CHAPTER VI

CONCLUSIONS AND OBSERVATIONS

I

In our first chapter we examined the recent trend towards the restriction of the privileges and immunities enjoyed by foreign States. We pointed out that the classical or the absolute theory of sovereign immunity has lost much of its validity; that modern international law on the subject of State immunities is the theory of restrictive immunity which draws a distinction between acts performed by a State in its sovereign capacity i.e. acts *jure imperii* and commercial acts i.e. acts *jure gestionis*, and restricts the immunity only to acts *jure imperii*. The distinction drawn between the sovereign and commercial activities of a State is irrelevant as far as international organizations are concerned. This is due to the fact that the immunity of a State is based primarily upon the principle of sovereign equality. On the contrary, the immunity of an international organization is based upon the paramount necessity of function. Sovereignty is not an attribute of an international organization. An international organization does not have a territory of its own where it can exercise its exclusive jurisdiction. We made it amply clear in our second chapter that the headquarters of an international organization remains a part of the territory of the host State and with few exceptions, the operational laws of that State apply therein. The legal instruments of various international organizations have adopted the principle of functional necessity which furnishes the sole criterion for determining the extent of the immunities to be enjoyed by them. “The functional test, rather than analogy to sovereign immunity, appears to be the most generally recognized basis for such immunities as have been
According to this functional test, an international organization should enjoy complete immunity from the jurisdiction of the courts of the Member States including the host State. It would impose a serious burden on an international organization were it to defend its actions in the local courts of various countries. It would be undesirable to allow such courts to determine, "quite possibly in different senses, the legal effects of acts performed in the exercise of the organization's functions." Moreover, there is "the need of protection against baseless actions brought from improper motives or by the numerous cranks, fanatics or cantankerous persons who may conceive that they have a duty to compel the organization to take some particular step or that they have suffered wrong at its hands." In practice, as we have seen, most international organizations, their property and assets, enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is to be borne in mind that the waiver of immunity by an international organization must be express because "the immunity of an international organization is generally based on functional necessity rather than on the theoretical consideration of sovereign equality which is the primary basis of the immunity of a foreign state and which does not preclude waiver by implication, including mere failure to assert it promptly." When such immunity is expressly waived by an international organization it submits, in principle, to the procedural rules of the forum. No waiver of immunity extends, however, to any measure of execution.

One of the main objections against the grant of immunity to foreign States when they indulge in commercial activities is to prevent their use of the cloak of immunity to deny private individuals their legiti-


3 Ibid. Also see J. F. Lalive, "L'immunité De Jurisdiction Des Etats Et Des Organisations Internationales," Recueil Des Cours, 84 (1953, III), pp. 300–301, "pour ces diverses raisons, l'immunité juridictionnelle est, au stade actuel de l'évolution et à la différence de celle des Etats, une nécessité inéluctable pour les organisations internationales et une condition de leur bon fonctionnement... La position des organisations internationales est différente; institutions nouvelles, elles sont en plein essor, traversant ici et là des crises de jeunesse et de croissance. Bien qu'elles soient indispensables pour mettre fin graduellement à l'anarchie de la société internationale et qu'elles répondent aux besoins les plus profonds de la solidarité entre Etats, leur racines ne plongent pas encore bien profond dans la conscience des peuples. Leur autorité et leur puissance doivent être renforcées."

4 See supra, pp. 66–70.