

OXFORD PUBLIC INTERNATIONAL LAW

Oxford Scholarly Authorities on International Law

IV Immunities and Privileges, IX Abuse of Privileges and Immunities, Abuse of Privileges and Immunities (Article VII Sections 24-25 Specialized Agencies Convention)

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From: The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary

Edited By: August Reinisch

Content type: Book content

Product: Oxford Scholarly Authorities on International Law [OSAIL]

Published in print: 01 March 2016

ISBN: 9780198744610

Subject(s):

Diplomatic privileges — Immunities — Privilege — UN Charter

(p. 467) Abuse of Privileges and Immunities (Article VII Sections 24-25 Specialized Agencies Convention)

Article VII

ABUSE OF PRIVILEGES AND IMMUNITIES

SECTION 24. *If any State party to this Convention considers that there has been an abuse of a privilege or immunity conferred by this Convention, consultations shall be held between that State and the specialized agency concerned to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question whether an abuse of a privilege or immunity has occurred shall be submitted to the International Court of Justice in accordance with section 32. If the International Court of Justice finds that such an abuse has occurred, the State party to this Convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused.*

A. Introduction

1 Art. VII Section 24 Specialized Agencies Convention emerges as a counterweight to the privileges and immunities provided to the Specialized Agencies. Whilst waiver of immunity constitutes the usual formula to respond to abuses of privileges and immunities, the present provision introduces a new set of procedures aimed at settling disputes arising out of such circumstances. It is thus a provision for which there is no precedent, including within the framework of the General Convention, which only deals with abuses allegedly perpetrated by UN officials.

B. Drafting History

2 Art. VII Section 24 Specialized Agencies Convention finds its origin in a Memorandum of the ILO from 1945,¹ where the necessity to provide means of redress in the case of abuse of privileges and immunities was for the first time explicitly embodied in an international instrument.²

3 In the discussions regarding the conceptualization of the regime of the present section, the suggestion was put forward to Sub-Committee 1 of the Sixth Committee of the UN General Assembly, on the Coordination of Privileges and Immunities of the United Nations and the Specialized Agencies, to include a right of denunciation by a State in (p. 468) the case of abuse.³ This would exonerate the State from according any privileges and immunities to a Specialized Agency of which it still remained a member. The suggestion was, however, seen by the majority as quite far-reaching and susceptible to a number of objections and was thus not endorsed.⁴ Art. VII Section 24 Specialized Agencies Convention, instead, envisages a set of procedures whereby the initial objective is to settle the matter by agreement. These were deemed to provide a suitable solution to the concerns that had ignited the proposal for a right of denunciation.

C. Key Elements

4 In referring to the privileges and immunities conferred by the Convention, Art. VII Section 24 Specialized Agencies Convention applies to alleged abuses by the Specialized Agencies themselves. The issue of abuse of privileges and immunities by officials is addressed in Art. VI Section 23.⁵

5 The procedures outlined in the present section can be split into three different stages. In an initial stage, consultations between the State Party and the Specialized Agency concerned are envisaged, in order to determine whether the institution has abused a privilege and immunity and, in the affirmative, to attempt to provide guarantees of non-repetition. Where such consultations fail to yield a satisfactory result, the Specialized Agency is under an obligation,⁶ in a subsequent stage, to refer the question to the ICJ for an advisory opinion,⁷ in accordance with Art. IX Section 32 Specialized Agencies Convention.⁸ Where the Court concludes that abuse has occurred, a final stage is provided for whereby the State concerned has the right to withhold from the Specialized Agency the benefits of the privilege and immunity so abused. Before doing so, however, the State is required to notify the Specialized Agency accordingly.

6 An important aspect to note is that the State concerned is not entitled to undertake outright unilateral action in the presence of a perceived abuse: following the failure of (p. 469) consultations, the State is only granted the possibility to respond provided there is a favourable opinion proffered by the ICJ. Secondly, the State's right to withhold only refers to the particular privilege or immunity abused of (and not the whole set of privileges and immunities) and, notably, to its incidental benefits (and not the privilege and immunity as such).⁹

7 The present section does not specify the period of time during which the State is entitled to withhold the benefits of a given privilege or immunity.¹⁰ Based on the argument that Art. VI Sections 22 and 23 Specialized Agencies Convention already offer enough assurances against abuse of privileges and immunities, it is suggested that providing the State with a right to withhold indefinitely the privilege or immunity abused by the Specialized Agency would substantially weaken its juridical regime.¹¹ The suggestion has been put forward that the issue should be subjected to negotiations between the State and the Specialized Agency concerned, aimed at reaching a reasonable reconciliatory solution.¹²

8 It is noteworthy that in the case of the US, which is not a Party to the Convention, the International Organizations Immunities Act (IOIA) grants the Executive Branch extensive powers to adjust the immunities accorded to specific organizations, where an abuse is identified. Accordingly, provided that in the President's judgment 'such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason', the President may, at any time, 'revoke the designation of any international organization'.¹³ In this light, the Specialized Agency would cease to be classed as an international organization for the purposes of the relevant section. This provision has been termed 'extreme', in the sense that the power to withhold and withdraw privileges and immunities in case of abuse is expressed in such unqualified terms that it can lead itself to abuse.¹⁴

9 Headquarters and regional office agreements may contain variations of the procedures to be followed in case of alleged abuse. For instance, the FAO Headquarters Agreement provides, in Section 33(b), for consultations between Italian authorities and the Director-General of the FAO and, where such consultations do not yield a satisfactory result, the matter can be submitted to arbitration in accordance with Section 35 of the Agreement.¹⁵ In addition, Section 33(c) foresees the possibility that the Government takes all (p. 470) precautionary measures necessary to the national safety of the country, following

consultations with the Director-General of the FAO and provided that the independent and proper working of FAO is not prejudiced.

D. The Concept of Abuse

10 There is no generally accepted understanding within the legal community of what constitutes an 'abuse' of a privilege or immunity by a Specialized Agency.¹⁶ The scarce use of the procedures envisaged in the present section contributes to this. The suggestion has been put forward that it would relate to the 'false use of privileges and immunities by an international organization, which does not correspond to the original purposes for which they were granted to the organization concerned'.¹⁷ This definition remains, however, rather short in normative guidance: would such 'false use' require intent (*dolus*)? Would mere knowledge of the circumstances suffice? Is abuse to be defined by reference to a certain degree of damage?¹⁸

11 A Swiss case where an abuse of immunity was invoked involved the Bank for International Settlements (BIS), an international organization, and two investment funds, NML Capital Ltd and EM Ltd, which had obtained judgments against Argentina (and/or its central bank) with respect to defaulted Argentinian bonds.¹⁹ NML Capital Ltd and EM Ltd endeavoured to enforce these judgments by targeting funds deposited by Argentina with the BIS, but were impeded from doing so in view of the immunity from jurisdiction and enforcement of the latter. Against this backdrop, the applicants contended that the transfer of funds to BIS constituted a means for Argentina to hide behind the Bank's immunity, and thus, avoid any seizure of the creditors. This, in their view, was tantamount to an abuse of the BIS's immunity and could not be justified under a functional necessity test. Eventually, the Court did not decide on the question of abuse of immunity by BIS, on grounds that any assessment of whether the act in question was necessary for the functioning of the Bank or rather constituted an abusive invocation of immunity could jeopardize the organization's independence and impartiality and entail a decision contrary to public international law.²⁰

(p. 471) **12** The question of abuse was also mentioned in a recent case decided by the ILO Administrative Tribunal involving the recruitment by WHO of an employee (the complainant) at a time when the latter did not hold a residence permit from the Swiss authorities.²¹ As noted by the Tribunal, recruiting officials without making sure that their status complied with the laws of the host State governing the residence of aliens could be understood as an abuse of the privileges and immunities conferred upon the organization and upon its staff members.²²

SECTION 25.

1. Representatives of members at meetings convened by specialized agencies, while exercising their functions and during their journeys to and from the place of meeting, and officials within the meaning of section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country provided that:

2.

(I) Representatives of members, or persons who are entitled to diplomatic immunity under section 21, shall not be required to leave the

country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country.

(II) In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

A. Introduction

13 Art. VII Section 25 Specialized Agencies Convention is based on the provisions of Section 13 of the Headquarters Agreement between the United Nations and the US.²³ Interestingly, the General Convention does not address the expulsion of UN officials in the case of abuse of privileges of residence.²⁴

14 The purposes of Art. VII Section 25 Specialized Agencies Convention are twofold. On the one hand, it provides a clear means to deal with situations where the Government of a country in which officials and representatives of members are exercising their functions wishes to have them leave due to undesirable activities unrelated to their official functions. Indeed, both Art. V Section 13(d) Specialized Agencies Convention²⁵ and Art. VI Section 19(c) Specialized Agencies Convention²⁶ could be interpreted in a sense that would negate any power for the local government to expel these individuals in any (p. 472) circumstances. On the other hand, the present section is also protective of officials and member State representatives, inasmuch as it provides them with strong safeguards in cases of expulsion.²⁷

B. Key Elements

15 In addition to Art. VII Section 24 Specialized Agencies Convention, Art. VII Section 25 prescribes that the territorial authorities may expel any individual, be it a representative of a member State, a person granted 'high officer treatment' under Art. VI Section 21 Specialized Agencies Convention, or an official of a given Specialized Agency, in case of commission of an abuse of privilege of residence by activities in that country outside official functions. Accordingly, the right of host States to expel these individuals is not recognized with regard to acts performed by the latter in an official capacity.

16 Art. VII Section 25 Specialized Agencies Convention further describes the required procedures to enact such a decision, which vary depending on who committed the abuse. Representatives of members and persons falling within the scope of Art. VI Section 21 Specialized Agencies Convention will be treated in accordance with diplomatic procedures applicable to diplomatic envoys accredited to the country concerned. With regard to officials, expulsion proceedings may only be instituted provided that the Minister of Foreign Affairs of the country concerned so approves and after consultation with the executive head of the official's Specialized Agency. In the event expulsion proceedings are taken, the executive head is accorded the right to appear in such proceedings on behalf of the official concerned.

17 The ICAO Headquarters Agreement,²⁸ for example, envisages equivalent procedures in Art. 31, which are specifically meant to address conduct performed by a permanent Representative, a Representative of a member State or an official that is 'incompatible with his status'. Art. VII Section 25 Specialized Agencies Convention was also echoed in Art. 9 UNESCO Headquarters Agreement,²⁹ with a few modifications that are worth nothing: it

widens the scope of the provision so as to encompass, for example, the family of officials; it describes the various authorities to be consulted by the Minister of Foreign Affairs prior to his approval of any given expulsion proceeding; and it does not specifically accord the Director-General with the right to appear on behalf of the official concerned in such proceedings.³⁰

18 On occasion, Art. VII Section 25 Specialized Agencies Convention has been violated for unjustified, extraneous political reasons.³¹ Admittedly, States may erroneously treat international officials as if the *persona non grata* doctrine applied to them, or discretionarily (p. 473) invoke national security reasons to initiate expulsion proceedings against an official.³² As an incident from 2012 involving UN officials shows, requests from national security services that officials leave a given country may even be accompanied by threats of detention.³³ Except where the motivation is clearly improper, it has sufficed for some Specialized Agencies to request the staff member concerned to make a protest and subsequently reassign him or her to a different post.³⁴

19 Art. VII Section 25 Specialized Agencies Convention confirms that—unlike the right of entry³⁵—the officials' right of residence in a host State is not perceived in unqualified terms, inasmuch as improper behaviour, amounting to an abuse of privileges of residence, may lead to his or her expulsion. Importantly, this decision is not one that can be taken unilaterally by host States: prior to the initiation of expulsion proceedings, the engagement of the Specialized Agency is required in order to assess the circumstances of the case and duly provide officials with the needed protection for an effective exercise of their functions. (p. 474)

Footnotes:

¹ The Memorandum was reproduced as General Note: Third Item on the Agenda: *The Status, Immunities and Other Facilities to be Accorded to the International Labour Organization*, in the ILO Official Bulletin, Vol. XXVII, No. 2 (10 December 1945) 197-223.

² P Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff 1994) 186.

³ Final Report of Sub-Committee 1 of the Sixth Committee of the General Assembly of the United Nations on 'Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN-Doc. A/C.6/191 (15 November 1947) 10-11, para 28 (hereinafter: 'Final Report of the Sixth Committee 1947').

⁴ As explained in the Final Report of the Sixth Committee 1947 (*ibid.*), at 10-11, para 28, the objections raised included, *inter alia*: '(1) that fact that, if it were adopted, the Convention for the Specialized Agencies would be hardly following the same lines as the United Nations Convention, which does not provide any such right of denunciation; and (2) the general principle that it was necessary that the Specialized Agencies should receive appropriate privileges and immunities had been accepted, and a state, by becoming party to this Convention in respect of a Specialized Agency, would by so doing have agreed that those therein provided were what was appropriate and necessary; (3) it seemed wrong in principle that a state should have the advantages of being a member of a Specialized Agency and yet deny it privileges and immunities which were necessary for its operation.'

⁵ See A S Barros and C Ryngaert, Commentary on Art. VI Sections 18- 23 Specialized Agencies Convention for further reference.

⁶ See B Moradi, Commentary on Art. X Sections 33-40 Specialized Agencies Convention, MN 27, for further reference.

⁷ It should be noted that the instruments of accession of Belarus, Cuba, Romania, the Russian Federation, and Ukraine contained a reservation whereby these countries did not consider themselves bound by Art. VII Section 24 Specialized Agencies Convention (as well as Art. IX Section 32) in what regards the compulsory jurisdiction of the ICJ.

⁸ However, Art. IX Section 32 Specialized Agencies Convention provides for the possibility of resorting to another mode of settlement, subject to the agreement of both parties.

⁹ See P Bekker (n 2), at 188.

¹⁰ As ascertained in the Final Report of the Sixth Committee 1947, the State's right to withhold the immunity abused of is not necessarily indefinite. See Final Report of the Sixth Committee 1947 (n 3), at 11, para 28.

¹¹ K Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff 1964) 102.

¹² P Bekker (n 2), at 188. As underlined by the author (at 188), the State and the Specialized Agency concerned 'are under an obligation to come to terms with each other, this obligation to be based on the purposes behind the granting of privileges and immunities to international organizations'.

¹³ International Organizations Immunities Act (IOIA) 1945, 59 Stat. 669, 22 U.S.C. Sections 288ff.

¹⁴ K Ahluwalia (n 11), at 103.

¹⁵ Agreement between Italy and the Food and Agriculture Organization of the United Nations regarding the Headquarters of the Food and Agriculture Organization of the United Nations, 1409 UNTS 521; Art. XII (6) Agreement between the Government of the Lao People's Democratic Republic and the International Fund for Agricultural Development (IFAD) on the establishment of the IFAD's country office, concluded on 23 July 2012, read in conjunction with Art. XIII, envisages a similar procedure. Interestingly, Art. XIII(2) specifies that, where the allegation (of abuse) is substantiated, 'the party in breach shall undertake in writing to remedy the breach and notify the other party in writing the measures taken or proposed to be taken to remedy the breach and prevent further breaches'.

¹⁶ Admittedly, the question is one that could be referred by the Specialized Agencies to the ICJ, when duly authorized in accordance with Art. 96 para 2 UN Charter. This is in line with the recommendations of the UNGA contained in its Resolution 'A Need for Greater Use by the United Nations and its organs of the International Court of Justice', UN-Doc. A/RES/171(II) (14 November 1947), whereby the General Assembly '[r]ecommends that organs of...the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled'.

¹⁷ P Bekker (n 2), at 185, 186.

¹⁸ According to Bekker, any definition should remain vague enough to encompass a wide variety of situations; *ibid.* at 190.

¹⁹ *NML Capital Ltd and EM Limited v. Bank for International Settlements and Debt Enforcement Office Basel-Stadt*, Final appeal judgment, Switzerland, No 5A 360/2010, 12 July 2010, BGE 136 III 379 (partial), ILDC 1547 (CH 2010).

- 20** *ibid.* para 4.4. See also T Neumann and A Peters, 'Switzerland', in A Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013) 250; A Peters, 'Die funktionale Immunität internationaler Organisationen und die Rechtsweggarantie', (2011) 21 *Revue suisse de droit international et européen* 397, at 419ff.
- 21** *Mr T. v.WHO*, ILOAT Judgment No. 3141 (4 July 2012).
- 22** *ibid.* at 17.
- 23** Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 11 UNTS 11.
- 24** It should be noted that, apart from the UN-US Headquarters Agreement, other host country agreements also include provisions on this matter.
- 25** See U Kriebaum, Commentary on Art. V Sections 13-17 Specialized Agencies Convention for further reference.
- 26** See A S Barros and C Rynngaert, Commentary on Art. VI Sections 18-23 Specialized Agencies Convention, for further reference.
- 27** Final Report of the Sixth Committee 1947 (n 3), at 12, para 29.
- 28** Headquarters Agreement between the International Civil Aviation Organization and the Government of Canada, 1669 UNTS 105.
- 29** Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, 357 UNTS 3.
- 30** See also Section 29(e) Agreement between the Republic of Austria and the United Nations Industrial Development Organization regarding the Headquarters of the United Nations Industrial Development Organization, Austrian Official Gazette BGBl. III 100/1998.
- 31** 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—Extract from the Yearbook of the International Law Commission 1967 Vol. II (UN-Doc. A/CN.4/L.118) 320, para 161.
- 32** See, with regard to earlier US practice in this regard, K Ahluwalia (n 11), at 152-4.
- 33** See 'Note to the Ministry of Foreign Affairs of [state A] concerning a request to [State B] staff members of the United Nations to leave the country or face possible detention', May 2012, as quoted in (2012) UNJYB 457-9.
- 34** Relations between States and international organizations (second part of the topic). 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—Topic: Status, privileges and immunities of international organizations, their officials, experts, etc.—Extract from the Yearbook of the International Law Commission 1985 Vol. II/Add.1 (UN-Doc. A/CN.4/L.383) 207, paras 216, 217.
- 35** See A S Barros and C Rynngaert, Commentary on Art. VI Sections 18-23 Specialized Agencies Convention for further reference.