INTERNATIONAL ORGANIZATION REFORM OR IMPUNITY? IMMUNITY IS THE PROBLEM

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I. GENERAL BACKGROUND

"No one can read the significant Supreme Court cases on sovereign immunity . . . without concluding that the field is a mass of confusion; and if he ventures beyond that to attempt some reconciliation of the courts of appeals decisions, he will find confusion compounded."[1]

> The sovereign immunity doctrine . . . is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of law, it encourages irresponsibility in the world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.[2]

The forgoing observations apply exponentially when one considers the privileges and immunities of International Organizations, and the impediment that such immunity presents to the real and meaningful reform of IOs. In recent years, there has been a litany of press reports recounting the abject failings of IOs in effecting reform of their internal governance mechanisms[3] (to wit, Oil for Food, United Nations (UN) Procurement Fraud, sexual abuse of refugee girls by IO aid workers, UN peacekeepers, etc).[4]

The authors hypothesize that such failures result directly from the immunity afforded IOs which encourages or at least allows IO managers and executives to engage in illegal or unlawful practices which would otherwise expose them and their organizations to civil or criminal liability

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1. House Report, Pub. L. No. 94–574, 1976 U.S.C.C.A.N. 6121, 6145 (1976).

2. Chemical Nat. Resources v. Republic of Venezuela, 215 A.2d 864, 893 (1966) (Musmanno, J., dissenting).

3. For the latest on failed UN reform measures, *see* George Russell, *Reform is Just a Word at the U.N., Its own Investigation Shows*, FOX NEWS, Oct. 9, 2009, http://www.foxnews.com/story/0,2933,562382,00.html (last visited Jan. 25, 2010).

4. One of the authors has published a paper which recounts the practical failings of the current internal justice system followed by most IOs, and the particularly oppressive effect it has on international civil servants. The paper, "LEGAL PROTECTION IN INTERNATIONAL ORGANISATIONS FOR STAFF—A Practitioner's View" can be accessed at http://tinyurl.com/IOstafflegalprotection. Edward P. Flaherty, *Legal Protection for Staff in International Organisations—A Practitioner's View*, 2 HUMAN RIGHTS & INT'L LEGAL DISCOURSE BRUSSELS 16–17, Mar. 2007.

in national courts there. Absent the threat of criminal sanction or a substantial civil damages award, the normal incentive of civil society for managers and executives to run their organizations lawfully and/or in accord with best practices is non-existent, encouraging rather than preventing unacceptable behavior within IOs which clearly also has a negative effect on their performance and effectiveness. The inability of the scourge of IOs, United States (U.S.) Ambassador to the UN John Bolton (during his brief tenure at Turtle Bay) to change this troubling culture, suggests that neither the IOs themselves nor their Member States are willing or able to take the steps necessary to effect meaningful reform that will prevent the reoccurrence of such shameful incidents as Oil for Food and the sexual abuse of refugee girls.[5] The authors believe that this will occur only if the current immunities afforded to IOs are radically recast as suggested herein.

Historically, jurisdictional immunities came from a notion of comity that existed among equal sovereigns, whose actions were not to be judged by their fellow rulers, unless their express consent was given to it.[6] With the emergence of nation-states, the concept of jurisdictional immunity was transferred from the figure of the sovereign to that of the State. In other words, no State could be subject to the jurisdiction of the courts of another State. This principle was later codified in several international instruments and has also been recognized as part of customary international law.

Although the initial explanation justifying the application of this privilege used to lie in a reciprocal sense of comity, with the passing of time it was deemed that sovereign immunity served a functional purpose as it enabled both the State and its agents—especially those working at foreign locations—to carry on their duties without being hampered by the threat of being sued in local jurisdictions (and therefore being prevented from carrying out their functional duties or otherwise being deterred therefrom by the risk of such suit).

Immunity of foreign States was initially conceived as being absolute and as such, States could never be compelled to appear as defendants in judicial proceedings. Nevertheless, with the boom of international commercial and investment transactions in the international scenario after World War II, in which States obviously played an important role, the old notion of absolute immunity was transformed by the introduction of a distinction between those acts a State did in its sovereign capacity (*de jure*

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5. Nile Gardiner, Ph.D., *John Bolton: A Force For Change at the U.N.*, THE HERITAGE FOUNDATION, Aug. 3, 2005, *available at* http://www.heritage.org/research/internationalorganizations/wm814.cfm (last visited Feb. 9, 2010).

6. For a far more detailed survey of sovereign and IO immunities, please see the paper of our fellow panelist Dr. Matthew Parish presented simultaneously.

imperii) and the same State's acts of a commercial nature (*de jure gestionis*). While immunity remained for the first category, acts pertaining to the second one no longer granted the State immunity from judicial processes in other States' courts.

Following this logic, a State could not be sued for having committed an armed invasion in pursuance of its own interests, but it would no longer be immune from suit for having incurred in a breach of a commercial contract with a foreign private entity. This is what is known as restrictive immunity, in contrast to the previous absolute notion.

II. IMMUNITY OF INTERNATIONAL ORGANIZATIONS

The immunity granted to IOs comes from the foreign sovereign immunities tradition mentioned above. However, it is justified by a theory of "functional necessity," which came into being after World War II, when emerging IOs needed support from the States in order to achieve a certain degree of maturity and therefore to be able to perform their duties in an unfettered manner. This kind of immunity was based on the idea that it would serve the best interests of the organizations by keeping them protected from potential lawsuits that would negatively affect the organizations' limited resources at that time or their ability to operate independently. For IOs, immunity was supposed to ensure their political and financial independence and therefore their impartiality.

Since immunity of IOs came into being before the restrictive immunity theory had been adopted by many sovereign states, it was conceived and codified as being absolute. Many of these organizations actually have it codified in their own constituent instruments and other international treaties.[7] It can also exist in the form of headquarters agreements, regional agreements, and conference agreements. These treaties, due to their international law character, are to be considered internal law of the signatory States (at least for those in which treaty law is self-executing).

Under most of the international treaties just mentioned above, the immunity to which IO employees are subject is equivalent in practice to that enjoyed by diplomatic envoys of the State Members to the organizations (of course IOs are neither sovereign States nor are their staff diplomatic agents of sovereign States). In this sense, they are being afforded the same treatment that is internationally given to a State's representatives, without actually being agents of any State. It is important to point out that diplomatic envoys and other sovereign State civil servants are granted immunity on the understanding that they are acting under the orders of their States and not in their private capacity. As such, they are considered agents

7. *See, e.g.*, U.N. Charter art. 105.

of their States and their actions are to be attributed to the State they are representing. While a State has the means for controlling its diplomatic envoys' actions and is actually responsible for them, the situation with an IO employee is much more complex, since the organization possesses no actual judicial means (or otherwise) of ensuring its employee's behavior will truly represent the interests of the organization.[8]

A. The "Functional Necessity" of IOs Immunities

In the vast majority of constituent instruments of IOs, immunity is based on the doctrine of "functional necessity." In practice, this means that immunity has little to do with whether an act involved "functions" or "official duties," but rather with the fact that it must serve the proper operation of the organization. In other words, even when the organization or its representatives may be acting outside their functions (as for instance in the case of sexual harassment), they still may be protected by the "functional necessity" doctrine because removing their immunity would hamper the IO's capacity to perform its duties. Taking the functional necessity doctrine as being true, we therefore assume that the organization actually depends on its immunity for being able to function properly. This concept challenges the classical theory on immunity, under which it is to be considered a privilege granted on the basis of comity, which would in turn mean that no immunity is truly necessary in the first place. This makes functional necessity a rather interesting concept, since it seems to be contradictory with the nature of any kind of immunity.

As a consequence of the functional necessity doctrine, the extent of the immunity is really dependent upon the interpretation and scope given to the functional necessity doctrine. The dominant interpretation has been astonishingly broad in its grant of immunity, resulting in IOs enjoying absolute immunity, far beyond what sovereign States currently enjoy in the world today (as Messrs. Pinochet and Milosevic would readily testify to were they still alive).

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8. While a receiving State may generally not prosecute a diplomat from a sending State in its own Courts for a criminal offense, it may render the offending diplomat *persona non grata*, requiring the expatriation of the diplomat, and under the Vienna Convention on Diplomatic Relations, the sending State is under an obligation to try the diplomat at home under its own laws for the alleged offense. In the case of staff members of IOs who are afforded diplomatic immunity, even if they are made PNG and expatriated to their home state for a criminal offense, their home state can generally not prosecute such a staff member unless the staff member's immunity is lifted by the IO.

B. IOs Immunity in the United States

The United States issued the International Organizations Immunities Act (IOIA) in 1945,[9] rather than acceding to the UN Treaty on Privileges and Immunities which was promulgated at the same time but seen by many in the U.S. Congress as far exceeding what was necessary or acceptable for IOs (indeed because international organizations, including the United Nations, were not in fact sovereign States). By this act, IOs are granted "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."[10] IOs are also afforded immunity from search and seizure of property. As mentioned above, at the time of passing of this Act, sovereign immunity was still absolute. Therefore, through this Act, the United States Government codified the absolute immunity of IOs in the United States.

However, in 1976, the restrictive theory on foreign governments' immunities was incorporated in the United States through the Foreign Sovereign Immunities Act (FSIA), thus limiting the immunity of foreign States to acts *de jure imperii*.[11] The so-called restrictive immunity approach had actually been adopted by the U.S. State Department in practice beginning in 1952.[12]

Nevertheless, the old absolute approach to immunity contained in the IOIA was never updated, therefore bringing into being a differentiation between the immunities legally enjoyed by sovereign States and those enjoyed by IOs. In the end, regardless of the fact that IO's immunities were in the beginning based on those afforded to foreign sovereign States, the

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9. Although still in effect and controlling the immunities of IOs operating in the United States which are not covered by the UN Treaty on Privileges and Immunities, and having been superseded by said UN Treaty with regard to UN entities (which was signed by the U.S. in 1945, but never ratified and brought into legal effect in the United States until 1970, during the Nixon Administration), IOIA required the U.S. President to nominate each IO which was to enjoy the immunities of the IOIA by executive order. It also provided that by similar Executive Order the U.S. President could unilaterally lift the immunity of an IO or its officials. *International Organization Defined; Authority of President*, 22 U.S.C. § 288 (1954).

10. International Organizations Immunities Act, § 2(b), ch. 652, 59 Stat. 669 (1945).

11. Davis Graham & Stubbs LLP, *A Primer on Foreign Sovereign Immunity*, WORLD SERVICES GROUP, Mar. 8, 2006, http://www.hg.org/articles/article_1223.html (last visited Feb. 20, 2010).

12. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a State, but not with respect to private acts (*jure gestionis*) . . . it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Tate Letter, 26 DEP'T ST. BULL. 984, 984–85 (1952).

former became much broader than the latter, creating a whole set of complex and irreconcilable judicial situations, which will be discussed further below.

In the United States, the combination of a liberal interpretation of immunity regarding both the IOIA and the functional necessity doctrine has made the question of which legal source an organization bases its immunity on rather irrelevant, for the absolute immunity approach is enough in itself to confer immunity upon an IO, regardless of the special provisions contained in its constituent instrument or in any other legal source.

C. The Special Status of the United Nations Organization

The United Nations Organization, rightly or wrongly, holds a special place in international law. Its immunity is very well established and is based on two sources. The first one is the Charter of the United Nations (UN Charter), which contains a provision regarding immunity in its Article 105 Section One, which states that it "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."[13] This wording is clearly linked to the functional necessity doctrine, which means nothing more than an assumption of absolute immunity for the UN in the territories of all its Member States.

The second source is the General Convention on the Privileges and Immunities of the United Nations (General Convention), which allows the UN to "enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[14] These two provisions are cumulative, although the immunity granted by the UN Charter seems to have a wider scope.

It is important to point out that the UN Charter also holds a special place in international law, due to its Article 103, which provides that "[i]n 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."[15]

The UN Charter thus takes precedence over any other international treaty of any kind. In this sense, even if the scope of the General Convention's immunities was not narrower or equal to that under the UN

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13. U.N. Charter art. 105, § 1.

14. General Convention on the Privileges and Immunities of the United Nations, art. 2, § 2, 43 AM. J. INT'L L. No.1 supp. (1949) [hereinafter General Convention].

15. U.N. Charter art. 103.

Charter, it would make no difference, since the Charter's Article 103 would prevail in any case.

Regarding the means of dispute settlement, the General Convention stipulates in its Article 8, Section 29 that "The United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."[16]

The effect of this provision has been that the UN and other IOs have implemented arbitration clauses in their purchase contracts, lease agreements and other similar arrangements, in order to be able to solve disputes under its own terms, preventing it from ever being subjected to any national court.

D. Internal Dispute Settlement Mechanisms

In particular, concerning employment issues, in most IOs, there exists an internal dispute settlement mechanism, in the form of an administrative tribunal or joint staff management advisory body. Employees must have recourse to these institutions, since immunity of IOs prevents them from being able to sue their employers before national courts.

In the early days of IOs, there was no appeal possible to the decisions of these mechanisms. Today the situation is somewhat different and most organizations employ some kind of quasi-judicial forum where employees may appeal adverse decisions. Larger organizations usually have their own, while smaller ones may opt to use the United Nations Administrative Tribunal (UNAT) or the International Labor Organization Administrative Tribunal (ILOAT).

III. IMMUNITY AS OPPOSED TO NATIONAL AND INTERNATIONAL LAW

Under United States law, Constitutional provisions are superior to both federal law and also to any IO constituent instrument or charter (including the UN Charter). This becomes evident when taking a look at Article VI of the U.S. Constitution. This Article states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[17] Derived from this provision comes the conclusion that no legal text, international or otherwise, could possibly grant immunity in violation of the Constitution.

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16. General Convention, art. 8 § 29, 43 AM. J. INT'L L. No. 1 supp. (1949).

17. U.S. CONST. art. VI.

The ways in which an instrument granting immunity could be held to be unconstitutional are several and will be discussed below.

Alternatively, international law also includes notions that may be deemed of a universal nature, which are in some cases clearly contrary to the theories granting immunity to IOs. The clearest example comes to mind when Human Rights law comes into play, where it becomes evident that some types of international obligations should take precedence over others, at least for the sake of logic and justice itself. Such cases will also be discussed below.

A. Violation of Due Process of Law

IO's internal dispute settlement mechanisms have been criticized for being deficient in general and for not being able to provide an effective remedy to employees with legal disputes in particular. As a consequence, there arise several areas of concern regarding these tribunals or internal advisory boards, where a case for the violation of substantive due process could be made.

To begin with, the independence of the hearings, which constitutes an established due process right, has been a recurrent issue of concern. Although the administrative tribunals assert themselves to be independent from the decision-making organs of their parent organizations in their constituent instruments, it is precisely the defendant organizations with no input from staff who appoint the members of the tribunals to serve for renewable short periods of time.[18] Under this scheme, it might appear that any judge who rules against the organization is therefore running the risk of not being re-appointed for serving a second, rather lucrative term.[19]

Many administrative tribunals do not publish their decisions in due time, because some of them are only made available to the public after being collected in volumes. Further, some decisions fail to mention the names of the judges who were sitting during the case; indeed, most litigants before international administrative tribunals do not know the names of the

18. Effective 1 July 2009, the UN instituted a new so-called internal justice system which dramatically changes, at least on paper, the way in which internal staff disputes and grievances are adjudicated. For the purposes of this paper, it is still too early to tell if the procedural changes called for in the new system will in practice be implemented to any discernible difference, and will not be addressed in detail herein. Press Release, Dep't of Pub. Info., Reform of United Nations Internal Justice System, Security Management, Tsunami, U.N. Doc. GA/AB/3795 (March 30, 2007).

19. Judges in both the ILOAT and UNAT systems are paid by the case, with the judge authoring the controlling decision paid three or four times more than his panel peers (which may explain why there are so few dissents written in either the ILOAT or UNAT—no extra compensation is paid for a dissent. The Secretary-General, *Report of the Secretary-General on the Administration of Justice in the Secretariat*, ¶ 41, U.N. Doc. A/56/800 (Feb. 13, 2002).

judges who will be adjudicating their appeals in advance, thereby depriving them of the right to object to the panel composition in the event there is a real or perceived conflict of interest with one or more of the judges. In addition, the procedures under which the trials are held usually do not meet minimum due process standards;[20] many administrative tribunals do not allow for oral hearings at which witnesses may be called to testify in the presence of their parties or their representatives. Although in the statutes of many of these administrative tribunals there exist provisions providing for the possibility of oral proceedings, these are rarely used.[21]

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20. The *Redesign Panel on the United Nations System of Administration of Justice* was established by the Secretary-General of the United Nations in February 2006 pursuant to Resolution 59/283, in which the General Assembly requested him to establish a panel of external, independent experts to review and possibly redesign the system of administration of justice at the United Nations [Press release—*see* http://www.un.org/News/Press/docs/2006/sga971.doc.htm.] The Panel included in its membership Justice Mary Gaudron, of the International Labour Organization Administrative Tribunal and former Judge of the Australian High Court, Ms. Louise Otis, who is an alternative dispute resolution expert, and Dr. Ahmed El-Kosheri, being a former Judge of the Administrative Tribunal of the African Development Bank, ad hoc Judge of the International Court of Justice and the Vice-President of the International Chamber of Commerce's Court of Arbitration. Press Release, The Secretary-General, Secretary-General Appoints Independent Experts to Redesign System of Administration of Justice, U.N. Doc. SG/A/971 (Dec. 1, 2006).

The Redesign Panel considered both the internal and external and informal and formal modes of administration of justice within the United Nations system, which includes the UNDP. In the section headed "Overview" the Review Panel stated:

> The Redesign Panel found that the administration of justice in the United Nations is neither professional nor independent. The system of administration of justice as it currently stands is extremely slow, underresourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments.

Report of the Redesign Panel on the United Nations System of Administrative Justice, ¶ 5, U.N. Doc. A/61/205 (July 28, 2006) (emphasis added) [hereinafter Redesign Panel].

In discussing the jurisdictional immunities enjoyed by the United Nations the Review Panel stated:

> [As] a result of the jurisdictional immunities enjoyed by the Organization, staff members have no external recourse to the legal systems of Member States, while the Secretary-General may waive their functional immunity from action under national legal systems in certain cases. Thus, it is essential to have an internal justice system that both provides adequate safeguards and ensures accountability of staff members. The Redesign Panel finds that the system that exists at present is fundamentally inadequate for the task of administering justice.

Redesign Panel, ¶ 7, U.N. Doc. A/61/205 (July 28, 2006) (emphasis added).

21. The ILOAT has not held an oral argument or allowed the testimony of witnesses since 1989; the UNAT has held hearings on average once every 5 years. August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 INT'L ORG. L. REV. 59, 108 (2004).

In the cases of UNAT and ILOAT, even when oral proceedings are permitted, these may only be conducted after the approval of the President of the tribunal, who may cast a negative vote without further explanation. It is therefore not surprising that this kind of request is seldom approved.[22] Regarding the calling of witnesses, the tribunals may arbitrarily decide to refuse such a motion. In this context, we could cite the example of the World Bank Administrative Tribunal, which, eleven years after its establishment in 1981 had never allowed for the calling of witnesses in any of the cases it had heard at that point of its existence.[23]

It is important to point out that these tribunals deal with highly important and delicate issues, not merely "administrative" disputes as their names may mislead us to believe. Many of the disputes being decided deal with serious issues of harassment, personal injury to staff on duty, and sexual assault or arbitrary or discriminatory treatment of employees by the IOs. This is why it can be said that when dealing with these issues, the tribunals often fall short of what would be defined as due process both by U.S. and international law.

1. Due Process Under United States Law

The notion of due process of law is contained in the Fifth and Fourteenth Amendments of the U.S. Constitution, stating that no person shall "be deprived of life, liberty, or property, without due process of law."[24] These provisions therefore impose a constitutional limitation upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of the case.

The right of access to a court of law lies on the very essence of civil liberty. The Supreme Court has held in *Powell v. Alabama* that, "notice and hearing were the preliminary steps to passing an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process. . . ."[25] Accordingly, if a court were to dismiss a complaint for lack of jurisdiction under the argument of IO immunity, it would therefore be depriving the plaintiff of due process under the Fifth and Fourteenth Amendments. Such an action would undoubtedly be unconstitutional.

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22. For instance, from 1973 to 1985, 110 requests for oral proceedings were made before ILOAT. Only three of these were granted. Joint Inspection Unit, *Administration of Justice at the United Nations*, ¶ 69, JIU/REP/2000/1 (2000).

23. C.F. Amerasinghe, *Judging with and Legal Advising in International Organizations*, 2 CHI. J. INT'L L. 283, 287 (2001).

24. U.S. CONST. amend, V & XIV, § 1.

25. 53 S. Ct. 55, 64 (1932) (emphasis added).

While it has been argued that the administrative tribunals of IOs provide the plaintiffs with an available alternative forum to file their complaints, it becomes evident from the discussion above that these fora and their standards provide no reasonable just substitute, since they cannot be deemed to be independent, or to meet the minimum due process requirements under international law[26] or the U.S. Constitution.[27]

2. Due Process Under International Law

The notion of due process of law has long been considered as the fundamental basis of any reliable legal system. Internationally, it has been codified in the most important human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). The ICCPR states in its Article II, Section 3 that States Parties undertake:

> a) To ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy . . . ,
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> b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other

26. *See* Redesign Panel, U.N. Doc. A/61/205 (July 28, 2006).

27. In considering the constitutionality of arbitration agreements in the employment context, which by analogy one could argue is how the internal grievance procedures of IOs function, the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1654 (1991) set out the minimum due process standards for alternative dispute resolution procedure (that the agreement waiving an employee's right to litigate his claims in a national court be made knowingly and voluntarily, knowing the background of the arbitrators and being able to challenge them to recuse themselves where there is evident partiality or corruption, adequate discovery procedures, and open and public hearing of the claims before the tribunal)—neither the ILOAT nor the UNAT meet these minimum standards—*see* "The Non-Compliance of the ILOAT with respect to Article Six of the ECHR"; by the Amsterdam International Law Clinic,Keith J. Webb & Arthur van Neck, *The Non-Compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 6 ECHR*, AILC, 1, 32 (Aug. 3, 2005) *available at* http://www.caioch.org/reforms/Non_compl_ILOAT_wrt_Art6_EHCR.pdf, (last visited Jan. 20, 2010) and "The Report of the Redesign Panel on the United Nations Administration of Internal Justice" *see* Redesign Panel on the United Nations System of Administrative Justice, ¶ 73, U.N. Doc. A/61/205 (July 28, 2006). In the case of IO/UN staff members, their employment contracts or letters of appointment never mention or explain that by joining such organizations, they are waiving their rights to litigate any claims against their employers in a national court.

> competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.[28]

It further says in its Article XIV: "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[29]

Similar provisions can be found in the UDHR Articles 8 and 10. Article 8 says that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. . . ." Article Ten states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[30]

Access to a court of law as well as the notion of the right to an effective remedy are the essential components to be found in these provisions. The denial of such rights by the dismissal of a case on the grounds of immunity of an IO would therefore constitute nothing less than a flagrant violation of the State's obligations to grant and protect these rights.

The immunity of IOs would also therefore appear to violate the ICCPR, Article II, Section 3, to which the United States is a party, by failing to grant the appellant an effective remedy for her damage claims which assert several fundamental liberty interests against the defendants.[31]

Although the ICCPR is not self-executing, and although the United States Congress has not passed any implementing legislation for the ICCPR, the ICCPR is binding upon the United States as a signatory thereto, which is evidenced from a straightforward reading of its Article II Section 3, quoted above. Therefore, the barring of a claim under the ICCPR (or an equivalent right found under domestic U.S. law) by implementation of immunity would appear to be a violation of said Article.

The ICCPR cannot be binding upon a government and contain language invoking a remedy for individual violations and yet not infer a domestic basis for raising this treaty as a defense to the offending government action.[32] This is true notwithstanding the U.S. Senate's

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28. International Covenant on Civil and Political Rights, U.N., Dec. 19, 1966, 999 TREATY SERIES 174.

29. *Id.* at 176.

30. Universal Declaration of Human Rights, G.A. Res. 217A, arts. 8 & 10.

31. International Covenant on Civil and Political Rights, Art. 2, § 3, 999 U.N.T.S. 171, 6 I.L.M. 368, 369 (Dec. 16, 1966).

32. *See* United States v. Hongla-Yamache, 55 F. Supp. 2d 74, 76–77 (D. Mass., 1999) (in which the Court recognized the right and standing of a litigant to raise an international treaty as a

declaration announcing that the ICCPR is non-self-executing and does not create any new private rights of action not already found in domestic United States law.[33]

Moreover, if the United States had intended the non-self-executing declaration to apply to defense claims as well as private rights of action, Article II would negate the very purpose of the treaty as a human rights agreement established to protect individuals within a government's jurisdiction.[34]

It is also clear that while the ICCPR does not create any new "private rights of action" enforceable under domestic U.S. law, such new rights of action were not deemed necessary by the U.S. Government for it considered that the fundamental freedoms and rights enumerated in the ICCPR were already guaranteed as a matter of U.S. law.[35]

In further support of the assertion herein that the terms of Article II of the ICCPR prevent a national court from invoking the immunity of an IO bar an appellant's tort or contract claims. Soon after its adoption, the U.S. Senate Committee on Foreign Relations declared the ICCPR to be non-self-

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defense to violations of the treaty even when the treaty was not self-executing (in that case, the Vienna Convention on Consular Relations)).

33. Beyond the general declaration of the Senate that the ICCPR is non-self-executing, the U.S. government has not declared an understanding or reservation to Article Two of the ICCPR.

34. *See* U.N. GAOR, Human Rights Committee, 52nd Sess., 1382nd mtg. at 4, U.N. Doc. CCPR/C/21/Rev.1/Add. 6 (Nov. 11, 1994) (stating that the purpose of the ICCPR is "that rights contained therein should be ensured to all those under a state party's jurisdiction").

35. In its Initial Report to the Human Rights Committee on the ICCPR, the United States stated:

> This declaration [that Articles 1 through 27 are not self-executing] did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts. As indicated throughout this report, however, the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. In some cases, it was considered necessary to take a substantive reservation to specific provisions of the Covenant, or to clarify the interpretation given to a provision through the adoption of an understanding.

Initial Reports of State Parties due in 1993: United States of America, CCPR/C/81/Add.4, (Aug. 24, 1994); *see also* United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, May 1992, 31 I.L.M. 645, 645, *reproduced from* U.S. Senate Executive Report 102–23 (102d Cong., 2d Sess.).

executing only with respect "to private causes of action"—it does not contain the same statement with regard to raising the ICCPR as a defense.[36]

A private cause of action is not the same thing as a defense. A recent U.S. District Court decision essentially accepted the distinction between a "private right of action" and a defense raised for the purpose of determining whether the ICCPR itself was self-executing.[37] In a number of older cases where a treaty is raised as a defense rather than as a private cause of action, the United States courts have generally not reached the issue as to whether or not the treaty is self-executing, but rather address whether the defense is valid under the subject treaty, irrespective of the treaty's non-self-executing nature.[38]

Again, more recently, a U.S. District Court reached the merits of a claim without discussing the non-self-executing nature of the ICCPR, where the defendants, who were accused of assaulting several Drug Enforcement Administration agents, raised the ICCPR as a defense to the assault indictment. The court accepted the defense without addressing the issue of self-execution, and proceeded to the merits of the defense, thereby implicitly accepting the application of the ICCPR when used as a defense.[39]

Finally, the Restatement (Third) of the Foreign Relations Law of the United States, Section 111, Reporter's Note five, states that negative treaty provisions (such as those found in Article II of the ICCPR) are self-executing (quoting *Commonwealth v. Hawes*),[40] and therefore, implementation language is not necessary: "[If a treaty states] that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override these limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the 'supreme law of the land.'"[41]

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36. *See* United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, May 1992, 31 I.L.M. 645, 657, *reproduced from* U.S. Senate Executive Report 102–23 (102d Cong., 2d Sess.).

37. Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000).

38. *See* Kolovrat v. Oregon, 81 S. Ct. 922, 925 (1961); Cook v. United States, 288 U.S. 102, 121–22 (1933); Pastone v. Pennsylvania, 232 U.S. 138, 145–46 (1914); and United States v. Rauscher, 119 U.S. 407, 420 (1886).

39. United States v. Benitez, 28 F. Supp. 1361, 1363–64 (S.D. Fla. 1998).

40. 76 Ky. 697, 702–03 (1878)

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, n.5 (1986).

As mentioned before, the case with the UN is particular, since some have argued its Charter takes precedence over any other international obligation of the State in question.[42] At first glance it would seem that States would be obliged to give precedence to Article 105 of the Charter, therefore granting immunity to the organization. Nevertheless, the same UN Charter also contains provisions such as its Articles 55 and 56, by which the Member States undertake to promote the universal respect and observance of human rights and fundamental freedoms. As a consequence, Member States of the UN would also have a positive duty to enforce the UN Charter's human rights obligations over and above any other international law granting immunity, which actually makes more sense both in law and in fact than upholding the IOs immunity defense before a national court.

In the case of all other IOs, since there is no provision granting their constituent instruments precedent over any other treaty, it could be more easily argued that their obligations under the human rights conventions as well as under customary international law are to be sustained and defended before any other obligation the States may have contracted.

Interestingly, until the passage of the International Organization Immunities Act (IOIA) in 1945,[43] the U.S. government had consistently taken the position that there was no basis in the U.S. law or treaties or in customary international law to extend the privileges and immunities of foreign diplomats to personnel of international organizations.[44] Even with the passage of the IOIA, the Senate believed this to be the controlling interpretation of the IOIA: "It should be noted that under this . . . (Act) there would not be extended full diplomatic immunity from judicial process as in the case of diplomatic officers."[45]

As absolute foreign sovereign immunity has been repudiated by virtually all other countries, and as judicial scrutiny of the conduct of States has been expanded in both domestic and foreign courts, it is not clear why IOs should need to be presumptively exempted from similar review. There is no compelling jurisprudential or policy reason why a collection of States

42. This is certainly not an accepted view in the United States where the U.S. Constitution is seen as the supreme law of the land.

43. International Organization Defined; Authority of President, 22 U.S.C. § 288 (1954).

44. Lawrence Preuss, *The International Organization Immunities Act*, 40 AM. J. INT'L L. 332, 333 (1946).

45. U.S. Senate, Committee on Finance, Report on Immunities for International Organizations, S. Rep. N°. 861, 79th Cong., 1st Sess. (1945) reprinted in the U.S. Senate, Committee on Foreign Relations, Subcommittee on the UN Charter, Review of the UN Charter, Senate Doc. N°. 87, 83rd Cong., 1st Sess., 88, 92 (1954).

acting through an international organization should require substantially broader immunity than its Member States enjoy when they act alone.

States may not evade their international obligations by acting through international organizations granting them broader immunities than their Member States enjoy, lest that create perverse incentives for Member Countries to use them to circumvent their own obligations.[46]

The argument that IOs and their officials need expansive immunities to achieve their organizational purposes also overlooks the current size, stature, and influence of many of these institutions. Expansive jurisdictional immunity arguably may have been a functional requirement over a half century ago, when these organizations were fledgling entities. But this is not the case today. The most prominent IOs are now well-funded and firmly established, and have considerable legal and political resources at their disposal to defend their independence and organizational prerogatives. In fact, the power and influence of the more prominent organizations have expanded to the point where they are largely insulated from overreaching by most of their Members States.

B. Denial of the Right to Petition the Government for Redress of Grievances

The United States Supreme Court has been of the opinion that the right to petition the Government for redress of grievances is "among the most precious of liberties safeguarded by the Bill of Rights."[47]

The right of petition for redress of grievances (which has been found by the Supreme Court to include the act of bringing a lawsuit) envisaged by the U.S. Constitution and case law would be nullified if the Government could simply prevent their assertion or vindication by immunizing certain non-governmental defendants (such as the UN or IOs) from being sued before its courts.

C. Violation to the Right to a Trial by Jury

Under the Seventh Amendment, the U.S. Constitution grants its citizens the right of trial by jury. As with the previous Amendments discussed, in granting immunity from suit to certain kind of defendants, the Government would be violating this constitutional provision and therefore depriving the plaintiff of his right to a trial by jury.

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46. Matthews v. United Kingdom, ECHR Application No. 24833/94, Judgment of 18 February 1999, para. 32 (European Convention on Human Rights does not exclude the transfer of competences to international organizations provided that states continue to "secure" Convention rights).

47. United Mine Workers v. Illinois State Bar Ass'n, 88 S. Ct. 353, 356 (1967).

Even so, it is common for courts both in the United States and elsewhere to hold that IO immunities are indeed absolute and are to be sustained as a defense on the admissibility of the case, therefore not even granting a review on the merits of the case by the court.

IV. ALTERNATIVES TO ABSOLUTE IMMUNITY

Under the current regime of immunity afforded to IOs by most national courts, it seems therefore that plaintiffs are left with no available remedy for addressing their injuries resulting from tortious conduct or breach of contracts. This is precisely why the absolute immunity theory does not correspond to today's realities, and why alternatives are very much needed. In this sense, there are a number of real and practical ways in which absolute immunity could be transformed into a scheme where the plaintiff's rights are also respected.

A. Functional Immunity as an Affirmative Defense to be Pleaded Rather than an Absolute Bar

As discussed above, State courts normally apply the absolute immunity theory as a bar on the admissibility of a case, rather than requiring that immunity be raised as a defense on the merits. As a consequence, most cases are dismissed without giving the plaintiffs a chance to plead the facts of the case before the court, or to otherwise argue that the conduct complained of is neither necessary to the functioning of the IO nor part of the IO's treaty mandate.

An alternative to this practice, which would actually be in line with many national constitutional provisions, would be for courts to adopt the "functional immunity" approach as a defense on the merits, to be pleaded by the IO once the court has affirmed jurisdiction on the case. In this way, it would be for the IO to convince the court that being sued in that specific case would hamper the correct functioning of the organization and therefore its immunity should be preserved in the case at hand. In this regard, some kind of test could be developed through case law, in order to determine in which cases and under which conditions immunity could be upheld. It is necessary to mention that under this scenario, the only cases in which immunity could remain would be those in which it proved absolutely necessary for the IO to be immune from prosecution in order to continue carrying out the mandate for which it was created.

Of course, devising a methodology to distinguish the worthy actions of IOs which deserve immunity is no mean feat. The authors would suggest that the system currently employed in the United States to circumvent sovereign immunity (actions under Section 1983 of the United States

Federal Code,[48] so-called Bivens actions,[49] and the Federal Tort Claims Act) would be the starting point for such a comprehensive model.

In this manner, courts would ensure the proper application of functional immunities on a case-by-case basis, and plaintiffs would get a chance to have the facts of their cases heard before a neutral court, in accordance with their fundamental right guarantees.

Applying functional immunity in its true form—that is, when immunity is truly justified by the Organization's necessity of carrying out its functions for the common good—would actually bring to an end the incorrect prevailing assumption today that functional immunity has to be equivalent to absolute immunity.

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48. The Act, 42 U.S.C. § 1983 (1996), was originally enacted a few years after the U.S. Civil War. One of the chief reasons for its passage was to protect southern blacks from the KKK by providing a civil remedy for abuses then being committed in the South. The statute has been subject to only minor changes since then, but has been the subject of voluminous interpretation by courts. It provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

For most of its history, the Act had very little effect. The legal community did not think the statute served as a check on state officials, and did not often litigate under the statute. However, this changed in 1961 when the US Supreme Court decided *Monroe v. Pape*, 365 U.S. 170, 171 (1961), reopening interest in the statute. Now the statute stands as one of the most powerful authorities with which U.S. State and federal courts may protect those whose rights are deprived.

49. The US Supreme Court laid down a rule that it will imply a private right of action for monetary damages where no other federal remedy is provided for the vindication of a Constitutional right, based on the principle that for 'every wrong, there is a remedy'. The Court reasoned based upon a presumption that where there is a violation of a right, the plaintiff can recover whatever he could recover under any civil action, unless Congress has expressly curtailed that right of recovery, or there exist some "special factor counseling hesitation." Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999, 2005 (1971).

B. Creation of Specialized Courts to Deal with the Claims of IO Staff Members and Third Parties Injured by the Tortious Behavior or Contractual Breach by an IO

The creation of independent, specialized courts to deal with specific disputes, is not precisely new. Perhaps the most evident example is the Iran-U.S. Claims Tribunal, which was "established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States,"[50] as a response to the disputes that had arisen during the 1979 Iranian Revolution. The tribunal was indeed conceived as a permanent forum for conducting binding third-party arbitration, avoiding in that way the issue of sovereign immunity of both States.

A similar scheme could be devised with the purpose of solving certain types of disputes involving IOs, in which a forum with permanent standing would have jurisdiction to hear the cases and to give binding judgments. In this manner, the immunity of the IOs would no longer be a bar to adjudicating the case, since they would be considered to have expressly waived them by creating such a forum. Of course, ensuring that such specialized courts were truly independent from the Members States and IOs is a huge burden to be overcome.

C. True Independent Arbitration

Along the same line as the previous proposal, truly independent arbitration proceedings could be entered in order to solve disputes between IOs and private individuals. Instead of having a permanent forum to hear these cases, *ad hoc* arbitral tribunals could be established on a case-by-case basis to render binding awards on specific disputes.

The key issue with this system is that both parties would appoint independent arbitrators to decide the case, unlike the existent internal fora, in which judges are chosen by the same IOs against whom the cases are presented. By nominating arbitrators, their impartiality would be guaranteed and therefore the system of justice administration would not be compromised as it is nowadays.

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50. Iran–United States Claims Tribunal, *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, art. 2 (1) (Jan. 19, 1981), *available at* http://www.iusct.org/ (last visited Mar. 10, 2010).

D. Qui Tam for IOs

In the United States, the notion of *qui tam* has been codified in the U.S. Federal Fraud Claims Act. If, following this example, IOs were to implement a similar provision allowing their employees to report fraud within the Organization, and to receive a part of the amounts recovered as a result of their reporting, cases of fraud and mismanagement could be addressed through this legal avenue. In this sense, employees would be encouraged on one hand, to avoid being involved in these situations, and on the other hand, would demand from the IO clean processes and truly competent fora to hear these complaints.

E. Reform Through Litigation

Reforming IO's constituent instruments has proven one of the most difficult tasks on the international agenda. It is no secret that, for instance, the UN Charter has only been formally amended with regards to the number of Member States in its organs. Every single other reform that the UN has gone through has had to be done through the practice of the organization rather than by statutory reform. Following this line of thought, even if the UN Charter's Article 105 would be almost impossible to amend, it could be transformed—although not literally reformed—through a series of judicial decisions, rendered before several national courts, in which the provisions related to immunity would be interpreted in a restrictive way, contrary to the absolute approach that still persists. One of the authors currently has two cases pending before the U.S. Federal Court of Appeals for the second Circuit in which the constitutionality of the immunities of the United Nations and the World Meteorological Organization under United States law are at issue.[51]

F. Reducing Absolute Immunity Through Statutory Measures

In the United States, absolute governmental immunity no longer exists. It has been reduced by the introduction of various statutory measures (such as the U.S. Code Section 1983, so-called Bivens actions, and the Federal Tort Claims Act). On the contrary, as has been evidenced above, the immunity of IOs remains absolute, with no real (or even functional) justification anymore. In the same manner that sovereign immunities and

51. Brzak v. United Nations, Annan, Lubbers *et al.* Docket N° 08cv2799, and Veiga v. World Meteorological Organisation, Jarraud, *et al.* Docket N°. 08cv3999. The cases were argued in May 2009, and judgment in one is still pending. In *Brzak* the United States Court of Appeals for the Second Circuit dismissed the claim on March 2, 2010, however, the plaintiffs intend to seek relief from the United States Supreme Court.

privileges have been limited by these acts, statutory measures restricting the immunity of IOs before national courts could be implemented in order to set limits on these, although that does not seem likely to happen anytime soon.

V. CONCLUSIONS

The notion of sovereign immunity dates back several centuries. It was brought into being in an epoch in which monarchs enjoyed absolute power to do as they pleased and could not be restrained by others except generally by force. The constant change of the international scenario has forced sovereigns to adapt to new conditions, in which there are monarchs no more and sovereign immunity, although still present, has at least been somewhat restricted.

The immunities and privileges first granted to International Organizations were intended to aid them into correctly evolving and taking their place in the international arena. This function can nowadays be said to have been more than fully accomplished—International Organizations are properly established and therefore do not need this excessive protection anymore.

Quite to the contrary, it could be argued that the present situation calls for a further process of evolution of IOs immunities, since this scheme no longer fits the current needs of the international community. It could even be said that the asserted immunities arguably have a contrary effect—rather than encouraging the good governance of IOs, they enable unethical, illegal and sometimes criminal behavior that as a result of such immunities goes unpunished and often remains unreformed. The repeated and unabated sexual abuse of refugee girls by IO aid workers and UN peacekeepers over the past decade (despite the UN's pitiful so-called "zero tolerance" policy for such atrocities) is a prime example.

Sovereign States and their leaders under current doctrines of jurisdictional immunity, although somewhat free to brutalize whom they please within their own territory, with little fear of accountability for such impunity, still must be concerned about the International Criminal Court, the UN Security Council, as well as extra-territorial tort claim statutes such as the U.S. Alien Tort Claims Act. It would indeed be a grave mistake to send the IOs and their officials the message that they can now enjoy the same freedom to act with impunity within their own sphere, particularly as some IO staff will and indeed have developed a sense of being above the law.

Immunities may at first glance seem beneficial to the UN and other international organizations but may ultimately prove counterproductive. One should consider that the vast immunities of these organizations will give the impression that they can get away with abusing the very principles for which they were created to promote.

It is more than evident that limiting of IOs immunities would only serve the proper administration of justice. If immunities were to be conceived under a system where, for instance, IOs could retain their immunity so long as their actions were deemed to be consistent with their functional necessity doctrine as determined by some national court or another truly independent body, the organization's functions would not be affected by unfounded lawsuits, but at the same time, national and international law would always be respected. This is of particular importance in the case of human rights law and constitutional provisions, as mentioned earlier.

In closing, the authors wish for the reader to consider the following quotations which aptly summarize the pressing rationale for eliminating the absolute immunity currently enjoyed by IOs which serve simply as an impediment to the long-overdue meaningful reform of such entities:

"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor." U.S. President Theodore Roosevelt.

"When plunder becomes a way of life for a group of men living together in society, they create for themselves in the course of time a legal system that authorizes it and a moral code that glorifies it." Frederic Bastiat, 'The Law'.[52]

52. Rodrigue Tremblay, *The Moral Dimension of Things*, DISSIDENT VOICE, Mar. 6, 2010, http://dissidentvoice.org/2010/03/the-moral-dimension-of-things/ (last visited Mar. 13, 2010).