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INTERNATIONAL LAW-PRIVILEGES AND IMMUNITIES OF UNITED NATIONS DELEGATES AND OFFICIALS-THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

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INTERNATIONAL LAW—PRIVILEGES AND IMMUNITIES OF UNITED NATIONS DELEGATES AND OFFICIALS—THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT—The primary sources of the privileges and immunities granted to delegates to and officials of the United Nations are the United Nations Charter and the International Organizations

Immunities Act.¹ Article 105, paragraph 2 of the United Nations Charter provides:

“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.”²

Although the United States has recognized the legal capacity of public international organizations, it has taken the position that there exists no obligation under customary international law to extend to such organizations the privileges, exemptions and immunities accorded to foreign governments, and has accordingly refused to grant to their officers and employees the special legal status of either foreign diplomatic agents or non-diplomatic governmental officials.³ Article 105, by using the language “necessary for the independent exercise of their functions” has posed at least one major problem.⁴ The legal status of United Nations delegates and officials is not tied to the prerogatives of diplomatic agents by international law, as was done in the Covenant of the League of Nations.⁵ This leaves the Member Nations and United Nations free to work out a system of privileges and immunities based on the requirements of the functions performed by varying strata of individuals, but until national legislation or an international convention is adopted the legal status of both delegates and officials depends upon an interpretation of the word “necessary.”⁶

Congress has now passed the International Organizations Immunities Act,⁷ and the President by Executive Order has applied it to the United Nations.⁸ The act was not designed to be applicable only to the United Nations,⁹ but it is the only step that the United States

¹ 59 Stat. L. 669 (1945); Exec. Order No. 9698 (Feb. 20, 1946), 11 FED. REG. 1809.

² The Charter is published *in extenso*, 55 YALE L. J. 1291 (1946).

³ Preuss, “The International Organizations Immunities Act,” 40 AM. J. INT. L. 332 at 333 (1946).

⁴ A question as to the power of Congress to implement the United States’ pledge of immunities is raised in 55 YALE L. J. 778 at 782 (1946).

⁵ Covenant of the League of Nations, Art 7, ¶ 4.

⁶ Preuss, “The International Organizations Immunities Act,” 40 AM. J. INT. L. 332 at 341 (1946).

⁷ *Supra*, note 1.

⁸ This method of application was chosen to assure flexibility both in granting and withdrawing the scheduled immunities from individual organizations. Preuss, “The International Organizations Immunities Act,” 40 AM. J. INT. L. 332 at 335 (1946).

⁹ Exec. Order No. 9698 which applied the act to the United Nations (Feb. 20, 1946), 11 FED. REG. 1809, also applied it to:

has as yet taken to implement its international obligation to provide "necessary" privileges and immunities for the delegates to and officials of the United Nations.

For the purposes of the act, representatives of foreign governments in or to international organizations and officers and employees of such organizations are placed on an equal basis. They are assimilated to the "foreign governmental official"¹⁰ and granted:

(a) Immunity from suit and legal process relating to acts performed by them in their official capacities and within the limits of their functions, except insofar as such immunity may be waived by the foreign government or international organization concerned.¹¹

(b) Exemption from (only) federal income taxes:

(1) on the salaries of alien employees unconditionally;

(2) on the salaries of representatives of foreign governments on condition that their government grant reciprocal exemptions to American officials serving abroad with international organizations; and

(3) no exemption on the salaries of American employees.¹²

(c) Exemption from customs duty on baggage and effects brought in on arrival, but not for anything subsequently imported.¹³

(d) Exemption from social security taxes.¹⁴

(e) Such exemptions with regard to laws regulating entry into and departure from the United States, alien registration and finger-

The Food and Agriculture Organization

The International Labor Organization

The Pan American Union

The United Nations Relief and Rehabilitation Administration.

¹⁰ Preuss, "The International Organizations Immunities Act," 40 *AM. J. INT. L.* 332 at 342 (1946).

¹¹ 59 *STAT. L.* 669 at § 7 (b). In this connection it is interesting to note that the first judicial interpretation of the act dealt with this section. The decision, by the City Court of New Rochelle, N. Y., is that the defendant, charged with exceeding the speed limit on a parkway by ten miles per hour, was "not entitled to immunity as a matter of law without a trial of the issue of fact," although he was at the time employed by the United Nations as chauffeur for the Secretary-General. If the Court meant that an employee of the United Nations is not entitled to immunity until he has convinced the trier of fact that he was performing an act in his official capacity and within the limits of his functions it is undoubtedly correct. If the Court meant that as a matter of law he was not entitled to immunity the decision is open to question, for defendant was presently engaged in transporting the Secretary-General on the business of the United Nations, from one conference to another. The case is critically discussed by Lawrence Preuss in "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case," 41 *AM. J. INT. L.* 555 (1947).

¹² 59 *Stat. L.* 669 at § 4 (b) (1945).

¹³ *Id.* § 3.

¹⁴ *Id.* § 4 (c) and 5.

printing, and registration of foreign agents as are accorded under similar circumstances to officials and employees of foreign governments, and members of their families.¹⁵

It is to be noted that only the class (a) immunities are accorded to American employees. The underlying tenor of the act is more boldly highlighted, however, by other provisions. An express stipulation is inserted to bar any claim to diplomatic privileges.¹⁶ The President is given the power, expressed in unqualified terms, to withhold or withdraw the benefits of the act from any international organization,¹⁷ and the Secretary of State is given special powers over all international agents in that the privileges of the act may not be enjoyed without his consent, and he may require the departure of any person "not desirable."¹⁸ He may also withdraw the privileges from nationals of any foreign countries who fail to reciprocate.¹⁹

The adequacy of this legislation to meet the needs of the United Nations, now to be permanently quartered within our borders, may best be tested by the experience of the League of Nations in Switzerland. The Covenant of the League of Nations provides:

"Representatives of the Members of the League and officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities."²⁰

It was tacitly agreed that this article was sufficient to grant to delegates the privileges generally accorded diplomatic agents by international law,²¹ but the prerogatives of officials and employees of the League were agreed upon by the Swiss Federal Council and the Secretariat, not on the basis of an interpretation of the covenant, but on the principle that agents of the League were to be assimilated to the members of corresponding rank belonging to the diplomatic missions at Berne.²² The practical results of this assimilation were: first, the Swiss national practice of granting varying degrees of privileges and immunities to different classes of diplomatic personnel was in-

¹⁵ Id. § 7 (a), (c) and (d).

¹⁶ Id. § 8 (c).

¹⁷ Id. § 1.

¹⁸ Id. § 8 (a) and (b).

¹⁹ Id. § 9.

²⁰ Covenant of the League of Nations, Art. 7, ¶ 4. It is provided in ¶ 5: "The buildings and other property occupied by the League or its officials or by representatives attending its meetings shall be inviolable."

²¹ Norman L. Hill, "Diplomatic Privileges and Immunities in International Organizations," 20 GEO. L. J. 44 at 50 (1931).

²² Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 AM. J. INT. L. 694 at 700 (1931).

corporated into the agreements: and, second, by assimilating Swiss nationals employed by the League with those employed by the diplomatic missions at Berne, a discrimination against Swiss nationals was forced on the League.²³

The covenant divided the personnel of the Secretariat (and the International Labor Office) into two classes: the first, or "exterritorial" class, comprising those agents who, by their rank and attributes, corresponded to public functionaries;²⁴ the second, or "non-exterritorial" category, composed principally of technical and manual personnel.²⁵ Agents of the first category were granted the privileges of inviolability,²⁶ immunity from civil and criminal jurisdiction,²⁷ exemption from direct taxes, except on immovables,²⁸ and exemption from customs duty and inspection on articles imported for their own use.²⁹ Members of the second class were accorded jurisdictional immunity "in respect of acts performed by them in their official capacity and within the limits of their functions"³⁰ and exemption from taxation on income and payment of the emergency federal war tax.³¹ The members of the League staff of Swiss nationality excepted from these classifications enjoyed only: (1) freedom from suit before the local courts in respect of acts performed by them in their official capacity and within the limits of their official duties, (2) tax exemption on their League salaries.³²

These agreements are notable in two ways: first, since they were not based on the provisions of the covenant but were worked out over

²³ *Id.* at 703 et seq. The theory of nationality discrimination was based not only on traditional concepts of diplomatic immunity, but on an unwillingness to free Swiss nationals of jurisdictional controls, taxation, and service in the armed forces. Deák, "Classification, Immunities and Privileges of Diplomatic Agents," 1 *SO. CAL. L. REV.* 332 (1928).

²⁴ A group of about 225 persons, principally including chiefs of section and above. Preuss, "Diplomatic Privileges and Immunities of Agents," 25 *AM. J. INT. L.* 694 at 702 (1931).

²⁵ *Ibid.*

²⁶ The duty of special vigilance and the obligation to refrain from acts of force or coercion, subject to the right of defense of the state of residence. Eagleton, "The Responsibility of the State For the Protection of Foreign Officials," 19 *AM. J. INT. L.* 293 (1925).

²⁷ Preuss, "Diplomatic Privileges and Immunities of Agents," 25 *AM. J. INT. L.* 694 at 706 (1931).

²⁸ *Id.* at 707.

²⁹ *Ibid.*

³⁰ NORMAN L. HILL, *INTERNATIONAL ADMINISTRATION* 212 (1931).

³¹ *Ibid.*

³² *Id.* at 213.

a period of years by negotiation between the League and federal government, they represent grants of privilege deemed not only advisable in recognition of the dignity of the League's agents but essential to the proper functioning of the League itself; and, second, because the provisions were not adequate to solve other problems that faced the League.

On the "adequate" side of the ledger we may perhaps rank the following solutions. The highest officials were granted complete freedom from all state control, and a measure of personal status sufficient not only to enable those League agents to deal on a footing of equality with the representatives of Member Nations, but to reflect dignity on the League. Equality of compensation, at least so far as Switzerland was concerned, was made easy by the grant of tax exemption on the League salaries of all levels of employees. Freedom from state control in the performance of their League functions was assured the League for those second category officials and Swiss nationals not allowed complete freedom.

On the "inadequate" side of the ledger must be listed those problems for which no satisfactory solution was ever reached.³³ No agreement was ever worked out for freeing second category officials or Swiss nationals from legal process for their private affairs whenever such proceedings would interfere with their League duties.³⁴ Only a provisional agreement was reached concerning freedom for Swiss nationals from annual military training.³⁵ However, the clear cut lines of these differentiations were blurred in actual practice. A judicious use of the waiver by the Secretary General and the sanction of an official report to the Secretariat by the police accomplished a complete regard for local order even among the first category officials.³⁶ Requests from the Secretary General for freedom from jurisdiction, and the inviolability of League premises, tended to free second category

³³ The only complete study of the League experience in Switzerland is one by Martin Hill, published by the Carnegie Endowment for International Peace under the title: *IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS* (1947). The following citations refer only to general chapter headings in that work.

³⁴ *Id.*, c. 3.

³⁵ *Ibid.* One of the major problems which the League faced was the difficulty of quickly obtaining passports and visas for its emergency missions abroad. Since the League itself decided that it had no power to grant its own passports, this was not a subject for agreement between Switzerland and the League. Martin Hill devotes chapter 7 to this problem.

³⁶ Each official or employee of the League carried an identification pass suitably marked to show the degree of protection he enjoyed. In only one instance was it necessary for the Secretary-General to banish any first category official. *Id.*, c. 7.

officials and Swiss nationals for the performance of their functions.³⁷ The courtesy of the Swiss Federal Council in allowing Swiss nationals freedom from annual military service removed the greatest deterrent on employment of those persons.³⁸

In the conclusion to his work, Martin Hill drew these conclusions from his extensive study of the problems encountered by the League of Nations:

(1) No international organization of the scope of the League of Nations can work effectively unless its officials are free from control, not only by other states, but from their own states.

(2) As it is unreasonable for one state to derive financial advantage from member states by taxing an international agency located within its borders, so it is undesirable that that state should discriminate against its own nationals by taxing their salaries.

(3) Some means of facilitating expeditious and unhindered travel is essential, and it should be afforded on the basis of the international function performed.³⁹

If we apply the accumulation of this experience to the provisions of the International Organizations Immunities Act previously set out we must arrive at the following conclusions. First, the United States has achieved equality of rank for United Nations officials and delegates by reducing all representatives and officials to the level of second category employees of the League of Nations. But in so attempting to forestall any claim to diplomatic immunity⁴⁰ we have failed to provide the highest officials of the United Nations as well as the permanent delegates to that body with those privileges and immunities long recognized as a necessity for ambassadors. It would appear that the General Assembly will soon demand a general convention to correct this defect.⁴¹

Second, no provision has been made to solve the problems of selective service or to facilitate the travel of the officials of the United Nations. Both these problems harrassed the League of Nations and

³⁷ See note 20, supra. In practice, Art 7, ¶ 5 of the Covenant granted a limited right of asylum and freedom from process for both the persons and the salaries of League employees, Hill, *id.*, c. 6.

³⁸ *Ibid.*

³⁹ *Id.*, c. 9.

⁴⁰ Preuss, "The International Organizations Immunities Act," 40 AM. J. INT. L. 332 at 342 (1946).

⁴¹ It has been suggested that by statute and international law these officials enjoy complete immunity from criminal and civil jurisdiction. 55 YALE L. J. 778 at 786, note 45 (1946).

neither were ever adequately settled. However, until the Member Nations grant the United Nations power to issue its own passports it would seem beyond the capacity of the United States to do so. Perhaps, too, it would be best to leave selective service immunity, like freedom from process for the private affairs of minor officials, to the individual requests of the Secretary General. There is no reason to suspect that this practice would be any less effective today than it was during the existence of the League of Nations.

Third, it is to be regretted that the doctrine of nationality discrimination, begun by the Swiss assimilation of League officials to the members of the missions at Berne, has survived in the act. The United Nations cannot hope to pay equal salaries for equal work unless all nations, including the United States, grant their own nationals income tax exemption. Equality of compensation is a necessary personnel policy, yet no bookkeeping system could calculate the variable repayments that would be necessitated by income taxation by all represented nations. However, the proposal that the United Nations pay such taxes directly, and charge the budget contribution of the taxing nation, may become a complete answer to this difficulty.⁴²

Fourth, though the act is a step forward from the previous United States position, its basic deficiency is that it does not give the United Nations freedom from state control. The power of the President to withhold or withdraw the benefits of the act is capable of exercise inconsistent with the international obligations of the United States,⁴³ unless the act is construed as not intended to override previous treaties and agreements. The grant of powers to the Secretary of State is based on a false analogy between the position of international officials and that of foreign governmental agents in the state where they exercise their functions.⁴⁴ By this means the United States has reserved to itself a power to exert pressure on an organization which has the exclusive right and duty to serve the international interest. It is not too early to suggest that the powers of waiver and banishment in the hands of the Secretary-General proved effective safeguards for the Swiss national interests during the continuance of the League.⁴⁵ A

⁴² Journal of the General Assembly, No. 16, Supp. 5, A/C. 5/3, p. 16 (1946).

⁴³ Preuss, "The International Organizations Immunities Act," 40 AM. J. INT. L. 332 at 339 (1946).

⁴⁴ It has been suggested that these provisions were exacted by the Department of Justice in exchange for the relaxation of customs and immigration controls, and alien registration and fingerprinting. *Id.* at 339.

⁴⁵ *Supra*, note 36.

convention between the United Nations and the Member Nations at this time would serve not only the purpose of defining the scope of Article 105 for all those nations, but of enlightening the United States respecting its duty toward the United Nations and clarifying the power of Congress to take further steps in that direction.

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