

MR. BAN—TEAR DOWN THE U.N.’S WALL OF IMMUNITY/IMPUNITY (BEFORE A NATIONAL COURT DOES)!!

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I. BACKGROUND

Immunity has been proven to be not only a living anachronism, but one which often leads to impunity for the worst kinds of rights violations. It was precisely real and feared impunity that led to changes in the way in which state immunity was understood and applied, therefore, creating the very welcomed distinction between the different qualities under which the acts of a state could be catalogued.¹ Although it is not the purpose of this article to revise the history and development of the several theories regarding immunity, the authors believe it necessary to start by briefly recalling from where immunities come—a sovereign act of comity—to where they should be redirected to—that is, a world in which international actors are accountable for their acts.

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1. Acts *de jure imperii*—where the State is acting on its sovereign capacity—and acts *de jure gestionis*—where the State engages in administrative affairs, such as commercial contracts.

In other words, immunity should promote the existence of a legal framework where every actor can be held responsible for their actions, whether they are acting on their own, on instructions from a third party, as part of an international operation, on behalf of someone else, or under any other circumstances. Ideal as this may sound, this is actually what marks the difference between the rule of law and the rule of man and the very thing which lies precisely at the base of every legal system, thus providing its subjects with a system that grants them judicial protection as well as resources for claiming their rights.²

Let us keep in mind that the regime under which absolute immunity of states prevailed was one that existed several decades ago, i.e., before World

2. This includes the access that every person must be granted to effective remedies against violations to their rights. As such, this principle has been codified in several core Human Rights instruments. For instance, Article 2.3 of the International Covenant on Civil and Political Rights reads:

Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- 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 competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171. ¶ 3.

Another instrument codifying this principle is Article 8 of the Universal Declaration of Human Rights, which states 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." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71, art. 12 (1948). Perhaps the clearest example lies within the Interamerican Convention on Human Rights, which actually calls it "the Right to Judicial Protection" and codifies it in its Article 25, as follows:

Article 25. Right to Judicial Protection

- 1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
- 2) The States Parties undertake:
 - a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b) to develop the possibilities of judicial remedy; and
 - c) to ensure that the competent authorities shall enforce such remedies when granted.

Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

War II.³ The international scenario was governed and decided by the actions of the states, and the only subjects of International Law were thus States. As such, each sovereign state was free to do as it saw fit.

The notion of absolute immunity was inherited by this system of states from the previous one—a system where sovereign rulers had the power to impose their will upon their subjects and were not able to be brought before any other sovereign's court.⁴ In other words, absolute sovereign immunity came into being as a privilege that sovereigns recognized with regards to each other, thus enabling them to perform any kind of act with no repercussions whatsoever. It is important to recall that sovereigns granted such immunities on the basis of comity and correctly considered them to be privileges, not rights of any kind.⁵

When the international system stopped being one of relations among sovereigns, but among sovereign states, many of the rules that applied to the previous setting were automatically inherited by the new system.⁶ Sadly, this was the case for the rules regarding immunity.

This is how states became absolutely immune from prosecution of any kind, presumably because very little thought was given to the matter. Nevertheless, with the passing of time, it became evident that if the system was to work properly—especially regarding commercial deals between states and private individuals that could be reliable, and, therefore, good for business-making—absolute immunity would have to make way for judicial protection.

This was how the preconceived and never-before-questioned rules regarding immunity underwent a deep transformation over the last half century that resulted in a new scheme, where states could retain some of the privileges that were afforded to them, just by the mere fact of being sovereign nations, while they renounced other such privileges for the sake of protecting the international business environment.⁷

Thus came into being the distinction between the different kinds of actions a state could undergo, as a fundamental pillar in the theory of State immunities. States could, from then on, engage in acts that only their capacities of states could afford them, such as conducting an armed invasion in order to protect their own interests, and still be immune from prosecution in foreign jurisdictions: on the other hand, they were no longer

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See generally Edward Patrick Flaherty & Greta L. Rios, *International Organization reform or impunity? Immunity is the problem*, 16 ILSA J. INT'L & COMP. L. 433 (2010).

capable of incurring breaches of commercial contracts and avoiding the legal consequences for such actions.⁸

As International Organizations (IOs) came onto scene, they just adopted the rules of the then existing geo-political system.⁹ That is, they entered into the game and played it applying the absolute immunity rule, simply because at the moment there was no alternative. This was also justified by a functional theory, according to which, IOs needed to be afforded immunity, so as to ensure that they would be able to duly perform their duties without any external interference from sovereign states with their mandates.¹⁰ The reason behind this functional immunity theory was to grant IOs enough range of action so they could get to perform their mandates—as usually, but not always, delegated to them by sovereign states collectively—without obstacles, such as political or financial issues that would distract them from their greater goals.¹¹ Immunity of IOs was also supposed to guarantee their impartiality and thus, their proper functioning.¹²

In 1945, absolute immunity of the United Nations Organization was codified by its Treaty on Privileges and Immunities.¹³ Since then, many aspects of the international arena have shifted, including the ways in which international relations are conducted. Even the notions of who the subjects of international law are have changed.

IOs have expanded and are no longer feeble and in need of protection of any kind.¹⁴ As such, there is no further need for the “functional necessity” doctrine of immunities.¹⁵ Even more, the continuation of such a model is nowadays acting, not as a guarantee that IOs will be able to comply with their mandates of peace and the protection of human rights, but as an obstacle to them attaining these lofty goals.

II. THE SCENARIO TODAY

As the United Nations (U.N.) and its affiliated and specialized agencies take on more and more of the international community’s sovereign dirty work—peace-keeping, protection of refugees, disaster relief,

8. *Id.* at 437.

9. *Id.* 436–38.

10. *Id.* at 437.

11. *Id.*

12. Flaherty & Rios, *supra* note 7, at 436.

13. *Id.* at 438.

14. *Id.* at 454.

15. *Id.*

etc.—and as the size of their staff, who generally enjoy immunity from national or municipal laws, grows apace, the number of incidents where IOs or their officials have caused serious harm or injury to third parties has also grown.¹⁶ A mere small sample of the harm that the IOs, such as the U.N. and its officials inflict on innocent third parties around the world today, many of which victims are those very people such organisations exist to protect and serve, are:

- 1) The introduction of cholera in Haiti, after its devastating January 2010 earthquake by U.N. peacekeepers from Nepal, that killed nearly 6,500 Haitians to-date—and counting with no likely abatement in sight—and sickened almost another half million;
- 2) The siting of a Roma refugee camp in Kosovo by UNHCR on the lead tailings of an abandoned mine that has not surprisingly resulted in the acute lead poisoning and permanent neurological impairment of many of the refugee children;
- 3) The on-going sexual abuse of refugee girls and women by U.N. staff and peacekeepers, despite the U.N.'s professed “zero tolerance” policy;
- 4) The inability or failure of U.N. peacekeepers to stop the mass systematic rape of more than 500 women and girls in Eastern Congo by Rwandan and Congolese rebels in August 2010, through either gross misfeasance or simple cowardice;
- 5) The recent claim of diplomatic immunity by the former head of the International Monetary Fund to try to block a civil suit brought against him by his alleged hotel maid, rape victim.

The on-going tolerance in deed, if not word, of wide-spread sexual harassment within IOs among their staff is another example of this sad state of affairs.¹⁷ In most national societies, criminal and civil tort systems have developed first to compensate innocent victims of wrongful injuries or acts inflicted upon them by others, and also to serve as an incentive for those in a position of trust or responsibility to such innocent victims to discharge their obligations with reasonable care, in the future, lest they be exposed to substantial financial liability for their failure to exercise such care.¹⁸

16. *Id.* at 439.

17. Flaherty & Rios, *supra* note 7, at 443.

18. *Id.* at 454.

In recent years, a whole theory on state responsibility and accountability towards victims of great violations has also developed. At this point, even some of the most heinous state crimes against victims of violent regimes, often vigorously denied, have been investigated by their governments and truth commissions. Most modern states now grant proper judicial remedies and have provided proper legal recourse in the cases of thousands of victims whose victimizers were, in many cases, agents of the state.¹⁹ It is important to point out that in many cases, the perpetrators of such violations had enjoyed immunity from prosecution at the time the atrocities occurred. Many of these immunities were lifted later on for the sake of guaranteeing the victims' access to justice.

Unfortunately, contrary to the overriding trend in international law today to limit and restrict immunities of sovereign states—and their representatives—to those absolutely necessary for a state to carry out its fundamental sovereign functions, carving out express exceptions to such immunities in cases of commercial activity or civil—tort—wrongs, IOs and their officials, until recently, have enjoyed near total immunity for their criminal, contractual, or tortious acts carried out in the context of their duties.²⁰

It may be necessary at this point to explain that several of the activities that IOs carry out today on a regular basis, were never envisioned by their founders, and as such, the legal framework governing actions of great contemporary importance, such as Peacekeeping Operations and missions where civil police forces and international observers are deployed, is in its infancy or completely lacking.²¹

However, as history has shown us, changes usually occur before legal frameworks are fully developed, through practice and out of necessity. As such, it is of particular relevance that recent developments in the United States and Europe suggest that this shameful trend of absolute immunity may finally be changing as well for IOs, forcing them into line with the best state practice. Below are some examples of the cases that may be leading the way into the beginning of the end of IO impunity.

A. The Swarna v. Al-Awadi case (2010)

The Second Circuit Court of Appeals issued a very promising decision regarding the *Swarna v. Al-Awadi* case in 2010 regarding the invocation of diplomatic immunities and how this defence on admissibility may lead to

19. *Id.* at 454.

20. For the most senior officials of such organisations, their immunities extended even to criminal or tortious acts that were in no way related to the function of their organisation.

21. Flaherty & Ríos, *supra* note 7, at 454.

impunity regarding violations of human rights, including those asserted in the context of a labour relationship.

Swarna, an Indian national, was offered to serve as a domestic employee in the household of Al-Awadi, a Kuwaiti diplomat serving at his country's Mission to the United Nations in New York.²² She accepted the offer and moved to New York City in 1996.²³

The complainant was allegedly abused on several occasions by her employers, including the diplomat's wife.²⁴ They retained her travel documents, refused to pay her the agreed salary, prevented her from leaving their household, not even to attend church on Sundays, and denied her communications with her family in India.²⁵ Al-Awadi raped Swarna several times during the four years she remained in his household, before she managed to recover her passport and visa and seek help.²⁶

Swarna filed an action against the defendants in U.S. Federal Court in 2002.²⁷ Neither of them responded to her complaint, and the District Court ruled that it had no jurisdiction over Swarna's case due to the fact that by 2002, Al-Awadi was still employed as a diplomat by the Kuwaiti Mission, and therefore, could not be brought before any national court, according to the rules governing diplomatic immunity.²⁸ The District Court even went so far as to state that the complainant could institute new proceedings when the defendant was no longer employed by his Mission.²⁹

In 2006, Swarna filed action against the complainants again, this time including the State of Kuwait as one of her defendants.³⁰ Once more, none of them answered the complaint, so Swarna filed a motion for default judgement.³¹ Both the individual defendants and the State of Kuwait replied to Swarna's motion for default judgment in 2008.³²

The District Court made some interesting findings in Swarna's case. First of all, it held that her claim against the individual defendants was not barred by immunity under the Vienna Convention on Diplomatic

22. See *Swarna v. Al-Awadi*, 622 F.3d 123, 130 (2nd Cir. 2010).

23. *Id.* at 128.

24. *Id.* at 128–30.

25. *Id.*

26. *Swarna*, 622 F.3d at 130.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 130–31.

31. *Swarna*, 622 F.3d at 130–31.

32. *Id.*

Relations.³³ Regarding Swarna's claims on the State of Kuwait, the Court held that under the Foreign Sovereign Immunities Act (FSIA),³⁴ her request for default judgment could not be granted.³⁵ Both Swarna and the individual defendants moved for reconsideration of the District Court's decision.³⁶ Both motions were rejected, and the previous decision was held by the Court.³⁷

Swarna and the individual defendants appealed the District Court's decision for different reasons to the U.S. Second Circuit Court of Appeal.³⁸ The Al-Awadi family argued that Article 39(2) of the Vienna Convention on Diplomatic Relations³⁹ granted them "residual immunity" for acts performed while serving as diplomats, and further, that the employment of Swarna as a domestic worker was protected under the same Convention as part of a diplomat's mission-related functions.⁴⁰ On her part, Swarna argued that the District Court erred in dismissing her claims against the State of Kuwait, because they fell within the FSIA's exception to immunity regarding tort and commercial activities.⁴¹

1. The Federal Court of Appeals' decision

While the Court agreed that under Article 39(2) of the Vienna Convention on Diplomatic Relations, former diplomats retain residual immunity for some kinds of acts performed while serving in the diplomatic station, it held that in the case under discussion, no such legal provision

33. *Id.* at 131.

34. Foreign Sovereign Immunity Act, 28 U.S.C. § 1330 (1976).

35. *See generally* Swarna v. Al-Awadi, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

36. *Id.*

37. *See generally* Swarna v. Al-Awadi, No. 06 Civ. 4880, 2009 WL 1562811 (S.D.N.Y. 2009).

38. *Id.*

39. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. Article 39.2 of the Vienna Convention reads:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Id. ¶ 2 (emphasis added).

40. *Id.*

41. *See generally* Swarna v. Al-Awadi, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

could be applied.⁴² To begin with, defendant Al-Shaitan, Al-Awadi's wife, never served as a diplomat, and thus, this argument was moot in relation to her.⁴³ With regards to Al-Awadi, the test used to determine whether he possessed residual immunity, as established by the Vienna Convention, consisted of determining if the acts he performed in relation to Swarna's employment and alleged treatment were done in the exercise of his functions as a member of the mission.⁴⁴ On this point, the Court recalls that the Vienna Convention does not immunize those acts that result "incidental" to the performance of a diplomat's functions as a member of the mission.⁴⁵

According to the Court, acts that deserve immunization are those "directly imputable to the state or inextricably tied to a diplomat's professional activities."⁴⁶ Since Swarna was employed by the defendants to meet their private needs, as opposed to performing mission-related functions, the Court concluded that in this case, the argument of residual immunity could not be sustained.⁴⁷ The Court went further to state that in relation to Swarna's alleged rape, "[i]f Swarna's work for the family may not be considered part of any mission-related functions, surely enduring rape would not be part of those functions either."⁴⁸

On this topic, the Court was particularly emphatic and went on to say:

Moreover, assuming arguendo that Swarna's employment constituted an official act, it does not follow that Al-Awadi is accorded immunity for any and all acts committed against her. For example, while Al-Awadi could claim diplomatic immunity for common crimes directed at Swarna while he was serving as a member of the mission, he could not commit these crimes and claim residual immunity merely because his initial hiring of Swarna constituted an official act. Only if the commission of such crimes could be considered an official act would residual immunity apply.⁴⁹

The Court's reasoning in Swarna is of particular relevance to the development of case law regarding the changing application of immunities

42. See Swarna v. Al-Awadi, 622 F.3d 123, 130 (2nd Cir. 2010).

43. *Id.* at 134.

44. *Id.* at 134–38.

45. *Id.* at 135.

46. *Id.*

47. See Swarna v. Al-Awadi, 622 F.3d 123, 135 (2nd Cir. 2010).

48. *Id.* at 138.

49. *Id.* at 139–40.

of IOs for several reasons. In the first place, it endorses the idea that even if immunity were to be applied to Al-Awadi with respect to the alleged acts, it would, under no circumstance, be absolute, since the “official acts” defense cannot possibly include actions that would otherwise be classified as crimes.⁵⁰ Under this logic, even if the Court had ruled that hiring Swarna had been an official act performed as part of Al-Awadi’s functions as a diplomat, the constant abuse and inhumane conditions to which she was submitted could not have been catalogued as official acts.⁵¹ This reasoning would have also led the Court to the conclusion that denying a defense based on immunity with regards to such acts was the only available course of action.

Therefore, the distinction made by the Second Circuit Court of Appeal on whether the crimes allegedly committed by the defendant in the Swarna case where “official” or not becomes a good starting point on the way to piercing immunities effectively, especially with regards to IOs and bringing them in line with the accepted restrictive immunities practice of sovereign states.⁵²

B. The OSS Nokalva Inc. v. European Space Agency Case (2010)

OSS Nokalva (OSSN) and the European Space Agency (ESA) were working under a series of four commercial contracts, each of them including a dispute settlement clause.⁵³ The first contract referred the parties to arbitration, while the other three granted jurisdiction to the Courts of the State of New Jersey over disputes arising between the parties.⁵⁴ Following these clauses, OSSN filed suit against ESA before the Superior Court of New Jersey, Somerset County.⁵⁵ ESA moved to dismiss the claim, alleging immunity from prosecution under the International Organizations Immunity Act (IOIA).⁵⁶ This motion to dismiss was denied by the District Court.⁵⁷

Although the District Court stated that ESA, as an IO, enjoyed immunity from prosecution, it held that such immunity could be expressly

50. *Id.* at 134–38.

51. *See Swarna*, 622 F.3d at 134–38.

52. *Id.*

53. *See generally* OSS Nokalva Inc. v. Eur. Space Agency, No. 08-3169, 2009 WL 2424702, at *1 (D.N.J. Aug. 6, 2009).

54. *Id.* at *1.

55. *Id.*

56. *Id.* at *3.

57. *Id.* at *8.

waived by the IO.⁵⁸ It went further to conclude that by engaging in commercial activity and due to the dispute resolution clauses included in the contracts, ESA had expressly waived its immunity and therefore, could not bring this argument before the Court as a defense on admissibility.⁵⁹ Both ESA and OSSN appealed the District Court's decision for different reasons.⁶⁰

1. The Decision of the Court of Appeals

The Federal Third Circuit Court of Appeals deemed it unnecessary to determine whether ESA had actually waived its immunity, because according to its interpretation of the laws regarding immunity, ESA was not immune from civil suit in the first place.⁶¹

The Court started with an analysis of IOIA, which states that IOs “shall enjoy the same immunity from suit and every other form of judicial process as is enjoyed by foreign governments.”⁶² In relation to this wording, the Court discussed if such phrasing was intended to mean that IOs would always be entitled to absolute immunity—as was the case of foreign governments when IOIA was enacted—or on the contrary, whether it meant that since the approach towards absolute immunity of foreign sovereigns had shifted since the enactment of IOIA to a more restricted practice, the new restrictive provisions of FSIA⁶³ would automatically be incorporated into IOIA by analogy.⁶⁴ FSIA became binding US law in 1976 and codified then accepted restrictive immunities practice on the part of sovereign states, setting out an express set of exceptions to the defense of immunity in the case of commercial dealings and tort claims.⁶⁵

According to the Court, the correct approach consists of incorporating the contents of the new provisions of the FSIA, codifying the laws of immunities to the wording of the IOIA.⁶⁶ In other words, the Court held that the absolute immunity theory is no longer justified and is not

58. See generally *OSS Nokalva Inc.*, 2009 WL 2424702, at *3.

59. *Id.* at 7–8.

60. See generally *OSS Nokalva Inc. v. Eur. Space Agency*, 617 F.3d 756, 760–61 (3rd Cir. 2010).

61. *Id.* at 760–61.

62. International Organizations Immunities Act, 22 U.S.C. § 288a(b) (1945).

63. Foreign Sovereign Immunity Act § 1330.

64. Compare International Organizations Immunities Act § 288a(b) with Foreign Sovereign Immunity Act § 1330.

65. Foreign Sovereign Immunity Act § 1330.

66. *OSS Nokalva Inc. v. Eur. Space Agency*, 617 F.3d 756, 763 (3rd Cir. 2010).

compatible with the IOIA, nor does it make any sense in today's globally recognized climate of restricted sovereign immunity.⁶⁷ The Court also said that:

ESA's contrary position leads to an anomalous result. If a foreign government, such as Germany, had contracted with OSSN, it would not be immune from suit because the FSIA provides that a foreign government involved in a commercial arrangement such as that in this case may be sued, as ESA acknowledged at oral argument. We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.⁶⁸

The Court, therefore, concludes that ESA is not entitled to immunity as it existed for sovereigns in 1945. Furthermore, the Court also upheld the District Court's findings that by not being immune from civil prosecution, ESA would benefit from being able to access the market and perform commercial transactions with other actors in it.⁶⁹ The Court concluded by saying that the same reasoning applied for drafting the FSIA's commercial exception to immunity and is equally applicable to IOs through the IOIA.⁷⁰

The OSSN case is relevant to the discussion of the validity and applicability of immunities to IOs in that it circles back to the debate that actually originated the distinction between the absolute and functional theories of immunity.⁷¹ In a very straightforward decision, the Court went on to conclude that, were absolute immunity to apply indiscriminately, there would be no guarantees of judicial protection when conducting business at the international level and therefore, this would greatly and adversely affect the business environment.⁷² Since this reasoning cannot follow the needs and desires of an ever more globalized society, it is just logical that IOs would be willing to either waive or permanently restrict their immunity, at least with regards to commercial activity.

In the best case scenario, IOs would voluntarily adopt and incorporate the restrictive immunity theory, asserting its full immunity only for those

67. *Id.* at 765.

68. *Id.* at 763.

69. *Id.* at 765.

70. *Id.* at 764.

71. *See generally* *OSS Nokalva Inc.*, 617 F.3d at 756.

72. *Id.* at 765.

cases where the IOs' acts were being performed in pursuit of a sovereign purpose or when their functionality would be otherwise significantly compromised.

C. Case of Sabeh El Leil v. France (European Court of Human Rights)

This is the case of a French national who was employed by the Embassy of Kuwait in Paris as an accountant and then chief accountant.⁷³ He was wrongfully terminated after more than twenty years in service.⁷⁴ He filed suit before national courts, which determined that absolute immunity applied to his case, and, therefore, dismissed his claims without granting any redress.⁷⁵ Mr. Sabeh El Leil brought his case before the European Court of Human Rights, alleging that by finding that the State of Kuwait was immune from prosecution, the French State denied him his fundamental right of access to justice, as stipulated by Article 6 of the European Convention on Human Rights.⁷⁶

The ECHR ruled in favor of the applicant, finding that since his daily tasks were purely administrative and not sovereign in nature, the Embassy could not raise an absolute immunity claim as a defense on admissibility, because in doing so, it had the adverse effect of violating Article 6 of the European Convention, causing gross prejudice to the claimant.⁷⁷ Therefore, the ECHR decided that, by recognizing the immunity, France had violated its international obligations under Article 6 of the ECHR to the claimant.

III. CONCLUSIONS

The results in the foregoing cases, when taken as a whole, suggest that the ability to assert absolute immunity on the part of IOs, may be finally coming to an end, and with it, the possibility to act towards its employees and its innocent third party victims with impunity. By being forced into line with the more restrictive immunities enjoyed by sovereign states in most national or municipal courts where they find themselves the target of a lawsuit, regardless of the violations claimed, the depth and breadth of IO immunity seems to be on the wane.

73. Case of Sabeh El Leil v. France, No. 34869/05, Eur. Ct. H.R. (June 29, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sabeh%20%7C%20El%20%7C%20Leil%20%7C%20v.%20%7C%20France&sessionId=88471910&skin=hudoc-en> (last visited Mar. 18, 2012).

74. *Id.* at 1–6.

75. *Id.* at 13.

76. *Id.* at 35.

77. *Id.* at 67.

It has long since been evident that the theory of “functional necessity”⁷⁸ ceased to play a fundamental role in the way international relations were conducted over the course of the second half of the 20th century. Further, the current trends at the international level have been more focused on the protection and promotion of human rights of individuals vis-à-vis the prerogatives of states or their rulers. It is about time this same approach was applied to IOs, treating them as just another group of actors that can be held accountable for their acts and omissions in the international scenario—especially those violations that have to do with gross violations of International Human Rights Law, International Humanitarian Law, and *jus cogens*.⁷⁹ Let us keep in mind that protecting these rights was the main goal for creating most IOs in the first place.

It is just logical that in this case, change should come from within. Any IO that is truly complying with its mandate of serving humanity should, by now, have started the process of reform to adjust the legal framework in order to provide a wider protection for individuals to whom it causes injury.

The U.N., for instance, has the necessary instruments within to be able to start this process on its own at any moment. It is no secret that the International Law Commission (ILC) has drafted, in recent times, several pieces of proposed international legislation that strive for the enhancement of human rights protection. Such is the case of the widely known *ILC Articles on State Responsibility*—which can be clearly said to counter the former theory of absolute State immunity—and the *Draft Articles on the Responsibility of International Organizations*.⁸⁰ Whether the ILC is the right forum to change the state of play regarding the immunity of IOs is yet to be seen, but debating it within seems to be a good starting point. Mr. Ban himself could bring this topic to the ILC’s agenda.

Rather than waiting for a national court to deliver the *coup de grâce* to such immunity in a piece-mail fashion—a current contract dispute case against the United Nations Development Programme pending in the U.S. District Court for the Southern District of New York may well do just

78. Flaherty & Ríos, *supra* note 7, at 454.

79. *Id.* at 444–48.

80. See generally Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, [2001] 2 Y.B. Int’l L. Comm’n 2, U.N. Doc. A/56/10, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Mar. 14, 2012); Draft articles on the responsibility of international organizations, [2011] 2 Y.B. Int’l L. Comm’n 2, U.N. Doc. A/66/10, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf (last visited Mar. 14, 2012).

that⁸¹—Secretary-General Ban Ki Moon should begin the process to greatly restrict the immunity of the U.N. and its specialized agencies for contracts and tortious acts of its officials without delay, along the lines of the FSIA. The U.N. Charter and the goals for which the U.N. is supposed to stand demand no less. And once the immunity is fundamentally pierced by a national court, it will be difficult to maintain those aspects of it which still make sense today—such as the immunity of U.N. peace-keepers in war-torn regions—although of course, not for their *ultra vires* acts, such as rape or spreading a pandemic among a helpless civilian population.

81. *Sadikoglu v. U.N. Dev. Programme*, No. 11 Civ. 0294, 2011 WL 4953994, at *1 (S.D.N.Y. Oct. 14, 2011).