CHAPTER 4

Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations?

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Abstract

This paper argues that the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property should not serve as a model for a new convention with regard to international organizations. It has been suggested that there would be some advantages in preparing a draft convention on the jurisdictional immunity of international organizations: it would make the law governing the immunities of international organizations more ‘easily ascertainable’; a convention would progressively develop the law; and it would make a useful counterpart and parallel convention to the 2004 convention. However, this paper contends that each of these reasons—while appealing from the perspective of harmonization and a notion of an accessible and predictable international ‘rule of law’—does not overcome the problems of principle, practice and precedent. However, the immunities afforded to state officials may have greater value as a model for the immunities of officials of international organizations.

Keywords

immunities of international organizations – model convention – jurisdictional immunity of states

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1 Introduction

Harmonization, integration or coherence is typically a desirable policy goal in international law.\(^1\) There is value in treating like cases alike and, where possible, treating different international actors in a consistent manner. However, with the immunity of international organizations, harmonization should not be the goal and the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (‘UNCSI’)\(^2\) should not serve as a model for a new convention with regard to international organizations. This is not to say the traditional rules on the immunity of international organizations are satisfactory. But a parallel convention of a generic nature is not the answer.

In taking this position, I respectfully depart from what Judge Hammarskjöld suggested in 1954 (“la règlementation générique est dans l’air”)\(^3\) and from what Judge Gaja observed in 2006.\(^4\) Judge Gaja noted that the International Law Commission (‘ILC’) had taken up parallel studies with regard to international organizations in the fields of treaties and responsibility. He said that the adoption of UNCSI “gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations”.\(^5\) Judge Gaja pointed out three advantages of preparing a draft convention.\(^6\) First, it would make the law governing the immunities of international organizations more “easily ascertainable” due to the number of instances in which the treaties concerning the immunities of international organizations do not apply and the very general character of most treaty provisions. Second, such a convention would progressively develop the law, especially in

\(^4\) The subject of immunities of international organizations was on the agenda of the ILC for 30 years, but the Draft Articles were not referred back to the plenary from the Drafting Committee and the ILC decided in 1992 to put the topic aside for the moment as it did “not seem to respond to a pressing need of States or of international organisations”: Yearbook of the ILC (‘YILC’), 1992, Vol II, UN Doc. A/CN.4/SER.A/1992/Add.1 (Part 2), p. 53, para. 362. See further the contribution of Johan Lammers to this volume; and see also the 1924 Vienna Resolution of the Institut de droit international (L’interprétation de l’article 7, alinéa 4, du Pacte de la Société des Nations) and the 1957 Amsterdam Resolution (Recours judiciaire à instituer contre les décisions d’organes internationaux).
\(^6\) Ibid., p. 458.