, even if the right of access must be construed as necessarily implying a right to have an office, the question remains open whether national security considerations may authorize the host State to order its closure. If the P.L.O. had carried out terrorist attacks in U.S. territory, the answer would be affirmative beyond any doubt. National security would, in that case, prevail over the right to have an office. This was actually implicitly, but clearly suggested by Judge Palmieri in *U.S. v. P.L.O.*<sup>74</sup> But the P.L.O. did not carry out, or support terrorist activities in U.S. territory. The truth is that several attacks outside U.S. territory took place against U.S. nationals.<sup>75</sup> As a result, the national security of the United States on a worldwide scale was potentially endangered. As a host State, however, the United States was only exposed to a risk. Is that risk legally compelling enough to justify the Anti-Terrorism Act? That is the question which should have been addressed by an international tribunal, had the United States accepted to submit its dispute with the Organization to arbitration.<sup>76</sup> There was obviously no reason to accept such a course since the dispute could be resolved through local remedies. But should the case have been argued before an international tribunal, building a case for the United States would have been no easy task. For it is only where the national security of host States to international organizations is threatened that national laws may prevail over international obligations. The United States would presumably have been declared in violation of its international obligations should

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<sup>73</sup> *Id.* at 1465.

<sup>74</sup> *Id.* at 32. Recalling that "[a]t oral argument, the United States Attorney conceded that there was no evidence before the court that the Mission had misused its position at the United Nations or engaged in any covert actions in furtherance of terrorism," Judge Palmieri rightly concluded: "This concession disposes of the suggestion that the United States' Security Reservation to the Headquarters Agreement . . . serves as a justification for the ATA." *Id.* at 1470 n.31.

<sup>75</sup> For instance, Abu Al-Abbas, retained as a member of the P.L.O. Executive Committee, was responsible for the Achille Lauro hijacking, which included the murder of an American citizen, Leon Klinghoffer. See the letter of Sept. 15, 1987 sent by the Director of the Office of Foreign missions of the State Department to the Palestine Information Office in Washington, reprinted in 82 A.J.I.L 103-04 (1988).

<sup>76</sup> The arbitration issue became moot after the decision by the Department of Justice not to appeal Judge Palmieri's ruling in *U.S. v. P.L.O.* See International Herald Tribune, Aug. 30, 1988, at 2, col. 1.

it have been proved that Congress adopted the Anti-Terrorism Act for the sole purpose of punishing an Organization which carries out or supports terrorist activities in the Middle East and in Europe. Host States to international organizations have no right to punish violations of international rules committed by member States or their invitees unless their national security interests are directly affected. Switzerland faced the problem in 1984 when Chile had designated as its representative to the Office of the United Nations in Geneva, a general accused of serious violations of international human rights. When asked whether Switzerland was obligated to receive the Chilean representative, the President of the Swiss Confederation expressed the view that: "Switzerland, in its capacity of host State, and in accordance with headquarters' agreements, is bound to respect the independence of international organizations and may object to the entry into its territory of a diplomat accredited with the United Nations only where its national security interests are directly affected."<sup>77</sup> Notwithstanding its precision and clarity, the statement does not answer the question whether the neutrality policy of Switzerland does not place that State in a different position from that of the United States which assumes a leadership in the defense of fundamental ethical values and in the protection of international human rights. It may be suggested that the necessary independence of international organizations imposes a condition of neutrality to host States. Admittedly, this solution is not wholly satisfactory. But it is somewhat compensated by the substantial economic and financial advantages that any host State withdraws from the presence of an international organization in its territory.

## II. The Necessary Privileges of the Member States

U.N. member States affected by the various measures undertaken by the United States to safeguard its security - chief among them, the Soviet Union - have taken the view that these measures are deprived of any legal value with regard to them. They contend that the national security argument is "a pre-

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<sup>77</sup> 40 ANN. SUISSE DROIT INTERNATIONAL 184-85 (1984).

text”<sup>78</sup> “based on an artificial construction that [has] no legal background.”<sup>79</sup> The linchpin of their position is that they are third parties to the 1947 Agreement. Relying on the usual absence of effects of agreements with respect to third parties, they claim that the United States has no right to invoke the reservation against them. In 1978, Mr. Ushakov presented the Soviet position on the Headquarters Agreement as follows:

An agreement concluded between the United Nations and a State could not bind the States Members of the United Nations without their consent. . . . In the case of a headquarters agreement concluded by the United Nations, rights accorded to States Members of the United Nations could be accepted implicitly, but obligations must be accepted expressly and in writing.<sup>80</sup>

The effect of agreements with respect to third parties is one of the most complex issues in the law of treaties between States and international organizations. In 1972, Mr. Reuter accurately observed:

It would be difficult to imagine an absolute separation between the judicial personality of the organization and the personalities of its members, whatever the circumstances. No legal system in the world provides for such separation between the personality of commercial companies and the personalities of their members: why should the situation be different for international organizations, whose sociological foundations are still rather superficial?<sup>81</sup>

Nonetheless, the 1986 Convention mirrors the 1969 Convention in regard to the effect of treaties upon third States; the attempt cogently made by the Special Rapporteur to tailor a provision that would have adjusted the rule *pacta tertiis* to the particular-

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<sup>78</sup> Declaration by the representative of the U.S.S.R. at the 114th Meeting of the Committee on Relations with the Host Country. U.N. Doc. A/41/26 (1987) at 6, para. 22.

<sup>79</sup> Declaration by the observer for Czechoslovakia at the 117th Meeting of the committee on Relations with the Host Country, *id.* at 12, para. 54.

<sup>80</sup> Declaration by Mr. Ushakov at the 1511th Meeting of the International Law Commission (July 5, 1978), [1978] 1 Y.B. INT'L L. COMM'N 199, para. 38, U.N. Doc. A/CN.4/SER.A/1978.

<sup>81</sup> R. Reuter, *First Report on the question of treaties concluded between States and international organizations or between two or more international organizations* U.N. Doc. A/CN.4/248 (1972), reprinted in [1972] 2 Y. B. INT'L L. COMM'N 171, 182, para. 38, U.N. Doc. A/CN.4/SER.A/1972/Add.1.

ities of membership in international organizations,<sup>82</sup> was vigorously opposed by some members of the Commission.<sup>83</sup> The final text proposed by the Commission made the unanimity rule applicable to the conclusion of Headquarters Agreement.<sup>84</sup> Such a proposal was unrealistic and unwise, for it would have entitled a single member of an international organization to prevent a headquarters agreement from being concluded or even modified.<sup>85</sup> All international organizations present at the 1986 Conference opposed it.<sup>86</sup> After procrastinated debates, it was finally decided to delete the article.<sup>87</sup> However, following a suggestion made by the International Labor Organization, the International Monetary Fund and the United Nations,<sup>88</sup> the Conference adopted, as a safeguard, a new article which became Article 74(3) of the 1986 Convention and which reads as follows:

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<sup>82</sup> See P. Reuter, *Sixth Report on the question of treatise concluded between States and international organizations* U.N. Doc. A/CN.4/298 (1977) reprinted in [1977] 2 Y. B. INT'L L. COMM'N 119, 128-29 (art. 36 bis), U.N. Doc. A/CN.4/SER.A/1977/Add.1.

<sup>83</sup> See *1510th, 1511th and 1512th Meetings of the International Law Commission* (June 30, July 4 & 5, 1978), [1978] 1 Y. B. INT'L L. COMM'N at 191-206, U.N. Doc. A/CN.4/SER.A/1978.

<sup>84</sup> The final text drafted by the Commission [art. 36 bis] provided:

Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.

*Report of the International Law Commission on the work of its thirty-fourth session* (3 May-23 July 1982), U.N. Doc. A/37/10 (1982), reprinted in [1982] 2 Y.B. INT'L L. COMM'N 43, Part II, (art. 36 bis), U.N. Doc. A/CN.4/SER.A/1982/Add. 1 (Part 2).

<sup>85</sup> See, e.g., the observations by Mr. Hafner (Austria) at the 19th Meeting of the Committee of the Whole at the Vienna Conference (Mar. 5, 1986), U.N. Doc. A/CONF.129/C.1/SR.19, at 2.

<sup>86</sup> See the observations by Ms. Morgenstern (I.L.O.), *id.* at 5; by Mr. Paszkowski (UNESCO), *id.* at 8; by Mr. Buguicchio (Council of Europe), *id.* at 10; by Mr. de Ceglie (F.A.O.) at the 20th Meeting, U.N. Doc. A/CONF.129/C.1/SR.20 at 5; by Mr. Neumann (U.N.I.D.O.), *id.* at 9; by Mr. Zimmerli (I.C.A.O.), *id.* at 11.

<sup>87</sup> See Draft Report of the Committee of the Whole, Vienna Conference (18 Feb.-21 Mar. 1986), U.N. Doc. A/CONF.129/C.1/L.74/Add.3 at 11, para. 23.

<sup>88</sup> U.N. Doc. A/CONF.129/C.1/L.56, 65.

"The provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party."<sup>89</sup>

Therefore, the question whether or not a headquarters agreement entails legal effects upon member States of the Organization, is not resolved by the 1986 Convention. In particular, the deletion of the ILC proposal does not mean that the question henceforth falls under Articles 34, 35 and 36 of the Convention (Treaties and Third States).<sup>90</sup> In other words, the deletion did not transform member States of an international organization into *third States*, a status that would entitle them to claim their being bound by a headquarters agreement only upon consent to the agreement in writing. On the contrary, "appropriate wording" was adopted "so that the entire subject with which that article dealt was left out of the purview of the draft convention."<sup>91</sup> Failing application of the 1986 Convention, the law applicable to the legal effects of a treaty concluded by an international organization is not undeterminate for all that. The Expert Consultant, Mr. Reuter, recalled that: "The question whether such a treaty could have legal effects in the relations between the member States and a State which had concluded the treaty with the international organization is governed by the rules of the organization, and by those rules alone."<sup>92</sup>

As each organization has its own rules, the diversity is so great that doubts were raised on the ripeness of the topic for codification in all its aspects.<sup>93</sup> For instance, in the COMECON, decisions concerning participation in treaties concluded by the organization are adopted in each individual case by the member States.<sup>94</sup> But, in the United Nations, the rules of the Organiza-

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<sup>89</sup> The article was adopted without a vote, see U.N. Doc. A/CONF.129/SR.6 at 3-4.

<sup>90</sup> See, in particular, the arguments adduced against the deletion of art. 36 bis by Mr. Riphagen (Netherlands) at the 20th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.129/C.1/SR.20 at 6.

<sup>91</sup> Statement by Mr. Szasz (United Nations) at the 23rd Meeting of the Committee of the Whole, U.N. Doc. A/CONF.129/C.1/SR. 23 at 3.

<sup>92</sup> Statement by Mr. Reuter (Expert Consultant) at the 25th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.129/C.1/SR.25 at 4.

<sup>93</sup> See the observations by Mr. Dalton (United States of America) at the 20th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.129/C.1/SR.20 at 13.

<sup>94</sup> See the observations by Mr. Netchaev (U.S.S.R.), *id.* at 10 ("That [is] the most



tion do not call upon member States to expressly accept in writing the obligations that agreements concluded by the Organization may impose on them. In the case of the 1947 Agreement, it was "resolved" at the outset that in order to "come into force," namely to entail legal effects, the Agreement had "to be approved by the General Assembly."<sup>95</sup> Approval was duly given by the General Assembly on October 31, 1947.<sup>96</sup> Furthermore, U.N. members, from the beginning invoked the provisions of that treaty and indicated by their conduct that they accepted those obligations.<sup>97</sup> In truth, they cannot at the same time claim the rights and repudiate the obligations that derive from the Agreement. On the other hand, when a State becomes a member of the Organization, it is never called upon to give formal consent to the Agreement, and, for example, to the obligation not to abuse privileges and immunities in the territory of the United States.<sup>98</sup> Moreover, it has become a practice accepted as law that the many conference agreements, which entail obligations similar to that of the 1947 Agreement, are not even submitted for approval to any organ of governmental representatives.<sup>99</sup> It is thus clear that, under the rules of the United Nations, member States are bound by the Agreement and the reservation attached to it. The reservation is binding upon them as it is upon the Organization.

Curiously, the United States has never really taken advan-

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democratic way of taking decisions. If a member State [does] not wish to become a party to a treaty concluded by the organization, it merely [has] to declare that it [does] not participate in any work involving the instrument. In other words, the full protection of sovereignty [is] possible and available.")

<sup>95</sup> G.A. Res. 99 (I), para. 3.

<sup>96</sup> G.A. Res. 169 (III), A.

<sup>97</sup> See the observations by Mr. Reuter at the 1510th Meeting of the International Law Commission (June 30, 1978), [1978] 1 Y. B. INT'L L. COMM'N 191, para. 5, U.N. Doc. A/CN.4/SER.A/1978.

<sup>98</sup> See the observations by Mr. Reuter at the 1512th Meeting of the International Law Commission, (July 5, 1978) [1978], 1 Y. B. INT'L L. COMM'N 204, para. 58, U.N. Doc. A/CN.4/SER.A/1978.

<sup>99</sup> See the written comments (1983) made by the United Nations on the final draft articles on the law of treaties between States and international organizations or between international organizations, *Analytical Compilation of Comments and Observations by States and Principal International Intergovernmental Organizations on the Final Draft on the Law of Treaties Between States and International Organizations or Between International Organizations, Working Paper Prepared by the Secretariat*, U.N. Doc. A/CONF.129/5 (1985) at 176 n.36.

tage of its right to invoke security grounds in order to limit certain privileges of foreign missions based in New York. Usually, restrictive measures are based upon reciprocity, not security. This is particularly the case in the following areas: travel, acquisition of real property, and automotive and customs.<sup>100</sup> This legal policy calls for two observations.

First, the United States without necessity enfeebls its position before U.N. forums. This is not the place to analyze in depth the possible application or reciprocity in a multilateral context.<sup>101</sup> Suffice it to say that, if reciprocity certainly does not apply to the Organization itself, it does however apply to foreign nationals working in U.N. missions.<sup>102</sup> The argument that Article 105 of the Charter compels the host State to grant immunities and privileges to the representatives of member States, unconditionally and on equal basis,<sup>103</sup> would be persuasive if U.N. representatives enjoyed only the minimum privileges and immunities necessary for the independent exercise of their functions. Such privileges are nonderogable rights. But U.N. representatives have more than what Article 105 mandates; they have full diplomatic status. True, Article 105 forbids reciprocity. But the scope of the prohibition cannot exceed the scope of the Article. In other words, reciprocity is forbidden only in respect of functional privileges. Therefore, reciprocity is definitely applicable to

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<sup>100</sup> These various measures are explained at length in the testimony of James E. Nolan, Jr., Director, Office of Foreign Missions in the 1985 *Senate Hearings*, *supra* note 1, at 162-72. See also 1985 *Senate Hearings supra* note 1, at 197-200 (Responses to Questions for the State Department).

<sup>101</sup> See, e.g., Note, *Applying the Foreign Missions Act of 1982 to International Organizations: Reciprocity in the Multilateral Context*, 18 N.Y.U. J. INT'L L. & POL. 229 (1985-86).

<sup>102</sup> Such is the solution that results from the combination of Section 9 of the International Organizations Immunities Act of 1945, *codified at* 22 U.S.C. § 288 f (Supp. III 1985) and Section 15 of the Headquarters Agreement (*cf.* the phrase: "Subject to corresponding conditions and obligations"). It must be recalled that the principle of reciprocity has never been intended to apply to the Organization itself. Reciprocity applies only with respect to nationals of any foreign country which fails to provide corresponding privileges to U.S. citizens. See HOUSE REPORT ON THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT H.R. REP. No. 1203, 79th Cong. 1st Sess. (1945), *reprinted in* 1945 U.S. CODE CONG. SERV. 946, 950.

<sup>103</sup> See United States Foreign Missions Act: application of section 205 to the missions accredited to the United Nations, Note by the Legal Counsel, *reprinted in Report of the Committee on Relations with the Host Country*, 38 U.N. GAOR Supp. (No. 26) at 21, para. 25, U.N. Doc. A/38/26 (1983).

the non-necessary privileges of U.N. representatives such as freedom of movement.<sup>104</sup>

Second, reciprocity is not the most appropriate legal ground to cope with security threats. The suggestion can be made in regard to the legislation enacted to limit the size of the Soviet mission in New York. On October 27, 1986, Congress adopted Public Law 99-569 whose Section 702 reads as follows:

It is the policy of the Congress that the number of Nationals of the Soviet Union admitted to the United States to serve as members of the Soviet mission at the United Nations headquarters shall not substantially exceed the number of United States nationals who serve as members of the United States mission at the United Nations headquarters.<sup>105</sup>

The legislative history of the provision makes it crystal clear that Congress took such an action on national security grounds. Not only did it explicitly say so,<sup>106</sup> but it explained:

Counterintelligence specialist, especially in the FBI, say that the SMUN in New York City is one of the chief havens for Soviet spies in the United States. With its large staff, the SMUN provides a major operational center for the KGB and GRU in their activities throughout the United States.<sup>107</sup>

However, this motivation fails to come across in the legislation itself. Plain reading of the text gives the impression that Congress took action solely to seek a rough equivalence in size between the U.S. and the Soviet missions. In other words, Con-

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<sup>104</sup> Member States representatives sometimes need less privileges than ordinary diplomatic agents. For instance, they need not the same freedom of movement because, unlike the latter, they are not in charge of "protecting in the receiving State the interests of the sending State and of its nationals," or "ascertaining by all lawful means conditions and developments in the receiving State" See Vienna Convention on Diplomatic Relations, *supra* note 18, at art. 3, paras. b & d. Thus, they may lawfully be restricted in their travel within the host State provided, of course, that the purpose of the travel is not connected with their official functions (*e.g.*, attending a conference held under the auspices of the Organization in, say, San Francisco).

<sup>105</sup> Pub. L. 99-569, Title VII, § 702, 100 Stat. 3204, *approved* Oct. 27, 1986, *codified* at 22 U.S.C. § 287 note.

<sup>106</sup> See AUTHORIZING APPROPRIATIONS FOR F.Y. 1987 FOR INTELLIGENCE ACTIVITIES OF THE UNITED STATES GOVERNMENT, THE INTELLIGENCE COMMUNITY STAFF, THE CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM (CIARDS), AND FOR OTHER PURPOSES, S. REP. NO. 307, 99th Cong., 2nd Sess., 27 (1986).

<sup>107</sup> *Id.* at 24-25.

gress reckoned the problem with the plane of equality before the law. It implicitly denied the Soviet Union mission the privilege of being substantially more staffed than the U.S. mission. There is a serious problem with this approach insofar as equality before the law is legally meaningful only with respect to comparable situations. True, the Soviet Mission had by far more staff than any other mission; its size exceeded that of the two next largest missions combined.<sup>108</sup> But, in order to persuasively claim that such a size is excessive in comparison to that of the U.S. mission, it must be proved that the situation of the Soviet mission is comparable to the latter, that its needs are not greater than the latter, and that no particular and specific circumstance may be considered as compelling necessity for it to be more staffed than the U.S. mission. This is no easy task. It could be cogently argued that foreign language constraints make local recruitment of administrative and technical employees almost impossible, that regular commutes between Moscow and New York are out of the question for financial reasons, that the 4,600 miles existing between a U.N. mission and a Foreign Office impose other constraints than the 227 miles between Washington and New York. Fortunately enough, the Soviet representative at the Host Country Committee refrained from dwelling at length with the argument.<sup>109</sup> Interestingly, the U.N. Legal Counsel in a statement on the issue implicitly discarded the equivalence argument by reiterating that "reciprocity is not possible"<sup>110</sup> *vis-à-*

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<sup>108</sup> See the statement made by the U.S. Representative to the Host Country Committee (125th mtg.), *Report of the Committee on Relations with the Host Country*, 42 U.N. GAOR Supp. (No. 26) at 12, para 38, U.N. Doc. A/42/26 (1987).

<sup>109</sup> See the statement made by the Soviet Representative to the Host Country Committee (119th mtg.):

[T]he comparison of the numbers of staff of missions of the United States and other Members (is) inappropriate. The United States mission is located in its own country and relies on a huge network of numerous United States governmental agencies and organizations in Washington and New York. The United States may even reduce almost to zero the size of its mission by replacing its activities with those of various agencies in New York and Washington. The Soviet Union (is) obliged to maintain a large number of technical, security and administrative staff and the United States has included those workers in its computation of the staff members of the Soviet Mission.

*Report of the Committee on Relations with the Host Country*, 41 U.N. GAOR Supp. (No. 26) at 15, para. 70, U.N. Doc A/41/26 (1986).

<sup>110</sup> See the statement made by the Legal Counsel at the 115th meeting of the Com-

*vis* U.N. missions. He nonetheless justified U.S. action, but on the ground that, in accordance with Article 14 of the 1975 Vienna Convention, the size of the mission should be "reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host state."<sup>111</sup>

The foregoing developments may suggest that reciprocity is perhaps not the most appropriate legal ground to reduce the size of overstuffed missions and, in a more general perspective, to remedy national security threats. This is so true that the U.S. representative to the Host Country Committee did not hesitate to declare in 1987 what was apparently an embarrassment in 1986;<sup>112</sup> "The United States [is] determined to protect its national security."<sup>113</sup> There was not a single objection against this claim, not even on the part of the Soviet Union. Instead, the Soviet representative argued that the United States had failed to implement Resolution 41/82 urging both parties "to follow the path of consultations."<sup>114</sup> The absence of protest in the Host Country Committee amounts in the circumstance to tacit acquiescence.

The right of the United States to protect its national security against member States goes, of course, beyond the right to request U.N. foreign missions being reasonably and normally sized. True, member States enjoy a hard core of necessary privileges and immunities that are nonderogable. The functional privileges of Article 105, however, are not superior to ordinary diplomatic privileges. In the same manner that the Organization

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mittee on Relations with the Host Country, Mar. 13, 1986, U.N. Doc A/AC.154/264 (1986), reprinted in 80 A.J.I.L. 783, para. 4 (1986).

<sup>111</sup> *Id.* at para. 4 The Legal Counsel saw fit to add: "While the 1975 Convention is not yet in force, this particular provision reflects a common consensus on the matter." At the Vienna Conference, the Committee of the Whole adopted Article 14 by sixty votes to none, with one abstention. See 1975 Vienna Documents, *supra* note 9, at 91, para. 136.

<sup>112</sup> See *supra* note 90 and accompanying text.

<sup>113</sup> Statement made by the U.S. Representative to the Host Country Committee (124th mtg.), *Report of the Committee on Relations with the Host Country*, 42 U.N. GAOR Supp. (No. 26) at 11, para. 31, U.N. Doc. A/42/26 (1987).

<sup>114</sup> Paragraph 4 of Resolution 41/82 urged "the host country and the Member States that raised the issues in response to the request and to action by the host country to reduce the size of their missions to follow the path of consultations with a view to reaching solutions to this matter." GA Res. 41/82, para. 4 adopted Dec. 3, 1986.

is not a *super-State*,<sup>115</sup> a U.N. diplomat is not a *super-Ambassador*. Such an interpretation is out of the question, for it would run against the original intent of the U.N. founding members. Therefore, U.N. representatives certainly do not have the additional or extraordinary privilege of being appointed as a member of the mission against the will of the host State.<sup>116</sup> Should that be *lex lata*, they would have more privileges than ordinary diplomatic agents. National security considerations may indeed control the appointment of the members of the mission, albeit in a different manner than in bilateral relations. Whereas, in bilateral relations, a diplomat may be denied *agrément* by the receiving State for any reason and for no reason as well,<sup>117</sup> the equivalent procedure in the multilateral context is qualified. First, the host State must invoke, as having motivated its decision, facts that in reality exist (mere allegations or suspicions should be insufficient). Second, the host State must invoke facts that are directly linked to national security considerations (a record of financial delinquency or reckless driving ought to be inappropriate). In other words, the major difference between a receiving State and a host State is that, whenever national security is at stake, the latter unlike the former is called upon to justify its position. This interpretation logically conforms with the vast majority of headquarters agreements that provide for either prior consultations,<sup>118</sup> or arbitral settlements in the case of disputes over the interpretation of the Agreement.

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<sup>115</sup> *Reparation*, *supra* note 41, at 179 (emphasis added).

<sup>116</sup> In practical terms, such is the demand implicitly formulated by a majority of sending States during the course of the debate on art. (Appointment of the members of the mission) at the Vienna Conference of 1975. See 1975 *Vienna Meetings*, *supra* note 9, at 87-89.

<sup>117</sup> See The Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, art. 4, para. 2, 23 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95.

<sup>118</sup> See FREDERICK L. KIRGIS, *PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE* (1983). Although the author does not address prior consultations in the context of headquarters agreements, he makes a suggestive remark for the topic under consideration: "When important national political considerations are at stake, prior consultation is unlikely. . . . [T]he perceived need for secrecy or immediate action sometimes takes priority." *Id.* at 372.

### III. The Necessary Privileges of the Officials

The problem of the necessary privileges of the officials arose in 1953 when a number of U.S. nationals employed on the U.N. Secretariat were summoned to appear before the Internal Security Subcommittee of the Senate Judiciary Committee.<sup>119</sup> When asked about their possible links with the Communist apparatus, the U.N. employees invoked the Fifth Amendment and refused to answer questions because the answer might have incriminated them. Secretary-General Trygve Lie held that refusal to answer questions on such grounds was conduct unbecoming to international civil servants and dismissed the employees involved. The employees appealed to the U.N. Administrative Tribunal, which reversed the Secretary-General in eleven cases, and ordered reinstatement, payment of awards of damages, or both, to American employees of the U.N. who would not state that they were not Communists.<sup>120</sup> The U.S. delegation in the General Assembly vigorously opposed payment of these awards. As a makeshift, it was decided to refer the question to the International Court of Justice for an advisory opinion. The World Court held that the General Assembly was compelled to give effect to the awards of the Tribunal.<sup>121</sup> Neither the Tribunal, nor the Court ever judged the cases on their true merits since the sole issue under consideration after Trygve Lie's decisions was whether the employees had breached their international civil service obligations by claiming the Fifth Amendment privilege. Had conclusive evidence been presented to the Secretary-General that the employees involved were placed in their positions in the U.N. as part of an interlocking subversion between members of the U.N. Secretariat and the Communist apparatus, the Secretary-General would have been compelled to dismiss the employees. For the U.N. Charter forbids the staff to seek or receive instructions from any authority external to the Organization.<sup>122</sup> The true problem for our concern is whether Congress was entitled under

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<sup>119</sup> See III U.S. FOREIGN RELATIONS 312-413 (1952-54).

<sup>120</sup> See Judgments of the United Nations Administrative Tribunal [No. 18-No. 38, 21 August 1953], U.N. Doc. AT/DEC/1-70 at 65-199 (1958).

<sup>121</sup> Effect of Awards of Compensation Made by the United Nations administrative Tribunal, 1954 ICJ 47 (Advisory Opinion).

<sup>122</sup> U.N. CHARTER art. 100, para. 1.

international law to call upon the employees to appear before the Senate Internal Security Subcommittee *i.e.*, whether or not the hearings contravened Article 105(2) of the Charter.

Insofar as the necessary privileges of U.N. officials are closely linked to the compelling necessity to grant them independence in the exercise of their functions, it may be suggested that the various legal mechanisms which constitute the translation of a link of political allegiance should not be enforced against them. Whereas one may readily concede that taxpayers, when paying their taxes, do not really pledge political allegiance to the State, the situation is slightly more controversial for citizens drafted for service in the armed forces.<sup>123</sup> Admittedly, it is doubtful that States may go much further, and in particular, keep requiring their nationals to pledge political allegiance to them.

Article 100 of the U.N. Charter implicitly guarantees to the staff a right to freedom of thought and conscience without qualification. Restrictions exist, but only with respect to the expression of thought insofar as U.N. employees "shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."<sup>124</sup> The freedom of thought rules out any form of compulsion to express thoughts or to divulge philosophical, religious or political persuasions. Interestingly, as early as 1952, the Secretary of State conveyed to the Attorney General his concern about U.S. nationals employed on the Secretariat who had been subpoenaed to appear before a Federal Grand Jury sitting in New York.<sup>125</sup> He expressed "hopes that instructions may be issued to confine the questioning of United Nations Secretariat personnel to matters outside the scope of their official duties."<sup>126</sup> He made clear that employees would be entitled to claim the immunities of the Organization when testifying before the Grand Jury.<sup>127</sup> To date, under United States constitutional law, the 1953 hearings would probably be considered unconstitutional. On April 8, 1986, the United States

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<sup>123</sup> See the United States reservations to the General Convention in Multilateral Treaties, *Multilateral Treaties supra* note 12, at 38.

<sup>124</sup> U.N. CHARTER art. 100, para. 1.

<sup>125</sup> See III U.S. FOREIGN RELATIONS, 312 (1952-54).

<sup>126</sup> *Id.* at 313.

<sup>127</sup> *Id.*



District Court for the Eastern District of Pennsylvania held, in the case of *Hinton v. Devine*,<sup>128</sup> that the U.S. loyalty security program for American citizens employed by the United Nations and its specialized agencies was unconstitutional in that it violated the First Amendment rights of American citizens. In deciding not to appeal and to suspend the investigative program, the United States government has implicitly recognized a lack of unfettered discretion in the choice of means available to protect national security interests. But this recognition was made under United States law, not under the Charter whose provisions lay down general principles which are not expressed in self-executing language.<sup>129</sup>

The irony in the recent United States policy is that it takes place in an international context which is seemingly going in the opposite direction. Forty years ago, the International Court of Justice in the *Reparation* opinion held that Article 100 of the U.N. Charter implied "independence"<sup>130</sup> for international agents. It espoused the liberal construction of Article 100, put forward by the United Kingdom, that the Article created "a special relationship of *international allegiance* between the Organization and its servants."<sup>131</sup> In the recent *Yakimetz* case,<sup>132</sup> however, the Court gave precedence to the link of national allegiance by refusing to censure the Secretary-General for having yielded to the "formal representations" made to him by a member State in regard to the employment of a national of that State on the Secretariat. According to the Court, member States can lawfully make "formal representations" to the Secretary-General provided that such representations are not tantamount to "instructions" or "pressures."<sup>133</sup> Doubts may be cast as to whether such subtle distinctions will prove to be efficient, or even useful. For the different political and financial weight of each member State

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<sup>128</sup> 633 F. Supp. 1023 (E. D. Pa. 1986). See also *Ozonoff v. Berzak*, 744 F.2d 224 (1984); Roy, *U.S. Loyalty Program for Certain U.N. Employees Declared Unconstitutional*, 80 A.J.I.L. 984, 984-85 (1986).

<sup>129</sup> See *Sei Fujii v. California*, 38 Cal. 2d 718, 722-725, 242 P.2d 617, 621-22 (1952).

<sup>130</sup> *Reparation*, *supra* note 42, at 183.

<sup>131</sup> See the oral statement of M.G.G. Fitzmaurice of the United Kingdom, *Reparation*, 1949 ICJ Pleadings 123 (emphasis added).

<sup>132</sup> Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, 1987 ICJ 18 (Advisory opinion) [hereinafter *Yakimetz case*].

<sup>133</sup> *Id.* at 71, para. 95.

obviously makes some "representations" more equal than others. Indeed, should the cases of 1953 be reheard, the numerous dismissals by Trygvie Lie could be immune despite the fact that they took place as a consequence of the following "formal representation" sent by the United States to the Secretary-General:

My government wishes to initiate at once the procedures provided by the Order, and its representatives would like to work out the details of the necessary arrangements with your designees at their earliest convenience. In the meantime, I would like to request that appointment action be withheld on any pending appointments of United States citizens.<sup>134</sup>

Whether or not the *Yakimetz* case will pave the way for further subservience by the Secretary-General to representations of a government in regard to U.N. staff management remains an open question. Perhaps, national security considerations would nowadays prevail more easily than they did in 1953. At any rate, the *Yakimetz* case is barely compatible with former positions adopted by the U.N. Legal Counsel. Suffice it to recall that in 1965 the Legal Counsel dismissed a request by a member State that all locally recruited U.N. employees be given employment contracts in accordance with a standard form contract on the ground that the adoption of such a form of employment contract would run counter to Articles 100 and 101 of the Charter.<sup>135</sup> Should standard form contracts be viewed as interference in the internal affairs of the Organization, the designation of employees to be dismissed and candidates to be appointed<sup>136</sup> would more nearly resemble direct administration.

No necessary privilege of U.N. officials is, of course, endangered when the United States government wishes to apply certain restrictions on travel undertaken by members of the Secretariat of the United Nations.<sup>137</sup> In his note verbale of September

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<sup>134</sup> See III U.S. FOREIGN RELATIONS 319-20 (1952-54).

<sup>135</sup> 1965 U.N. JURID. Y.B. 236.

<sup>136</sup> In the *Yakimetz* case, "evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant," see *Yakimetz* case, *supra* note 132, at 61, para. 78.

<sup>137</sup> See *Note Verbale to the Secretary-General by the acting Permanent Representative of the United States*, Annex I, U.N. Doc. ST/IC/85/48 (1985), reprinted in 80 A.J.I.L. 438 (1986).

9, 1985, the Secretary-General could not invoke a single provision of the Charter, of the Headquarters Agreement, or of the General Convention, which would grant U.N. employees the right to travel at large in the United States. Since the proposed travel restrictions only applied to nationals of the U.S.S.R., Afghanistan, Cuba, Iran, Libya and Vietnam, not to all employees of the United Nations, the Secretary-General argued that "the proposed measure would seem to constitute discrimination among members of the Secretariat."<sup>138</sup> Thus, the United States has a right to impose travel restrictions on a nondiscriminatory basis. But two observations must be made in that regard. First, depending on the scope of the restrictions imposed, it could be argued that the limitations are "unduly onerous."<sup>139</sup> Second, nondiscriminatory travel restrictions would probably be unwise and unrealistic policy since they would in all likelihood raise unnecessary embitterment with friendly governments and turn the State Department into a travel agency for some four thousand U.N. employees.<sup>140</sup>

In conclusion, the right of the United States as the host State to the United Nations to protect its national security is to date undisputable and undisputed. This right derives certainly from the security reservation appended to the Headquarters Agreement, but also from the rule and established practice of the Organization as well. The truth of the matter is that, should any host State be denied the right to safeguard its own security, it would cease to be sovereign and "become a servant in its own house."<sup>141</sup>

However, fostering great expectations upon the national security concept would be out of place. There is a hard core of necessary privileges and immunities which are nonderogable. National security does not authorize their being curtailed,

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<sup>138</sup> See Note Verbale by the Secretary-General to the Permanent Representative of the United States, Annex II, U.N. Doc. ST/IC/85/48 (1985), reprinted in 80 A.J.I.L. 440 (1986).

<sup>139</sup> *Id.* at 441, para. c.

<sup>140</sup> See Franck, *Unnecessary UN-Bashing Should Stop*, 80 A.J.I.L. 336, 336-37 (1986).

<sup>141</sup> See the declaration made by Mr. Vranken (Belgium) at the 13th plenary meeting of the 1975 Vienna Conference (March 13, 1975), 1975 *Vienna Meetings*, *supra* note 9, at 57, para. 17.

abridged or withdrawn. Should the host State by restricting the derogable privileges still feel unsecure and unprotected, the sole option is to have the Organization and its members be relocated elsewhere. On the other hand, the interpretation of the word *necessary* does not depend upon the considerations of the host State alone. The Headquarters Agreement lays down in Section 21 a judicial procedure for the settlement of any dispute between the United Nations and the United States. Should host State national security cases be ever adjudicated on the merits at the international level, no international tribunal would be able to do away with the national security interests of any host State. These interests are as commendable as those of the Organization. The future of multilateral diplomacy depends on their reconciliation.