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International Immunities: Some Dissident Views on the Role of Municipal Courts

CHARLES H. BROWER, II*

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I. INTRODUCTION

The history of foreign sovereign immunity constitutes a well-known tale¹ in which autonomy and privilege yielded substantial ground to accountability and democratic ideals.² Although international law conferred absolute immunity on foreign states until the end of the nineteenth century,³ two World Wars and the rise of communism produced a vast expansion in the economic activities of foreign states and, thus, their influence on daily human existence.⁴ These historical forces in turn generated demands for states to become more accountable and to tolerate corresponding encroachments on the doctrine of absolute sovereign immunity.⁵ In addition, the spread of democratic ideals fortified the popular resistance to anything that smacked of privilege.⁶ Thus, by the middle of the twentieth century, absolute sovereign immunity gave way to "restricted" immunity, which preserves immunity for the sovereign activities of foreign states but withholds immunity for their non-governmental activities.⁷ During the last twenty-five

1. See, e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 81 (1994) ("There has been a prodigious amount of well-informed writing on all aspects of the topic of [foreign sovereign] immunity."). See also Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 53 (1995) (observing that "[t]he law of jurisdictional immunity of states in the municipal courts of other states is now fairly well understood").

2. Cf. C. WILFRED JENKS, INTERNATIONAL IMMUNITIES at xxxv (1961) (noting the "general tendency of legal thought, national and international . . . to eliminate or restrict all forms of immunity").

3. See HIGGINS, *supra* note 1, at 79. See also Robert P. Lewis, Note, *Sovereign Immunity and International Organizations: Broadbent v. OAS*, 13 J. INT'L L. & ECON. 675, 688 (1979) (stating that, prior to World War II, "the policy of granting sovereigns absolute immunity in national courts was almost universal").

4. See HIGGINS, *supra* note 1, at 79 (describing the "widespread contracting for trade by socialist governments" during the post-war period); John C. Griffith, Jr., Note, *Restricting the Immunity of International Organizations in Labor Disputes: Reforming an Obsolete Shibboleth*, 25 VA. J. INT'L L. 1007, 1009 n.10 (1985) (explaining how state involvement in economic activities first grew during World War I, when states nationalized industries, and again after World War II due to the expansion of communism).

5. See HIGGINS, *supra* note 1, at 79; Gordon H. Glenn et al., *Immunities of International Organizations*, 22 VA. J. INT'L L. 247, 251 (1982); Antoinette A. Farrugia, Comment, *Boimah v. United Nations General Assembly: International Organizations Immunity Is Absolutely Not Restrictive*, 15 BROOK. J. INT'L L. 497, 500 (1989); Griffith, *supra* note 4, at 1009; Frances Wright Henderson, Casenote, *How Much Immunity for International Organizations?: Mendaro v. World Bank*, 10 N.C. J. INT'L L. & COM. REG. 487, 490 (1985); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 YALE L.J. 1167, 1173 (1982).

6. See JENKS, *supra* note 2, at 111 (describing the "contemporary tendency to curtail immunities which savour of personal privilege").

years, the world's major legal systems also concluded that municipal courts provide the appropriate forum for adjudicating questions of diplomatic immunity, consular immunity, and foreign sovereign immunity.⁸

Many writers contend that the immunities of international organizations and their personnel (international immunities)⁹ have

7. See HIGGINS, *supra* note 1, at 79; Glenn et al., *supra* note 5, at 252; Farrugia, *supra* note 5, at 501; Henderson, *supra* note 5, at 490-91; Lewis, *supra* note 3, at 677.

8. With respect to diplomatic immunity, a former Vice President of the International Court of Justice (ICJ) recently observed that "[t]he case-law . . . contains a strong current of decisions indicating that the domestic courts of the host State have strongly and successfully asserted their authority to determine these questions." *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___, ___ (Apr. 29) (separate opinion of Vice-President Weeramantry at 2).

With regard to foreign sovereign immunity, it is well known that Congress intended the Foreign Sovereign Immunities Act of 1976 (FSIA) to transfer the competence for immunity determinations from the Executive branch to the Judicial branch. See Glenn, *supra* note 5, at 255; Farrugia, *supra* note 5, at 505; Henderson, *supra* note 5, at 492; Lewis, *supra* note 3, at 677. According to the House Report, this step brought U.S. law into conformity with "the practice in virtually every other country." H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

In transmitting a draft version of the FSIA to the Senate, the State Department and the Justice Department proposed that the United States submit to the compulsory jurisdiction of the ICJ for disputes involving foreign sovereign immunity, thus vesting the final decision-making authority for foreign sovereign immunity determinations at the international level. See Letter from William P. Rogers, Secretary of State, to the President of the Senate (Jan. 22, 1973), *reprinted in* 12 I.L.M. 118, 121-22 (1973) (predicting that adjudication by the ICJ "would have the beneficial effect of assuring that the law and practice of this and other countries conform with international law"). Although the United States ultimately passed the FSIA, it never filed a declaration submitting foreign sovereign immunity disputes to the compulsory jurisdiction of the ICJ.

9. For the purposes of this article, the phrase "international immunities" means the privileges and immunities enjoyed by international organizations and their personnel under international law. Breaking this explanation into its component parts, this article defines international organizations to include "an organization that is created by an international agreement and has a membership consisting entirely or principally of states." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 221 (1987). Obviously, this definition excludes NGOs.

This article defines the personnel of international organizations to include both full-time staff members and individuals, such as peacekeepers or special rapporteurs, who perform specific missions on behalf of international organizations. See Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, arts. V (providing for the immunities of United Nations "officials"), VI (providing for the immunities of "experts on missions for the United Nations"), 21 U.S.T. 1418, 1 U.N.T.S. 15 [hereinafter General Convention].

This article does not define the personnel of international organizations to include representatives of member states. While representatives of member states are entitled to immunities, they reflect the immunities of the sending states and not those of the organizations. See *id.*, art. IV (providing for the immunities of the "representatives of members," but recognizing the power of member states to waive the immunities of their representatives).

followed a darker and more mysterious path.¹⁰ Like states, international organizations have proliferated since World War II¹¹ and have matured into institutions that exercise political, economic and social influence of "massive importance."¹² While international organizations have obvious and important responsibilities for human rights, peace, security, trade, and the environment, they also have become a major force in global markets. In fact, international organizations resemble large multinational corporations that

While writers often discuss the "privileges" and "immunities" of international organizations, it is impossible to distinguish between the two. PETER H.F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS* 97 (1994). Although treaties and customary law may provide international organizations with a variety of privileges and immunities from municipal regulation, immunity from the jurisdiction of municipal courts lies at the heart of international immunities. See Yuen-Li Liang, *The Legal Status of the United Nations in the United States*, 2 INT'L L.Q. 577, 584 (1948-49) (referring to jurisdictional immunity as "[o]ne of the first and most fundamental requirements" of international organizations); Henderson, *supra* note 5, at 492 (explaining that jurisdictional immunity "lies at the core" of international immunities). Except as otherwise noted, this article only addresses the jurisdictional immunities of international organizations under international law. It does not address the jurisdictional immunities of international organizations under municipal statutes, such as the International Organizations Immunity Act (codified at 22 U.S.C. §§ 288-288k (1994 & Supp. 1997)).

10. In contrast to the developed body of literature on foreign sovereign immunity, leading writers frequently refer to a serious gap in our understanding of international immunities. See Sir Robert Y. Jennings, *Foreword* to BEKKER, *supra* note 9, at vii (introducing a recent work on international immunities and stating that "the gap in our juridical understanding of international organization is a serious weakness of modern international law"). See also Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335, 1336 (D.C. Cir. 1998) (describing the immunity of international organizations from judicial process as a "little-known" immunity); KULJIT AHLUWALIA, *THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES OF THE UNITED NATIONS AND CERTAIN OTHER INTERNATIONAL ORGANIZATIONS* 208 (1964) (identifying a "dire need" for increased understanding of international immunities); HIGGINS, *supra* note 1, at 94 (concluding that "[m]ore attention should be paid to the immunities of international organizations"); JOHN KERRY KING, *INTERNATIONAL ADMINISTRATIVE JURISDICTION* 10 (1952) (complaining that writers have devoted "scant attention" to the problems of international immunities); Green H. Hackworth, *Foreword* to CAROL MCCORMICK CROSSWELL, *PROTECTION OF INTERNATIONAL PERSONNEL ABROAD* at iii (1952) (observing that "much less is generally known" about international immunities than is known about diplomatic immunity); Elmer Plischke, *Foreword* to DAVID B. MICHAELS, *INTERNATIONAL PRIVILEGES AND IMMUNITIES* at xiii (1971) (noting that the subject of international immunities "has only recently been broached in an occasional professional journal article, and touched upon briefly in a few basic international law texts").

11. See LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 577-78 (1999). As of 1994, there were over 350 international organizations. See BEKKER, *supra* note 9, at 4. By the year 2000, the number of international organizations may reach 450. See FREY & FREY, *supra*, at 578.

12. Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?*, 24 VAND. J. TRANSNAT'L L. 689, 690 (1991) (quoting Thomas J. O'Toole, *Sovereign Immunity Redivivus: Suits Against International Organizations*, 4 SUFFOLK TRANSNAT'L L.J. 1, 1 (1980)).

operate in hundreds of locations,¹³ own or lease large stocks of real property,¹⁴ employ tens of thousands of individuals,¹⁵ manage large quantities of assets,¹⁶ and conduct billions of dollars worth of transactions.¹⁷ Under the circumstances, one would expect international immunities to encounter the pressures and restrictions already experienced by the doctrine of foreign sovereign immunity.¹⁸ Consistent with these expectations, the international legal community embraced the functional necessity doctrine (*i.e.*, the principle that international organizations should possess the *minimum* immunities necessary to perform their functions) as a theoretical limitation on international immunities.¹⁹

Contrary to such expectations, however, most immunities conventions and headquarters agreements provide that "international organizations cannot be judged by any [municipal] court . . . unless they expressly waive that privilege."²⁰ Because complete jurisdictional immunity may seem "excessive" in light of the functional

13. See Paul C. Szasz, *The United Nations Legislates to Limit Its Liability*, 81 AM. J. INT'L L. 739, 740 (1987) (describing the United Nations as a large multinational enterprise that operates in well over a hundred countries). See also JOHN KERRY KING, *THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS* at xii (1949) (explaining that the operations of international organizations are "literally world-wide").

14. See C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS* at xxxvi (1962); A.S. MULLER, *INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES* 151 (1995).

15. See FREY & FREY, *supra* note 11, at 573 (estimating that, in 1980, 200 international organizations employed approximately 90,000 individuals); Szasz, *supra* note 13, at 740 (observing that the United Nations alone employs "tens of thousands of staff members").

16. See MULLER, *supra* note 14, at 151 (noting, for example, that the United Nations has accumulated large pension funds that operate on international securities markets).

17. See HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 1005 (1995) (describing, for example, the United Nations Relief and Works Agency's large-scale purchase and movement of supplies to shelter and feed hundreds of thousands of persons in the Middle East); Szasz, *supra* note 13, at 740 (explaining that the United Nations alone "carr[ies] out many types of transactions involving money or goods valued at some billions of dollars"). See also JENKS, *supra* note 14, at xxxvi (describing the vast range of commercial activities performed by international organizations).

18. See D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 362 (4th ed. 1982); MULLER, *supra* note 14, at 151-52; Singer, *supra* note 1, at 56, 141; Griffith, *supra* note 4, at 1007; Lewis, *supra* note 3, at 689; Note, *The Status of International Organizations Under the Law of the United States*, 71 HARV. L. REV. 1300, 1312 (1958).

19. See, *e.g.*, BEKKER, *supra* note 9, at 111 (stating that the functional necessity doctrine seems "universally accepted" as the justification for international immunities); Joseph L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 847 (1947) (stating that the principle of functional necessity has become almost "universally recognized" as the basis for international immunities).

20. Leonardo Díaz González (Special Rapporteur), *Fourth Report on Relations Between States and International Organizations*, U.N. Doc. A/CN.4/424, reprinted in [1989] 2 Y.B. Int'l L. Comm'n 153, 161, U.N. Doc. A/CN.4/SER.A/1989/Add.1.

necessity doctrine,²¹ writers mistakenly assert that international immunities have expanded²² to the point where their implementing treaties resemble the doctrine of absolute sovereign immunity.²³ These writers attack the perceived expansion of international immunities on the normative grounds that most international organizations do not require immunities²⁴ and that immunities encourage international organizations to behave irresponsibly.²⁵ Inevitably, these sentiments provoked calls for reform.

Generally speaking, reform proposals fall into two categories, both of which draw on analogies to restricted sovereign immunity and, therefore, assume that municipal courts will play a key role in making immunity determinations. First, a number of writers have suggested that municipal courts should apply the doctrine of restricted sovereign immunity en bloc to international organizations and their personnel.²⁶ Despite its popularity, this view generated

21. *Id.* Cf. RESTATEMENT (THIRD), *supra* note 9, at § 467 reporters' note 4 (construing Section 2 of the General Convention to confer absolute immunity on the United Nations and questioning the justification for absolute immunity under the functional necessity doctrine).

22. See Singer, *supra* note 1, at 56 (arguing that "as jurisdictional immunity has waned for states, it has waxed for international organizations"); Daniel Hammerschlag, Comment, *Morgan v. International Bank for Reconstruction and Development*, 16 MD. J. INT'L L. & TRADE 279, 282 (1992) (describing "a long line of rulings that have expanded immunity for international organizations"). Cf. O'Toole, *supra* note 12, at 1 (asserting that "[w]hile the nation states have been drastically curtailing their assertion of sovereign immunity, the international organizations have been boldly laying claim to the inheritance of that same wounded doctrine").

23. See, e.g., *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (describing the General Convention as creating "absolute" immunity); THE CHARTER OF THE UNITED NATIONS 1140 (Bruno Simma ed. 1994) (explaining that the General Convention creates a form of "absolute immunity"); FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 6 (1986) (referring to the "absolute" immunity of international organizations); Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 128 (1996) (stating that the General Convention "creates a system of absolute immunity for the property, funds, and assets of the United Nations"); Farrugia, *supra* note 5, at 513 (stating that "international organizations still have absolute immunity, although foreign government immunity is now restricted"); Griffith, *supra* note 4, at 1007 (criticizing the "absolute immunity" granted to international organizations); Henderson, *supra* note 5, at 487 n.6 (asserting that the United Nations Charter grants the United Nations "complete immunity" from all legal process); Lewis, *supra* note 3, at 686 (noting that most international organizations "define their immunities from legal process as absolute," and stating that the language of the United Nations Charter "was intended . . . to confer absolute immunity"). *But see* SCHERMERS & BLOKKER, *supra* note 17, at 351 (emphasizing that international immunities are a form of functional – not absolute – immunity).

24. See *infra* notes 121, 166-73 and accompanying text.

25. See *infra* notes 173, 366-70 and accompanying text.

26. See BEKKER, *supra* note 9, at 158 (observing that several writers and courts have attempted to apply the doctrine of restricted foreign sovereign immunity to international

substantial criticism. Leading writers have rejected the wholesale application of sovereign immunity concepts to international organizations, which do not possess the traditional attributes of states.²⁷

Second, while recognizing that the application of state-immunity principles to international organizations en bloc may be untenable, other writers support limited comparisons to foreign sovereign immunity.²⁸ For example, one writer observes that restricted sovereign immunity rests in part on the functional necessity doctrine.²⁹ Because international immunities likewise rest on the functional necessity doctrine, he argues that restricted sovereign immunity still provides a model for the development of international immunities.³⁰ In particular, he suggests that if foreign states can function with restricted immunity, municipal courts should require international organizations to do the same.³¹

Thus, the proponents of reform share a general commitment to the expansion of municipal court jurisdiction for questions involv-

organizations). See also BOWETT, *supra* note 18, at 362 (predicting that as international organizations expanded, there would be greater justification for applying the doctrine of restricted sovereign immunity to their activities); Letter from Roberts B. Owen, Legal Adviser to the Department of State, to Leroy D. Clark, General Counsel to the EEOC (June 24, 1980), reprinted in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 918 (1980) [hereinafter Owen Letter] (concluding that international organizations enjoy the same restricted immunity as foreign states); O'Toole, *supra* note 12, at 14-16 (arguing that international organizations, like foreign states, should not enjoy immunity for commercial activities); Griffith, *supra* note 4, at 1033 (suggesting that restrictive sovereign immunity principles could be applied to international organizations); Note, *The Status of International Organizations Under the Law of the United States*, *supra* note 18, at 1312 (advocating the application of restricted sovereign immunity concepts to international organizations).

27. See RESTATEMENT (THIRD), *supra* note 9, at § 467 cmt. d; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 83 cmt. e (1965); C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 376 (1996); BEKKER, *supra* note 9, at 155-56; HIGGINS, *supra* note 1, at 93; MULLER, *supra* note 14, at 152-53; MALCOLM N. SHAW, INTERNATIONAL LAW 924 (4th ed. 1997); Singer, *supra* note 1, at 62-63.

28. See Singer, *supra* note 1, at 65 (proposing to draw on foreign sovereign immunity concepts in defining the scope of international immunities); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1191-92 (proposing limited restrictions that would harmonize international immunities with developments in the law of foreign sovereign immunity); Kenneth R. Lee, Recent Developments, 20 VA. J. INT'L L. 913, 922-23 (1980) (proposing a cautious restriction of international immunities in conformity with trends in state-immunity law). See also BEKKER, *supra* note 9, at 163 (proposing to draw a modest analogy to foreign sovereign immunity by distinguishing between the nature of activities performed by international organizations).

29. Singer, *supra* note 1, at 65.

30. *Id.* at 56-57, 65, 135.

31. *Id.* at 135.

ing international immunities. Surprisingly, they have not explored the likely costs of expanded jurisdiction. Given their premises that international immunities are unnecessary and encourage irresponsible behavior, writers seem to have assumed that the expansion of municipal court jurisdiction would produce (1) few institutional costs, and (2) substantial benefits in the form of greater accountability.

This article challenges the premises of proposals to expand municipal court jurisdiction. To this end, it first argues that history reflects not an expansion—but the substantial contraction—of international immunities. Second, the provisions of immunities agreements do not resemble the doctrine of absolute sovereign immunity. To the contrary, those treaties adhere to the functional necessity doctrine, but give international officials the primary authority for making immunity determinations. Third, this article draws on a recent decision of the International Court of Justice (ICJ) to explain why the expansion of municipal court jurisdiction would create significant institutional costs. It could, in fact, endanger the capacity of international organizations to perform their obligations with respect to peace, security, the promotion of human rights, and other controversial issues. Finally, the expansion of municipal court jurisdiction is unlikely to make international organizations significantly more accountable because international law already requires international organizations to minimize their reliance on immunity and to provide claimants with alternatives to municipal court litigation.

In short, this article recognizes that international immunities operate within a world that requires their minimization. Contrary to a misguided strain in U.S. academic discourse, however, it concludes that international organizations have taken adequate steps to balance the need for autonomy with the interests of accountability.

II. INTERNATIONAL IMMUNITIES IN THEIR HISTORICAL CONTEXT

Several publicists describe international immunities as a recent phenomenon³² and trace their development to the end of World War II.³³ Others portray their development as an exception to the

32. See AHLUWALIA, *supra* note 10, at 48; AMERASINGHE, *supra* note 27, at 369; BEKKER, *supra* note 9, at 3; Farrugia, *supra* note 5, at 502.

33. See AMERASINGHE, *supra* note 27, at 370-74 (tracing the conventional law of international immunities to the 1940s); Glenn et al., *supra* note 5, at 276 (asserting that the

modern preference for limiting immunities of every kind.³⁴ This Part explains that international immunities first appeared during the nineteenth century and that their evolution conforms to the general trend towards limited immunity. This Part also introduces a cautionary tale about the problems created by early attempts to apply state-immunity concepts to international organizations.³⁵

While their proliferation may be a post-war phenomenon,³⁶ international organizations have existed since the middle of the nineteenth century.³⁷ Many of these early organizations, such as the Universal Telegraphic Union and the General Postal Union, regulated non-political and technical activities for member states. Because politics did not intrude on the work of these organizations, member states entrusted their administration to the civil services of their host states.³⁸ As a result, these "administrative unions" and their personnel did not require—and did not receive—immunities of any kind.³⁹

During the same period, however, states created a small number of international organizations to manage international problems having political dimensions. To ensure that these organizations would not fall under the control of any particular state, member

jurisdictional immunities of international organizations first gained widespread acceptance following ratification of the United Nations Charter).

34. See *supra* notes 22-23 and accompanying text.

35. While recognizing the differences between foreign sovereign immunity and diplomatic immunity, this Part refers to both doctrines as a form of "state immunity" in the sense that they both grow out of the rights, duties, and needs of states. See SHAW, *supra* note 27, at 523 ("The special privileges and immunities related to diplomatic personnel . . . grew up partly as a consequence of sovereign immunity. . . . Since [diplomats] represent their states in various ways, they thus benefit from the legal principle of state sovereignty.").

36. See O'Toole, *supra* note 12, at 1 (identifying a "confusing proliferation of international organizations" since the close of World War II); Note, *The Status of International Organizations Under the Law of the United States*, *supra* note 18, at 1300 (asserting that the "period following World War II has been marked by a proliferation" of international organizations).

37. See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 5-6 (2d ed. 1993) (describing the nineteenth-century antecedents of modern international organizations).

38. See AMERASINGHE, *supra* note 27, at 327.

39. See KING, *supra* note 13, at 57; Norman L. Hill, *Diplomatic Privileges and Immunities in International Organizations*, 20 GEO. L.J. 44, 46-47 (1931); Lawrence Preuss, *Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest*, 25 AM. J. INT'L L. 694, 698-99 (1930); Jacques Secretan, *The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities*, 1935 BRIT. Y.B. INT'L L. 56, 64; Hugh McKinnon Wood, *Legal Relations Between Individuals and a World Organization of States*, 30 GROTIUS SOC'Y TRANSACTIONS FOR THE YEAR 1944, at 141, 142 n.2 (1945).

states endowed them with jurisdictional immunities.⁴⁰ One example involved the International Commission for the Cape Spartel Light, which was created in 1865 and which placed a lighthouse near the Straits of Gibraltar under international administration.⁴¹ Other examples include the conferral of diplomatic immunities on the Danube, Congo, and Central Rhine River Commissions in 1878, 1885, and 1922, respectively;⁴² international judicial bodies;⁴³ and the institutions created to implement peace treaties following World War I.⁴⁴ Because they offered a convenient model, it be-

40. See MICHAELS, *supra* note 10, at xvi (explaining that, prior to the establishment of the League of Nations, the drafters of constituent agreements endeavored to vest international organizations and their personnel with the immunities enjoyed by the nineteenth-century diplomatic corps). See also KING, *supra* note 13, at 25 (stating that the "granting of privileges and immunities to international organizations ... has always had the same basic reason and purpose; that is, to secure for them both [the] legal and practical independence" necessary to pursue the common interests of member states); Kunz, *supra* note 19, at 836 (reaching a similar conclusion).

41. See David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275, 280-87, 362-63 (1996) (describing the Commission's establishment and stating that the Commission received "immunity from jurisdiction by any . . . sovereign"). The International Commission for the Cape Spartel Light operated from 1865 to 1958 on the approach to the Straits of Gibraltar and was the first international organization joined by the United States. *Id.* at 276.

42. See KING, *supra* note 13, at 39, 44-45, 53-54 (providing an account of the concession of immunities to the Danube, Congo and Central Rhine River Commissions); Preuss, *supra* note 39, at 696-97 (referring to the grant of immunities to the Danube and Central Rhine River Commissions); Secretan, *supra* note 39, at 60-62 (describing the concession of immunities to the Danube and Central Rhine River Commissions). See also Serguei Tarassenko & Ralph Zacklin, *Independence of International Civil Servants*, in INTERNATIONAL ADMINISTRATION, at III.1, 2 (Chris de Cooker ed., 1990) (recounting the French government's decision, in 1922, to confer diplomatic immunities on representatives and agents of the Central Rhine Commission).

43. See KING, *supra* note 13, at 237 (identifying the Hague Conventions for the Peaceful Settlement of Disputes of 1899 and 1907 (Hague Conventions) as the first examples in which diplomatic privileges and immunities were extended to judges of international tribunals); Sir Cecil J.B. Hurst, *Diplomatic Immunities—Modern Developments*, 1929 BRIT. Y.B. INT'L L. 1, 6-8 (describing the diplomatic immunities conferred by the Hague Conventions and concluding that the granting of diplomatic immunities to members of international tribunals had become a feature of customary international law); Preuss, *supra* note 39, at 699 (asserting that the Hague Conventions first conferred diplomatic immunities on international tribunals, and that a 1907 treaty also gave diplomatic immunities to members of the short-lived Central American Court of Justice); Secretan, *supra* note 39, at 63 (referring to the diplomatic immunities conferred by the Hague Conventions, as well as the 1923 Convention creating an International Central American Tribunal); Wood, *supra* note 39, at 142 n.2 (noting that the Hague Conventions conferred diplomatic immunities on arbitrators appointed by the Permanent Court of Arbitration).

44. See Preuss, *supra* note 39, at 697-98.

came a common practice to grant diplomatic privileges and immunities to international organizations having a political character.⁴⁵

The Covenant of the League of Nations continued this practice by providing that "officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."⁴⁶ At first glance, the phrase "when engaged on the business of the League" suggests that the League's personnel were entitled to immunity only for their official activities – not for private behavior.⁴⁷ This interpretation, however, never gained favor.⁴⁸ To the contrary, writers uniformly concluded that the Covenant granted League officials the full range of diplomatic immunities, but limited their application to the period of an official's appointment.⁴⁹

As is typical for the constituent documents of international organizations,⁵⁰ the Covenant did not define the content of "diplomatic privileges and immunities" and left its elaboration to subsequent agreements.⁵¹ To achieve a more concrete framework for the League's relations with its host state, the Secretary-General reached a preliminary agreement with Swiss authorities in 1921 and a final *Modus Vivendi* in 1926.⁵² In substance, these documents extended to the League and its officials the same immunities enjoyed by accredited diplomatic missions and their personnel

45. See KING, *supra* note 10, at 10 (describing the initial inclination to use diplomatic privileges and immunities as a model when addressing the problem of international immunities); KING, *supra* note 13, at 26 (appreciating reliance on diplomatic privileges and immunities given the clarity of those principles under international law); Kunz, *supra* note 19, at 836-37 (recognizing the advantages of diplomatic immunities as a template for international immunities and stating that diplomatic immunities became the favorite standard "[f]rom the beginning of the 19th century onward"). See also AHLUWALIA, *supra* note 10, at 105 (noting that many states granted diplomatic privileges and immunities to international officials prior to World War II).

46. LEAGUE OF NATIONS COVENANT art. 7, para. 4; Hurst, *supra* note 43, at 8.

47. See MARTIN HILL, IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS 11 (1947); KING, *supra* note 10, at 39; KING, *supra* note 13, at 78; Liang, *supra* note 9, at 589; Preuss, *supra* note 39, at 706-07; Tarassenko & Zacklin, *supra* note 42, at 3.

48. See *id.*

49. See *id.*

50. See BEKKER, *supra* note 9, at 129; BOWETT, *supra* note 18, at 346; Hans Aufricht, *The Expansion of the Concept of Sovereign Immunity: With Special Reference to International Organizations*, 46 PROC. AM. SOC'Y INT'L L. 85, 91 (1952).

51. See KING, *supra* note 13, at 81; EGON F. RANSHOFEN-WERTHEIMER, THE INTERNATIONAL SECRETARIAT 265 (1945).

52. See HILL, *supra* note 47, at 15-16, 19-20; KING, *supra* note 13, at 80; RANSHOFEN-WERTHEIMER, *supra* note 51, at 265; Preuss, *supra* note 39, at 701-03; Wood, *supra* note 39, at 142. See also Tarassenko & Zacklin, *supra* note 42, at 3 (noting that the 1921 agreement provided detailed arrangements regarding the immunities of the League and of its officials).

under Swiss law.⁵³ Thus, the League enjoyed complete immunity from suit except to the extent that it waived its immunity.⁵⁴

In accordance with Switzerland's restrictive treatment of diplomatic personnel, however, League officials were divided into two categories.⁵⁵ Non-Swiss officials of the "first category" received complete immunity from the jurisdiction of Swiss courts.⁵⁶ These officials included members of the League's higher administrative and research staff.⁵⁷ By contrast, non-Swiss officials of the "second category" received jurisdictional immunity only for their official acts.⁵⁸ The second category included the League's lower administrative staff and clerical workers.⁵⁹ Thus, during the height of its activities, roughly one-third of the League's officials fell within the first category, while the remaining two-thirds fell within the second category.⁶⁰ It is important to remember, however, that *all* League officials enjoyed "diplomatic immunities." The distinction be-

53. See HILL, *supra* note 47, at 15; KING, *supra* note 10, at 42; KING, *supra* note 13, at 88; Preuss, *supra* note 39, at 703; Secretan, *supra* note 39, at 67.

54. See Wood, *supra* note 39, at 143.

55. See FREY & FREY, *supra* note 11, at 549; HILL, *supra* note 47, at 15-16; KING, *supra* note 10, at 42; KING, *supra* note 13, at 87; Preuss, *supra* note 39, at 701, 703; Tarassenko & Zacklin, *supra* note 42, at 3-4.

56. See HILL, *supra* note 47, at 27; KING, *supra* note 10, at 43; KING, *supra* note 13, at 93; RANSHOFEN-WERTHEIMER, *supra* note 51, at 265; Hill, *supra* note 39, at 51; Preuss, *supra* note 39, at 706; Tarassenko & Zacklin, *supra* note 42, at 4; Wood, *supra* note 39, at 146; Note, *The United Nations Under American Municipal Law: A Preliminary Assessment*, 55 YALE L.J. 778, 781 n.11 (1946).

57. See HILL, *supra* note 47, at 16; Tarassenko & Zacklin, *supra* note 42, at 4. See also RANSHOFEN-WERTHEIMER, *supra* note 51, at 272 (suggesting that interpreters and translators also belonged to the first category); Preuss, *supra* note 39, at 701-02 (asserting that the first category also included officials of the intermediate class).

58. See HILL, *supra* note 47, at 30, 36-37; KING, *supra* note 10, at 45; KING, *supra* note 13, at 103; CHESTER PURVES, *THE INTERNAL ADMINISTRATION OF AN INTERNATIONAL SECRETARIAT* 52-53 (1945); RANSHOFEN-WERTHEIMER, *supra* note 51, at 265; Hill, *supra* note 39, at 51; Preuss, *supra* note 39, at 706; Tarassenko & Zacklin, *supra* note 42, at 4-5; Wood, *supra* note 39, at 146; Note, *The United Nations Under American Municipal Law: A Preliminary Assessment*, *supra* note 56, at 781 n.11.

59. See HILL, *supra* note 47, at 16; Tarassenko & Zacklin, *supra* note 42, at 4. See also Preuss, *supra* note 39, at 702 (explaining that the second category was composed of "technical or manual personnel").

60. See Preuss, *supra* note 39, at 702 n.35 (stating that, as of 1930, 225 persons fell within the first category of League officials). See also RANSHOFEN-WERTHEIMER, *supra* note 51, at 242 (stating that, as of October 15, 1930, the League employed some 658 officials). In earlier years, the percentage of first-category officials was much higher. For example, in the period from 1925 to 1926, 350 out of 488 staff members were officials of the first category. See KING, *supra* note 13, at 89 (stating that from 1925 to 1926 "some 350 officers were listed in the first category"). See also RANSHOFEN-WERTHEIMER, *supra* note 51, at 241 (stating that, as of December 1, 1925, the League employed 488 officials).

tween the two categories of officials arose from Switzerland's restrictive approach towards diplomatic personnel.⁶¹

Thus, by the 1930s, the concession of diplomatic privileges and immunities to international political organizations and their personnel arguably evolved into a rule of customary international law.⁶² Unfortunately, the application of diplomatic immunities to a growing body of international officials created unforeseen problems. For example, the introduction of a large privileged class created public relations problems for host states.⁶³ More importantly, the adoption of *diplomatic* privileges and immunities prompted member states to deny immunity to officials serving in their home jurisdictions. Under traditional diplomatic law, this policy made sense. Diplomatic agents typically do not enjoy immunity from the jurisdiction of their home states⁶⁴ because agents do not require immunity from their principals.⁶⁵

61. See *supra* note 55 and accompanying text. See generally KING, *supra* note 13, at 86-87, 90 (explaining that diplomatic practices vary from state to state and recognizing that the application of diplomatic immunities to international organizations may have the undesirable effect of exposing their personnel to the "fluctuations of national practice").

62. See Preuss, *supra* note 39, at 695-96 (writing in 1930, recognizing that international organizations had already begun to claim diplomatic prerogatives in the absence of express treaty provisions and acknowledging that the concession of diplomatic immunities to international organizations had become the rule); Secretan, *supra* note 39, at 64 (writing in 1935, and observing that it had become the practice under international law to grant "diplomatic privileges and immunities . . . to those agents who are engaged in the performance of duties involved in the maintenance of peace or in some public international service such as ensuring freedom of navigation on rivers"). See also Wood, *supra* note 39, at 142 n.2 (identifying several cases in which international organizations received diplomatic immunities after the League's formation).

Given the United States' long-standing resistance to the concession of diplomatic immunities to international organizations, one must approach these assertions with a measure of caution. See, e.g., CROSSWELL, *supra* note 10, at vi (observing that "[o]nly the United States, until 1941, assumed the position that representatives . . . of international organizations should not have privileges and immunities"). At the same time, the views of the United States may have reflected the eccentricities of its domestic law and its decision not to join the League of Nations. See KING, *supra* note 13, at 68-69, 142 (attributing the United States' reluctance to a provision of the United States Code, which permitted the grant of diplomatic prerogatives only to "ambassadors or foreign ministers of any *foreign prince or state*, authorized and received *as such* by the President") (emphasis added); Note, *Privileges and Immunities Accorded by the United States to the United Nations Organization, Its Property, and Its Personnel*, 34 MINN. L. REV. 445, 445-56 (1950) (attributing the United States's reluctance to grant diplomatic privileges to international organizations to its failure to join the League of Nations).

63. See Preuss, *supra* note 39, at 694-95 (characterizing the extension of diplomatic privileges to large and growing classes of persons as "a problem of serious proportions").

64. See JENKS, *supra* note 2, at xxxvii; KING, *supra* note 13, at 118; Kunz, *supra* note 19, at 845; Preuss, *supra* note 39, at 708-09; Secretan, *supra* note 39, at 65.

65. See MICHAELS, *supra* note 10, at 22, 25.

The retention of jurisdiction by a diplomat's home state also serves the important theoretical purpose of ensuring that diplomats do not abuse their immunities for private purposes. While serving abroad, diplomats enjoy immunity from *local* jurisdiction for official acts and most private acts. By denying immunity to their own diplomatic personnel, however, sending states preserve a forum in which diplomats must answer for private acts.⁶⁶ While the practical significance of that forum may be overrated,⁶⁷ writers argued that the extension of diplomatic immunities to international officials in their home states would render them completely unaccountable for private acts.⁶⁸ Arguably, this situation could result in the denial of justice.⁶⁹

In its negotiations with the League, Switzerland therefore claimed that it had no obligation to extend diplomatic immunities to officials of Swiss nationality.⁷⁰ While recognizing that the Covenant granted "diplomatic privileges and immunities" to all League officials, Switzerland argued that "diplomatic privileges and immunities" did not exist between individuals and their home state.⁷¹ The League's Secretariat vigorously disagreed.⁷² According to the Secretariat, jurisdictional immunities protected international officials from improper influence or attacks by member

66. See Secretan, *supra* note 39, at 70 (identifying this as "a necessary complement" to the immunity of diplomatic personnel from the jurisdiction of the receiving state's courts). See also RESTATEMENT (THIRD), *supra* note 9, at § 464 reporters' note 9 (explaining that the jurisdiction of the sending state "assure[s] a competent forum for hearing cases against members of . . . diplomatic missions").

67. See Lawrence Preuss, *Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case*, 41 AM. J. INT'L L. 555, 567 & n.35 (1947) (discounting the likelihood that sending states would exercise jurisdiction over their nationals for wrongful acts committed abroad, but recognizing an exceptional case in which a Romanian court convicted a Romanian diplomat for offering and accepting bribes in Italy).

68. See JENKS, *supra* note 2, at xxxvii (recognizing that if international officials were to enjoy immunity in their home states, it would become necessary to create an equivalent type of jurisdiction at the international level); Secretan, *supra* note 39, at 69 (questioning what jurisdiction would apply to international officials if not their home jurisdiction).

69. See Secretan, *supra* note 39, at 74 (describing the views of writers who espoused this principle).

70. See FREY & FREY, *supra* note 11, at 550.

71. See HILL, *supra* note 47, at 17 (describing the Swiss position).

72. See KING, *supra* note 10, at 46 (recounting the "considerable difficulty and disagreement" between Swiss authorities and the League of Nations regarding the status of Swiss officials); KING, *supra* note 13, at 83 (referring to the "open disagreement and protracted negotiations" between the League of Nations and Switzerland); Wood, *supra* note 39, at 146-47 (describing this as "the principle question of diplomatic privilege upon which agreement proved unobtainable").

states.⁷³ Furthermore, international officials required immunity in their home jurisdictions because inappropriate pressures were as likely to emanate from there as from anywhere else.⁷⁴ In fact, international officials require *special* protection from their home states because international officials are most susceptible to their influence.⁷⁵

Ultimately, the League of Nations and Switzerland reached an expedient compromise, whereby Swiss officials of the first and second categories received immunity for acts performed in their official capacities.⁷⁶ Switzerland made this concession on the theory that, as a juridical person, the League acted only through its personnel. Therefore, Swiss officials did not bear responsibility for official acts taken on behalf of the League.⁷⁷ To the contrary, those acts were deemed to be acts performed by the organization itself and, therefore, subject to the League's own immunity.⁷⁸

In some respects, this compromise represented a victory for the League because it provided *some* protection to its Swiss personnel. However, in reaching this solution, Switzerland yielded no ground on the principle that – like diplomats – international officials enjoy no personal immunities in their home states. This, moreover, established the troublesome precedent that, in granting immunity to

73. See Wood, *supra* note 39, at 146-47. See also CROSSWELL, *supra* note 10, at 19 (explaining that international officials act in the interests of all member states and, in discharging their functions, require jurisdictional immunities to prevent improper influence by any particular state); SCHERMERS & BLOKKER, *supra* note 17, at 235 (stating that international organizations need privileges and immunities as protection against undue interference by member states).

74. See HILL, *supra* note 47, at 9 (quoting a June 11, 1925 letter from the League of Nations' Secretary-General to Swiss authorities, which explained that "an official might find diplomatic privileges and immunities *particularly necessary* as far as his own Government was concerned") (emphasis added); Secretan, *supra* note 39, at 65 (noting that international officials need protection not only against foreign states, but also against their home states).

75. See BOWETT, *supra* note 18, at 345 (explaining that international immunities may be "most important" in the case of relations between an official and the official's state of nationality); JENKS, *supra* note 2, at xxxvii (observing that international immunities may be "specially important" with respect to an official's home state); KING, *supra* note 10, at 51 (accepting the possibility that international officials serving in their home states "may require even greater jurisdictional immunities than their foreign colleagues").

76. See HILL, *supra* note 47, at 46; KING, *supra* note 10, at 47; Hill, *supra* note 39, at 51; Preuss, *supra* note 39, at 706; Secretan, *supra* note 39, at 68; Tarassenko & Zacklin, *supra* note 42, at 4-5.

77. See Secretan, *supra* note 39, at 72.

78. See KING, *supra* note 13, at 103; Preuss, *supra* note 39, at 706. See also Preuss, *supra* note 67, at 569-70 (questioning whether a League official would enjoy full diplomatic immunity in his home state, but concluding that he would have immunity for *official* acts performed in his home state because that immunity belongs to the organization).

international civil servants, states could discriminate against their own nationals.⁷⁹ Thus, the application of diplomatic immunities to international organizations had the perverse effect of conferring the least protection where it was needed the most.⁸⁰

In short, the application of diplomatic privileges and immunities to international officials created unanticipated doctrinal problems.⁸¹ On the one hand, their extension to relations between international officials and their home states threatened to undermine the accountability of international officials for private acts. On the other hand, the application of traditional diplomatic law compromised the integrity of international officials by exposing them to the influence of their home states.

The emergence of this unforeseen dilemma suggests the need for caution when applying state-immunity concepts to international organizations. Borrowing from the law of state immunity may be convenient and instructive in some cases,⁸² but international organizations and states are very different institutions. The most significant difference between states and international organizations lies in the fact that states possess the totality of international rights and duties, while international organizations possess only those rights and duties that are established by treaty, functionally necessary, or developed by practice.⁸³ More specifically, with a very few exceptions, international organizations lack territorial sovereignty.⁸⁴ Compared to states, international organi-

79. See KING, *supra* note 13, at 27 (observing that the assimilation of League personnel to the diplomatic corps resulted in discrimination against Swiss staff members).

80. See KING, *supra* note 10, at 51.

81. See FREY & FREY, *supra* note 11, at 542 (finding it ironic that theorists applied diplomatic privileges and immunities to international organizations for the purpose of clarity only to find that their application "obfuscated" the doctrine of international immunities); KING, *supra* note 10, at 19 (explaining that the application of diplomatic privileges and immunities to international officials resulted in considerable confusion); KING, *supra* note 13, at 26-27 (reaching a similar conclusion).

82. See Singer, *supra* note 1, at 57 (asserting that comparisons and analogies may be drawn between state immunity and international immunities). See also AMERASINGHE, *supra* note 27, at 370 (recognizing that international immunities "are not always analogous to those of States," but stating that they are "comparable" in some cases); BOWETT, *supra* note 18, at 345 (observing that the analogy between diplomatic immunities and international immunities "suggests itself" but also acknowledging that "major differences exist"). But see KING, *supra* note 10, at 49 (concluding that "[t]he 'natural and easy solution' for granting [international] officials diplomatic privileges . . . did not prove to be natural, easy or a solution").

83. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 180, 182 (Apr. 11); AHLUWALIA, *supra* note 10, at 48-49.

84. RESTATEMENT (SECOND), *supra* note 27, at § 83 cmt. b; BEKKER, *supra* note 9, at 59; Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52

zations also have a more limited capacity to engage in the tit-for-tat self-help measures that are vital to the enforcement of legal rights in international relations.⁸⁵ At the same time, international organizations necessarily perform tasks that states cannot accomplish by themselves.⁸⁶ Thus, international organizations have to do "more" with "less," while at the same time overcoming collective-action problems. Therefore, we should not be surprised that they require different kinds of immunity than states do. For the same reasons, we should be suspicious of analogies between international immunities and various forms of state immunity.⁸⁷

By the 1940s, the problems of applying state-immunity concepts to international organizations became obvious. Therefore, the drafters of the United Nations Charter (Charter) avoided any reference to diplomatic immunities and adopted a new standard that gave the United Nations and its personnel the minimum immunities necessary to secure their independence and effective func-

PROC. AM. SOC'Y INT'L L. 88, 92 (1958) (arguing that international organizations require "complete immunity"); Finn Seyersted, *Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations*, 14 INT'L & COMP. L.Q. 31, 49 (1965); Lewis, *supra* note 3, at 685. The few exceptions include the limited territorial jurisdiction of international river commissions over navigation; the jurisdiction of the League of Nations over the Saar until 1935; and the authority of the United Nations and the International Atomic Energy Agency to issue regulations having the force of law within their respective headquarters districts. Seyersted, *supra*, at 49.

85. See RESTATEMENT (SECOND), *supra* note 27, at § 83 cmt. b; BOWETT, *supra* note 18, at 345; MICHAELS, *supra* note 10, at 21; Ehrenfeld, *supra* note 84, at 92; Lewis, *supra* note 3, at 685. See also JENKS, *supra* note 2, at xxxvii (noting that, with respect to their immunities, international organizations cannot effectively employ the sanctions of reciprocity and retaliation).

86. See BEKKER, *supra* note 9, at 47, 99-100.

87. In a milestone decision rendered in 1949, the ICJ explained that the United Nations possesses international legal personality, but that it is not a state. See *Reparation*, 1949 I.C.J. at 179. In addition, the ICJ rejected several arguments based on comparisons between the United Nations and its member states. See *id.* at 182 (upholding the right of the Organization to espouse a claim for damage to its agents, but rejecting analogies to state practice regarding the diplomatic protection of nationals and dual nationals). Fifty years later, the ICJ continues to reject arguments that attempt to establish the Organization's rights and duties by analogy to those of states. See *infra* discussion at notes 244-45, 273-86 and accompanying text.

This body of precedent supports the conclusion that state-immunity concepts constitute a poor guide for international immunities. See MULLER, *supra* note 14, at 176 (noting that improper comparisons between state immunity and international immunities have often been made); Glenn et al., *supra* note 5, at 266 (concluding that the fundamental differences between state immunity and international immunities militate against comparisons between the two). But see Singer, *supra* note 1, at 65 (insisting that state immunity and international immunities "have a good deal in common").

tioning.⁸⁸ Their efforts evolved into Article 105 of the Charter, which provides that

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. [O]fficials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Thus, Article 105 gave birth to a more limited breed of international immunities based on the functional necessity doctrine.⁸⁹ The functional necessity doctrine's underlying premise is simple and flows from reciprocal notions of good faith.⁹⁰ On the one hand, international organizations should not request immunities

88. See FREY & FREY, *supra* note 11, at 557-58 (indicating that the drafting committee "explicitly rejected" the traditional formulation of diplomatic privileges and immunities and adopted, instead, a "functional" approach); KING, *supra* note 10, at 10 (describing the Charter as a repudiation of diplomatic immunities and a conceptual turn towards a "functional approach"); KING, *supra* note 13, at 156 (explaining that the drafters of the Charter sought to avoid any reference to "diplomatic" privileges and immunities); Liang, *supra* note 9, at 588 (observing that the United Nations Charter made no reference to diplomatic privileges and immunities); Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT'L L. 332, 341 (1946) (explaining that Article 105 of the Charter was drafted "in a spirit of extreme caution, in order to . . . avoid any commitment to concede to officers of the United Nations the diplomatic privileges and immunities"); Note, *Privileges and Immunities Accorded by the United States to the United Nations Organization*, *supra* note 62, at 454 (explaining that the drafters chose to "avoid" any reference to "diplomatic" immunities). See also HILL, *supra* note 47, at 101 (noting the post-war tendency not to grant diplomatic privileges and immunities to international organizations).

89. See CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1139 (stating that Article 105 "established the principle of the functional necessity"); JENKS, *supra* note 2, at 18 (observing that the functional necessity language of Article 105 "has become a matter of common form for the constitutions of international organisations"); HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 338 (1950) (examining the Charter's fundamental shift from diplomatic immunities to the doctrine of functional necessity); Kunz, *supra* note 19, at 839 (identifying Article 105 as the source of a new standard for international immunities based on functional necessity); Singer, *supra* note 1, at 65 (tracing the functional necessity doctrine to Article 105 of the Charter).

90. See BOWETT, *supra* note 18, at 348; HIGGINS, *supra* note 1, at 91.

that they do not need to achieve their institutional goals.⁹¹ On the other hand, if states create an international organization for particular purposes, they must be deemed to provide it with the immunities necessary to accomplish its goals.⁹² In other words, states cannot simultaneously create an organization and fail to provide it with the tools for its success.

This compelling logic has made the functional necessity doctrine the touchstone for international immunities in the post-war era.⁹³ In fact, most writers agree that the functional necessity doctrine has become a rule of customary international law.⁹⁴ Therefore, in the absence of contrary treaty provisions, "major" international organizations possess the "necessary" immunities in both member

91. See CROSSWELL, *supra* note 10, at 40; FREY & FREY, *supra* note 11, at 557; SCHERMERS & BLOKKER, *supra* note 17, at 1004; 13 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 42 (1968); Liang, *supra* note 9, at 600.

92. See BOWETT, *supra* note 18, at 348; HIGGINS, *supra* note 1, at 91; Note, *The United Nations Under American Municipal Law*, *supra* note 56, at 781.

93. See RESTATEMENT (THIRD), *supra* note 9, at §§ 223 cmt b., 467(1), 469 cmt. a (identifying the functional necessity doctrine as the basis for international immunities); AMERASINGHE, *supra* note 27, at 370 (recognizing the functional necessity doctrine as the foundation of international immunities); BEKKER, *supra* note 9, at 111 (stating that the functional necessity doctrine seems to be "universally accepted" as the justification for international immunities); CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1139 (explaining that the functional necessity doctrine has been "introduced into all major status conventions and has . . . become a fundamental rule of the whole system of international . . . immunities"); SCHERMERS & BLOKKER, *supra* note 17, at 235 (describing functional necessity as the *raison d'être* of international immunities); SHAW, *supra* note 27, at 924 (identifying functional necessity as the "true basis" for international immunities); Kunz, *supra* note 19, at 847 (stating that the principle of functional necessity seems "universally recognized" as the basis for international immunities); O'Toole, *supra* note 12, at 3 ("There seems to be general agreement that granting an international organization immunity . . . can be justified only in terms of functional necessity."); Sharp, *supra* note 23, at 127 (asserting that the "principle of functional necessity has become a fundamental rule and is reflected throughout the international system of privileges and immunities"); Farrugia, *supra* note 5, at 502 (identifying the functional necessity doctrine as the "core" of international immunities); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1181 (stating that "[i]n the period after World War II . . . the consensus was that functional necessity entailed jurisdictional immunity").

While the functional necessity doctrine provides the justification for international immunities, the ICJ has recognized that it also provides a general basis for the implied rights and duties of international organizations. For example, in one case, the ICJ decided that the United Nations had the implied right to espouse a claim on behalf of agents injured the course of performing their missions. In reaching this conclusion, the ICJ held that the functions of the Organization gave it both the right and the duty to provide its agents with adequate protection. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 182-84 (Apr. 11). See also BEKKER, *supra* note 9, at 48-50 (describing the functional necessity doctrine as a source of implied powers and obligations).

94. See, e.g., RESTATEMENT (SECOND), *supra* note 27, at § 83 & cmts. b, c; HIGGINS, *supra* note 1, at 90-91.

states and non-member states.⁹⁵ Likewise, smaller international organizations enjoy the "necessary" immunities with respect to member states and (non-member) host states.⁹⁶

Because the United States had not previously recognized the claims of international organizations to jurisdictional immunities,⁹⁷ the Charter might be seen as leading to the creation of immunities where none previously existed.⁹⁸ Viewed from this perspective, one can understand the claims of some U.S. writers that international immunities have expanded during the twentieth century.⁹⁹ When placed in a broader context, however, it becomes clear that the Charter marks an historical shift towards the diminution of international immunities. When diplomatic immunities provided the baseline for international immunities, the League of Nations and non-Swiss officials of the first category enjoyed complete inviolability (while non-Swiss officials of the second category and all Swiss officials enjoyed immunity for official acts). By contrast, when the functional necessity doctrine became the baseline for international immunities, the United Nations and *all* its personnel received the *minimum* immunities *necessary* for the exercise of *official* functions. Thus, the history of international immunities is not one of growth. To the contrary, it is a tale of substantial contraction that fits comfortably within the modern preference for limiting immunities of all kinds.¹⁰⁰

95. See, e.g., RESTATEMENT (THIRD), *supra* note 9, at § 467 & cmt. a; HIGGINS, *supra* note 1, at 91.

96. See HIGGINS, *supra* note 1, at 91.

97. See *supra* note 62.

98. See WHITEMAN, *supra* note 91, at 38 (asserting that the adoption of the United Nations Charter arrested in the United States a possible tendency to limit diplomatic privileges and immunities).

99. Cf. *supra* notes 22-23 and accompanying text.

100. See BOWETT, *supra* note 18, at 346 (concluding that the trend towards diminution of immunities "ha[s] been reflected in the greater emphasis placed upon the functional basis for international . . . immunities"); JENKS, *supra* note 2, at 169 (observing that the scope of international immunities has "substantially contracted . . . particularly as regards immunity from jurisdiction"); KING, *supra* note 10, at 185 (identifying the reduction of immunities under the Charter as part of a broader reduction of international immunities); KING, *supra* note 13, at 253 (recognizing that the Charter fits within the "current tendency . . . to reduce privileges and immunities to a minimum"); Liang, *supra* note 9, at 600 (explaining that modern immunities agreements provide less protection than the agreements establishing the immunities of the League of Nations).

One might argue that international immunities have expanded in the sense that the proliferation of international organizations means that a greater number of organizations enjoy some form of immunity. See FREY & FREY, *supra* note 11, at 593; Singer, *supra* note 1, at 56. This phenomenon, however, is consistent with the restriction of foreign sovereign immunity. Over the past century, the number of states enjoying some form of immunity

III. INTERNATIONAL IMMUNITIES IN THEIR STRUCTURAL CONTEXT

Because this article contends that international immunities have experienced a significant diminution over the past century, it must respond to popular assertions that immunities conventions and headquarters agreements implement the functional necessity doctrine through provisions that resemble the doctrine of absolute state immunity. This Part recognizes why some writers make such arguments, but explains that they are mistaken. Structurally speaking, the relevant treaties adhere to the functional necessity doctrine, but concentrate decision-making authority in the hands of international organizations and tribunals.

While mandating a shift from diplomatic immunities to the functional necessity doctrine, Article 105 of the Charter never defined the immunities that the United Nations would require.¹⁰¹ Instead, the Charter contemplated two possible avenues for the elaboration of specific rules. First, it suggested that member states could develop rules through consistent practice. Most commentators assumed that this would leave municipal authorities with substantial discretion to identify the privileges and immunities the Organization requires in any situation.¹⁰² For obvious reasons, the United Nations did not favor that approach.¹⁰³

As an alternative to the piecemeal development of the functional necessity doctrine, Article 105(3) gave the General Assembly the authority to make recommendations or to propose conven-

has grown dramatically. But because their immunities have declined in a qualitative sense, we still refer to the "restriction" of foreign sovereign immunity.

101. See AMERASINGHE, *supra* note 27, at 371 (observing that Article 105 defines the scope of international immunities "in a very general way").

102. See KELSEN, *supra* note 89, at 342; KING, *supra* note 10, at 63-64; KING, *supra* note 13, at 161. Cf. RANSHOFEN-WERTHEIMER, *supra* note 51, at 267 (explaining that the lack of specific immunity rules in the Covenant of the League of Nations left most member states with a broad discretion "to interpret and implement . . . the general principles they had accepted in ratifying the Covenant"). As explained below, however, the ICJ recently suggested that Article 105 of the Charter may *require* municipal authorities to give nearly conclusive weight to the Secretary-General's immunity decisions. See *infra* note 275.

103. See Ehrenfeld, *supra* note 84, at 92 (representing the UN Office of Legal Affairs and stating that "United Nations immunity from suit cannot . . . be determined in each case by any national authority, judicial or executive"). See also *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: A Study Prepared by the Secretariat*, U.N. Doc. A/CN.4/L.118 and Add. 1 and 2, reprinted in [1967] 2 Y.B. Int'l L. Comm'n 154, 265 [hereinafter *ILC Study (1967)*] (recounting the Secretariat's position that the immunity of U.N. personnel for official acts "arises directly under Article 105 of the Charter and constitutes an essential condition for the conduct of all United Nations activities").

tions to define the scope of international immunities.¹⁰⁴ This, in effect, gave member states the opportunity to make collective decisions without "risking litigation to determine whether each measure was 'necessary' to the United Nations as required by the Charter."¹⁰⁵

In 1946, the General Assembly exercised this right by adopting and proposing for signature the Convention on the Privileges and Immunities of the United Nations (General Convention).¹⁰⁶ Since then, over 130 countries have become states parties to the General Convention.¹⁰⁷ In substance, the General Convention's provisions on jurisdictional immunity have been applied to other organizations and non-member states through the development of similar treaties and customary international law. For example, most of the "major" international organizations adopted the General Convention as a model for their own treaties, which provide for jurisdictional immunity on substantially the same terms.¹⁰⁸ Further-

104. See Lewis, *supra* note 3, at 686 (noting that Article 105(3) gives the General Assembly the power to recommend methods for implementing Article 105(1), (2)).

105. Note, *The United Nations Under American Municipal Law*, *supra* note 56, at 783.

106. See General Convention, *supra* note 9; Lewis, *supra* note 3, at 686. See also RESTATEMENT (THIRD), *supra* note 9, at § 467 cmt. b (explaining that the General Convention gives "specific content" to Article 105 of the Charter); AMERASINGHE, *supra* note 27, at 373 (stating that the General Convention "implements" Article 105 of the Charter); KING, *supra* note 13, at 164 (describing the General Convention as "a codification of the privileges and immunities which the [General] Assembly consider[ed] necessary to the . . . implementation of . . . Articles 104 and 105"); HILL, *supra* note 47, at 109 (referring to the General Convention as an attempt to "codify" the privileges and immunities required by international officials); Sharp, *supra* note 23, at 127-28 (describing the General Convention as an attempt to "detail" the protections afforded by Article 105).

107. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___, at para. 10 (Apr. 29) (quoting Request for Advisory Opinion at para. 1).

108. See RESTATEMENT (THIRD), *supra* note 9, at § 467 cmt. b (describing the General Convention's provisions and stating that "[e]ssentially the same privileges and immunities are enjoyed by the other major international organizations"); BEKKER, *supra* note 9, at 131-32 (explaining that the General Convention has served as a model for subsequent agreements made by other international organizations); BOWETT, *supra* note 18, at 346-47 (stating that the General Convention and the similar Specialized Agencies Convention have served as a model for later agreements made by other organizations); HIGGINS, *supra* note 1, at 90 (stating that the Specialized Agencies Convention's provisions on jurisdictional immunities are "very similar" to those set forth in the General Convention, and that the "position is broadly similar in respect of those international organizations which are not [S]pecialized [A]gencies of the United Nations"); JENKS, *supra* note 2, at 37 (listing a number of immunities and headquarters agreements which contain provisions that are identical or equivalent to the General Convention's grant of immunity); Lewis, *supra* note 3, at 681, 687 (noting that Article 2 of the OAS Convention is almost identical to Section 2 of the General Convention, and that the immunities agreements of most international organizations provide for jurisdictional immunity in similar terms).

more, some influential writers and courts argue that the General Convention and its progeny have matured into rules of customary international law. For instance, the United Nations Legal Counsel asserts that the General Convention constitutes part of the customary law governing relations between the United Nations and all member states.¹⁰⁹ Other writers assert that the General Convention reflects a customary law that presumptively applies to a broader range of international organizations.¹¹⁰ The Netherlands's

109. See Statement by the U.N. Legal Counsel (Dec. 6, 1967), 1967 U.N. Jurid. Y.B. 311, 314, U.N. Doc. ST/LEG/SER.C/5 (asserting that the terms of the General Convention had become part of the customary law governing the relations between the United Nations and member states).

110. See AMERASINGHE, *supra* note 27, at 400 (indicating that the General Convention and the similar Specialized Agencies Convention reflect customary international law, and that there is at least a "presumption that many of the privileges and immunities incorporated in the two general conventions are generally what are required for this purpose"); Sharp, *supra* note 23, at 128 (asserting that the provisions of the General Convention "have reached such universal acceptance that they are now considered customary international law"). See also Singer, *supra* note 1, at 98-99 (conceding that modern immunities agreements are substantially identical to the General Convention and that the proliferation of these norms arguably meets the ICJ's criteria for identifying the development of customary international law, but arguing against the conferral of international immunities as a matter of customary international law).

The author agrees that the General Convention's provisions on jurisdictional immunities are declarative of customary international law. Cf. KING, *supra* note 10, at 189 (asserting, in 1952, that the principle of jurisdictional immunity of international civil servants for official acts appeared in the constitutions of most international organizations and, moreover, had become declaratory of customary international law). The author recognizes, however, that the General Convention's treatment of subsidiary privileges may not have attained the status of customary international law.

Admittedly, one can identify variations in the jurisdictional immunities of the international financial institutions and discrepancies regarding subsidiary courtesies enjoyed by international organizations. See RESTATEMENT (THIRD), *supra* note 9, at § 467 cmt. b (observing that the charters of some international financial institutions provide exceptions to immunity for suits by some creditors under certain circumstances); JENKS, *supra* note 2, at 111 (recognizing a measure of diversity with respect to subsidiary courtesies). But the fact remains that most contemporary agreements on international immunities share a common core of "responsible . . . opinion" regarding jurisdictional immunities. *Id.* See also BEKKER, *supra* note 9, at 148, 150 (recognizing that all international immunities agreements contain very similar provisions and acknowledging that they may be declarative of international law, but concluding that the "precise scope" of customary international law may be uncertain); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 685 (4th ed. 1990) (describing the immunity of international civil servants for their official acts as the "minimum" principle established by customary international law); SCHERMERS & BLOKKER, *supra* note 17, at 1007 (observing that treaties provide most international organizations with immunity from every form of legal process before municipal courts); SHAW, *supra* note 27, at 928 (noting that the immunities granted by agreements and implementing legislation usually include immunity from jurisdiction); Edwin H. Fedder, *The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization*, 9 AM. U. L. REV. 60, 63-64 (1960) (stating that "[a]ll of the documents pertinent to this area provide . . . international organizations . . .

supreme court seems to have adopted this view in *Iran-United States Claims Tribunal v. A.S.* by assuming that customary international law provides small international organizations with the same jurisdictional immunities as are generally provided by treaty.¹¹¹ Thus, while this article concentrates on the General Convention and the United Nations, its reasoning applies to a larger community of international organizations.

With respect to the United Nations, Section 2 of the General Convention provides that

[t]he [Organization], its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.¹¹²

In addition, the General Convention provides "officials"¹¹³ and "experts on missions"¹¹⁴ with immunity from "legal process" of

[with immunity] from suit . . . in the absence of waiver"); Liang, *supra* note 9, at 584 (describing jurisdictional immunity as "[o]ne of the first and most fundamental requirements" of international organizations).

111. *Iran-United States Claims Tribunal v. AS*, 94 I.L.R. 320, 329 (Hoge Raad der Nederlanden 1985). Because the General Convention provides the model for treaty norms, this decision suggests that the General Convention and its progeny reflect customary international law, at least with respect to the immunities that smaller international organizations possess in member states and in non-member, host states.

112. General Convention, *supra* note 9, at § 2.

113. *Id.*, § 18. While the General Convention does not itself define the term "official," it authorizes the Secretary-General to designate the categories of staff that will be deemed to be "officials" for purposes of the Convention. *Id.*, § 17. This gives the Secretary-General an important decision-making power to define the scope of functional necessity. Subject to approval by the General Assembly, the Secretary-General may identify the staff members who require immunity for their official acts.

The Secretary-General exercised that right in 1946 and defined "officials" to include all staff members, with the exception of locally recruited employees assigned to hourly rates. Statement made by the U.N. Legal Counsel (Dec. 1, 1981), 1981 U.N. Jurid. Y.B. 159, 161-62, U.N. Doc. ST/LEG/SER.C/19; CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1142; CROSSWELL, *supra* note 10, at 43; KING, *supra* note 10, at 89; Kunz, *supra* note 19, at 859; Tarassenko & Zacklin, *supra* note 42, at 7. Since locally-recruited staff (including clerks, secretaries and drivers) are paid according to established salary or wage scales, the term "official" applies to virtually every UN employee. See Statement of the U.N. Legal Counsel (Dec. 1, 1981), *supra*, at 161-62; FREY & FREY, *supra* note 11, at 560; KING, *supra* note 10, at 90.

The Secretary-General's broad definition of "officials" makes sense. The official acts of United Nations personnel constitute acts of the Organization itself. Therefore, the Organization's own immunity attaches to such acts as a matter of law. See, e.g., Kunz, *supra* note 19, at 855 (explaining that international civil servants must enjoy immunity for official acts because they constitute the acts of the organization). Consequently, the Preparatory

every kind for words spoken or written and all acts performed in their official capacities.

Unfortunately, these provisions create an artificial distinction between the immunities of the United Nations and the immunities of its personnel.¹¹⁵ Because juridical persons act only through their agents, it is an elementary principle that their immunities automatically extend to the official acts of their agents.¹¹⁶ If this were not the case, a juridical person could never claim immunity for its

Commission for the United Nations stated that it "clearly" would be necessary for all officials of whatever rank or nationality to possess immunity for acts performed in their official capacities. CROSSWELL, *supra* note 10, at 40-41.

114. General Convention, *supra* note 9, at § 22. The General Convention neither defines the term "experts on missions" nor specifically authorizes the Organization to designate categories of agents as "experts on missions." The ICJ, nonetheless, has construed the term broadly to include persons who do not have the status of an official of the Organization, but to whom the Organization has entrusted a mission. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, 194 (Dec. 15). Such experts may or may not have a contract with the Organization. *Id.* They may be paid or receive no compensation. *Id.* Finally, they may be entrusted with tasks requiring work over a long period or a very short time. *Id.* In practice, the Organization has called on such experts to mediate disputes; prepare reports and studies; conduct investigations or fact-finding missions; participate in peacekeeping forces; perform technical assistance work; and to sit on a variety of committees in their personal capacities. *Id.*

The grant of immunities to experts on mission raises special concerns. Because experts on mission often serve part-time and do not fall within the Organization's regular disciplinary system, they may be more likely to abuse their immunities. See JENKS, *supra* note 2, at 141. On the other hand, because they serve the United Nations only part-time, they may be even more susceptible to governmental influence and, therefore, require more protection than full-time staff.

While it is possible to distinguish between "officials" and "experts on mission" based on their respective accountability and vulnerability, they share one important attribute: they are agents of the Organization. As such, the Organization's immunity should attach equally to their official acts. Therefore, it is not surprising that the General Convention endows them with a virtually identical immunity from legal process for acts performed in their official capacities. See RESTATEMENT (THIRD), *supra* note 9, at § 469 cmt. b (describing the jurisdictional immunities of international "officials" and stating that "[t]he immunities set forth in this section are enjoyed also by experts performing missions for an international organization"). See also *ILC Study (1967)*, *supra* note 103, at 285 (recognizing the similarities between the immunities accorded to officials and experts on mission and concluding that precedent regarding the former can be applied by analogy to the latter). When discussing their jurisdictional immunities, this article refers to "officials" and "experts on mission" collectively as "agents," "officials," or "personnel" of the Organization.

115. See BOWETT, *supra* note 18, at 353.

116. See KELSEN, *supra* note 89, at 339; KING, *supra* note 10, at 79; KING, *supra* note 13, at 103, 182. See also RESTATEMENT (THIRD), *supra* note 9, at § 469 cmts. a, b (explaining that the immunity of an international organization may also apply to the official acts of staff members); FREY & FREY, *supra* note 11, at 560 (indicating that the immunity of international civil servants for official acts is not a personal immunity but comes into existence because the acts are "authorized acts of an agent of an immune organization").

activities.¹¹⁷ Thus, while Switzerland maintained that Swiss staff members were not entitled to diplomatic immunities, it recognized that the League's own immunity extended to their official acts.¹¹⁸ Likewise, the official acts of United Nations personnel constitute acts of the Organization itself.¹¹⁹ Therefore, the immunity of United Nations personnel for official acts constitutes a manifestation of the Organization's immunity, which is established by Section 2 of the General Convention.¹²⁰

At first glance, there seems to be a fundamental tension between the Charter's commitment to the functional necessity doc-

117. See AHLUWALIA, *supra* note 10, at 106 (quoting JENKS, *THE HEADQUARTERS OF INTERNATIONAL INSTITUTIONS* 40 (1945)); Note, *The United Nations Under American Municipal Law*, *supra* note 56, at 787.

118. See *supra* notes 76-78 and accompanying text.

119. See *Relations Between States and International Organizations (Second Part of the Topic)*, [1985] 2 Y.B. Int'l L. Comm'n 145, 171, U.N. Doc. A/CN.4/L.383 and Add. 1-3 [hereinafter *ILC Study (1985)*]; Memorandum from the General Counsel of UNRWA (May 15, 1968), 1968 U.N. Jurid. Y.B. 212, 213, U.N. Doc. ST/LEG/SER.C/6; AHLUWALIA, *supra* note 10, at 106; KELSEN, *supra* note 89, at 339; KING, *supra* note 13, at xiii, 182; Kunz, *supra* note 19, at 855.

The United Nations takes very seriously the unity of its immunity and the immunity of UN personnel for official acts. When a member state proposed to ratify the General Convention subject to a reservation regarding the immunity of its own citizens, the Office of Legal Affairs responded in an uncharacteristically direct manner: "It follows that your country reserved the right to prosecute United Nations officials of its nationality for words spoken or written or for any acts performed by them in their official capacity, *indeed for actions which are in effect the acts of the Organization itself.*" WHITEMAN, *supra* note 91, at 152 (quoting Aide-Mémoire to the Permanent Representative of a Member State (Oct. 22, 1963), 1963 U.N. Jurid. Y.B. 188, 189, U.N. Doc. ST/LEG/SER.C/1) (emphasis added). Consistent with these views, the United Nations has asserted that it would never accept a ratification of the General Convention that included a reservation regarding the immunity of UN personnel for official acts. Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (May 5, 1965), 1965 U.N. Jurid. Y.B. 234, 235, U.N. Doc. ST/LEG/SER.C/3.

120. See Statement made by the U.N. Legal Counsel (Dec. 1, 1981), *supra* note 113, at 161 (explaining that the immunity of UN officials belongs to the Organization and that infringements upon their immunity violate the Organization's rights); FREY & FREY, *supra* note 11, at 540 (explaining that "the privileges and immunities of officials stem directly from the immunity of the international organization"); KELSEN, *supra* note 89, at 317, 339-40 (explaining that the "exemption of the United Nations from . . . jurisdiction . . . coincides with exemption of individuals from . . . jurisdiction . . . with respect to acts performed . . . in their capacity as organs of the United Nations"); KING, *supra* note 13, at 182 (explaining that "immunity [for official acts] devolves upon all agents of an entity which itself possesses immunity from jurisdiction"); Kunz, *supra* note 19, at 855 (explaining that international officials must enjoy immunity for official acts because they are imputed to the organizations). See also *The Status, Immunities, and Other Facilities to Be Accorded to the International Labour Organisation by Governments*, 27 INT'L LAB. OFF. OFFICIAL BULL. 197, 214 (1945) [hereinafter *ILO Memorandum*] (asserting that the immunity of International Labor Organization (ILO) staff members for official acts "is a necessary corollary of the immunity from suit accorded to the [ILO] itself").

trine and its implementation through the General Convention. On the one hand, the Charter limits international immunities to the bare *minimum*. On the other hand, the General Convention implements the functional necessity doctrine by granting the Organization immunity from "every form of legal process" and vesting its personnel with immunity from "legal process of every kind" for their official acts. Yet, writers frequently question whether the Organization requires immunity from every suit brought by unpaid suppliers or victims of traffic accidents.¹²¹

Viewed in these terms, one can appreciate concerns that the General Convention implements the functional necessity doctrine through provisions that resemble the doctrine of absolute state immunity.¹²² While such claims enjoy a superficial plausibility, they do not reflect a complete understanding of the General Convention. Specifically, they do not account for the countervailing role played by the duty of waiver, which reincorporates the functional necessity doctrine by requiring the Secretary-General to waive unnecessary immunities.

With respect to diplomatic immunities, the right of a sending state to waive the immunity of its officials constitutes the traditional method of preventing abuse.¹²³ When liberally exercised, the power of waiver hangs "like a permanent threat over the heads of officials who might otherwise [be] inclined to abuse their posi-

121. See Singer, *supra* note 1, at 128, 141 (emphasizing that the functional necessity doctrine secures only the minimum immunities necessary for international organizations and does not guarantee them immunity from all routine transactions, much less a "quiet" or "charmed" existence); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1190 ("Merely allowing a suit in tort against an intergovernmental organization seems unlikely to constitute an overly intrusive interference with its core activities."). See also *Westchester County v. Ranollo*, 67 N.Y.S.2d 31, 33 (New Rochelle City Ct. 1946) (refusing to believe that every employee of an international organization requires immunity for official acts without regard to the importance of his or her functions); HIGGINS, *supra* note 1, at 93 (acknowledging that international organizations do not always require immunity in order to fulfill their purposes).

122. See Singer, *supra* note 1, at 84 (concluding that the "General Convention . . . represent[s] the view of the member states at that time that the . . . functioning of the United Nations demanded absolute jurisdictional immunity"). See also RESTATEMENT (THIRD), *supra* note 9, at § 467 reporters' note 4 (construing Section 2 of the General Convention to establish absolute immunity and questioning the justification for absolute immunity under the functional necessity doctrine).

123. See Kwen Chen, *The Legal Status, Privileges and Immunities of the Specialized Agencies*, 42 AM. J. INT'L L. 900, 904 (1948) (describing waiver as "the usual method of counterbalancing . . . immunities"); Kunz, *supra* note 19, at 852, 861 (identifying waiver as the "oldest" and "most favored" counterbalance to immunity). See also SCHERMERS & BLOKKER, *supra* note 17, at 1008-09 (describing waiver as a way to mitigate the "injurious effects" of immunity).

tion."¹²⁴ In other words, waiver can provide both a disincentive to improper behavior and a remedy for victims of abuse.¹²⁵ But even though waiver has become an increasingly common event,¹²⁶ it remains a right—and not an obligation—of the sending state.¹²⁷ Thus, because waivers require the exercise of discretion, they place no dependable legal restrictions on diplomatic immunities.¹²⁸ For similar reasons, writers suggest that waiver has no meaningful role to play in the limitation of international immunities under the functional necessity doctrine.¹²⁹ As explained below, these conclusions reflect an inapt comparison between the *right* of waiver under diplomatic law and the *duty* of waiver that applies to international immunities.

At first blush, one can appreciate comparisons between the discretionary waiver of diplomatic immunities and the waiver of international immunities. Section 2 of the General Convention provides the United Nations with immunity from "every form of legal process," subject only to the possibility of express waiver. Furthermore, nothing in Section 2 expressly requires the United Nations to waive its immunity. Sections 20 and 23 of the General Convention, however, contain two additional waiver provisions:

Section 20: Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the *duty* to waive

124. Cf. RANSHOFEN-WERTHEIMER, *supra* note 51, at 266 (describing the effect of potential waivers of diplomatic immunities on League of Nations officials). Cf. also CROSSWELL, *supra* note 10 at 24 (describing the threat of waiver as a "very effective brake" on agents of international organizations who might be inclined to abuse their immunities); Liang, *supra* note 9, at 591 (reaching the same conclusion).

125. See Secretan, *supra* note 39, at 72 (arguing that "[t]he right to waive immunities, vested in the authority which appoints the agent in question, is a sufficient guarantee that cases of denial of justice will not occur").

126. See, e.g., EILEEN DENZA, *DIPLOMATIC LAW* 286 (2d ed. 1998) (stating that "in recent years waivers of immunity have been more rigorously sought . . . and . . . more readily granted").

127. KING, *supra* note 13, at 123. See also Kunz, *supra* note 19, at 852 (recognizing the historical absence of a duty to waive diplomatic immunities).

128. See FREY & FREY, *supra* note 11, at 561 (stating, in the context of diplomatic immunity, that waiver "is more a moral than a legal obligation").

129. See Singer, *supra* note 1, at 80 ("Finally, it must be stressed that functional necessity doctrine has no application to waiver."). See also Farrugia, *supra* note 5, at 514 (suggesting that the disparity of bargaining power makes it difficult for private parties to negotiate waivers of immunity by international organizations); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182 (describing waivers as an unsatisfactory limitation on immunity because their grant lies "entirely within the discretion of the organization").

the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.¹³⁰

Section 23: Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the *duty* to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.¹³¹

The language of Sections 20 and 23 embodies a clear departure from diplomatic immunity in two respects. The first sentence of each section confirms that the Organization's personnel enjoy immunity only for *official* acts, which may be imputed to the Organization.¹³² More importantly, the second sentence creates an obligation for the Secretary-General to waive the immunities of UN personnel whenever the assertion of immunity would impede the course of justice and waiver may be accomplished without prejudice to the Organization.¹³³ As a result, waiver becomes a frequent *duty* of the United Nations and, thus, a serious structural limitation of its immunity.¹³⁴

In addition to providing a serious limitation on the General Convention's initial grant of immunity, the duty of waiver also

130. General Convention, *supra* note 9, at § 20 (emphasis added).

131. *Id.*, § 23 (emphasis added).

132. See Peter H.F. Bekker, *Memorandum of the Lawyers Committee for Human Rights on Legal Issues Arising from the Case Concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* at para. 46 (visited Nov. 16, 1998) <<http://www.lchr.org/feature/cumaraswamy/bekkerbr1.htm>>. By contrast, diplomatic personnel generally enjoy immunity for official and private acts. See, e.g., Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31(1), 23 U.S.T. 3227, 500 U.N.T.S. 95 (providing diplomatic agents with absolute immunity from the criminal jurisdiction of receiving states and also providing them with immunity from civil and administrative jurisdiction, except in actions relating to private immovable property, actions relating to succession in which the diplomatic agent is involved, and professional and commercial activities not falling within the diplomat's official functions).

133. See HILL, *supra* note 47, at 109-11 (describing the General Convention's mandatory waiver as an innovation).

134. See BOWETT, *supra* note 18, at 377 (explaining that "waiver is often a duty imposed on the organisation").

supplies the vehicle through which the General Convention maintains its fidelity to the functional necessity doctrine.¹³⁵ While the General Convention preliminarily confers a blanket immunity on the official acts of United Nations personnel, the Convention requires the Secretary-General to waive that immunity whenever he can do so without prejudice to the interests of the Organization. In so doing, the General Convention preserves the conceptual framework of the functional necessity doctrine, but vests the Secretary-General with the primary authority for its application.¹³⁶

Although the Secretary-General has a duty to waive the immunities of United Nations personnel, the practical significance of that obligation depends on the possibility of independent review. Without independent review, the "mandatory" waiver could become reinvested with a discretionary character, which would undermine its restraining effect on assertions of immunity. In this regard, one must note that the General Convention requires the Secretary-General to waive immunity only after determining, "*in his opinion*," that immunity would impede the course of justice and that waiver would not prejudice the interests of the Organization.¹³⁷ While this language is not clear, the reference to the "opinion" of the Secretary-General might imply a subjective standard, which could eliminate (or at least minimize) the possibility of independent review.¹³⁸ In an authoritative statement to the ICJ, however, the United Nations Legal Counsel recognized that the Secretary-General's waiver decisions are subject to review by the

135. See David R. Deener, *Some Problems of the Law of Diplomatic Immunity*, 50 AM. J. INT'L L. 115, 119 (1956) (citing a number of treaties that impose mandatory waivers on international organizations and concluding that such provisions carry "the functional theory . . . to its logical extreme"). See also KING, *supra* note 10, at 129 (concluding that "[t]he principle of waiver of immunity is an integral part of the idea of granting jurisdictional immunities to international officials"); Henderson, *supra* note 5, at 492 (implying that the functional necessity doctrine plays an important role in the decision to waive international immunities).

136. See Peter H.F. Bekker, *International Decision: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 93 AM. J. INT'L L. 913, 921 (1999) (stating that "[t]he object and purpose of [the mandatory waiver provisions] is to assign a central role to the Secretary-General in the case of immunity questions arising under the Convention").

137. General Convention, *supra* note 9, at §§ 20, 23.

138. See Written Comments of the Government of Costa Rica at 8, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___ (Apr. 29) [hereinafter Written Comments of Costa Rica] (arguing that the application of a subjective standard rendered the Secretary-General's waiver decisions non-justiciable); BEKKER, *supra* note 9, at 174 (concluding that although the General Convention creates a "duty" to waive immunity, it vests the Secretary-General with discretion in deciding whether to exercise that "duty").

ICJ.¹³⁹ Because the General Convention both requires the Secretary-General to waive unnecessary immunities and provides for judicial review of his decisions, it creates a genuine legal restriction on the immunities of United Nations personnel.

There is, however, substantial confusion regarding the duty of the United Nations to waive its "own" immunity. Many writers claim that the General Convention requires the Organization to waive the immunities of its personnel, but not its own immunity.¹⁴⁰ While this view enjoys popular support, it reflects an incomplete understanding of the Convention. As explained above, the immunity of UN personnel for official acts and the immunity of the Organization are inseparable because the former constitutes a manifestation of the latter.¹⁴¹ Strictly speaking, when the Organization waives the immunity of its personnel for official acts, it waives a manifestation of its own immunity,¹⁴² assumes responsibility for

139. See Oral Statement of the United Nations (Dec. 7, 1998) at para. 59, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ____ (Apr. 29) [hereinafter Oral Statement of the United Nations (Dec. 7, 1998)]. See also Written Statement of the Government of Federal Republic of Germany, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ____ (Apr. 29) [hereinafter Written Statement of the Federal Republic of Germany] (assuming that the ICJ has the authority to review the Secretary-General's decisions on waiver).

140. See BEKKER, *supra* note 9, at 192 (stating that international organizations have no legal duty to waive their own immunities and that the decision to waive immunity is usually left to the discretion of the organization); JENKS, *supra* note 2, at 45 (stating that there is "no corresponding 'right and duty' . . . of the organisation" to waive its own immunity); KING, *supra* note 13, at 230 (describing the waiver as a "competence," but not a "duty" of the United Nations).

141. See *supra* notes 119-20 and accompanying text.

142. A few writers have suggested that the waiver of the immunity of *agents for official acts* has no logical place in the framework of United Nations immunity. See WHITEMAN, *supra* note 91, at 155 (quoting KING, *supra* note 10, at 139). United Nations personnel possess immunity for official acts because they constitute the acts of the Organization itself. See *id.*; KING, *supra* note 13, at 258-59. Therefore, as a technical matter, the officials' immunity should not be waived; the immunity of the Organization should be waived. See *id.*

This view is consistent with the Organization's long-standing position that any breach of its agents' immunity for official acts constitutes an infringement of the Organization's immunity. See *supra* notes 119-20. It is also consistent with the practice of the Organization to waive its *own* immunity when waiving the immunity of its agents for traffic accidents. See Letter from the U.N. Office of Legal Affairs to the Legal Liaison Officer, UNIDO (Dec. 12, 1977), 1977 U.N. Jurid. Y.B. 247, 247, U.N. Doc. ST/LEG/SER.C/15 (indicating that the United Nations frequently waives its own immunity - along with that of its agents—to litigate damages resulting from automobile accidents caused by the official acts of UN personnel). See also *ILC Study (1985)*, *supra* note 119, at 162 (discussing the UN's policy of waiving its own immunity in cases that involve automobile accidents caused by the official acts of UN personnel).

the underlying conduct,¹⁴³ and undertakes to indemnify its agents against any damage awards.¹⁴⁴ In this sense, the express duty of waiver indirectly applies to the United Nations's "own" immunity, at least in cases where the claimants join UN personnel as defendants. Because the United Nations acts (and commits legal wrongs) only through its personnel, claimants can generally join them as defendants.¹⁴⁵ Therefore, the Organization's duty of waiver will become relevant to most disputes.

Arguably, it could be difficult for plaintiffs in some contract actions to join United Nations personnel as defendants.¹⁴⁶ Without any UN personnel as defendants, claimants could not invoke the

143. See Oral Statement of the United Nations (Dec. 10, 1998) at para. 14, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ____ (Apr. 29) [hereinafter Oral Statement of the United Nations (Dec. 10, 1998)] ("By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations.").

144. See Written Statement Submitted on Behalf of the Secretary-General of the United Nations at para. 64, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ____ (Apr. 29) [hereinafter Written Statement of the United Nations] (recognizing that an expert on mission was "entitled to be reimbursed by the United Nations for any . . . costs, expenses or damages" resulting from a defamation suit arising out of his official activities); Oral Statement of the United Nations (Dec. 10, 1998), *supra* note 139, at para 46 (reaching the same conclusion).

145. See, e.g., *ILC Study (1967)*, *supra* note 103, at 223 n.50 (observing that, in *Curran v. City of New York*, 77 N.Y.S.2d 266 (Sup. Ct. 1947), the plaintiff effectively joined the United Nations by suing the Secretary-General in a representative capacity). See also *Rendall-Speranza v. Nassim*, 107 F.3d 913 (D.C. Cir. 1997) (involving statutory and tort claims of an International Finance Corporation employee against her supervisor); *Donald v. Orfila*, 788 F.2d 36 (D.C. Cir. 1986) (involving a tort claim by a former employee against the Secretary-General of the Organization of American States); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996) (involving tort and statutory claims by a private party against United Nations officials, and acknowledging that such claims are effectively actions against the United Nations itself); *De Luca v. United Nations Org.*, 841 F. Supp. 531 (S.D.N.Y. 1994) (involving contract, tort, and statutory claims by a former UN employee against the United Nations and individual UN officers).

Because claimants frequently can name individual United Nations officials as defendants, one may conclude that the duty to apply the mandatory waiver provisions will "often" be imposed on the Organization by the express terms of the General Convention. See *BOWETT*, *supra* note 18, at 377 (indicating that "waiver is often a duty imposed upon the *organisation*") (emphasis added).

146. Nevertheless, it will often be possible to join the chief administrative officer of an international organization as the defendant to breach-of-contract actions and to accuse subordinate officials of tortious behavior related to the breach of contract. See *Tuck v. Pan American Health Org.*, 668 F.2d 547, 548-49 (D.C. Cir. 1981) (involving allegations that the director of an international organization either breached or tortiously interfered with the plaintiff's contract); *De Luca*, 841 F. Supp. at 532-35 (apparently involving allegations that the United Nations breached its contract with the plaintiff and that the underlying behavior of various UN officials constituted *prima facie* torts, injurious falsehoods, and employment discrimination).

General Convention's express provisions on mandatory waiver. Yet, the Organization would still have a moral as well as a legal obligation to waive any unnecessary immunities.¹⁴⁷ To reach this conclusion, one must apply the ICJ's long-standing view that rights are encumbered with corresponding duties.¹⁴⁸ For international organizations, the most important correlative duty is to exercise their rights with the utmost good faith.¹⁴⁹ This applies with particular force to the assertion of immunity.¹⁵⁰ In fact, writers have concluded that the principle of good faith independently requires the waiver of unnecessary immunities even if not mandated by an express treaty provision.¹⁵¹

147. Some writers cast this obligation in moral terms. See BEKKER, *supra* note 9, at 192 (asserting that an international organization "should feel compelled to waive its immunities in situations where the immunity is not strictly necessary for the exercise of the organization's functions in the fulfilment of its purposes"); SCHERMERS & BLOKKER, *supra* note 17, at 1004 (stating that international organizations "should" waive immunities when they are not really necessary). See also Liang, *supra* note 9, at 591 (arguing that the question of waiver should be viewed as one of "policy [rather] than as one of legal rights and duties"). Other writers define the obligation in legal terms. See *infra* note 151 and accompanying text.

148. See, e.g., Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. __, __ (para. 50) (discussing both the "authority" and "responsibility" of the Secretary-General to render functional protection to United Nations personnel); *id.* at __ (separate opinion of Vice President Weeramantry at 5) (stating that any right of a United Nations official to functional protection is "matched by a correlative duty"); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, 381 (Sept. 13) (separate opinion of Vice President Weeramantry) (observing that "a legal right imports a correlative legal duty"). See also BEKKER, *supra* note 9, at 50 (recognizing the ICJ's adoption, in 1949, of the principle that "[t]he entrustment with functions comes with attendant duties and responsibilities").

149. In a 1980 decision, the ICJ acknowledged that a "body of mutual obligations of cooperation and good faith" is "the very essence" of the relationship between a host state and an international organization. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 93 (Dec. 20). A number of writers support the proposition that the principle of good faith forms the cornerstone of all relationships within an international organization. See JENKS, *supra* note 2, at 170; Glenn et al., *supra* note 5, at 268. See also SHAW, *supra* note 27, at 81 (describing good faith as "the most important general principle, underpinning many international legal rules").

150. See BEKKER, *supra* note 9, at 183; JENKS, *supra* note 2, at 169-70.

151. See JENKS, *supra* note 2, at 170 (arguing that the "principles [of good faith] include . . . the 'right and duty' [of the organization] to waive immunity in any case where . . . 'the immunity would impede the course of justice and can be waived without prejudice to the interests of' the organisation"); MULLER, *supra* note 14, at 163 n.37 (stating that the obligation to cooperate in good faith with the host state can compel international organizations to waive their immunity). See also RESTATEMENT (THIRD), *supra* note 9, at § 467 reporters' note 7 (suggesting that the functional necessity doctrine might require an international organization to waive its own immunity "wherever it can do so without hampering the achievement of its purposes").

Under these circumstances, it is not accurate to say that the provisions of immunities agreements resemble the doctrine of absolute immunity. By introducing a duty to waive unnecessary immunities, the General Convention preserves the substance of the functional necessity doctrine, but commits its application to the competence of international organizations. Thus, the chief function of international immunities is to concentrate responsibility for questions involving the powers and duties of organizations at the international—as opposed to the municipal—level.¹⁵² Any attempt to expand the jurisdiction of municipal courts would upset the General Convention's deliberate structure.

IV. INTERNATIONAL IMMUNITIES IN THEIR PRACTICAL CONTEXT: THE COSTS OF REFORM

A. *The Unexplored Costs of Reform*

One may safely assume that the expansion of municipal court jurisdiction would affect the substantive outcomes of immunity determinations.¹⁵³ After all, municipal courts have different interests and perspectives than the international officials and judges who currently make immunity determinations.¹⁵⁴ Yet, because the proponents of reform argue that international organizations do not require immunity, they seem to assume that the expansion of municipal court jurisdiction would not produce significant institutional costs. This Part explains that the expansion of municipal

The invocation of good faith constitutes an acceptable method for filling textual gaps in treaties. For example, Bekker relies on good faith to close another lacuna in the General Convention. In so doing, he acknowledges that the General Convention expressly requires the United Nations to cooperate with municipal authorities to prevent the abuse of immunities by *officials*, but does not expressly require the Organization to settle disputes regarding the abuse of its own immunities. BEKKER, *supra* note 9, at 187. Yet, he asserts that the absence of "any explicit provision . . . does not necessarily mean that the United Nations is not bound on other grounds to settle disputes of this kind. [This obligation may rest on] the binding legal principle of good faith referred to above." *Id.* at 187 & n.816.

152. See Wood, *supra* note 39, at 163.

153. Cf. Charles H. Brower, II, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, 12 EMORY INT'L L. REV. 1571, 1578-79 & n. 35 (1998) (discussing the outcome-determinative consequences of transferring adjudicatory competence from municipal courts to international tribunals).

154. See KING, *supra* note 13, at 188 (stating that a municipal court sitting in New Rochelle, New York is unlikely to have a conception of the public interest that extends beyond that city or, at most, the United States). See also BEKKER, *supra* note 9, at 102 (observing that the experiences of municipal judges within a particular legal culture will give rise to parochial biases); SCHERMERS & BLOKKER, *supra* note 17, at 837 (explaining that municipal judges will inevitably be influenced by their national legal environment and precedents).

court jurisdiction would impair the capacity of international organizations to discharge their obligations with respect to peace, security, human rights, and other controversial issues.

To understand the likely costs of expanded municipal court jurisdiction, one must ascertain why member states of international organizations initially placed the competence for immunity decisions at the international level. By identifying the problems that they hoped to avoid, one can better predict the costs that would result from expanded municipal court jurisdiction.

Writing in 1945, the League of Nations's former legal adviser gave three justifications for international immunities and, implicitly, for the concentration of decision-making power at the international level.¹⁵⁵ First, international organizations must have effective protection against biased municipal courts.¹⁵⁶ Second, they need effective protection against baseless suits brought by the "cranks" and "fanatics" of the world.¹⁵⁷ Third, international organizations require effective protection against the possibility that member states will interpret the legal effect of their acts in different, and possibly inconsistent, ways.¹⁵⁸

Each of these three concerns speaks to a different form of prejudice. The first refers to the prejudice of municipal courts in its most direct sense. The second relates to a fear that, in times of stress, municipal courts might encourage (or at least tolerate) baseless suits to harass international organizations.¹⁵⁹ While the

155. See Wood, *supra* note 39, at 143-44. See also FREY & FREY, *supra* note 11, at 551 (describing Wood as the League's "legal adviser").

156. See Wood, *supra* note 39, at 143-44.

157. *Id.* at 144.

158. *Id.*

159. See WHITEMAN, *supra* note 91, at 64 (quoting JENKS, *supra* note 2, at 164, who recognized a "real danger" that people would initiate baseless proceedings against international organizations during times of acute tension within the forum state). Historical experience confirms the prescience of Jenks' warning; in over fifty years, the United Nations has only twice commenced advisory proceedings to resolve disputes regarding the immunities of UN personnel. See Oral Statement of the Government of Costa Rica (Dec. 10, 1998) at para. 24, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ___ (Apr. 29) [hereinafter Oral Statement of Costa Rica (Dec. 10, 1998)]. In both cases, municipal authorities refused to recognize the immunities of their own citizens during times of serious domestic turmoil. *Id.* at para. 25. The first case involved Romania and occurred shortly before the violent downfall of the Ceausescu regime. See Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15). See also Keith Highet et al., *International Decision*, 84 AM. J. INT'L L. 742, 746 (1990) (describing the downfall of the Ceausescu regime following the delivery of the ICJ's advisory opinion). The second case involved Malaysia and occurred contemporaneously with the arrest and trial of Malaysia's former Deputy Prime Minister, Anwar Ibrahim. See Differ-

first two concerns deal with manifestations of bad faith,¹⁶⁰ the third involves a more subtle form of prejudice.¹⁶¹ It recognizes that municipal courts have limited national perspectives, which are not consistent from country to country and which lack the global vision of international organizations.¹⁶² In this situation, the fear is that their limited perspectives will lead municipal courts to divergent and restrictive conclusions regarding the legality of acts falling within the exclusive competence of international organizations.¹⁶³ For example, the United Nations's peacekeeping and human rights efforts might become crippled if the municipal courts of each member state had concurrent jurisdiction to test the legality of force used by peacekeepers or official statements made by human rights workers.¹⁶⁴ Although writers disagree about the danger posed by these three forms of prejudice, they continue to shape contemporary debate about the need for international immunities.¹⁶⁵

Proponents of reform argue that direct prejudice may have posed a valid concern during the infancy of international organiza-

ence Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ___ (Apr. 29). See also *infra* notes 199-232 and accompanying text.

160. Because the first two concerns involve manifestations of bad faith, this article refers to them collectively as "direct prejudice."

161. Because the third concern does not involve bad faith, this article refers to it as "indirect prejudice."

162. See BEKKER, *supra* note 9, at 101-02 (observing that prejudice need not take the form of bad faith and explaining that municipal judges have biases that differ from country to country); SCHERMERS & BLOKKER, *supra* note 17, at 837 (explaining that the views of municipal judges will inevitably be shaped by their national legal culture).

163. See MULLER, *supra* note 14, at 151 (quoting JENKS, *supra* note 2, at 41, who identified the likelihood that municipal authorities would interpret the status of international organizations in unduly restrictive ways). See also Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1187 (arguing that international organizations should not have to face municipal regulation when performing their constitutive or core functions).

164. See SCHERMERS & BLOKKER, *supra* note 17, at 358 (discussing the likely prejudice to international organizations if municipal authorities could prosecute peacekeepers for aggression or international officials for submitting insulting reports). See also RESTATEMENT (SECOND), *supra* note 27, at § 85 illus. 1, § 92 illus. 1 (recognizing that people might attempt to sue agents of international organizations in municipal courts for the submission of reports that describe "corruption," include damaging information, or discuss the "reprehensible practices" of member states).

165. An examination of the literature reveals that almost all writers assess the need for international immunities against these standards. See, e.g., AHLUWALIA, *supra* note 10, at 200; BEKKER, *supra* note 9, at 101-03; BOWETT, *supra* note 18, at 349; JENKS, *supra* note 2, at 40-41; SCHERMERS & BLOKKER, *supra* note 17, at 1007-08; WHITEMAN, *supra* note 91, at 47 (quoting Liang, *supra* note 9, at 584); Glenn et al., *supra* note 5, at 277-78; Lewis, *supra* note 3, at 683-84.

tions, but that such fears have become untenable in the modern world.¹⁶⁶ Specifically, they describe the threat of actual prejudice as "unrealistic"¹⁶⁷ and "exaggerated,"¹⁶⁸ and argue that international immunities only provide a "psychological" benefit to international organizations.¹⁶⁹ They argue further that international organizations can trust municipal courts to dismiss baseless suits brought by cranks and fanatics.¹⁷⁰ While they agree that divergent judgments could pose difficulties with respect to the regulatory activities entrusted to international organizations,¹⁷¹ they argue that such areas are limited¹⁷² and that the need for increased accountability outweighs any inconvenience to organizations.¹⁷³ In short, they see little justification for maintaining decision-making authority at the international level and correspondingly few costs in the expansion of municipal court jurisdiction.

It is tempting to conclude that biased municipal authorities pose no threat to large international organizations like the United Nations. After all, such organizations have power and prestige that rival many states and multinational enterprises. From this perspective, fears of prejudice indeed seem "unrealistic" or "exaggerated."¹⁷⁴ While these perceptions may ring true in the stable envi-

166. Singer, *supra* note 1, at 66-67, 133.

167. *Id.* at 128. See also SCHERMERS & BLOKKER, *supra* note 17, at 359 (describing the threat of direct prejudice as "hardly conceivable"); Note, *Jurisdictional Immunities of International Organizations*, *supra* note 5, at 1185 (doubting that there is "reason to fear judicial bias against an IGO defendant").

168. See Hammerschlag, *supra* note 22, at 296 (contending that the foreign policy arguments against greater municipal court involvement are "exaggerated"). See also WHITEMAN, *supra* note 91, at 47 (quoting Liang, *supra* note 9, at 584, for the proposition that the danger of bad faith is a "minor and comparatively unimportant" concern).

169. Singer, *supra* note 1, at 87, 132.

170. See *id.* at 130.

171. *Id.* at 129-30. See also Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1187 (asserting that international organizations should enjoy immunity when performing their constitutive or core public functions). In such areas, the issue is not simply a fear of conflicting judgments, but the idea that member states have committed the regulation of certain matters exclusively to the international level. See Singer, *supra* note 1, at 129-30.

172. See, e.g., Singer, *supra* note 1, at 129-30 (arguing that international organizations do not require special protection from conflicting judgments in commercial transactions); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1190 ("Merely allowing a suit in tort against an intergovernmental organization seems unlikely to constitute an overly intrusive interference with its core activities.").

173. See Singer, *supra* note 1, at 154-55, 162 (recognizing that municipal court jurisdiction over employment matters could interfere with the functions of international organizations, but arguing that a lack of accountability would cause even greater harm to their effective functioning).

174. See *id.* at 128 (describing the likelihood of prejudice as "unrealistic"); Hammerschlag, *supra* note 22, at 296 (referring to foreign policy concerns as "exaggerated"). See

ronment of major Western capitals,¹⁷⁵ it is not fair to judge the system of international immunities by reference to the situations in which they are needed the least.¹⁷⁶ Rather, we must examine the system of international immunities by reference to the situations in which international organizations have their greatest need for effective protection.¹⁷⁷

We often forget that the twentieth century was "mankind's most bloody and hateful century."¹⁷⁸ In the past 100 years, the world lost over 87,000,000 souls to war and another 80,000,000 to extrajudicial killings by the victims' own governments.¹⁷⁹ Despite their many weaknesses, international organizations have made important contributions to the maintenance of international peace and security, and to the protection of individual peace and security from governmental repression.¹⁸⁰ It may be comforting to think that *organizations* can take care of themselves in tense situations.¹⁸¹ But the fact remains that organizations are juridical entities that respond to international problems only by placing peacekeepers, mediators, human rights monitors, and aid workers in situations that pose great risks of personal danger.¹⁸² Practically

also SCHERMERS & BLOKKER, *supra* note 17, at 359 (describing retaliation by municipal authorities as "hardly conceivable"); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1185 (suggesting that there is little reason to fear judicial bias against international organizations).

175. For example, during the inter-war period, critics asserted that the League of Nations did not require immunities because its seat was located in a "civilized country." FREY & FREY, *supra* note 11, at 552, 593. *See also* Wood, *supra* note 39, at 143-44 (recognizing that international organizations have little reason to fear the possibility of bad faith or prejudice in the municipal courts of countries like Switzerland).

176. *See* BEKKER, *supra* note 9, at 207 (quoting JENKS, *supra* note 2, at xxxvi, for the proposition that "the need for [international] immunities must be gauged not by the extent to which they are necessary or useful in every day life in a well-ordered capital but by their potential importance in emergencies").

177. *See id.* *See also* FREY & FREY, *supra* note 11, at 553 (quoting RANSHOFEN-WERTHEIMER, *supra* note 51, at 273, for the proposition that "[i]n troubled times' . . . privileges cease to be 'privileges and become . . . necessities'").

178. Sharp, *supra* note 23, at 93 (quoting ZBIGNIEW BRZEZINSKI, *OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE TWENTY-FIRST CENTURY* 4 (1993)).

179. *Id.* *See also* *A Survey of the 20th Century*, *ECONOMIST*, Sept. 11, 1999, at 7 (estimating that 207,000,000 *civilians* perished during the twentieth century as the result of war or extrajudicial killings by governments).

180. *See* Sharp, *supra* note 23, at 93-94 (discussing the contribution of the United Nations to this process).

181. *See* SCHERMERS & BLOKKER, *supra* note 17, at 359 (suggesting that international organizations can respond to prejudice by "mov[ing] shop"); Singer, *supra* note 1, at 129 (recommending that international organizations address prejudice "within [their] own political organs").

182. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 183 (Apr. 11) (taking judicial notice of the United Nations' need to send agents

speaking, international organizations often cannot remove their agents from danger because they serve in their home countries.¹⁸³ These are the people and the situations by which we must judge the need for international immunities. As several writers have cautioned, we must ensure that biased municipal governments do not prosecute peacekeepers for supposed acts of aggression or persecute international officials for submitting unflattering reports.¹⁸⁴ Simply put, when international organizations expose their personnel to hazardous conditions, they must provide effective protection against the responses of unhappy national governments.¹⁸⁵

Viewed from this perspective, fears of prejudice become far more realistic.¹⁸⁶ Moreover, the threat to international officials has increased and not abated over the past several decades. During the Cold War, for example, member states of the United Nations occasionally arrested, detained, or exerted improper pressure on

to disturbed parts of the world and to expose them to "unusual dangers to which ordinary persons are not exposed"); Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (Feb. 11, 1976), 1976 U.N. Jurid. Y.B. 236, 239, U.N. Doc. ST/LEG/SER.C/14 ("The Organization is frequently operating in areas of tension and conflict, in which immunity for official acts is essential if United Nations officials are to function at all."). See also Bekker, *supra* note 136, at 919 (describing the "ever-increasing number of UN experts[,] [who] are being asked to conduct their investigations in countries [where the] authorities are suspected of being responsible for serious human rights violations and which may lack an independent judiciary"); Sharp, *supra* note 23, at 95 (emphasizing that the United Nations depends on individuals to conduct military operations).

183. See YVES BEIGBEDER, THREATS TO THE INTERNATIONAL CIVIL SERVICE 124 (1988) (explaining that the United Nations cannot withdraw from countries that violate the immunities of local staff members because that would leave it without any means of protecting locally-recruited officials).

184. See *supra* note 164 and accompanying text.

185. To borrow words used twice by the ICJ during the last century:

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. __, __ (para. 51) (quoting *Reparation*, 1949 I.C.J. at 183).

186. See BEKKER, *supra* note 9, at 207 (warning that "[w]e have to face the fact that the danger of interference by sovereign States will constantly be lurking, no matter what stage the development of world organization has reached"); JENKS, *supra* note 2, at 119 (reminding that "[t]here are circumstances in which the danger of vexatious suits against international officials is far from unreal"); MULLER, *supra* note 14, at 151 (concluding that warnings about indirect prejudice "still hold true today").

international officials.¹⁸⁷ At that time, such incidents were not widespread. In the past twenty years, however, they have become a problem of increasing concern to the United Nations. In 1981, the United Nations and its Specialized Agencies reported the arrest, detention, or abduction of 43 officials.¹⁸⁸ In 1982, the number climbed to 203.¹⁸⁹ In 1983 and 1984, a total of 84 staff members were arrested in 28 countries.¹⁹⁰ In the next five years, the number of arrests, detentions, and disappearances climbed again to 89, 95, 123, 168, and 160, respectively.¹⁹¹ By 1992, attacks on United Nations officials had become so widespread that the General Assembly adopted a resolution, in which it "strongly deplored the *unprecedented* and still *increasing* number of fatalities which had occurred among United Nations personnel"¹⁹² These figures demonstrate that international officials face considerable risks from the "breakdown of law and order."¹⁹³ They also suggest that proposals to restrict international immunities "pay too little regard to the unsettled conditions of the world of today."¹⁹⁴

Most of the incidents described above occurred in areas of military strife and repressive political regimes, where the independence of courts is not sufficiently mature to afford a guarantee of impartiality in times of strain.¹⁹⁵ Many of these cases involve states

187. See, e.g., CROSSWELL, *supra* note 10, at 38 (describing how Czechoslovakian authorities apologized after a security official entered United Nations premises without permission for the purpose of arresting a UN employee).

188. See BEIGBEDER, *supra* note 183, at 113.

189. See *id.* at 114.

190. See *id.*

191. See *id.* (providing information for the years 1985 to 1986); FREY & FREY, *supra* note 11, at 591 (providing information for the years 1987 to 1989).

192. *Respect for the Privileges and Immunities of Officials of the United Nations and the Specialized Agencies and Related Organizations*, 1992 U.N. Jurid. Y.B. 258, U.N. Doc. ST/LEG/SER.C/23 [hereinafter *Respect for the Privileges and Immunities of Officials (1992)*] (emphasis added). See also *Respect for the Privileges and Immunities of Officials of the United Nations and the Specialized Agencies and Related Organizations*, 1986 U.N. Jurid. Y.B. 145, 145-46, U.N. Doc. ST/LEG/SER.C/17 (deploring the growing number of cases where the functioning, safety and well-being of officials had been endangered by detention or abduction, and concluding that the circumstances "represented a deterioration of the situation with regard to the observance of . . . privileges and immunities").

193. FREY & FREY, *supra* note 11, at 591. See also Tarassenko & Zacklin, *supra* note 42, at 8 (observing that "privileges and immunities are being . . . eroded by the practice of certain States, particularly with regard to locally recruited officials who are vulnerable to arrest and detention").

194. RANSHOFEN-WERTHEIMER, *supra* note 51, at 271.

195. See BEIGBEDER, *supra* note 183, at 114 (describing the countries in which these incidents occurred); FREY & FREY, *supra* note 11, at 590-91 (discussing the regions in which such incidents occurred). See also JENKS, *supra* note 2, at 41 (commenting on the insufficient development of judicial independence in many places); Bekker, *supra* note 136, at

that are unwilling to recognize the immunities of their own nationals from local control.¹⁹⁶ We often do not hear about such incidents because the United Nations prefers to handle them through quiet diplomacy.¹⁹⁷ Nonetheless, the United Nations has taken the position that "disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the United Nations system by Member States."¹⁹⁸ To understand why this is the case, it may be helpful to examine a recent decision of the ICJ.

In April 1999, the ICJ issued a binding Advisory Opinion relating to a difference between the United Nations and Malaysia over the immunity of a special rapporteur to the United Nations Commission on Human Rights.¹⁹⁹ The Commission on Human Rights, which is the only UN body having competence for serious human rights problems in all member states,²⁰⁰ appointed Dató Param

919 (noting the "ever-increasing number of UN experts[,] [who] are being asked to conduct [controversial] investigations in countries . . . which may lack an independent judiciary").

196. See Statement made by the U.N. Legal Counsel (Dec. 1, 1981), *supra* note 113, at 161-62 (noting the views of some member states that locally-recruited staff members are not entitled to privileges and immunities in their home states because they are "first and foremost" nationals of those states); BEIGBEDER, *supra* note 183, at 121 (observing that national authorities often ignore the immunities of locally-recruited staff); BOWETT, *supra* note 18, at 358 (observing that "the discrimination against their own nationals by states is . . . the largest problem in relation to the immunities and privileges of officials"); FREY & FREY, *supra* note 11, at 569 (explaining that "[g]overnments have not hesitated to arrest their own nationals, especially in areas of unrest"). See also *ILC Study (1985)*, *supra* note 119, at 170, 199 (describing the recognition of the immunity of locally-recruited officials as an area in which the United Nations and the ILO have experienced "problems").

197. When an international organization asserts the immunity of an official against his or her home state, the state may interpret such action as an interference in its internal affairs and as a "veiled . . . condemnation of its political, judicial and administrative system." BEIGBEDER, *supra* note 183, at 113. Therefore, international organizations prefer to handle such matters with discretion, if not outright secrecy. See *id.*

198. *Respect for the Privileges and Immunities of Officials (1992)*, *supra* note 192, at 258; Written Statement of the United Nations, *supra* note 144, at para. 43. See also Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (Feb. 11, 1976), *supra* note 182, at 239 (explaining that the "Organization is frequently operating in areas of tension and conflict, in which immunity for official acts is essential if United Nations officials are to function at all").

199. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___ (Apr. 29). Hereafter, this article will use *Cumaraswamy* as the short-form citation of this case.

200. Excellent overviews of the Commission on Human Rights may be found in LOUIS HENKIN ET AL., *HUMAN RIGHTS 685-92 (1999)* and KIRGIS, *supra* note 37, at 969-75.

Cumaraswamy (a prominent Malaysian jurist),²⁰¹ as a special rapporteur in 1994. Because judges and lawyers provide the first line of defense against human rights violations and because they had been subjected to increasing pressure during the 1990s, the Commission instructed Cumaraswamy to investigate and report on attacks against the independence of judges and lawyers throughout the world.²⁰² Upon accepting his appointment, Cumaraswamy stated that he viewed his primary mission as that of an educator and communicator.²⁰³

Having previously concentrated his efforts on other countries, Cumaraswamy announced to the press in August 1995 that he planned to investigate the Malaysian judicial system.²⁰⁴ In so doing, he explained that "[c]omplaints are rife that . . . highly placed personalities . . . are manipulating the Malaysian system of justice . . ." ²⁰⁵ That same month, Cumaraswamy made a similar statement to the Chairman of the Commission on Human Rights, who also was a Malaysian national.²⁰⁶ Cumaraswamy asked the Chairman to transmit his concerns to Malaysia's Prime Minister.²⁰⁷

Later, Cumaraswamy gave an interview to a British magazine called *International Commercial Litigation*, which was preparing an article entitled "Malaysian Justice on Trial." This article appeared in the magazine's November 1995 issue and described a case in which Malaysian courts apparently granted preferential treatment to an influential law firm.²⁰⁸ In so doing, the article identified Cumaraswamy as a special rapporteur for the Commission on Human Rights and quoted him as saying that the case looked like "a very obvious, perhaps even glaring, example of judge-choosing," and that "[c]omplaints are rife that certain highly

201. See Ruslaini Abbas, *Judiciary Won't Be Dictated to by Anyone, Says Judge*, NEW STRAITS TIMES (MALAYSIA), Oct. 2, 1998, at 5, available in LEXIS, News Library (referring to Cumaraswamy as the "former Bar Council chairman and the chief executive partner of . . . Shook Lin & Bok"); Branko Milinkovic, *Rights—United Nations/Malaysia: U.N. Official Defends Immunity*, INTER PRESS SERV., Dec. 30, 1998, available in LEXIS, News Library (describing Cumaraswamy as the "former president of the Malaysian Bar Council").

202. See United Nations Department of Public Information, *Independence of the Judiciary: A Human Rights Priority* (visited Apr. 27, 1999) <<http://www.un.org/rights/dpi1837e.htm>>.

203. See *id.*

204. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dató Param Cumaraswamy*, Commission on Human Rights, 52d Sess., Agenda Item 8, at para. 160, U.N. Doc. E/CN.4/1996/37 (1996) [hereinafter *Second Cumaraswamy Report*].

205. *Id.*

206. See Written Statement of the United Nations, *supra* note 144, at para. 10.

207. See *id.*

208. David Samuels, *Malaysian Justice on Trial*, INT'L COM. LITIG., Nov. 1995, at 10-13.

placed personalities . . . are able to manipulate the Malaysian system of justice."²⁰⁹

In December 1995, several of the people mentioned in the article threatened to sue Cumaraswamy for defamation.²¹⁰ Cumaraswamy referred their inquiries to the United Nations Legal Counsel, who informed the Government of Malaysia that Cumaraswamy gave the interview in his official capacity and, therefore, would enjoy immunity from the threatened lawsuits.²¹¹ For almost a year, the claimants did not pursue their threat to take legal action.

During that time, Cumaraswamy continued his investigation of the Malaysian legal system. In 1996, for example, he received information that the Attorney General intended to restructure Malaysia's bar,²¹² which consists of private attorneys and which routinely criticizes Malaysian authorities. Essentially, the proposal would have increased the government's influence by admitting government lawyers to the bar, appointing the Attorney General as President of the bar, and authorizing the Attorney General to select the members of Malaysia's Bar Council.²¹³ As part of his investigation, Cumaraswamy requested Malaysia's Foreign Minister to comment on the proposal.²¹⁴

At roughly the same time, the Attorney General delivered a speech, in which he described the government's complaints about—and plans for—the existing Bar Council:

Because the Bar Council comprises only private practitioners . . . [i]t does not . . . seek to understand the various sensitive issues facing the Government. I have always reminded the leaders of the Bar Council that it can . . . have meaningful dialogues with the Attorney General's Chambers . . . away from the glare of media attention. If the leaders of the Bar Council can bring themselves to talk with genuine respect for judges . . . instead of taking positions by . . . open criticisms . . . then and only then

209. *Id.* at 12, 13.

210. *See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, Commission on Human Rights, 53d Sess., Agenda Item 8, at para. 125, U.N. Doc. E/CN.4/1997/32 (1997) [hereinafter Third Cumaraswamy Report].*

211. *See Request for Advisory Opinion, supra* note 107, at para. 6. *See also Third Cumaraswamy Report, supra* note 210, at para. 125.

212. *See Third Cumaraswamy Report, supra* note 210, at para. 129.

213. *See id.*

214. *See id.*

can there be a truly useful forum. . . . I have in my previous meetings with the President and leaders of the Bar Council stated that if the Bar Council does not take medication to cure itself, then it may have to undergo surgery [for] its malignant illness. . . . They have not listened to my advice. . . . My Chambers are presently preparing . . . recommendations to the Government to reform the legal profession and, hopefully, with proper medication, a few minor surgeries, implantations and transplantations here and there, the legal body will be cured of its many ills and live a long and healthy life.²¹⁵

Against this background and the subsequent downfall of Anwar Ibrahim, the following chain of events should come as no surprise.²¹⁶ Beginning in December 1996, Cumaraswamy became the defendant in a series of four defamation suits based on statements attributed to him by *International Commercial Litigation*.²¹⁷ All told, the lawsuits sought \$112,000,000 in damages and an injunction prohibiting Cumaraswamy from making similar statements in the future.²¹⁸

Acting on behalf of the Secretary-General, the United Nations Legal Counsel requested the Malaysian Government to advise its courts of Cumaraswamy's immunity.²¹⁹ Thereafter, the Secretary-General personally issued a certificate confirming the determination of immunity, which Cumaraswamy filed with the Malaysian High Court.²²⁰

215. *Id.* at para. 131.

216. A concise description of the politically motivated trial of Anwar Ibrahim (Malaysia's former Deputy Prime Minister) and subsequent attacks on his defense lawyers may be found in Lawyers Committee on Human Rights, *Justice on Trial: Malaysia's Assault on Lawyers* (Apr. 1999) <<http://www.lchr.org/feature/malaysia/JusticeOnTrial.htm>>.

217. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ___, ___ (para. 10) (Apr. 29) (quoting Request for Advisory Opinion, *supra* note 107, at paras. 5, 11, 12 and describing the initiation of four civil suits against Cumaraswamy in December 1996, July 1997, October 1997, and November 1997).

218. *See id.* (describing the damages claimed in the four lawsuits). *See also* MBf Capital Bhd & Anor v. Cumaraswamy, 1997 MLJ LEXIS 328, at *12 (Kuala Lumpur High Ct. June 28, 1997) (stating that the "plaintiffs also claim for an order of injunction to restrain [Cumaraswamy] whether by himself, his servant or agent or otherwise howsoever from further speaking or publishing or causing to be published, the said or any similar words defamatory of the plaintiffs").

219. *See Cumaraswamy*, 1999 I.C.J. at ___ (para. 10) (quoting Request for Advisory Opinion, *supra* note 107, at para. 6).

220. *See id.*

The Malaysian Minister of Foreign Affairs filed his own certificate with the High Court. In contrast to the Secretary-General's certificate, the Minister's certificate ominously stated that Cumaraswamy possessed immunity "only in respect of words spoken or written . . . in the course of the performance of his mission."²²¹ Moreover, the Minister's certificate did not refer to the Secretary-General's determination of immunity or to the Secretary-General's contention that his certificates of immunity have binding effect in municipal courts.²²² Despite repeated requests by the United Nations Legal Counsel, the Minister of Foreign Affairs refused to amend his certificate.²²³

At the very least, this behavior signaled that the High Court had the authority independently to decide whether Cumaraswamy had spoken in his official capacity.²²⁴ Taking that cue, the High Court declined to give any effect to the Secretary-General's certificate. To the contrary, it described the Secretary-General's certificate as a mere "opinion" entitled to scant probative value and no binding force.²²⁵ As a result, the High Court ruled that the case would proceed to trial.²²⁶ Only after completion of the trial would the court determine if Cumaraswamy spoke in his official capacity and whether he enjoyed immunity from the proceedings, which—by that time—would have come to an end.²²⁷ In subsequent proceedings, the Malaysian Court of Appeals and the Malaysian Federal Court affirmed the High Court's rulings.²²⁸

221. See *id.* (quoting Request for Advisory Opinion, *supra* note 107, at para. 7).

222. See *id.*

223. See *id.*

224. See Written Statement of the United Nations, *supra* note 144, at para. 60 (describing Malaysia's behavior as an invitation for its national courts "to conclude that it was for them to decide whether or not the Special Rapporteur spoke the words complained of in his official capacity").

225. *Cumaraswamy*, 1999 I.C.J. at ___ (para. 10) (quoting Request for Advisory Opinion, *supra* note 107, at para. 8). See also *MBF Capital Bhd & Anor v. Cumaraswamy*, 1997 MLJ LEXIS 328, at *27 (Kuala Lumpur High Ct. June 28, 1997) (describing the Secretary-General's certificate as "an opinion [that] has no more probative value than a document which appears wanting in material particulars").

226. See *MBF Capital Bhd & Anor*, 1997 MLJ LEXIS 328, at *38-39.

227. See *id.*

228. See *Cumaraswamy*, 1999 I.C.J. at ___ (paras. 10 (quoting Request for Advisory Opinion, *supra* note 107, at para. 8), 13). The Malaysian Federal Court affirmed in an oral opinion delivered from the bench. Written Statement of the United Nations, *supra* note 144, at para. 25. The oral statement of the presiding judge mocked Cumaraswamy's claim to immunity by observing that he was not a "sovereign or a full-fledged diplomat [but] someone called a Rapporteur who has to act . . . within a mandate of . . . an unpaid, part-time provider of information." *Id.*

Due to the proceedings against him, Cumaraswamy suspended his investigation of the Malaysian judicial system.²²⁹ Thus, the High Court accomplished exactly what the General Convention sought to avoid. It claimed for municipal courts the primary authority to regulate international immunities,²³⁰ as well as the power to suspend an unpopular human rights investigation.²³¹ With good reason, the special rapporteurs of the Commission on Human Rights described the situation as "an attack" on the United Nations human rights system.²³²

229. See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy*, Commission on Human Rights, 54th Sess., Agenda Item 8, at 31, U.N. Doc. E/CN.4/1998/39 (1998) (explaining that in light of the proceedings against him, Cumaraswamy was not "in a position to effectively follow-up his investigations" regarding the independence of the Malaysian judiciary during 1997); *Third Cumaraswamy Report*, *supra* note 210, at para. 134 (stating that in light of the proceedings against him, Cumaraswamy "decided to postpone reporting . . . on his findings" regarding the independence and impartiality of the Malaysian judiciary).

230. See Note, *Privileges and Immunities Accorded by the United States to the United Nations Organization*, *supra* note 62, at 459 (observing that "[a]pplication of the functional [immunity] test requires in each case a determination of the fact question whether the act was performed in an official capacity").

231. See Milinkovic, *supra* note 201 (suggesting that Malaysia's true aim was to "rein in UN officials who question its rights record"). The first oral statement of Malaysia's Solicitor General to the ICJ confirms the suspicion that Malaysia hoped to use municipal jurisdiction over UN personnel to inhibit their zealous protection of human rights:

I feel bound to observe that . . . the origin of the present problem lies in the relatively undeveloped state of the procedures and devices which the United Nations has come to utilize in its . . . notable zeal for methods of ensuring compliance with human rights standards. Malaysia has not complained of the unexpected selection of one of its nationals as a Special Rapporteur. Nor, in principle would the Malaysian Government complain if continued observations were made about . . . its Government if they were indeed true and fair. But Malaysia does suggest that there seems to be very little guidance, at any rate of a public nature, given to Special Rapporteurs as to the suitable limits of their comments on various aspects of governmental behaviour or the appropriate means by which they give currency to such comments. There is, it seems, no properly established code of conduct to govern their practices and procedures. I make these observations only to suggest that, if there had been, the events which have given rise to this whole controversy might well have been avoided; and I would urge that whatever else may come out of this case, the opening of discussions on this subject should no longer be delayed.

Oral Statement of Dató Heliliah Yusof, Solicitor General of Malaysia (Dec. 8, 1998) at para. 18, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___ (Apr. 29).

232. Written Statement of Government of the Republic of Costa Rica at 20 & n.47, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter *Written Statement of Costa Rica*] (quoting *Special Rapporteurs Concerned About Malaysia's Disregard of ECOSOC's Decision*, U.N. Press Release HR/98/66, Sept. 4, 1998, as available on <<http://www.unhchr.ch>>).

Following a series of unsuccessful negotiations, the Economic and Social Council of the United Nations (ECOSOC) invoked the General Convention's dispute resolution provisions. In accordance with Section 30, ECOSOC requested the ICJ to issue a binding Advisory Opinion to resolve the dispute between the United Nations and Malaysia. As is customary, several member states joined the United Nations and Malaysia in the advisory proceedings. While the participants raised a number of issues, two questions received particular attention during the proceedings and in the Court's Advisory Opinion. First, the case required the ICJ to decide whether Cumaraswamy had given the interview to *International Commercial Litigation* in his official capacity and, therefore, whether the Secretary-General properly asserted immunity on his behalf.²³³ Second, the case required the ICJ to decide whether Malaysia had a legal obligation to give special weight to the Secretary-General's characterization of the acts of UN personnel as official or unofficial.²³⁴

The latter question raised an issue of particular importance because the General Convention does not specifically give the Secretary-General the authority to make conclusive determinations about the nature of acts performed by UN personnel. In the absence of textual guidance, the issue had become a matter of contentious international debate.²³⁵ For decades, Secretaries-General claimed the exclusive authority to make such determinations, subject to review by the ICJ.²³⁶ Municipal courts, particularly in the

233. See, e.g., Written Statement of Costa Rica, *supra* note 232, at 10-17; Written Statement of the Government of Greece, *Cumaraswamy*, 1999 I.C.J. ___; Written Statement Submitted by the United States of America at paras. 19-41, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Written Statement of the United States].

234. See, e.g., Written Statement of Costa Rica, *supra* note 232, at 18-22; Written Statement of the Federal Republic of Germany, *supra* note 139; Written Statement of the Government of Sweden at 3, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Written Statement of Sweden]; Written Statement of the Government of the United Kingdom at para. 6, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Written Statement of the United Kingdom]; Written Statement of the United Nations, *supra* note 144, at paras. 38-51; Written Comments of the Government of the United States at 1-4, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Written Comments of the United States].

235. See e.g., AHLUWALIA, *supra* note 10, at 109 (indicating that this question has generated "some controversy"). See also KING, *supra* note 10, at 51 (observing, as a general matter, that "[c]onflict is certain to arise between the organization and . . . territorial authorities . . . unless a clear understanding on the areas of competence has been reached in the beginning").

236. See Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (May 22, 1985), 1985 U.N. Jurid. Y.B. 154, 154-55, U.N. Doc. ST/LEG/SER.C/23; Statement made by the U.N. Legal Counsel (Dec. 1, 1981), *supra* note 113, at 161; Letter from the U.N. Office of Legal Affairs to the Legal Liaison Officer,

United States, took the opposite view and refused to concede any decision-making authority to the international level.²³⁷ For example, in one case, a New York municipal judge declared that "the question of immunity [for official acts] should be entrusted not to the whim or caprice of any individual or committee that might speak for the United Nations Organization."²³⁸

Similar divisions appeared within the academy. Several writers identified the General Convention's failure to resolve the allocation of decision-making authority, but proposed no clear solution.²³⁹ Although they provided no textual support, a second group of writers argued that the Secretary-General *should* have primary authority to characterize the activities of United Nations personnel as official or unofficial.²⁴⁰ A third group claimed that municipal courts had the superior textual argument.²⁴¹ In their

UNIDO (Dec. 12, 1977), *supra* note 142, at 247; Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (Feb. 11, 1976), *supra* note 182, at 237-38; Memorandum from the General Counsel of UNRWA (May 15, 1968), *supra* note 119, at 213; BEIGBEDER, *supra* note 183, at 122; CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1142. *See also ILC Study (1985)*, *supra* note 119, at 172, 199 (setting forth the Secretary-General's traditional position and noting that the Specialized Agencies had adopted the same position).

237. *See People v. Weiner*, 378 N.Y.S.2d 966, 975 (N.Y. City Crim. Ct. 1976) (concluding that it was not "for the United Nations" to decide whether a UN security officer exceeded the scope of his authority in detaining a suspected vandal); RESTATEMENT (THIRD), *supra* note 9, at § 469 cmt. c (concluding that municipal courts must make an independent determination regarding the official or unofficial nature of acts performed by international civil servants); KING, *supra* note 10, at 57, 98, 190 (describing the "strong tendency" of municipal courts to assume this competence). *See also ILC Study (1985)*, *supra* note 119, at 200 (describing the practices of some municipal authorities to make independent determinations regarding the nature of acts performed by staff members of the FAO and WHO).

238. *Westchester County v. Ranollo*, 67 N.Y.S.2d 31, 35 (New Rochelle City Ct. 1946).

239. *See BOWETT*, *supra* note 18, at 355 (identifying the problem, but finding "no clear solution"); KELSEN, *supra* note 89, at 346 (suggesting that the General Convention could be interpreted to allocate authority either to municipal courts or to the Secretary-General).

240. *See AHLUWALIA*, *supra* note 10, at 111; BEKKER, *supra* note 9, at 174, 177-78; CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1142; KING, *supra* note 10, at 98-99.

241. *See FREY & FREY*, *supra* note 11, at 565; Kunz, *supra* note 19, at 862. *See also Liang*, *supra* note 9, at 590-91 (indicating that municipal courts have primary jurisdiction to make such determinations, subject to review by the ICJ); Preuss, *supra* note 67, at 569, 574 (concluding that municipal judges have the authority to determine the official or unofficial nature of acts performed by international civil servants); Note, *The United Nations Under American Municipal Law: A Preliminary Assessment*, *supra* note 56, at 787 n.50 (presuming that courts would decide whether international civil servants acted in their official capacities). *But see JENKS*, *supra* note 2, at 118 (proposing three possible ways to resolve the matter, none of which would permit municipal courts to decide whether international civil servants acted in their official capacities); Singer, *supra* note 1,

opinion, the General Convention could have granted the Secretary-General the power to characterize the nature of activities if it had conferred *absolute* immunity on U.N. personnel, but then required the Secretary-General to waive immunity for acts performed in a *private* capacity. Because the Convention creates immunity only for *official* acts and only permits the Secretary-General to waive immunity for *official* acts, they concluded that the General Convention left municipal courts with the power to characterize the acts of UN personnel.²⁴² Almost all writers, however, agreed on one point: the allocation of decision-making authority to municipal courts would pose a serious threat to the independence of international organizations.²⁴³

In assisting the ICJ to find the proper allocation of authority, participants in the advisory proceedings adopted three basic positions. While Malaysia did not raise the issue in its written pleadings, its oral statement urged the ICJ to interpret the General Convention against the background of state immunity.²⁴⁴ Surveying that doctrine, Malaysia demonstrated that the overwhelming approach is for municipal courts of "receiving states" to make independent determinations regarding the nature of acts performed by representatives of "sending states." According to Malaysia, there was no reason for the Court to apply a different rule to international immunities.²⁴⁵ Malaysia also cited the practice of

at 80, 102 (arguing that municipal courts should not attempt to decide whether an international organization has acted within its competence).

242. See Kunz, *supra* note 19, at 862. See also WHITEMAN, *supra* note 91, at 154 (quoting KING, *supra* note 10, at 95-96, who attributed his argument to Kunz).

243. See AHLUWALIA, *supra* note 10, at 111-12; CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1142; JENKS, *supra* note 2, at 117-19; WHITEMAN, *supra* note 91, at 154 (quoting KING, *supra* note 10, at 95-96); Kunz, *supra* note 19, at 862; Liang, *supra* note 9, at 589.

244. See Oral Statement of Sir Elihu Lauterpacht (Dec. 8, 1998) at paras. 31-59, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ___ (Apr. 29) [hereinafter Oral Statement of Sir Elihu Lauterpacht]. Malaysia was not alone in urging the Court to draw on state-immunity principles. In its written submissions to the Court, the United States likewise urged the Court to refer to consular immunity as a source of precedent. See Written Statement of the United States, *supra* note 233, at para. 21. See also Preuss, *supra* note 67, at 576 (arguing that analogies to consular immunity provide courts with guidance in addressing the novel legal problems of international immunities). *But see* Written Statement of Costa Rica, *supra* note 232, at 21 (insisting that "issues of immunity under the General Convention clearly are, and must be, treated differently than . . . issues of immunity of bilaterally accredited . . . consular officers").

245. Malaysia's argument was not entirely correct. In its written and oral statements, Costa Rica anticipated this argument and explained that the distinctions between states and international organizations militate against comparisons between state immunity and international immunities. Written Statement of Costa Rica, *supra* note 232, at 20-22; Oral

United States courts which, it will be recalled, have claimed the power to characterize the acts of UN personnel as official or unofficial.²⁴⁶

Joined by Costa Rica,²⁴⁷ Germany,²⁴⁸ and Sweden,²⁴⁹ the United Nations advanced its traditional position that the Secretary-General's characterization of an act enjoys conclusive effect in municipal courts, subject to review by the ICJ.²⁵⁰ The proponents of this view, however, never reached consensus about the basis for their shared conclusion. The United Nations relied heavily on the practice of Secretaries-General.²⁵¹ Joined by Sweden, the United Nations also argued that the authority to characterize acts arose by necessary implication from the Secretary-General's power to waive immunity.²⁵² Costa Rica, on the other hand, placed greater

Statement of the Government of Costa Rica (Dec. 10, 1998), *supra* note 159, at paras. 16-17.

246. See Oral Statement of Sir Elihu Lauterpacht, *supra* note 244, at paras. 75-79.

247. See Written Statement of Costa Rica, *supra* note 232, at 19; Written Comments of Costa Rica, *supra* note 138, at 12.

248. See Written Statement of Federal Republic of Germany, *supra* note 139, at 1-2.

249. See Written Statement of Sweden, *supra* note 234, at 2.

250. See Written Statement of the United Nations, *supra* note 144, at paras. 42, 44, 46, 54, 56; Written Comments Submitted on Behalf of the Secretary-General of the United Nations at para. 4, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Written Comments of the United Nations].

251. See Written Statement of the United Nations, *supra* note 144, at paras. 42-49; Written Comments of the United Nations, *supra* note 250, at para. 4.

252. Written Statement of the United Nations, *supra* note 144, at paras. 41-46; Written Statement of Sweden, *supra* note 234, at 2-3. See also KING, *supra* note 13, at 262 (stating that an "indispensable part of the right of waiver is the right to decide if the nature of the act requires exercise of waiver"); Bekker, *supra* note 136, at 921 (suggesting that the power to waive immunity necessarily implies the power to assert immunity).

In some respects, the United Nations' argument makes sense. One can draft an immunities agreement to make waiver the vehicle for conclusive assertions of immunity. As noted above, the General Convention does this with respect to determinations regarding the *functional necessity* of immunity for official activities. See *supra* notes 133-36 and accompanying text. Structurally speaking, the General Convention accomplishes this by granting a blanket immunity to the United Nations for official activities, but then requiring the Secretary-General to waive any unnecessary immunities. See *supra* notes 135-36 and accompanying text. Under these circumstances, mandatory waiver effectively becomes the vehicle by which the Secretary-General makes conclusive determinations regarding the functional necessity of immunity for official activities.

As also noted above, the General Convention could have been drafted to make waiver the vehicle for conclusive determinations regarding the *official or unofficial* character of an act. It could have done this, for example, by imposing a blanket immunity on all activities of UN personnel, but then requiring the Secretary-General to waive their immunity for private acts. See *supra* notes 241-42 and accompanying text. Because the drafters of the General Convention did not adopt this structure, the power to waive official immunity does not itself establish the Secretary-General's authority to make conclusive determinations regarding the official or unofficial nature of acts performed by UN personnel. See Kunz, *supra* note 19, at 862 (adopting this view). See also Written Comments of the

emphasis on the Organization's need to control its internal affairs and on the absurdity of committing international immunity decisions to the very courts whose independence the United Nations had placed under investigation.²⁵³

Taking the middle ground, Italy, the United Kingdom, and the United States rejected the notion that the Secretary-General's immunity determinations enjoy *conclusive* weight at the municipal level.²⁵⁴ Yet, they recognized that the Secretary-General is "uniquely qualified to indicate the actual scope and nature of [an agent's] responsibilities, and to indicate the [O]rganization's own acceptance of the relevant conduct as [an] official act[]." ²⁵⁵ Therefore, they argued that the Secretary-General's characterizations of activities are entitled to "great weight" and deference,²⁵⁶ enjoy a strong presumption of correctness,²⁵⁷ and could be rejected by municipal authorities only under the most compelling circumstances.²⁵⁸ While Italy, the United Kingdom, and the United

United States, *supra* note 234, at para. 6 & n.2 (quoting the Written Statement of the Government of Italy and agreeing that the "[a]uthority to waive immunity is relevant only after the right to immunity is established[;] [s]uch authority has no bearing on the preliminary . . . entitlement to immunity"). *But see* Written Statement of Sweden, *supra* note 234, at 2-3 (explaining that the Secretary-General cannot waive immunity unless the Secretary-General has already decided that a dispute involves an official activity for which an agent of the Organization would otherwise enjoy immunity).

253. *See* Written Statement of Costa Rica, *supra* note 232, at 20; Written Comments of Costa Rica, *supra* note 138, at 13-15. *See also* Bekker, *supra* note 136, at 920 (observing that Malaysian courts had a particularly weak claim to second-guess the Secretary-General's findings because they represented the object of Kumaraswamy's investigation).

254. *See* Written Statement of the United Kingdom, *supra* note 234, at para. 6; Written Statement of the United States, *supra* note 233, at para. 22; Written Comments of the United States, *supra* note 234, at paras. 3-8; Oral Statement of the Government of Italy (Dec. 8, 1998) at para. 3, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter Oral Statement of Italy].

255. Written Statement of the United States, *supra* note 233, at para. 22. *See also* Written Statement of the United Kingdom, *supra* note 234, at para. 6 (recognizing that the Secretary-General has a superior institutional understanding of the scope of an agent's mission and, therefore, can provide an "authoritative" view regarding the official or unofficial nature of particular activities).

256. Written Statement of the United States, *supra* note 233, at para. 22 (recognizing that the Secretary-General's opinions are entitled to "great weight"). *See also* Written Statement of the United Kingdom, *supra* note 234, at para. 6 (counseling national courts to give "all due weight" to the Secretary-General's views); Oral Statement of Italy, *supra* note 254, at para. 3 (recognizing that "decisions of the Secretary-General . . . carry special weight").

257. *See* Written Statement of the United States, *supra* note 233, at para. 24 (adopting a strong presumption of correctness); Written Statement of the United Kingdom, *supra* note 234, at para. 6 (giving "crucial" weight to the Secretary-General's views).

258. *See* Written Statement of the United States, *supra* note 233, at para. 24 (acknowledging that the Secretary-General's certificates of immunity raise "a presumption in favor of immunity rebuttable only if there is powerful contrary evidence"); Written Statement of

States did not cast their arguments in these terms, other participants construed their positions as giving "nearly" conclusive effect to the Secretary-General's determinations.²⁵⁹

Thus, all participants identified the Secretary-General's power to characterize the nature of activities as a key issue in *Cumaraswamy*.²⁶⁰ In rendering its decision, however, the Court held that it need not resolve that particular question. Because ECOSOC's Request for an Advisory Opinion only asked the Court to decide whether Cumaraswamy was entitled to immunity and, if so, to define Malaysia's legal *obligations*, the Court implied that the case did not require it to address the Secretary-General's legal *powers*.²⁶¹ Whatever its logical appeal, this distinction appears to have been a face-saving device that allowed the Court to require deference to the Secretary-General without approving his claim to make conclusive immunity determinations.²⁶²

Having thus recast the issues, the Court first examined whether the Secretary-General correctly decided that Cumaraswamy spoke to *International Commercial Litigation* in his official capacity and, therefore, enjoyed immunity from legal process of every kind.²⁶³ In so doing, the Court recognized that, as the United Nations' chief administrative officer, the Secretary-General has the right and the duty to protect UN personnel and the missions they undertake.²⁶⁴ The Secretary-General thus plays a "pivotal role" in any immunity determination.²⁶⁵ After recognizing the significance of the Secretary-General's role, the Court itself deferred to his repeated statements that Cumaraswamy spoke to *International*

the United Kingdom, *supra* note 234, at para. 6 (arguing that municipal courts should reject the Secretary-General's decisions only for "the most compelling reasons"); Oral Statement of Italy, *supra* note 254, at para. 3 (arguing that municipal authorities may challenge the Secretary-General's decisions "only if [they are] in clear contradiction with the letter and spirit of the provision[s] conferring immunity"). *See also* Written Comments of Costa Rica, *supra* note 138, at 17-18 (adopting the presumption of correctness as an alternative argument).

259. Written Comments of Costa Rica, *supra* note 138, at 18.

260. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. ___, ___ (paras. 32-34) (Apr. 29) (noting the range of views expressed by member states with respect to the Secretary-General's decision-making authority).

261. *See id.* at ___ (paras. 31, 36-37).

262. *See* Bekker, *supra* note 136, at 919 (describing the Court's "half-hearted" analysis as an "effort to please all the parties").

263. *See* Cumaraswamy, 1999 I.C.J. at ___ (paras. 49-56).

264. *See id.* at ___ (paras. 50-51).

265. *Id.* at ___ (para. 50).

Commercial Litigation in his official capacity.²⁶⁶ As further support of that determination, the Court also observed that media contacts had become standard practice for special rapporteurs; the article identified Cumaraswamy as a special rapporteur for the Commission on Human Rights; Cumaraswamy reported his media contacts and the ensuing litigation to the Commission; and the Commission subsequently extended Cumaraswamy's mandate for another three years.²⁶⁷ Under these circumstances, the Court held that "the Secretary-General correctly found that Mr. Cumaraswamy . . . act[ed] in the course of the performance of his mission . . . [and, therefore, enjoyed] immunity from legal process of every kind."²⁶⁸

The Court then turned its attention to "the legal obligations of Malaysia in this case."²⁶⁹ Here, the Court elaborated on its conclusion that the Secretary-General has the primary responsibility to safeguard the interests of the United Nations.²⁷⁰ Specifically, the Secretary-General must determine whether the Organization's agents have acted within the scope of their missions and, if so, whether to protect their independence by asserting immunity from national control.²⁷¹ As a result, the Secretary-General has the corresponding power and duty to inform member states' governments of his findings and to request that they bring his findings to the attention of their courts.²⁷² Moreover, the ICJ held that municipal courts cannot properly apply the General Convention without giving due regard to information provided by the Secretary-General.²⁷³ The Court thus concluded that the Secretary-General's findings with respect to immunity create a presumption, which municipal courts must accord "the greatest weight" and may set aside only "for the most compelling reasons."²⁷⁴

While the Advisory Opinion identifies the General Convention and Article 105 of the Charter as the sources of Malaysia's obligations, it does not explain *why* they require municipal courts to de-

266. *See id.* at ___ (para. 52). *See also id.* at ___ (paras. 9-10) (separate opinion of Judge Oda) (questioning why the *Court* gave such deference to the Secretary-General's views).

267. *See id.* at ___ (paras. 53-55) (majority opinion).

268. *Id.* at ___ (para. 56).

269. *Id.* at ___ (para. 57).

270. *See id.* at ___ (para. 60).

271. *See id.*

272. *See id.*

273. *See id.* at ___ (para. 61).

274. *Id.*

fer to the Secretary-General.²⁷⁵ The Advisory Opinion's structure, however, suggests that the presumption of correctness rests on two grounds. First, the principle of good faith plays an obvious role. If member states confer immunities on the United Nations and require the Secretary-General to protect the Organization and its personnel, good faith also requires them to endow the Secretary-General with the capacity to exercise *effective* protection.²⁷⁶ The Court's reliance on good faith lends a particular significance to the Advisory Opinion because member states of *all* international organizations have a duty of good faith.²⁷⁷ Therefore, the Court's reasoning should apply to other international organizations—even if their activities are less significant or salient than those of the United Nations.²⁷⁸

In addition to principles of good faith, the Court also relied on an efficiency argument, in which it noted that the "proper application of the Convention by [municipal courts] is dependent on . . . information [provided by the Secretary-General]."²⁷⁹ While the conclusion might not be as self-evident as the Court suggests, the separate opinion of Vice-President Weeramantry expands on this

275. See *id.* at ___ (para. 62) (indicating the General Convention and Article 105 of the Charter provide the source of Malaysia's legal obligations). The Court's apparent reliance on Article 105 of the Charter as an alternative ground constitutes a vindication of the United Nations' historical claim that the Charter severely limits the discretion of municipal courts to formulate their own interpretations of the functional necessity doctrine. Compare *ILC Study (1967)*, *supra* note 103, at 265 (recounting the Secretariat's position that the immunity of UN personnel for all official acts "arises directly under Article 105 of the Charter and constitutes an essential condition for the conduct of all United Nations activities"), with KELSEN, *supra* note 89, at 342 (stating that, in the absence of the General Convention, one could not impose a definitive interpretation of Article 105 on member states), and KING, *supra* note 13, at 161 (arguing that in the absence of the General Convention, each member state could unilaterally determine how to apply Article 105).

Thus, the Advisory Opinion suggests that municipal authorities must defer to the Secretary-General's immunity determinations even in the 51 member states that are not parties to the General Convention. As a result, the General Convention's allocation of decision-making authority to international officials for immunity determinations is neither unique nor aberrant. To the contrary, its allocation of authority constitutes an inherent feature of the functional necessity doctrine.

276. See *Cumaraswamy*, 1999 I.C.J. at ___ (para. 51) (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 183 (Apr. 11)).

277. See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. 73, 93 (Dec. 20) (acknowledging that a "body of mutual obligations of co-operation and good faith" is "the very essence" of the relationship between a member state and an international organization).

278. See *Cumaraswamy*, 1999 I.C.J. at ___ (separate opinion of Judge Rezek) (implying that the Court's reasoning applies even to organizations "whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights").

279. *Id.* at ___ (para. 61) (majority opinion).

point.²⁸⁰ In his separate opinion, Judge Weeramantry acknowledged the strength of Malaysia's argument that, in the context of *state* immunity, municipal courts have "strongly and successfully asserted their authority" to resolve immunity questions, including the official or unofficial nature of acts performed by agents of foreign states.²⁸¹ However, Judge Weeramantry identified several factors which "lift[ed] the matter [of *international* immunities] into a different frame of reference."²⁸² According to Judge Weeramantry, international officials occupy a unique position because their duties

are not restricted to the service of any particular State, but are owed to the community of States as represented by the United Nations. The limits of their functions are not determined by any particular State, but are defined on behalf of the international community by the Secretary-General of the United Nations. Their protections are claimed, not on behalf of any particular State, but on behalf of the international community whom such functionaries serve.²⁸³

Judge Weeramantry concluded that these factors rendered Malaysia's analogies to state immunity untenable.²⁸⁴ In contrast to state immunity, international immunities raise issues that are "not justiciable within the limited perspectives of the States involved, but engage[] the global interests of the United Nations."²⁸⁵ In particular, Judge Weeramantry suggested that municipal courts should not exercise primary decision-making authority for international immunities because they might allow "[l]ocally sensitive issues [to] crowd out perspectives regarding the global norms applicable to such situations."²⁸⁶

280. In ICJ jurisprudence, discussion tends to develop more fully in separate opinions. MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 194 (1996). Moreover, the separate opinions of ICJ judges constitute a particularly strong subsidiary source of law under Article 38(1)(d) of the ICJ's Statute because they are written by the most highly qualified jurists sitting as judges in cases that have been carefully argued and presented by expert counsel. *Id.* at 199-200.

281. See *Cumaraswamy*, 1999 I.C.J. at ___ (separate opinion of Vice President Weeramantry at 2).

282. *Id.* at ___ (2-3).

283. *Id.*

284. *Id.*

285. *Id.* at ___ (2).

286. *Id.* at ___ (3). Much of the academy seems to share the ICJ's concern about the limited perspectives of municipal judges. One writer, for example, notes that municipal judges "are not adequately equipped to deal with the novel and complex legal problems"

Having identified the handicaps of municipal courts, Judge Weeramantry then described the Secretary-General's comparative advantages in making immunity determinations. First, "[t]he Secretary-General is better informed than" municipal authorities regarding "the limits of a given agent's functions . . . and the needs of the United Nations in relation to any particular inquiry."²⁸⁷ Second, the Secretary-General has a unique perspective on "the entire scheme of United Nations operations" and, "more than any other authority, can assess a given agent's functions within the overall context of the rationale, traditions and operational framework of United Nations activities as a whole."²⁸⁸ Given these advantages, any attempt by municipal courts to determine the scope of an agent's privileges and immunities "without reference to the opinion of the Secretary-General would fail to take into account an important part of the material essential to an informed deci-

surrounding the activities of the United Nations. Preuss, *supra* note 67, at 574. For similar reasons, perhaps, another writer predicted that municipal courts would encounter "considerable confusion" in trying to draw the line between official and unofficial acts of U.N. personnel. Note, *Privileges and Immunities Accorded by the United States to the United Nations Organization, Its Property, and Its Personnel*, *supra* note 62, at 460.

When they have attempted to define the scope of international immunities, municipal courts have reinforced concerns about their limited perspectives. For example, in *Westchester County v. Ranollo*, 67 N.Y.S.2d 31, 34 (New Rochelle City Ct. 1946), a municipal court refused to accept the UN Legal Counsel's assertion of immunity on behalf of a UN chauffeur who was caught speeding while driving the Secretary-General to an official function. In so doing, the court suggested that the driver did not perform an important organizational function, but merely "serve[d] the personal comfort, convenience, [and] luxury" of the Secretary-General. *Id.* at 33-35. Apparently, the court never considered the fact that the host state's exercise of jurisdiction over the driver might interfere with the Secretary-General's freedom of movement.

Moreover, the *Ranollo* court stridently rejected the entrustment of immunity decisions to the "whim or caprice" of the United Nations. *Id.* at 35. Yet, the court tacitly admitted that it was incapable of determining whether the Organization required immunity in any given case. In fact, the court suggested that it would defer to the State Department's certification as to whether the assertion of immunity "was in the public interest." *Id.*

The *Ranollo* court's parochial decision and its reliance on the State Department for guidance "clearly demonstrate[] that national courts are not in a position to appreciate fully the problems or needs of international organizations." AHLUWALIA, *supra* note 10, at 111. See also KING, *supra* note 13 at 186-88 (concluding that the *Ranollo* court's limited perspective rendered it unable to appreciate the needs of the United Nations). This criticism dovetails with the popular view that United States courts are ill-equipped to define the foreign relations interests of the United States. See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1414-18 (1999). If municipal courts cannot define the needs and interests of their own countries, we should not expect them to perform the more difficult task of defining the needs and interests of international organizations.

287. *Cumaraswamy*, 1999 I.C.J. at ___ (separate opinion of Vice-President Weeramantry at 4).

288. *Id.*

sion."²⁸⁹ As a result, the Secretary-General's determinations regarding the official or unofficial nature of an agent's activities will bind domestic tribunals "unless compelling reasons can be established for displacing that weighty presumption."²⁹⁰

All told, *Cumaraswamy* provides a serious response to those who would expand municipal court jurisdiction for international immunities. Contrary to their suggestions, *Cumaraswamy* demonstrates that the fear of prejudice is neither "unrealistic" nor "exaggerated."²⁹¹ Rather, the limited perspectives of municipal courts are likely to produce rulings that consistently underestimate the legitimate scope of an organization's activities and its need for immunity.²⁹² Consequently, they are likely to make decisions that impair the capacity of international organizations to achieve their objectives,²⁹³ particularly in controversial areas such as peace, security, and human rights. Having granted immunities to international organizations on the basis of functional necessity, member states should leave immunity determinations to the international officials and judges who best understand the needs and functions of those organizations.

B. *Application of the Functional Necessity Doctrine by International Officials: Some Unwarranted Criticisms*

Even if international officials *theoretically* have the capacity to make superior immunity decisions on the basis of functional necessity, one cannot dismiss calls for reform without determining whether their decisions are, in fact, consistent with the functional necessity doctrine. In this regard, one must address contentions that international organizations unnecessarily maintain their immunity in routine contract disputes, intentional tort actions, and employment matters. This Subpart examines the practice of the

289. *Id.*

290. *Id.* This ruling may reflect the latest installment in a pattern of decisions, in which the Court has concluded that "the Organization is the best judge of what circumstances require." See BEKKER, *supra* note 9, at 175 n.772 (quoting Sir Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS (Hague Academy of International Law) 377, 428-30 (1976-IV), which identified this trend).

291. See *supra* notes 166-69 and accompanying text.

292. JENKS, *supra* note 2, at 41.

293. See Written Statement of the United Nations, *supra* note 144, at para. 43 (citing several General Assembly Resolutions for the proposition that "disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the organizations of the United Nations system by Member States").

United Nations and concludes that the functional necessity doctrine generally supports the Secretary-General's hesitance to waive immunity for such disputes.

As *Cumaraswamy* indicates, the direct and indirect prejudices of municipal courts still pose serious threats to the work of international organizations. Yet, one must take care not to overstate the problem. For example, one can safely assume that the risk of direct prejudice is imperceptible in many of the countries where international organizations operate.²⁹⁴ This assumption is particularly strong with respect to routine civil and commercial disputes in the host countries of international organizations.²⁹⁵ For such matters, the threat of indirect prejudice may also seem fairly remote. Because municipal law arguably governs routine contract and tort claims,²⁹⁶ the "limited" perspectives of municipal courts could actually give them an advantage in applying the governing law. Therefore, one might conclude that because threats of prejudice disappear in most civil and commercial claims, the functional necessity doctrine should require international organizations to waive their immunities on a regular basis.²⁹⁷ To support their calls

294. See, e.g., JENKS, *supra* note 2, at 40 (quoting Wood, *supra* note 39, at 143-44, for the proposition that the threat of direct prejudice provides little justification for immunities in countries "like Switzerland"); Singer, *supra* note 1, at 128 (recognizing that "[a] prejudiced court could certainly prove troublesome to an international organization," but claiming that "the concern seems unrealistic"); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1185 (doubting that there is "reason to fear judicial bias against an IGO defendant").

295. See Wood, *supra* note 39, at 162 (recognizing that prejudice would not normally support the assertion of immunity with respect to "ordinary legal claims"). See also JENKS, *supra* note 2, at 119 (acknowledging that when "relations with . . . the host State are good it should in normal times be unnecessary[] and . . . undesirable" for international organizations to maintain their immunity from routine claims).

296. See Wood, *supra* note 39, at 162 (stating that "[i]n all the normal transactions of normal times, [international organizations] will operate under the ordinary law"). See also AMERASINGHE, *supra* note 27, at 227-28 (stating that certain contracts of international organizations may be governed by municipal law and that the principle of *lex loci delicti commissi* should generally govern the tort liability of international organizations); SHAW, *supra* note 27, at 918 (explaining that municipal law may govern some commercial contracts of international organizations and that the tort liability of international organizations will generally be subject to municipal law).

297. See KING, *supra* note 10, at 135 (construing Section 20 of the General Convention and concluding that its purpose is "to make the exercise of waiver the rule rather than the exception"); Singer, *supra* note 1, at 124, 129, 141, 144 (arguing that international organizations have no need for jurisdictional immunity from claims involving routine business transactions); Wood, *supra* note 39, at 162 (arguing that the waiver of jurisdictional immunities should become the rule for ordinary legal claims against international organizations). Cf. *Report of the Preparatory Commission of the United Nations*, reprinted in HILL, *supra* note 47, at 208 (stating that the "Secretary-General both can waive immunity and

for reform, several writers claim that international organizations have failed to do so.

Because the literature reaches divergent conclusions, it is difficult to assess the frequency with which international organizations waive their immunities.²⁹⁸ By its own admission, however, the United Nations does not generally waive immunity for disputes involving commercial contracts.²⁹⁹ While this might initially provide reason for concern,³⁰⁰ one should not conclude that the United Nations relies on its immunity to prevent the adjudication of liability in commercial disputes. Like many private parties, the United Nations generally provides for arbitration of commercial disputes under the UNCITRAL arbitration rules and has also agreed to arbitration under the rules of the American Arbitration Association (AAA), the Inter-American Commercial Arbitration Association (ICAA), and the International Chamber of Commerce (ICC).³⁰¹

will in fact do so in every case where such a course is consistent with the interests of the United Nations").

298. Compare CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1140 (asserting that the United Nations has always made conscientious use of waiver), and SCHERMERS & BLOKKER, *supra* note 17, at 360 (suggesting that international organizations will "often" waive immunity when requested), and Felice Morgenstern, *The Law Applicable to International Officials*, 18 INT'L & COMP. L.Q. 739, 739 (1969) (indicating that international organizations have "waived the[ir] immunity as a matter of course whenever it constituted an obstacle to the normal course of justice"), and Liang, *supra* note 9, at 592 (stating that the policy of waiver was usually followed by the League of Nations and that United Nations has made an even more generous use of waiver), with BEKKER, *supra* note 9, at 193 (concluding that international organizations waive their immunity only in exceptional cases), and CROSSWELL, *supra* note 10, at 23 (suggesting that the Secretary-General has not frequently exercised the power to waive immunity).

To fully understand the practices of international organizations with respect to waiver, one cannot simply count the number of cases in which international organizations have waived their immunity and, then, describe the practice as "frequent" or "exceptional." One must also examine the *relative* frequency of waiver as compared to number of cases in which claimants have requested international organizations to waive their immunity. In this regard, it is worth noting that some international organizations do not frequently receive requests for waiver, but generally grant the requests that they do receive. See, e.g., *ILC Study (1967)*, *supra* note 103, at 317, 321 (reporting that the Specialized Agencies of the United Nations had received "few or no requests to waive the immunity of . . . their officials," but adding that "very few, if any, requests for waiver have been refused").

299. See Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), 1987 U.N. Jurid. Y.B. 203, 203, U.N. Doc. ST/LEG/SER.C/25 (explaining that the United Nations typically does not submit to municipal court adjudication of contract claims). See also BEKKER, *supra* note 9, at 204-05 (observing that, with the exception of automobile accidents and other cases that are covered by third-party insurance, the United Nations has submitted to arbitration instead of waiving immunity).

300. See Singer, *supra* note 1, at 124, 129, 141-44 (questioning the need of international organizations for jurisdictional immunity against commercial contract claims).

301. See *infra* notes 393-95 and accompanying text.

Thus, the United Nations's practice corresponds to the overall preference for arbitration in international business transactions.

Notwithstanding the popularity of arbitration, one writer argues that the "[O]rganization would probably not find it . . . more burdensome to waive its immunity and submit to the jurisdiction of . . . local courts in . . . day-to-day matters."³⁰² The argument does not, however, adequately consider the functional interests of the United Nations in declining to waive its immunity for commercial disputes. Even in the absence of direct and indirect prejudice, the unique nature of international organizations generates conflicts-of-law issues that compel them to maintain their immunity from municipal court jurisdiction and to rely, instead, on arbitration of commercial disputes.

In commercial transactions having an international dimension, the failure to designate the appropriate forum and governing law creates major uncertainty costs.³⁰³ Commercial enterprises with multi-jurisdictional operations overcome these costs by inserting standard choice-of-forum and choice-of-law clauses into their business agreements.³⁰⁴ Although commercial enterprises typically

302. Singer, *supra* note 1, at 85. In making this argument, Singer relies on the fact that the United Nations has, in the past, agreed to different arbitration rules depending on its suppliers' places of residence. *See id.* Specifically, Singer argues that the United Nations already bears the cost of tailoring arbitration to local conditions and, therefore, would not experience substantially greater inconvenience if it agreed to litigation in the municipal courts of different member states. *See id.* On its face, the argument seems implausible. Submission to the local procedures of numerous countries seems significantly more onerous than submission to arbitration under four different sets of arbitration rules. *See supra* note 301 and accompanying text (listing the four sets of arbitration rules that the United Nations formerly incorporated in its contracts). In addition, the argument relies on the outdated perception that the United Nations tailors its choice of arbitration rules to the location of its suppliers. Singer, *supra* note 1, at 85. While that was true in the past, the current practice of the United Nations is to standardize its arbitration agreements by incorporating the UNCITRAL rules, which are designed to be acceptable to a variety of legal cultures. *See infra* note 395.

303. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S. Ct. 2449, 2455 (1974) (commenting that "uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules"). *See also* W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION 2* (1997) (referring to the "serious[] and even calamitous" consequences of failing to provide for dispute resolution procedures in international commercial agreements).

304. *See Scherk*, 417 U.S. at 516, 94 S. Ct. at 2455 (concluding that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

choose arbitration,³⁰⁵ they may alternatively select a familiar court and governing law.³⁰⁶

To the extent that they resemble multinational enterprises, international organizations face similar pressures to standardize the procedures by which they resolve commercial disputes.³⁰⁷ Because the United Nations possesses a high degree of familiarity with New York law, it theoretically could standardize its commercial contracts by incorporating New York law.³⁰⁸ In practice, however, the Organization lacks that option. Because the United Nations must exhibit independence and neutrality with respect to each of its member states, it cannot standardize its commercial agreements by adopting New York law as the commercial law of the Organization. Consequently, the United Nations prefers not to designate any municipal law and interprets its contracts according to general principles of law.³⁰⁹

305. See TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION at v (1999) (observing that arbitration "has become the dominant method of settling international trade disputes").

306. See *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (recognizing that parties may use forum selection and choice-of-law clauses to "eliminate uncertainty in international commerce").

307. Cf. Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), 1976 U.N. Jurid. Y.B. 159, 163, U.N. Doc. ST/LEG/SER.C/14 (stating that the United Nations tries to avoid laws with which it is not familiar).

308. See *id.* (explaining that the United Nations has a familiarity with New York law that would make it relatively easy to agree to its incorporation into particular contracts).

309. See Letter from the U.N. Office of Legal Affairs to the Legal Counsel, Food and Agriculture Organization of the United Nations (July 16, 1986), 1986 U.N. Jurid. Y.B. 324, 324, U.N. Doc. ST/LEG/SER.C/24; Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 161; MORGENSTERN, *supra* note 23, at 38. See also JENKS, *supra* note 14, at 153 (stating that it is "not uncommon" for international organizations to require that contracts be governed by general principles of law). For those not part of the *cognoscenti*, the term "general principles of law" refers to a set of legal rules shared in substance by the world's major legal traditions. Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 332 (1988). Sometimes referred to as "*lex mercatoria*," general principles of law occupy an intermediate ground between municipal law and public international law. *Id.*

International organizations "widely" assume that general principles of law will govern their contractual relations with private parties even in the absence of an express contractual stipulation. MORGENSTERN, *supra* note 23, at 40. The United Nations and the Specialized Agencies, for example, take this position. See Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International, *supra* note 307, at 162, 165 (discussing the practice of the United Nations). See also *ILC Study (1985)*, *supra* note 119, at 182 (describing the practices of the Specialized Agencies).

Scholars have debated whether it is reasonable to conclude that private parties contemplate the application of general principles of law in the absence of an express contractual stipulation. Compare JENKS, *supra* note 14, at 153-54 (seriously entertaining this proposi-

Having made the decision to interpret its contracts according to general principles of law, the United Nations *must* choose arbitration of commercial disputes instead of litigation in municipal courts. While international arbitral tribunals often apply general principles of law to commercial disputes, municipal courts refuse to decide cases without reference to a particular body of municipal law.³¹⁰ Moreover, even if municipal courts agreed to resolve disputes based on general principles of law, a municipal judge sitting by herself would find it difficult to step out of her own legal tradition and to identify the general principles that are common to major legal systems.³¹¹ A panel of three experienced arbitrators from different countries would be better suited to the task. In short, because municipal courts would not (and arguably could not) apply general principles of law as a means of standardizing the United Nations's commercial contracts, the functional neces-

tion), with MORGENSTERN, *supra* note 23, at 40-41 (seriously questioning this proposition). With respect to international arbitration, several leading writers now treat the absence of a governing law clause as an indication that the parties could not agree to the application of a particular municipal law and, therefore, as a negative choice in favor of *lex mercatoria*. See, e.g., REISMAN ET AL., *supra* note 303, at 228 (quoting W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 615 (2d ed. 1990)). Thus, while the position of international organizations may not be beyond question, its basic premise has gained acceptance among international arbitrators.

310. See Curtis, *supra* note 309, at 333 (recognizing that arbitrators have applied general principles of law, but that municipal courts have not); Alejandro M. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 TUL. J. INT'L & COMP. L. 93, 104 (1995) (explaining that most national courts strive to avoid the application of *lex mercatoria* even if the parties have stipulated to its use). See also JENKS, *supra* note 14, at 152 (recognizing the existence of controversy regarding the ability of parties to adopt "general principles of law" as the governing law for contracts).

Some writers argue that municipal courts dislike general principles of law because they are vague and indeterminate. See Garro, *supra*, at 104. However, the aversion of municipal courts seems to be more deeply rooted in the positivist view that "any contract which is not a contract between States in their capacity as subjects of international law is based upon the municipal law of some country." Serbian Loans (France v. Serbia), 1929 P.C.I.J. (ser. A) No. 20, at 41 (July 12). See also F.A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 1960 BRIT. Y.B. INT'L L. 34, 44 (arguing that general principles "are not a law or a legal system"). Because arbitration takes place largely outside the realm of state power, it is not surprising that arbitrators have been more receptive to the non-positivist body of *lex mercatoria*.

311. See SCHERMERS & BLOKKER, *supra* note 17, at 1002 (doubting that municipal judges have sufficiently broad experience with multiple legal systems to apply general principles of law, and suggesting that mixed international tribunals can do a more effective job). See also Conte v. Flota Mercante Del Estado, 277 F.2d 664, 667 (2d Cir. 1960) (Friendly, J.) ("[T]ry as we may to apply . . . foreign law . . . there is an inevitable hazard that . . . our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.").

sity doctrine supports the Secretary-General's practice of not waiving immunity for such disputes and of providing, instead, for arbitration.

With respect to tort actions brought by non-employees, automobile accidents provide the most common source of dispute—and the one area in which the United Nations consistently waives its immunity.³¹² To the extent that it carries third-party insurance, the United Nations has also waived its immunity for other tort claims.³¹³ The United Nations seems unwilling, however, to waive immunity for cases in which claimants accuse the Organization's personnel of committing intentional torts in their official capacities.³¹⁴

One writer suggests that the failure to waive immunity for intentional torts is unwarranted because international organizations never require immunity "in cases alleging that they have intentionally caused death, personal injury, or damage to . . . property within the forum state."³¹⁵ At an intuitive level, the argument makes sense because the principle of *lex loci delicti commissi* often governs the tort liability of international organizations.³¹⁶ When municipal law governs a tort claim, international organizations

312. See *ILC Study (1985)*, *supra* note 119, at 162; *ILC Study (1967)*, *supra* note 103, at 225-26, 283; Letter from the U.N. Office of Legal Affairs to the Permanent Representative of a Member State (May 22, 1985), *supra* note 236, at 155; Memorandum from the U.N. Office of Legal Affairs to the Assistant Secretary-General for General Services (Apr. 5, 1983), 1983 U.N. Jurid. Y.B. 214, 215, U.N. Doc. ST/LEG/SER.C/21; Internal Memorandum of the U.N. Office of Legal Affairs (Nov. 3, 1964), 1964 U.N. Jurid. Y.B. 263, 263, U.N. Doc. ST/LEG/SER.C/2; BEKKER, *supra* note 9, at 204; CHARTER OF THE UNITED NATIONS, *supra* note 23, at 1142; WHITEMAN, *supra* note 91, at 62 (quoting Ehrenfeld, *supra* note 84, at 93). See also CROSSWELL, *supra* note 10, at 24-25, 57 (discussing the United Nations's practice of waiving immunity for suits arising out of automobile accidents and stating that "a similar view . . . is taken by . . . other international organizations").

313. *ILC Study (1985)*, *supra* note 119, at 162; Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 172, 176; BEKKER, *supra* note 9, at 204; WHITEMAN, *supra* note 91, at 62 (quoting Ehrenfeld, *supra* note 84, at 93); Singer, *supra* note 1, at 85. See also RESTATEMENT (THIRD), *supra* note 9, at § 467 reporters' note 7 (describing the practice of the United Nations and the Specialized Agencies to waive immunity in such cases); RESTATEMENT (SECOND), *supra* note 27, at § 84 reporters' note (describing the practice of the United Nations).

314. See Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 172, 176 (explaining that the United Nations does not generally waive immunity except in cases of third-party liability that is covered by insurance). Most insurance policies exclude coverage for intentional torts. See Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 76, 81 (1996).

315. Singer, *supra* note 1, at 151.

316. See AMERASINGHE, *supra* note 27, at 228; SHAW, *supra* note 27, at 918.

cannot cite the limited perspectives of municipal courts or the possibility of conflicting judgments to justify the assertion of immunity. In fact, the application of municipal law presupposes the likelihood of differing perspectives and conflicting rules.³¹⁷ In these tort cases, municipal courts may be in the *best* position to apply the governing law.³¹⁸

Still, a blanket rule against immunity fails to consider the nature of the situations in which international officials are likely to commit intentional torts in an official capacity. These cases do not involve mistakes; they involve purposeful activities that international organizations have determined to be part of their *official* work. In other words, intentional tort claims usually involve circumstances in which organizations conclude that they have a right under international law to perform acts that would otherwise be actionable under municipal law.³¹⁹ In these situations, it is not clear that municipal courts should adjudicate the rights and liabilities of the organizations and their personnel.

For example, when the Security Council supervises military enforcement actions in accordance with Chapter VII of the United Nations Charter, members of the participating forces should not be exposed to municipal court jurisdiction for claims of personal injury and property damage that might otherwise lie under municipal law.³²⁰ At a more basic level, when member states require the United Nations to issue reports on particular topics, their authors should not have to face municipal court jurisdiction for defamation claims that might arise under national laws.³²¹ Likewise, if the Organization exercises its right to protect the inviola-

317. See Singer, *supra* note 1, at 130 (explaining that the need to cope with differences in *municipal* law "is a routine cost of functioning internationally").

318. See Wood, *supra* note 39, at 162 (concluding that municipal courts provide the best and the natural forum for cases arising under municipal law).

319. Cf. AMERASINGHE, *supra* note 27, at 226 (noting that the tortious activities of international officials may sometimes be governed by international law); SHAW, *supra* note 27, at 918 (also recognizing that the tort liability of international organizations may, in some circumstances, be governed by international law).

320. See SCHERMERS & BLOKKER, *supra* note 17, at 358 (suggesting that participants in the United Nations operation in Somalia should not have to stand trial before local courts on charges of aggression).

321. See JENKS, *supra* note 14, at 213 (suggesting that municipal laws prohibiting defamation could not be applied to the dissemination of information that international organizations are required to publish). See also RESTATEMENT (SECOND), *supra* note 27, at § 85 illus. 1, § 92 illus. 1 (suggesting that international officials should not have to answer to municipal authorities for the issuance of objectionable reports); SCHERMERS & BLOKKER, *supra* note 17, at 358 (arguing that international officials should not have to stand trial in municipal courts for drafting unflattering reports).

bility of its premises and archives by detaining suspected thieves and vandals, it is not clear that its security agents should account for their conduct before municipal tribunals in accordance with municipal standards.³²²

In short, international officials are not likely to commit intentional violations of municipal tort law in the absence of a colorable claim that they have a right to do so under international law.³²³ While such claims may not always be justified, one may be even more suspicious of attempts by municipal courts to resolve conflicts between international law and municipal tort law.³²⁴ In fact, when international civil servants intentionally violate a member state's public policy, the threat of direct and indirect prejudice becomes a paramount concern.³²⁵ Under these circumstances, the assertion of immunity represents a legitimate effort by international organizations to transfer the adjudication of liability to an interna-

322. Under the General Convention, United Nations premises and archives are "inviolable." General Convention, *supra* note 9, at §§ 3, 4. In a few cases, plaintiffs have claimed that the personnel of international organizations used excessive force in preventing the theft of records and in apprehending vandals. *See* *Rendall-Speranza v. Nassim*, 107 F.3d 913 (D.C. Cir. 1997) (involving the attempted theft of files); *People v. Weiner*, 378 N.Y.S.2d 966 (N.Y. City Crim. Ct. 1976) (involving the apprehension of a suspected vandal). In the first case, the international organization maintained that its official complied with the organization's policy regarding the protection of archives. *Rendall-Speranza*, 107 F.3d at 915. In the second case, the United Nations claimed that municipal courts lacked the competence to determine whether a UN security officer exceeded his authority to protect the inviolability of UN premises. *Weiner*, 378 N.Y.S.2d at 970, 974. *See also* Letter to the Permanent Representative of a Member State (Feb. 11, 1976), *supra* note 182, at 237, 238. Because municipal law may not give adequate protection to the archives and premises of international organizations, because municipal authorities may not have the incentive to protect the archives and premises of international organizations, and because international law must prevail over domestic tort law, one cannot assume that an international organization's efforts to protect the inviolability of its archives and premises should be addressed by municipal judges in accordance with municipal tort law. *See* *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, 34 (Apr. 26) (recalling the "fundamental principle" that "international law prevails over domestic law"). *Cf.* BOWETT, *supra* note 18, at 370 (doubting whether municipal law should necessarily apply to torts committed by officials in the headquarters district of an international organization).

323. *See* JENKS, *supra* note 14, at 212-13 (recognizing that there may be questions about the capacity of states to bind international organizations regarding particular matters).

324. *See* JENKS, *supra* note 117, at 40 (arguing that the municipal authorities of one state do not have the capacity to nullify the official acts of international institutions, in part because municipal courts "are not in a position to weigh the different factors involved").

325. *Cf.* Ehrenfeld, *supra* note 84, at 90 (describing the possibility of local prejudice against some activities of international organizations, or at least the possibility that municipal courts would not recognize the inapplicability of certain municipal laws to the activities of international organizations).

tional tribunal and, thus, to ensure the primacy of international law.³²⁶

With respect to employment disputes, critics have suggested that international organizations cannot justify the assertion of immunity on functional necessity grounds.³²⁷ In making this argument, they observe that multinational enterprises employ thousands of individuals in scores of locations across the globe, but manage to function without the benefit of immunity.³²⁸ While this may be true, it ignores some fundamental differences between international organizations and multinational enterprises.³²⁹

As a rule, *some* municipal law governs employment relations between multinational enterprises and their employees.³³⁰ There is, however, a broad consensus for the proposition that the internal laws of international organizations govern their employment relations to the exclusion of municipal law.³³¹ The constituent documents of a few international organizations expressly recognize this point.³³² It is also deemed to be a feature of customary interna-

326. See Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1190-91 (recognizing that international organizations should enjoy immunity from the jurisdiction of municipal courts for torts performed in the pursuit of core public functions because municipal court jurisdiction would open the door to intervention in the work of international organizations).

327. See Singer, *supra* note 1, at 160-61.

328. See *id.* at 161.

329. See *Mendaro v. World Bank*, 717 F.2d 610, 619-20 (D.C. Cir. 1983) (recognizing important distinctions between international organizations and multinational companies). Cf. JENKS, *supra* note 14, at xxxi (warning that the tendency of private international lawyers to analyze international organizations according to normal conflicts-of-law rules is not "well founded").

330. See YVES BEIGBEDER, *THE INTERNAL MANAGEMENT OF UNITED NATIONS ORGANIZATIONS* 181 (1997).

331. See Opinion of the Legal Counsel of the Food and Agriculture Organization of the United Nations (Sept. 4, 1970), 1970 U.N. Jurid. Y.B. 188, 190-91, U.N. Doc. ST/LEG/SER.C/8; Owen Letter, *supra* note 26, at 920 (quoting JENKS, *supra* note 14, at 63); C.F. AMERASINGHE, *THE LAW OF THE INTERNATIONAL CIVIL SERVICE* 46 (1988); AMERASINGHE, *supra* note 27, at 331; BEIGBEDER, *supra* note 330, at 181; BOWETT, *supra* note 18, at 317, 367; JENKS, *supra* note 14, at 43-44; MORGENSTERN, *supra* note 23, at 37 n.105; SHAW, *supra* note 27, at 918-19; Morgenstern, *supra* note 298, at 740; Finn Seyersted, *Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations*, 14 INT'L & COMP. L.Q. 493 *passim* (1965); Seyersted, *supra* note 84, at 58-59, 67-68. *But see* KELSEN, *supra* note 89, at 314 (concluding that municipal law applies to employment contracts between international organizations and staff members).

332. For example, Article 101(1) of the United Nations Charter establishes the power of the General Assembly to regulate staff relations. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 58 (July 13); Seyersted, *supra* note 84, at 54. Likewise, Article V(5) of the World Bank's Articles of Agreement gives the Bank's President responsibility for "the organization, appointment and dismissal of the officers and staff." Owen Letter, *supra* note 26, at 919. The State

tional law³³³ on the theory that entities having international legal personality also possess exclusive legislative and adjudicative jurisdiction over their internal affairs.³³⁴

Although the internal laws of international organizations govern employment contracts, they are not a form of private law.³³⁵ To the contrary, they resemble the public law that governs employment relations between states and their civil servants.³³⁶ While international organizations establish much of this public law by regulations and rules, they depend on general principles of law to fill the gaps.³³⁷

Viewed in this context, it becomes clear that the employment contracts of international organizations enjoy a level of autonomy

Department's Legal Adviser has construed Article V(5) to indicate that the World Bank is not subject to municipal employment law. *See id.*

333. *See* RESTATEMENT (THIRD), *supra* note 9, at § 223 reporters' note 1; Seyersted, *supra* note 331, at 522; Seyersted, *supra* note 84, at 57.

334. *See* RESTATEMENT (THIRD), *supra* note 9, at § 223 cmt. a & reporters' note 1. *See also* AMERASINGHE, *supra* note 27, at 324 (explaining that it is a "characteristic" of international organizations to operate outside of national law with respect to "internal organization and functioning"); Seyersted, *supra* note 331, at 522-23 (explaining that international organizations have exclusive jurisdiction to govern their internal affairs).

335. *See Effect of Awards of Compensation*, 1954 I.C.J. at 82 (dissenting opinion of Judge Hackworth); SHAHABUDEEN, *supra* note 280, at 194-95 (explaining that the dissenting opinions of ICJ judges have been cited as authoritative statements of law with respect to points that are consistent with majority opinions of the ICJ). *See also* Opinion of the Legal Counsel of the Food and Agriculture Organization of the United Nations (Sept. 4, 1970), *supra* note 331, at 190, (quoting Opinion of Committee of Jurists, LEAGUE OF NATIONS O.J. Special Supp. 107, at 206-08 (1932), for the proposition that the employment relationship between international organizations and staff "is not a legal relationship of private law within the meaning of the civil law of any country"). *Cf.* *Broadbent v. Organization of American States*, 628 F.2d 27, 33-34 (D.C. Cir. 1980) (concluding that the employment of international civil servants would not be a "commercial activity" even if the doctrine of restricted sovereign immunity applied to international immunities). *But see* KELSEN, *supra* note 89, at 317 (asserting that international organizations lack legislative power and, therefore, doubting that their employment contracts have the characteristics of public law); Ivor L.M. Richardson, *The Legal Relation Between an International Organization and Its Personnel*, 2 WAYNE L. REV. 75, 90 (1956) (doubting that the internal law of international organizations constitutes a form of public law).

336. *See* BOWETT, *supra* note 18, at 371 (describing the public-law character of relations between international organizations and their staff). *See also* RANSHOFEN-WERTHEIMER, *supra* note 51, at 257-58 (describing the conclusion of a committee of jurists that employment relations between the League of Nations and its staff were governed chiefly by considerations of public law).

337. *See* AMERASINGHE, *supra* note 331, at 177; BOWETT, *supra* note 18, at 325; Morgenstern, *supra* note 298, at 741; Richardson, *supra* note 335, at 97; Seyersted, *supra* note 331, at 510. The reliance on general principles of law inures to the benefit of international officials because organizations tend to define them in a way that gives officials "the greatest possible protection which can be derived from the various systems of law." Morgenstern, *supra* note 298, at 742-43, 746.

that transcends the boundaries of international immunities.³³⁸ Because the internal laws of organizations govern their employment relations, municipal courts would have to apply those laws to disputes between international organizations and their personnel.³³⁹ It is, however, fairly well established that even courts of general jurisdiction have no competence to apply the public laws of another jurisdiction.³⁴⁰ Thus, while courts often dismiss employment claims against international organizations on the basis of immunity, courts have also dismissed such claims on the more fundamental ground that they lacked subject matter jurisdiction.³⁴¹ Even if proponents of reform could demonstrate that international organizations are not entitled to immunity for employment claims on functional necessity grounds, it is not clear that municipal courts would exercise jurisdiction over such cases.³⁴²

338. See AMERASINGHE, *supra* note 27, at 324 (stating that matters falling within an international organization's internal law are completely "outside the jurisdiction of national law").

339. See Seyersted, *supra* note 331, at 506.

340. See *Broadbent*, 628 F.2d at 35 n.27 (quoting M.B. AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS* 12 (1967)); Seyersted, *supra* note 331, at 523 (explaining that "external courts are incompetent in the sense that they do not have subject matter jurisdiction over disputes falling within the organic jurisdiction of international organizations"). See also GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 630 (3d ed. 1996) (noting the traditional rule that the courts of one country will not enforce foreign public rights).

341. See *Broadbent*, 628 F.2d at 35 n.27 (quoting AKEHURST, *supra* note 340, at 12, for the proposition that municipal courts are "totally unsuited" to apply the internal employment law of international organizations and recognizing that a number of municipal courts have dismissed employment law claims not on the grounds of immunity, but on the grounds of the "special law applicable"); Owen Letter, *supra* note 26, at 919-20 (noting the "widespread practice among States not to exercise jurisdiction over internal employment disputes in international organizations, regardless of whether national law specifically provides for immunity from jurisdiction"); AMERASINGHE, *supra* note 331, at 42 (explaining that most legal systems recognize that international organizations either enjoy immunity for employment matters or that such matters lie outside the subject matter jurisdiction of local courts); Seyersted, *supra* note 331, at 509 (describing cases in which the municipal court dismissed an employment claim against an international organization not on the grounds of immunity, but for lack of subject matter jurisdiction).

342. Nevertheless, a municipal court might *erroneously* exercise subject matter jurisdiction over employment claims against an international organization in the absence of international immunities. For example, in one case, the EEOC dismissed a claim against the United Nations because it concluded that Title VII does not apply to the United Nations. See *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 70 (E.D.N.Y. 1987). Later, a federal district court disagreed and held that, in the absence of a clearly worded exception, Title VII applies to the United Nations. See *id.*

While the court ultimately dismissed the case on immunity grounds, see *id.* at 70-71, its holding with respect to the applicability of Title VII is incorrect. It is true that Title VII does not explicitly exclude the United Nations from its scope of application. On the other hand, nothing in Title VII expressly *requires* its application to international organizations. Under these circumstances, the court should have applied the presumption that Congress

Moreover, one can justify the assertion of immunity for employment claims on functional necessity grounds. While the comparison may not be obvious, international organizations resemble armed services in the sense that they require their employees to adhere to strict codes of conduct not imposed on the general population.³⁴³ Because such codes of conduct are vital to the survival of international organizations and armed forces, they both require separate legal systems for employment matters.³⁴⁴ Furthermore, to reinforce the independence and neutrality of international organizations, staff members must see the law of the organization, and not a particular state, as the source of their rights and duties.³⁴⁵ Likewise, member states must understand that the civil services of international organizations do not operate within the value systems of particular member states, but reflect common values.³⁴⁶ To achieve these goals, the internal laws of international organizations must constitute the exclusive source of rules for their employment relations; however, because municipal courts will not apply the written public laws of international organizations (or the general principles of law that fill their gaps), international organizations must use their immunity to force adjudication of employment disputes by international tribunals.

intends domestic laws to comply with international law. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Because the United Nations Charter and customary international law give the United Nations exclusive jurisdiction over its internal affairs, the Court should have held that Congress did not intend that Title VII apply to the United Nations. Cf. *Fortino v. Quasar Co.*, 950 F.2d 389, 392-93 (7th Cir. 1991) (Posner, J.) (recognizing that a 1953 treaty permitted Japanese companies to discriminate in favor of their citizens, stating that "[t]he exercise of a treaty right may not be made the basis for inferring a violation of Title VII [of the Civil Rights Act of 1964]," and refusing to interpret Title VII to "tak[e] back from the Japanese . . . what the treaty had given them").

343. See *AKEHURST*, *supra* note 340, at 10. See also *Richardson*, *supra* note 335, at 88-89 & nn. 47-48 (remarking about the "severe restrictions" imposed by the United Nations Staff Regulations on the extra-office behavior of staff).

344. It is possible to characterize the independent legal systems of international organizations as having a psychological dimension in the sense that they create the esprit de corps necessary for the survival of the institutions. See *AMERASINGHE*, *supra* note 27, at 330 (speaking in these terms). It would be unfair, however, to characterize the legal independence of international organizations as conferring no more than a psychological benefit. See *Singer*, *supra* note 1, at 132 (rejecting the need for immunities that defend the "psychological well-being" of international organizations).

345. See *AMERASINGHE*, *supra* note 27, at 329 (describing the need to create uniform conditions of service for international officials and to preserve their independence from national pressures).

346. See *BEKKER*, *supra* note 9, at 103 (emphasizing an organization's need to convince member states of its impartiality).

In short, the Secretary-General's practices are broadly consistent with the obligation, under the functional necessity doctrine, to waive unnecessary immunities. Granted, the Secretary-General often decides not to waive immunity in cases involving commercial contracts, intentional torts, and employment disputes – even in the absence of direct and indirect prejudice. Yet, the Secretary-General's reluctance to waive immunity appears to rest firmly on considerations of functional necessity and to represent an effort to secure the effective functioning of the Organization.

C. *A Legitimate Concern*

While the Secretary-General's immunity decisions generally comply with the functional necessity doctrine, the United Nations adopted a position in *Cumaraswamy* that creates a potential tension between waivers of immunity and the functional necessity doctrine. As noted above, Sections 20 and 23 of the General Convention require the Secretary-General to waive the immunity of United Nations personnel whenever (a) the assertion of immunity would impede the course of justice; and (2) waiver may be accomplished without prejudice to the interests of the Organization.³⁴⁷ In *Cumaraswamy*, the United Nations correctly claimed that it need not waive immunity because the exercise of jurisdiction by Malaysian courts would prejudice the interests of the Organization.³⁴⁸ Given the effect of the Malaysian judicial proceedings on Cumaraswamy's work and on the work of other special rapporteurs, the United Nations had a strong argument for not waiving immunity.³⁴⁹

The United Nations, however, gave a second reason for not waiving immunity. Here, the Organization claimed that it need not waive immunity because immunity would not impede the course of justice. To justify this position, the United Nations relied on Section 29 of the General Convention, which provides that

The United Nations shall make provisions for appropriate modes of settlement of:

347. General Convention, *supra* note 9, at §§ 20, 23.

348. See Written Statement of the United Nations, *supra* note 144, at paras. 54-55.

349. See *id.* (explaining that the Malaysian judicial proceedings caused the postponement of Cumaraswamy's investigations, predicting that a waiver of his immunity would deter other human rights workers from speaking candidly about their efforts, and concluding that a waiver could "endanger the entire human rights mechanism of the United Nations system").

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

According to the United Nations, the assertion of immunity on Cumaraswamy's behalf could not possibly impede the course of justice because Section 29 would still require the United Nations to arbitrate the claims against Cumaraswamy.³⁵⁰

In the narrow context of *Cumaraswamy*, the United Nations's analysis seems tenable. The United Nations has long required claimants to make affirmative requests for waivers and to provide a "motivated statement of reasoning" indicating how the assertion of immunity would impede the course of justice.³⁵¹ Following the commencement of proceedings against Cumaraswamy, however, the Malaysian plaintiffs and the Malaysian government neither requested a waiver of immunity,³⁵² nor did they clearly explain how immunity would impede the course of justice.³⁵³ At most, the Malaysian government implied that the assertion of immunity would deprive the plaintiffs of any legal redress and would, therefore, constitute a denial of justice.³⁵⁴ That suggestion, however, invited

350. See *id.* at para. 52 (arguing that immunity would not impede the course of justice because the United Nations would still have an obligation under Section 29 to provide an appropriate remedy); Oral Statement of the United Nations (Dec. 10, 1998), *supra* note 143, at para. 14 (explaining that, in accordance with Section 29, the United Nations would agree to arbitrate the claims against Cumaraswamy under the UNCITRAL rules).

351. See *ILC Study (1967)*, *supra* note 103, at 283 (describing a 1963 incident in which the United Nations declined to waive immunity on the basis of a "bare statement" by the requesting government and, instead, requested a "motivated statement of reasoning indicating that manner in which the course of justice" might be impeded). See also Cable from the U.N. Office of Legal Affairs to Resident Representative, United Nations Development Program (Feb. 15, 1984), 1984 U.N. Jurid. Y.B. 186, 187, U.N. Doc. ST/LEG/SER.C/22 (explaining that waiver must be "in response to a formal request").

352. See Written Comments of the United Nations, *supra* note 250, at para. 9.

353. See Written Comments of Costa Rica, *supra* note 138, at 9.

354. See Written Statement of the Government of Malaysia at para. 9.7, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. ___ (Apr. 29) [hereinafter *Written Statement of Malaysia*] (suggesting that the Malaysian plaintiffs had no recourse to an alternative mode of settlement); Written Comments of the Government of Malaysia at para. 7.11, *Cumaraswamy*, 1999 I.C.J. ___ [hereinafter *Written Comments of Malaysia*] (suggesting that the maintenance of immunity would "result in the extinguishment of individual rights").

the United Nations's rejoinder that the claimants would have access to an independent arbitral tribunal under Section 29.³⁵⁵

While adequate to meet the situation in *Cumaraswamy*, the United Nations's argument bears the seeds of a disturbing process by which its duties under the functional necessity doctrine might collapse into a less demanding obligation to prevent the denial of justice. Structurally speaking, the General Convention requires the United Nations to waive any immunity that would interrupt the normal judicial processes of member states *unless* it can justify the assertion of immunity on functional necessity grounds.³⁵⁶ Only *after* the Organization justifies the refusal to waive immunity on functional necessity grounds does Section 29 mandate the provision of alternative remedies to prevent the denial of justice.³⁵⁷ Yet, the United Nations's argument in *Cumaraswamy* suggested that the Organization could short-circuit the first step and could decline to waive the immunity of its personnel whenever it provides an alternative forum.

According to that reasoning, however, the United Nations's obligation to perform a functional necessity analysis would disappear because the Organization could assert *unnecessary* immunities if it provided alternatives to municipal court litigation. This would, in effect, give the United Nations a unilateral right to select, *ex post*,

355. See Written Statement of the United Nations, *supra* note 144, at para. 52; Written Comments of the United Nations, *supra* note 250, at paras. 13, 15; Oral Statement of the United Nations (Dec. 10, 1998), *supra* note 143, at para. 14.

356. See General Convention, *supra* note 9, at §§ 20, 23 (obliging the Secretary-General to waive the immunities of UN personnel when "immunity would impede the *course* of justice and can be waived without prejudice to the interests of the United Nations") (emphasis added). See also Cable Prepared by the U.N. Office of Legal Affairs for the Liaison Office of the International Atomic Energy Agency (Dec. 2, 1975), 1975 U.N. Jurid. Y.B. 192, 192, U.N. Doc. ST/LEG/SER.C/13 (stating that the policy of the United Nations is to "waive . . . immunity so as not to impede *normal governmental processes* but only if it deems it in its own interest to do so") (emphasis added); Morgenstern, *supra* note 298, at 739 (observing that international organizations have "waived . . . immunity as a matter of course whenever it constituted an obstacle to the *normal course* of justice") (emphasis added).

Of course, if the parties have agreed to arbitrate their disputes, the assertion of immunity against municipal court jurisdiction would not impede the normal course of justice because the normal procedure would be to submit disputes to arbitration. See *ILC Study (1985)*, *supra* note 119, at 208 (describing a case in which the Food and Agriculture Organization (FAO) argued that its assertion of immunity did not impede the course of justice because the claimant could bring an arbitration against the FAO in accordance with the underlying agreement).

357. See General Convention, *supra* note 9, at § 29(b) (requiring provision of an appropriate mode of settling claims involving UN officials "if immunity has not been waived by the Secretary-General") (emphasis added).

the forum in which it preferred to be sued. While the United Nations should have the right to override a plaintiff's initial choice of forum when necessary to ensure the integrity of its operations, it is difficult to see why the Organization should have the same right for slip-and-fall claims or similar disputes that raise no functional necessity concerns.

In addition to raising issues of fairness to plaintiffs, the United Nations's apparent reliance on Section 29 gives inadequate consideration to the interests of municipal courts. As noted above, the General Convention's mandatory waiver provisions represent a commitment by the Organization not to interfere with the *normal* judicial processes of member states unless necessary to maintain the integrity of its operations. In other words, the General Convention requires the Secretary-General to balance the interests of the Organization against the interests of municipal courts in exercising jurisdiction.³⁵⁸ By suggesting that Section 29 always justifies a refusal to waive immunity, however, the United Nations seems to have lost sight of its duty to consider the interests of municipal courts.³⁵⁹

To be fair, the United Nations and other international organizations have, in the past, recognized their obligation not to interfere with the judicial processes of member states except on the grounds of functional necessity.³⁶⁰ Therefore, one may hope that the United Nations will not extend beyond the narrow facts of *Cumaraswamy* its suggestion that the alternative remedies required by

358. Cf. *ILC Study (1967)*, *supra* note 103, at 269 (explaining that, in making waiver determinations, the Secretary-General had weighed "the claims of the municipal court to exercise jurisdiction . . . against the interests of the Organization").

359. While Malaysia never clearly explained how the Secretary-General's assertion of immunity would impede the course of justice, its written submissions generally referred to the assertion of immunity as a "gross attempt to impose limitations" on Malaysia's sovereignty and a sign of "disrespect" for its courts. See Written Statement of Malaysia, *supra* note 354, at paras. 7.4, 7.12, 8.1; Written Comments of Malaysia, *supra* note 354, at para. 7.10. While the United Nations unquestionably had the right to maintain Cumaraswamy's immunity to protect the integrity of its human rights mandate, Malaysia's reaction illustrates why the United Nations should consider the interests of municipal courts and should not interrupt the normal course of judicial proceedings except on the grounds of functional necessity.

360. See Cable Prepared by the U.N. Office of Legal Affairs for the Liaison Office of the International Atomic Energy Agency (Dec. 2, 1975), *supra* note 356, at 192 (stating that the policy of the United Nations is to "waive . . . immunity so as not to impede *normal governmental processes* but only if it deems it in its own interest to do so") (emphasis added); Morgenstern, *supra* note 298, at 739 (indicating that international organizations have "waived the immunity as a matter of course whenever it constituted an obstacle to the *normal* course of justice") (emphasis added).

Section 29 constitute a sufficient justification for the failure to waive immunity.³⁶¹

Finally, to the extent that the Secretary-General's immunity decisions leave any room for criticism, it bears repeating that the General Convention provides for review by the ICJ.³⁶² Therefore, some writers have concluded that the Secretary-General only has the authority to make "prima facie" determinations of immunity.³⁶³ This characterization may be somewhat understated because the United Nations has the sole authority to seek review by the ICJ and because the ICJ may itself defer to the Secretary-General in close cases.³⁶⁴ Nonetheless, the Secretary-General can be called to account if he takes unreasonable positions regarding the scope (or waiver) of international immunities.³⁶⁵

On balance, it appears that proponents of reform have underestimated the costs that would result from the expansion of municipal court jurisdiction for international immunities. Recent experiences demonstrate that direct and indirect prejudice still threaten the capacity of international organizations to perform their obligations with respect to peace, security, human rights, and other controversial matters. Moreover, the ICJ has rendered an authoritative opinion that explains why international officials are better situated than municipal courts to decide immunity questions based

361. One writer agrees that international organizations may be excused from answering claims in municipal courts whenever they offer alternative remedies that guarantee a level of transparency, independence, and fairness comparable to that established by the procedures of United States federal courts. Singer, *supra* note 1, at 100-01, 146, 163. While the writer does not significantly develop the point, he acknowledges that the availability of an alternative forum does not require the grant of *immunity* to international organizations. *Id.* at 101. Rather, the availability of an alternative forum forces claimants to explain why the adjudication should take place in municipal courts as opposed to the alternative forum. *Id.*

In other words, the creation of alternative fora has nothing to do with immunity *per se*. To the contrary, it implicates traditional doctrines (such as *forum non conveniens* and *pro rogation* clauses) that allow defendants to overcome a plaintiff's initial choice of forum by identifying an alternative forum. The effect of these doctrines may be similar to immunity in the sense that they allow defendants to escape an undesirable municipal court. However, the conceptual basis for these doctrines differs from that of immunity, and their conflation invites confusion.

362. See *supra* note 139 and accompanying text.

363. Memorandum from the U.N. Office of Legal Affairs to the Assistant Secretary-General for General Services (Apr. 5, 1983), *supra* note 312, at 215; MULLER, *supra* note 14, at 162.

364. See BEKKER, *supra* note 9, at 175 (describing ICJ's role in terms of a "marginal review of the reasonableness of the [O]rganization's decision").

365. See JENKS, *supra* note 2, at 26 (emphasizing that "an immunity . . . disagreement [that] is justiciable . . . cannot be fairly represented . . . as lawlessness").

on the functional necessity doctrine. Finally, while some writers argue that international organizations cannot be trusted to make appropriate immunity decisions, UN practice suggests otherwise. There may be room for improvement, but adjustment of the existing system seems likely to generate fewer institutional costs than a substantial expansion of municipal court jurisdiction

V. INTERNATIONAL IMMUNITIES IN THEIR PRACTICAL CONTEXT: ALLEGED BENEFITS OF REFORM

Notwithstanding the likely institutional costs, an expansion of municipal court jurisdiction might be warranted if it generated large countervailing benefits. Here, the proponents of reform make one final argument: the expansion of municipal court authority would force international organizations to adopt significantly higher standards of accountability.³⁶⁶ According to these writers, international organizations currently lack incentives to limit their immunities.³⁶⁷ Consequently, they argue that the retention of decision-making authority by international organizations will lead to the creation of "several hundred" entities that possess the "illegitimate but effective [power] to act lawlessly without fear of immediate sanction."³⁶⁸ As proof of this phenomenon, various writers cite the absence of permanent tribunals having compulsory jurisdiction over international organizations.³⁶⁹ To remedy this perceived deficiency, they suggest that the expansion of municipal court authority—or the mere threat of municipal court jurisdiction—would cause international organizations to behave more responsibly.³⁷⁰ This Part explains that international organizations initiated the movement towards enhanced accountability. As a result of their efforts, international law already incorporates requirements that ensure a high level of responsibility. Therefore, this Part concludes that writers have overestimated the capacity of municipal courts to increase the accountability of international organizations.

While international organizations often find it necessary to escape municipal regulation, they do not have a similar need to

366. See, e.g., Singer *supra* note 1, at 164 (arguing that judicial proceedings will ensure the public accountability that international organizations must display if they are to contribute to world peace and enhanced social welfare).

367. See *id.* at 54-55.

368. *Id.* at 64.

369. See O'Toole, *supra* note 12, at 5 & n.15; Singer, *supra* note 1, at 64 & n.39; Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182.

370. See Singer, *supra* note 1, at 163.

avoid responsibility for legitimate claims.³⁷¹ The ILO recognized this principle in a 1945 memorandum, which explained that the "immunities accorded to the Organisation . . . carry with them corresponding responsibilities."³⁷² As the necessary "counterpart" to immunity, the memorandum proposed to require the ILO to "make provision for the determination by an appropriate international tribunal" of private-law and staff disputes to which its immunities applied.³⁷³ Thus, the thrust of the ILO's proposal was to place "the rule of law . . . in an international setting in which an equilibrium of all the factors . . . [could] be reached rather than in a . . . national setting in which purely local influences [might]. . . distort the outcome."³⁷⁴ Although the requirement of alternative remedies for private-law disputes was unknown to the law of international immunities in 1945,³⁷⁵ it has become a matter of common form in immunities and headquarters agreements.³⁷⁶ Thus, in assessing the criticisms of international immunities, it is important to remember that international organizations initiated the movement towards increased accountability.³⁷⁷

Because international organizations have a legal obligation to provide claimants with appropriate remedies for private-law disputes, their immunities supply less protection than meets the eye.³⁷⁸ At most, they provide international organizations with a procedural immunity that secures the transfer of private-law disputes from municipal tribunals to international fora when necessary to protect the organizations' independent and effective functioning.³⁷⁹

371. See MULLER, *supra* note 14, at 183. See also JENKS, *supra* note 117, at 52 (arguing that there are "overriding objections to making international officials subject to national jurisdiction," but acknowledging that the same objections do not apply to the jurisdiction of international tribunals).

372. *ILO Memorandum*, *supra* note 120, at 197.

373. *Id.* at 219. See also JENKS, *supra* note 2, at 17, 42-43 (describing the *ILO Memorandum* and its enduring influence on the law of international immunities).

374. JENKS, *supra* note 2, at 26 (describing the effect of international immunities).

375. *Id.* at 42. See also HILL, *supra* note 47, at 111 (explaining that the League of Nations's immunity agreements did not expressly provide for the settlement of disputes of a private law character).

376. See JENKS, *supra* note 2, at 19.

377. See *id.* at 42.

378. See Szasz, *supra* note 13, at 739.

379. JENKS, *supra* note 2, at 26; Ehrenfeld, *supra* note 84, at 93. See also MULLER, *supra* note 14, at 177 (explaining that international organizations "cannot use [their] jurisdictional immunity to hide from [their] responsibilities" because they are "under an obligation to create alternative and adequate means of redress"). In other words, one cannot assume that international organizations will avoid the costs of adjudication or liability by invoking their jurisdictional immunities. Memorandum from the U.N. Office of Legal Af-

Although proponents of reform acknowledge this to be the theoretical function of international immunities, they worry that claimants may not, in fact, have access to remedies at the international level.³⁸⁰ For example, they observe that private parties lack standing to initiate proceedings before the ICJ and most international tribunals.³⁸¹ Moreover, they contend that international organizations have *not* created permanent tribunals to resolve private-law disputes.³⁸² Finally, they argue that arbitration does not constitute a viable alternative because international organizations have complete discretion in deciding whether to submit to arbitration and because their tort victims lack the opportunity to negotiate arbitration agreements *ex post*.³⁸³

While it is true that international organizations have the discretion to decide what remedy to offer claimants following the assertion of immunity, the fact remains that most international organizations have an express treaty obligation to provide claimants with *some* meaningful form of relief.³⁸⁴ Even where the obligation is

fairs to the Chief, Salaries and Allowances, Office of Financial Services (Mar. 18, 1975), 1975 U.N. Jurid. Y.B. 160, 160-61, U.N. Doc. ST/LEG/SER.C/13. After invoking immunity, most international organizations submit to arbitration of private-law disputes. See *infra* notes 393-95 and accompanying text. The costs of arbitration can be quite substantial. Memorandum from the U.N. Office of Legal Affairs to the Chief, Salaries and Allowances, Office of Financial Services (Mar. 18, 1975), *supra*, at 160-61.

380. See, e.g., BEKKER, *supra* note 9, at 184 (recognizing the danger that international immunities could leave claimants without a forum for the enforcement of legitimate claims).

381. See O'Toole, *supra* note 12, at 5 & n.15; Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182; Note, *The United Nations Under American Municipal Law: A Preliminary Assessment*, *supra* note 56, at 785 n.37. See also AMERASINGHE, *supra* note 27, at 465 (observing that private parties generally lack standing before international courts).

382. See O'Toole, *supra* note 12, at 5 & n.15; Singer, *supra* note 1, at 64 & n.39; Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182.

383. See Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182.

384. See BEKKER, *supra* note 9, at 191, 196-97 (observing that treaties require most international organizations to establish appropriate modes of settling disputes with private parties); JENKS, *supra* note 2, at 19, 43-44 (indicating that such requirements have "become a matter of common form in all immunities and headquarters agreements," including the General Convention and the Specialized Agencies Convention, as well as the relevant agreements for NATO, the Organization of American States (OAS), and the Council of Europe); MULLER, *supra* note 14, at 177, 183 (explaining that most bilateral host agreements and multilateral immunity agreements provide for the settlement of private-law disputes). See also AHLUWALIA, *supra* note 10, at 70 (describing Article 21 of the General Convention on the Privileges and Immunities of the Council of Europe, which requires the Council of Europe to provide for the settlement of private-law disputes); Chen, *supra* note 123, at 904 (explaining that the Specialized Agencies Convention requires the Specialized Agencies of the United Nations to make appropriate provision for

not expressly established by treaty, it may be found in the obligation of international organizations to cooperate with member states in good faith.³⁸⁵ Thus, the choice between appropriate remedies may be discretionary, but the basic obligation to provide them is not.³⁸⁶

Notwithstanding the legal obligations of international organizations, critics respond that most international organizations have not *in fact* established permanent tribunals to handle private-law disputes.³⁸⁷ Although one must concede the point,³⁸⁸ international organizations have a legitimate reason for not establishing their own claims courts. One notable attempt to create such a tribunal proved a complete failure. For decades, the ILO Administrative Tribunal (ILOAT) has possessed the jurisdiction to hear contract claims brought by non-employees.³⁸⁹ Yet, the ILOAT has never exercised that jurisdiction.³⁹⁰ The fact is that private parties prefer to avoid the ILOAT because they are unfamiliar with its procedures and because they question its impartiality as an "in-house" tribunal.³⁹¹ Under these circumstances, it seems unfair to criticize international organizations for not creating standing international tribunals for which private parties would have no demand.³⁹²

In the absence of such tribunals, the overwhelming practice of international organizations has been to provide for arbitration ex

settlement of private-law disputes in which they assert immunity); Kunz, *supra* note 19, at 861 (discussing the identical obligation imposed on the United Nations by Section 29 of the General Convention); Lewis, *supra* note 3, at 689 (describing Article 12(a) of the OAS Convention, which imposes a similar obligation).

385. See MULLER, *supra* note 14, at 177.

386. See *id.* (emphasizing that international organizations have an obligation to provide adequate means of redress for cases in which they maintain their immunity).

387. See *supra* note 382 and accompanying text.

388. See BEKKER, *supra* note 9, at 205 (noting that international organizations have not responded to calls for the establishment of permanent claims courts); JENKS, *supra* note 2, at 44 (observing that international organizations provide for the resolution of private-law claims on an ad hoc basis "rather than by arrangements with any firm institutional content"); Kunz, *supra* note 19, at 852 (explaining that writers during the inter-war period proposed the creation of permanent claims courts for international organizations, but acknowledging that international organizations failed to establish such institutions).

389. BOWETT, *supra* note 18, at 375; JENKS, *supra* note 2, at 44, 162; Ehrenfeld, *supra* note 84, at 94.

390. *Id.*

391. See JENKS, *supra* note 2, at 44 (recognizing that third parties may perceive international administrative tribunals as being subject to the influence of international organizations); Ehrenfeld, *supra* note 84, at 93-94 (concluding that outside contractors prefer arbitration to adjudication by in-house, international administrative tribunals).

392. See Ehrenfeld, *supra* note 84, at 93 (explaining that the lack of a permanent claims court posed no difficulties to the resolution of commercial disputes in which the United Nations claimed immunity).

ante in contracts³⁹³ and ex post in tort cases where the organizations decline to waive immunity.³⁹⁴ In these cases, international organizations typically select arbitration under the rules of the AAA, the ICAA, the ICC, or UNCITRAL, all of which are extremely well known to—and respected by—the international arbitration bar.³⁹⁵ Thus, it seems unfair to suggest that international

393. See *ILC Study (1985)*, *supra* note 119, at 183, 189; *ILC Study (1967)*, *supra* note 103, at 209, 296; Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), *supra* note 299, at 204; Letter from the U.N. Office of Legal Affairs to the Legal Counsel, Food and Agriculture Organization of the United Nations (July 16, 1986), *supra* note 309, at 324; Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 162-63, 168-69; Memorandum from the U.N. Office of Legal Affairs to the Chief of the Purchase and Standards Section, Office of General Services (Oct. 9, 1964), 1964 U.N. Jurid. Y.B. 223, 223, U.N. Doc. ST/LEG/SER.C/2. See also RESTATEMENT (THIRD), *supra* note 9, at § 467 reporters' note 7; RESTATEMENT (SECOND), *supra* note 27, at § 84 reporters' note; AMERASINGHE, *supra* note 27, at 466 n.131; BEKKER, *supra* note 9, at 197-98; BOWETT, *supra* note 18, at 376; JENKS, *supra* note 2, at 44; MULLER, *supra* note 14, at 178-80; SCHERMERS & BLOKKER, *supra* note 17, at 1009; WHITEMAN, *supra* note 91, at 62 (quoting Ehrenfeld, *supra* note 84, at 93); Glenn et al., *supra* note 5, at 268; Singer, *supra* note 1, at 85; Lewis, *supra* note 3, at 689 n.109.

394. See *Starways Ltd. v. United Nations*, reported in 1969 U.N. Jurid. Y.B. 233, 233, U.N. Doc. ST/LEG/SER.C/7 (involving a tort claim in which the United Nations agreed to arbitration after the dispute arose); Oral Statement of the United Nations (Dec. 10, 1998), *supra* note 143, at para. 14 (offering to submit defamation claims to arbitration under the UNCITRAL arbitration rules). See also *ILC Study (1967)*, *supra* note 103, at 283 (recognizing that, as an alternative to waiver, the United Nations could submit automobile tort claims to arbitration), 321 (describing a case in which one of the Specialized Agencies submitted a slip-and-fall claim to arbitration); Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 172 (explaining that when a claim is not covered by third-party liability insurance, the United Nations submits to arbitration instead of waiving immunity); Internal Memorandum of the U.N. Office of Legal Affairs (Nov. 3, 1964), *supra* note 312, at 263 (discussing the possibility of arbitrating automobile tort claims); MULLER, *supra* note 14, at 178 & n.76 (referring to the *Starways* case and describing arbitration as the proper way to resolve disputes involving the non-contractual liability of international organizations).

395. See *ILC Study (1985)*, *supra* note 119, at 183 (describing the practice of Specialized Agencies, including the Food and Agriculture Organization, the International Atomic Energy Agency, the International Fund for Agricultural Development, the International Telecommunication Union, the World Bank, and the World Health Organization to provide for ICC arbitration); *ILC Study (1967)*, *supra* note 103, at 209 (describing the United Nations's practice to provide for AAA, ICAA, or ICC arbitration); Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), *supra* note 299, at 204 (explaining that the United Nations's standard arbitration clause now provides for arbitration under the UNCITRAL rules); Letter from the U.N. Office of Legal Affairs to the Legal Counsel, Food and Agriculture Organization of the United Nations (July 16, 1986), *supra* note 309, at 324 (discussing the United Nations's practice of providing in its contracts for arbitration under the AAA, ICC, or UNCITRAL rules); Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 162-63, 169 (describing the United Nations's practice of providing for AAA, ICAA, or ICC arbitration in its contracts); Memorandum from the U.N. Office of Legal Affairs to the Chief of the Purchase and Standards Section, Office of General Services (Oct. 9, 1964),

organizations lack accountability when they provide non-employee claimants with access to the most popular and widely accepted method of resolving transnational disputes. Moreover, because the United Nations resolves most claims by *negotiation*, criticisms of its accountability seem particularly misplaced.³⁹⁶

A more sophisticated criticism acknowledges that international organizations submit to arbitration of private-law disputes, but condemns the way in which they handle employee claims.³⁹⁷ To better understand this argument, one must appreciate the context in which employment claims arise and in which they are resolved.

Although their constituent documents require international organizations to provide adequate remedies for private-law claims

supra note 393, at 223 (explaining that the standard bid form for United Nations contracts provides for AAA, ICAA, or ICC arbitration depending on the residence of the other party); AMERASINGHE, *supra* note 27, at 466 n.131 (observing that United Nations contracts have provided for arbitration under the AAA rules); BEKKER, *supra* note 9, at 197 n.858 (describing the United Nations's practice of providing for AAA, ICAA, or ICC arbitration depending on the geographical location of the supplier); BOWETT, *supra* note 18, at 376 & n.68 (describing the United Nations's practice of providing either for AAA or ICC arbitration depending on the residence of a person); MULLER, *supra* note 14, at 180 (describing the host agreement between the OAS and the United States, which provides for AAA or ICAA arbitration of private-law disputes); WHITEMAN, *supra* note 91, at 62-63 (quoting Ehrenfeld, *supra* note 84, at 93 and describing the practice of the United Nations to provide for AAA, ICAA, or ICC arbitration in its contracts with private parties).

As the foregoing materials indicate, the United Nations formerly tailored its arbitration clauses to local conditions by selecting arbitral institutions and rules that were geographically and culturally familiar to the particular supplier. The foregoing materials also establish, however, that the United Nations recently adopted a more standardized approach. Under current practice, the United Nations submits to arbitration under the UNCITRAL rules, which were drafted to appeal to the widest variety of legal cultures and which, therefore, suit the United Nations's global operations. *See* Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), *supra* note 299, at 205. *See also* Oral Statement of the United Nations (Dec. 10, 1998), *supra* note 143, at paras. 8-9 (describing the United Nations' current practice of providing for arbitration of private-law disputes under the UNCITRAL rules).

396. In fact, very few of the United Nations's private-law disputes have gone to arbitration. *See ILC Study (1985)*, *supra* note 119, at 152; Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 170, 172; BEKKER, *supra* note 9, at 198. This reflects the United Nations's diligent performance of contracts and, when disputes arise, concerted efforts to achieve a negotiated settlement. *See ILC Study (1985)*, *supra* note 119, at 152 (stating that the "overwhelming majority of commercial contracts which have been entered into by the United Nations have been performed without the occurrence of any serious difficulties"); Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), *supra* note 299, at 204-05 (explaining that the United Nations settles most claims through negotiations).

397. *See* Singer, *supra* note 1, at 85-87, 154-62 (recognizing that the United Nations provides for arbitration of commercial disputes, but criticizing the procedures used by international organizations for resolving employment disputes). *See also* Griffith, *supra* note 4, at 1026-27 (criticizing the employee grievance procedures of international organizations).

following the assertion of immunity, that express obligation usually does not extend to the employment claims of staff members.³⁹⁸ Nonetheless, most international organizations have established internal grievance procedures and, in addition, have created (or secured access to) international administrative tribunals for the adjudication of staff disputes.³⁹⁹ In response to a challenge of the

398. See, e.g., *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 82 (July 13) (dissenting opinion of Judge Hackworth) (explaining that Section 29 of the General Convention obliges the United Nations to make appropriate provisions for the settlement of private-law disputes, but does not apply to staff disputes); JENKS, *supra* note 2, at 45 (reaching a similar conclusion). See also BEKKER, *supra* note 9, at 196 (recognizing that the General Convention "does not deal with the settlement of [staff] disputes").

399. See BEKKER, *supra* note 9, at 194 (explaining that most international organizations "have their own systems of administration of justice" for resolving staff disputes); BOWETT, *supra* note 18, at 317-18 (describing the administrative tribunals established by the United Nations, the ILO, the World Bank, the Council of Europe, and NATO); Singer, *supra* note 1, at 155 (recognizing that "almost every international organization now has a quasi-judicial forum where an employee may appeal an adverse decision"); Farrugia, *supra* note 5, at 521 (noting that "many international organizations have created their own forums for hearing employee grievances"); Mark Gordon, Recent Development, 21 HARV. J. INT'L L. 552, 560 n.49 (1980) (explaining that "[m]ost international organizations have intricate internal administrative mechanisms" for resolving staff disputes); Hamerschlag, *supra* note 22, at 295 (observing that most international organizations have established internal administrative tribunals). See also Opinion of the Legal Counsel of the Food and Agriculture Organization of the United Nations (Sept. 4, 1970), *supra* note 331, at 189 (describing the FAO's acceptance of the ILOAT's jurisdiction for staff disputes); BOWETT, *supra* note 18, at 318 (observing that a number of international organizations submit their staff disputes to the ILOAT); JENKS, *supra* note 2, at 161 (explaining that the ILOAT has jurisdiction over the staff disputes of the Food and Agriculture Organization; the General Agreement on Tariffs and Trade; the International Atomic Energy Agency; the International Telecommunication Union; the United Nations Educational, Scientific and Cultural Organization; the World Health Organization; and the World Meteorological Organization).

Although there are exceptions, most international administrative tribunals only have jurisdiction over disputes involving full-time staff members. See BOWETT, *supra* note 18, at 321 (discussing the limited jurisdiction of international administrative tribunals). *But see* C.F. Amerasinghe, *The World Bank Administrative Tribunal*, 31 INT'L & COMP. L.Q. 748, 756 (1982) (explaining that the World Bank Administrative Tribunal has jurisdiction over claims brought by temporary employees); Theodor Meron & Betty Elder, *The New Administrative Tribunal of the World Bank*, 14 N.Y.U. J. INT'L L. & POL. 1, 19 (1981) (explaining that the World Bank Administrative Tribunal has jurisdiction over claims brought by part-time and temporary employees). The limited jurisdiction of most international administrative tribunals has led to concerns that they do not provide any remedies to temporary employees. See Frank Gutteridge, *The ILO Administrative Tribunal*, in INTERNATIONAL ADMINISTRATION, at V.2/11-12 (Chris de Cooker ed., 1990). The United Nations, however, has resolved this problem by including arbitration clauses in most contracts of employees who are not subject to UNAT's jurisdiction. See Letter from the U.N. Office of Legal Affairs to a Professor (Dec. 27, 1987), *supra* note 299, at 205. See also BOWETT, *supra* note 18, at 321 (explaining that temporary employees generally do not fall within the jurisdiction of international administrative tribunals and, therefore, may have to rely on arbitration of employment disputes).

United Nations's authority to create such a tribunal, the ICJ held that its establishment was "essential" to the effective work of the Organization.⁴⁰⁰ In other words, the functional necessity doctrine authorized the creation of a permanent administrative tribunal for staff disputes.⁴⁰¹ Because functional necessity establishes both the rights *and* duties of international organizations,⁴⁰² one may also conclude international organizations have an affirmative obligation to provide full-time staff members with access to administrative tribunals for employment matters.⁴⁰³

Practice demonstrates, however, that international organizations retain considerable discretion in selecting the structure of their administrative tribunals. For example, the United Nations Administrative Tribunal (UNAT) consists of seven members, who are appointed by the General Assembly to renewable, three-year terms of office.⁴⁰⁴ Because the General Assembly usually does not appoint eminent jurists to the UNAT, its members do not receive the title of "judge."⁴⁰⁵ However, the members of UNAT typically have served on delegations to the United Nations⁴⁰⁶ and, therefore, have substantial experience with the Organization. By contrast, the ILOAT consists of three judges and three deputy judges, who are appointed to renewable, three-year terms of office.⁴⁰⁷ While the ILOAT Statute does not require the appointment of eminent jurists, the ILOAT has developed a long tradition of service by distinguished judges and lawyers.⁴⁰⁸ Like UNAT, the World Bank Administrative Tribunal (WBAT) consists of seven members who serve for renewable, three-year terms.⁴⁰⁹ The WBAT's Statute, however, requires the appointment of eminent jurists to its

400. *Effect of Awards of Compensation*, 1954 I.C.J. at 57.

401. See SCHERMERS & BLOKKER, *supra* note 17, at 159-60 (discussing the *Effect of Awards of Compensation* case in terms of the functional necessity doctrine).

402. See BEKKER, *supra* note 9, at 48-50.

403. See BEIGBEDER, *supra* note 330, at 181 (concluding that international organizations have a moral and a legal duty to establish administrative and judicial systems for resolving staff disputes). See also Owen Letter, *supra* note 26, at 920 (concluding that the privileges and immunities enjoyed by international organizations "impose a special responsibility . . . to ensure that internal procedures provide effective methods of addressing and resolving 'labor-management' disputes")

404. See AMERASINGHE, *supra* note 331, at 64.

405. *Id.* at 66-67.

406. See *id.* at 67.

407. See *id.* at 64.

408. See *id.* at 67; YVES BEIGBEDER, MANAGEMENT PROBLEMS IN UNITED NATIONS ORGANIZATIONS 118 (1987); Meron & Elder, *supra* note 399, at 17.

409. See AMERASINGHE, *supra* note 331, at 64.

bench.⁴¹⁰ The Organization of American States, the Inter-American Development Bank, the Council of Europe, and NATO all have similar administrative tribunals.⁴¹¹

Notwithstanding the creation of these international administrative tribunals, one critic argues that most do not "offer procedures meeting the[] basic standards necessary to assure adequate protection of human rights."⁴¹² According to that writer, international administrative tribunals manifest three fundamental deficiencies. First, they escape outside critique by failing to make timely publication of decisions.⁴¹³ Second, they lack sufficient independence because their members serve brief, renewable terms of office.⁴¹⁴ Third, they violate due process by not granting employees a right to oral hearings.⁴¹⁵ Until international organizations correct these perceived shortcomings, the writer suggests that municipal courts should withhold immunity in employment suits.⁴¹⁶

The least convincing of these arguments involves the timely publication of opinions by international administrative tribunals. While it is essential that their opinions be made public and subjected to outside evaluation,⁴¹⁷ critics seem to want more. In fact, their chief grievance is that "the decisions of some tribunals become readily available only when published in collected volumes, often a *year* or more after the last opinion in the volume was handed down. Until such publication, finding individual opinions *may require skilled and intensive research*."⁴¹⁸ This complaint proves too much because it demonstrates that the opinions of international administrative tribunals do not escape outside critique. From a systemic perspective, the delay of a year presents few con-

410. See *id.* at 67; Amerasinghe, *supra* note 399, at 757-58; Meron & Elder, *supra* note 399, at 16.

411. See AMERASINGHE, *supra* note 331, at 66-67 (discussing the administrative tribunals of the Inter-American Development Bank, the Council of Europe, and NATO); Glenn et al., *supra* note 5, at 268 n.113 (describing the Organization of American States Administrative Tribunal (OASAT)).

412. Singer, *supra* note 1, at 163.

413. See *id.* at 159-60.

414. See *id.* at 155.

415. See *id.* at 156-57. See also Farrugia, *supra* note 5, at 522 (recognizing complaints that international administrative tribunals provide inadequate procedures); Hamerschlag, *supra* note 22, at 295 (arguing that international administrative tribunals do not provide an effective means of redress); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182 (questioning the independence and sufficiency of procedures offered by international administrative tribunals).

416. See Singer, *supra* note 1, at 154, 163.

417. See *id.* at 159.

418. *Id.* at 159-60 (emphasis added).

cerns because the opinions will inevitably come under the harsh light of criticism. Moreover, the delay in publishing raises few concerns for individual cases, since unpublished opinions can be obtained through "skilled and intensive research."⁴¹⁹ In fact, the complaints in this area seem chiefly directed to the inconvenience of counsel.⁴²⁰

The independence of tribunal members raises a more legitimate concern. To be sure, the use of short, renewable terms theoretically detracts from tribunals' structural independence.⁴²¹ Practically speaking, however, the threat to independence seems more imagined than real. The members of international administrative tribunals serve only part time and do not rely on the tribunals for their livelihood.⁴²² Therefore, they are unlikely to experience financial pressures to decide cases based on political expediency.⁴²³ Moreover, the members of international administrative tribunals are prominent individuals who have already achieved strong professional reputations. For example, UNAT members have considerable expertise in the operation and administration of international organizations.⁴²⁴ The ILOAT has an even stronger pedigree and counts Lord Devlin and Justice Thurgood Marshall among the alumni of its bench.⁴²⁵ Similarly impressive, the WBAT bench has included two Presidents of the ICJ, a Vice President of the ICJ, a Judge of the ICJ, jurists who have argued cases before the ICJ, and the chief judge of a municipal supreme court.⁴²⁶ It is difficult to believe that such individuals would endanger their professional reputations by excessive pandering to the organizations.⁴²⁷ In fact, reviews of their jurisprudence suggest that the organizations criticize international administrative tribunals for being "overgenerous or biased in favor of the [staff]" while employees com-

419. *Id.*

420. *See id.* at 159 (lamenting the fact that "[r]esearchers in this area are all too aware" of publication delays).

421. *See id.* at 155 & n.411. *See also* Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182 (stating that international administrative tribunals "have been accused of succumbing to bias in practice").

422. *See* AMERASINGHE, *supra* note 331, at 71.

423. *See id.* (emphasizing that members of international administrative tribunals do not rely financially on their appointments).

424. Meron & Elder, *supra* note 399, at 17.

425. *See* AKEHURST, *supra* note 340, at 25 n.2.

426. *See* AMERASINGHE, *supra* note 331, at 67.

427. *See id.* at 71 (questioning the degree to which short terms of office affect the independence of senior professionals who do not depend on the emoluments of their positions).

plain that they award too little compensation.⁴²⁸ This mutual dissatisfaction suggests that international administrative tribunals are doing a fair and impartial job.⁴²⁹

The most troublesome critique of international administrative tribunals involves the lack of an affirmative right to oral proceedings.⁴³⁰ The statutes of most international administrative tribunals give their members the discretion to decide whether to hold oral proceedings in any given case.⁴³¹ The practice with respect to oral hearings has varied both over time and from organization to organization. For example, between 1971 and 1982, the OASAT denied oral hearings in only one case.⁴³² The Inter-American Devel-

428. BEIGBEDER, *supra* note 408, at 122-23 (emphasis added). Between 1978 and 1982, the UNAT delivered 70 judgments. *See id.* at 122; Farrugia, *supra* note 5, at 522. It rejected 42 claims and granted at least partial relief in the remaining 28 claims. *See id.* During the same period, the ILOAT delivered 198 judgments. *See* BEIGBEDER, *supra* note 408, at 122. It rejected 146 claims and granted at least partial relief in the remaining 52 claims. *See id.* Thus, employees prevailed about 40 percent of time before UNAT and about 25 percent of the time before the ILOAT. *See id.* at 121. These figures indicate, at least, that UNAT and ILOAT are not unduly biased in favor of international organizations and that their procedures give claimants a substantial prospect of success.

429. *See* BEIGBEDER, *supra* note 408, at 123. *See also* JENKS, *supra* note 2, at 44 (arguing that the experience of international administrative tribunals shows fears of bias to be "unjustified"); Meron & Elder, *supra* note 399, at 17 (emphasizing that UNAT and ILOAT judges have shown "competence and independence"). In fact, the ICJ has already considered and rejected arguments that UNAT is not an independent body. *Compare* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (July 13) (describing UNAT as an "independent and truly judicial body"), *with id.* at 95 (dissenting opinion of Judge Carneiro) (concluding that UNAT lacks the qualities of an independent and judicial body). Likewise, the European Court of Human Rights recently held that adjudication of staff disputes by the European Space Agency's internal appeals board satisfied the right to an independent and impartial tribunal. *Waite v. Germany*, App. No. 26083/94, at paras. 39-40, 47, 68-69, 72 (Eur. Ct. H.R. Feb. 18, 1999), available at <<http://www.dhcour.coe.fr/hudoc>>.

430. *See* Singer, *supra* note 1, at 156 (stating that "[t]he procedures in many tribunals are not adequate for [a judicial] function"). *See also* Farrugia, *supra* note 5, at 522 (recognizing the existence of complaints about the adequacy of procedures provided by international administrative tribunals); Hammerschlag, *supra* note 22, at 295 (arguing that international administrative tribunals are ill-equipped to handle employment claims); Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* note 5, at 1182 (claiming that proceedings before international administrative tribunals often "present the appearance of the denial of justice").

431. *See* AMERASINGHE, *supra* note 331, at 624; Singer, *supra* note 1, at 156-57. *See also* C.F. Amerasinghe, *The World Bank Administrative Tribunal: Its Establishment and Its Work*, in *INTERNATIONAL ADMINISTRATION*, at V.3/5 (Chris de Cooker ed., 1990) (explaining that the UNAT, ILOAT, and WBAT statutes do not grant parties the right to oral hearings).

432. AMERASINGHE, *supra* note 331, at 625. *See also* Glenn et al., *supra* note 5, at 268 n.113 (describing the procedures of the OASAT and emphasizing the rights of claimants to oral hearings, at which they may present and cross-examine witnesses); Singer, *supra*

opment Bank Administrative Tribunal has also granted oral hearings on a liberal basis.⁴³³ Overall, UNAT has granted significantly more oral hearings than it has denied, although it grants oral hearings less frequently than in past years.⁴³⁴ In the past, the ILOAT regularly granted oral hearings, but has become exceedingly stingy in recent years.⁴³⁵ As of 1992, the WBAT granted only two oral hearings.⁴³⁶ Thus, while the specific practices of international administrative tribunals show considerable variance, the general trend seems to be an increasing emphasis on written proceedings.⁴³⁷

One critic describes this state of affairs as "utterly inadequate," especially when compared to the due process rights that individuals could expect in United States federal courts.⁴³⁸ According to that writer, claimants in United States federal courts would have the due process right to an oral hearing and the cross-examination of witnesses.⁴³⁹ The writer further suggests that international procedural norms require no less.⁴⁴⁰ The first response to this argument is that staff members of international organizations agree, as a condition of appointment, to the adjudication of employment disputes without the right to an oral hearing.⁴⁴¹ In the context of

note 1, at 157 (recognizing that the OASAT "virtually always grant[s] oral proceedings upon [the] request of either party").

433. See Singer, *supra* note 1, at 157. See also AMERASINGHE, *supra* note 331, at 625 (explaining that the IDBAT held oral hearings in nine out of twelve cases decided before the end of 1986).

434. Prior to 1969, UNAT granted oral hearings in 69 cases and denied them in 8 cases out of a total of 132 cases. See AMERASINGHE, *supra* note 331, at 625. Up to 1984, UNAT granted oral hearings in 105 cases and denied them in 49 cases out of a total of 341 cases. See *id.*

435. Up to 1967, the ILOAT denied oral hearings in only 13 of the 96 cases that it decided. See AMERASINGHE, *supra* note 331, at 625. Between 1967 and 1985, the ILOAT granted oral hearings in only 18 cases and denied them in 153 cases out of a total of 549 cases. See *id.* During the last twelve years of that period, the ILOAT granted oral hearings in three cases and denied them in 107 cases. See *id.*; Singer, *supra* note 1, at 156-57.

436. See Singer, *supra* note 1, at 157. See also AMERASINGHE, *supra* note 331, at 625 (stating, as of 1986, that the WBAT had received "several requests" for oral hearings, but granted only one request).

437. Gutteridge, *supra* note 399, at 18.

438. Singer, *supra* note 1, at 158.

439. See *id.*

440. See *id.* (contending that "the standard of due process offered by several administrative tribunals falls unacceptably below that expected within a developed legal system").

441. In international organizations, letters of appointment generally provide that appointments are subject to staff regulations and staff rules. See, e.g., Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 57 (July 13); Reply by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International (Feb. 26, 1976), *supra* note 307, at 164 n.24; Opinion of the Legal Counsel of the Food and Agriculture Organization of the United Nations (Sept. 4, 1970),

international arbitration, courts have recognized that such parties "relinquish[] [their] courtroom rights . . . in favor [of the alternative procedure] 'with all of its well known advantages and drawbacks.'"⁴⁴²

More fundamentally, it is incorrect to suggest that U.S. conceptions of due process constitute the minimum international standard of fair procedure.⁴⁴³ Presently, the requirements of procedural fairness "var[y] from legal system to legal system according to [prevailing] political [and] cultural . . . influences."⁴⁴⁴ Given the diversity of municipal due process standards, one may identify only two commonly accepted requirements of procedural justice at the international level: impartiality of the tribunal and equal treatment of parties.⁴⁴⁵

However, while *audi alteram partem* may be characterized as a fundamental tenet of international procedural justice, it does not necessarily require the opportunity to make an oral statement.⁴⁴⁶

supra note 331, at 189; JENKS, *supra* note 14, at 37; Richardson, *supra* note 335, at 85, 88. See also KELSEN, *supra* note 89, at 313 (asserting that an organization's staff regulations and staff rules must be implied in employment contracts between international organizations and their staff); RANSHOFEN-WERTHEIMER, *supra* note 51, at 316 (explaining that the League of Nations expressly conditioned staff appointments on the appointees' written acceptance of the staff regulations). Staff regulations, in turn, generally require adjudication of employment disputes by an international administrative tribunal. See, e.g., *Effect of Awards*, 1954 I.C.J. at 60 (quoting United Nations Staff Regulation No. 11.2). As noted above, however, the statutes of most international administrative tribunals do not provide a right to oral hearings. See *supra* text accompanying note 431.

442. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974) (quoting *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 442 F.2d 1234, 1238 (D.C. Cir. 1971)). See also HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 672 (1989) (explaining that the UNCITRAL Model Law permits enforcement of agreements to arbitrate without oral hearings). Cf. *DDI Seamless Cylinder Int'l v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1993) (Posner, C.J.) (concluding that parties may agree to simplified proceedings and may waive the right to present oral testimony).

443. See JENKS, *supra* note 14, at 70 (reminding us to "be on our guard against importing . . . undertones of American constitutional law which have no immediate international application"); John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1175-77 (1999) (explaining that "due process is a predominantly American concept" and that "the concept . . . is an unfamiliar and difficult one for non-American lawyers to understand").

444. Gaffney, *supra* note 443, at 1178.

445. See *id.* at 1179, 1195.

446. See JENKS, *supra* note 14, at 52 (recognizing the concept of *audi alteram partem* as a general principle of law, but arguing that "[a]n opportunity to make an oral statement is not necessarily required"). See also V.S. MANI, *INTERNATIONAL ADJUDICATION* 164 (1980) (explaining that "[i]nternational practice tends to regard oral proceedings as somewhat exceptional").

For example, the reliance of international administrative tribunals on written submissions corresponds to the practice of respected and developed civil law institutions, such as the French Conseil d'Etat.⁴⁴⁷ In the context of international arbitration, United States federal courts have repeatedly held that the "lack of oral hearings does not [necessarily] amount to the 'denial of fundamental fairness' required to warrant vacating an award."⁴⁴⁸ Furthermore, the United Nations Compensation Commission, which has processed claims against Iraq since the end of the Gulf War, is expected to render the vast majority of its awards on the basis of written submissions.⁴⁴⁹ Under these circumstances, we should not assume that international procedural law requires oral proceedings in every case. Nor should we hasten to condemn international administrative tribunals for their "failure" to implement procedures that reflect U.S. standards of fairness.

Even if we were to approach the matter from a domestic perspective, one would immediately recognize that due process does not necessarily require oral proceedings.⁴⁵⁰ For example, federal

447. See Gutteridge, *supra* note 399, at 18 (observing that the restrictive procedures of UNAT and ILOAT were "doubtless strongly influenced by the customs of the Conseil d'Etat"). See also BOWETT, *supra* note 18, at 320 (explaining that the procedures of international administrative tribunals are "predominantly modelled on the French system and [are] based . . . on written briefs lodged by the parties"). Cf. Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1527 (D. Minn. 1996) (quoting Bolanos v. Gulf Oil Corp., 502 F. Supp. 689, 693 (W.D. Pa. 1980), *aff'd*, 681 F.2d 804 (3d Cir. 1982), for the proposition that "[w]e must be careful not to let our justifiable pride in the English common law system . . . obscure the fact that much of Western Europe and . . . South American countries . . . are firmly grounded in the Civil Law tradition [which relies on written submission of evidence, restricts cross-examination, and does not provide a jury trial]").

448. In re Griffin Indus., 58 F. Supp. 2d 212, 220 (S.D.N.Y. 1999) (quoting Transit Cas. Co. v. Trenwick Reins. Co., 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 1117 (2d Cir. 1988)). See also In re Intercarbon Bermuda, Ltd., 146 F.R.D. 64, 74 (S.D.N.Y. 1993) ("The arbitrator's conclusion that no live hearings were necessary to resolve the contract issue in this case was not fundamentally unfair to Intercarbon, and will not be disturbed by this Court."); Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 209 (1995-96) ("The vast majority of U.S. cases . . . have rejected allegations of due process violations by arbitral tribunals. For example, U.S. courts have enforced arbitral awards where the arbitrators decided issues on the basis of affidavits, as opposed to live testimony.")

449. See Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals*, 32 INT'L LAW. 499, 502 (1998). See also Robert C. O'Brien, *The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission*, 31 CORNELL INT'L L. J. 1, 21 (1998) (warning that when the United Nations Compensation Commission agrees to hold oral proceedings, "claimants . . . should not equate [them] with a full hearing on the merits at which [the parties] will have the right to present their views and arguments on the claims").

450. See Wilkins v. Rogers, 581 F.2d 399, 405 (4th Cir. 1978) (stating that it was "unquestionably constitutional" for the district court to deny an oral hearing on a motion to

district courts often resolve motions without oral argument.⁴⁵¹ Likewise, federal courts rarely permit evidentiary hearings when reviewing agency decisions. To the contrary, they review such decisions on the basis the administrative record.⁴⁵² Similarly, staff disputes come to international administrative tribunals with the benefit of a record generated by the quasi-judicial, internal grievance procedures of international organizations.⁴⁵³ In reviewing those records, international administrative tribunals frequently lack the authority to make independent determinations of fact and must limit themselves examining the record for an abuse of discretion.⁴⁵⁴ As many U.S. courts have found, one may perform that task without the benefit of additional evidentiary hearings.⁴⁵⁵

dismiss); *Spark v. Catholic Univ.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (recognizing that "due process does not include the right to oral argument on a motion"); *Morrow v. Topping*, 437 F.2d 1155, 1156 (9th Cir. 1971) (concluding that a local rule calling for motions without oral hearings complied with the requirements of due process); *Lewis, Lewis & Van Etten v. MCI Telecomm. Corp.*, 138 F.R.D. 25, 26 (E.D.N.Y. 1991) (observing that the courts "have repeatedly held that there is no constitutional right to present oral argument on motions"); *Butterman v. Walston & Co.*, 50 F.R.D. 189, 190 (E.D. Wis. 1970) (recognizing that "[d]ue process does not always require . . . an oral argument," and that oral argument is not always "helpful or desirable"); *Hilton v. W.T. Grant Co.*, 212 F. Supp. 126, 128 (W.D. Pa. 1962) (holding that "oral argument is not required in order to constitute due process").

451. See FED. R. CIV. P. 78 (authorizing federal district courts to decide motions without oral argument). See also FED. R. APP. P. 34(a) (allowing appellate panels to dispense with oral argument in certain cases, particularly when "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument").

452. See, e.g., *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973) ("In applying [the] standard [of review under the Administrative Procedure Act], the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Newton County Wildlife Assoc. v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) ("APA review of agency action is normally confined to the agency's administrative record."); *First Nat'l Bank & Trust v. Department of Treasury*, 63 F.3d 894, 897 (9th Cir. 1995) ("Generally, judicial review of an agency decision is limited to the administrative record."); *McDougall v. Widnall*, 20 F. Supp. 2d 78, 82 (D.D.C. 1998) ("This Court must review the decision of the [agency] through an examination of the administrative record of the proceedings before the [agency], rather than a de novo review of Plaintiff's claims.").

453. See C.F. Amerasinghe, *Problems of Evidence Before International Administrative Tribunals*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 205, 206-07 (Richard B. Lillich ed., 1992) (explaining that international administrative tribunals "have the benefit of findings of fact by internal quasi-judicial bodies such as joint appeals boards (UN) or appeals committees (World Bank)"). As one author explains, internal appeals boards "verify[] the facts, obtain[] and review[] relevant documentation, hear[] both parties and may call witnesses." BEIGBEDER, *supra* note 408, at 115. Thus, when staff members seek review by the relevant administrative tribunal, the board's report provides comprehensive documentation and analysis of the case. See *id.*

454. The abuse-of-discretion standard applies to disputes about salary awards, disability compensation, termination of employment for unsatisfactory service, confirmation of pro-

Given these facts, the procedures of international administrative tribunals seem adequate to the task.⁴⁵⁶ There is, in fact, no evidence to suggest that international administrative tribunals overlook important points in the cases that they decide without oral proceedings.⁴⁵⁷ To the contrary, the frequency with which claimants prevail demonstrates that international administrative tribunals provide a sufficient opportunity for redress.⁴⁵⁸

Because international administrative tribunals already provide claimants with adequate procedures, one must finally weigh the consequences of permitting oral hearings as a matter of right. It remains an inescapable fact that international administrative tribunals consist of few members, who serve on a part-time basis.⁴⁵⁹ Moreover, they do not sit in close proximity to the duty stations of many staff members. If these tribunals required oral proceedings in every case, many claimants, attorneys, and witnesses would face the expense of travel over long distances.⁴⁶⁰ Furthermore, *all* claimants would experience significant delays in the scheduling of hearings and, thus, in the ultimate award of relief.⁴⁶¹ International

bationary employment, transfers, promotions, and the classification or grading of positions. See AMERASINGHE, *supra* note 331, at 256-59. In these cases, international administrative tribunals do not find facts; they only look for procedural defects that suggest arbitrary conduct. See *id.* at 265-68 (describing the standards of review employed by international administrative tribunals).

In cases that require determinations of completely objective facts, such as the award of travel allowances based on distance or the payment of a death benefit, international administrative tribunals exercise *de novo* review. See *id.* at 255-56. Likewise, administrative tribunals exercise *de novo* review in disciplinary matters. See *id.* at 261. Even in these cases, however, the need for oral hearings should arise only if the internal grievance process fails to produce an adequate record or the dispute raises questions of credibility.

455. See *supra* note 452 and accompanying text.

456. See, e.g., AMERASINGHE, *supra* note 331, at 268 (concluding that the review exercised by international administrative tribunals protects the interests of staff members while avoiding undue interference with the internal governance of international organizations); Amerasinghe, *supra* note 453, at 232 (stating that international administrative tribunals "have rules of procedure and other means of dealing with documentary and oral evidence that seem in general to be effective").

457. See Gutteridge, *supra* note 399, at 19.

458. See *supra* note 428. See also *Waite v. Germany*, App. No. 26083/94, at paras. 39-40, 47, 68-69, 72 (Eur. Ct. H.R. Feb. 18, 1999) (involving the European Space Agency and holding that access to its internal appeals board satisfied the right to an impartial and independent tribunal), available at <<http://www.dhcour.coe.fr/hudoc>>.

459. See *supra* notes 404-11, 422 and accompanying text.

460. See Gutteridge, *supra* note 399, at 19 (describing the logistical problems created by the decentralization of international organizations and concluding that "it would be quite unfair if distance from the place of the hearing of a complaint were to play a role in the proper representation of the complainant").

461. See *id.*

practice has already shown that extended delays can result in the denial of justice.⁴⁶²

In short, international administrative tribunals offer procedures that are sufficiently transparent, independent, and fair to ensure that international organizations will conduct their employment activities with a high degree of accountability.⁴⁶³ While there may be room for improvement, it is not clear that the expansion of municipal court authority would produce a significant increase in the accountability of international organizations. In fact, an expansion of municipal court authority could have the opposite effect. While the procedures of international administrative tribunals may not comport with every aspect of American due process, they compare favorably with the procedural rights available in many of the courts that would benefit from proposals to expand municipal jurisdiction.⁴⁶⁴

VI. CONCLUSION

Several writers claim that treaties have implemented the functional necessity doctrine through expansive provisions that resemble the doctrine of absolute state immunity. They contend that international organizations and their personnel have little need for jurisdictional immunities. To the contrary, they argue that international immunities encourage international organizations to behave irresponsibly. Building on these premises, they urge us to draw on state-immunity principles and to expand the authority of municipal courts to make immunity determinations based on principles of restricted sovereign immunity or the functional necessity doctrine. Implicit in such proposals lies the assumption that the expansion of

462. See Charles N. Brower, Comment, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421, 427 (1992) (describing the delays encountered by wrongful expulsion claims before the Iran-United States Tribunal and concluding that claimants were "forced to wait beyond the period in which actual recovery would [have been] of any immediate help"). See also Brower, *supra* note 153, at 1592 (implying that significant delays in the resolution of individual claims before international tribunals may result in the denial of justice).

463. See BEIGBEDER, *supra* note 330, at 198 (acknowledging that the UNAT and ILOAT have played a "vital," if uneven, role in protecting staff from arbitrary and unfair employment actions); SCHERMERS & BLOKKER, *supra* note 17, at 366 (stating that an early comparative study concluded that the UNAT and ILOAT generally "provide effective protection for the interests of international officials"); Farrugia, *supra* note 5, at 522 (noting that the UNAT "has been commended for promoting 'the independence and security of the international civil service'").

464. See Glenn et al., *supra* note 5, at 269 (asserting that "the OAS Tribunal and those of other international organizations embody due process safeguards equal or superior to those of the member nations").

municipal court jurisdiction would not produce substantial institutional costs and would generate significant benefits in the form of increased accountability.

This article has challenged the misguided premises of proposals to expand municipal court jurisdiction. To this end, it first explained that international immunities have experienced a significant diminution over the course of the twentieth century. Second, the provisions of immunities agreements do not resemble the doctrine of absolute state immunity. Rather, they permit the maintenance of international immunities only on the basis of functional necessity, but give international officials the primary authority to apply the functional necessity doctrine. Third, drawing on a recent decision by the ICJ, this article argued that national prejudices still threaten the work of international organizations. These prejudices justify the continued existence of international immunities and the maintenance of decision-making authority at the international level. In fact, an expansion of municipal court authority would impair the capacity of international organizations to perform their obligations with respect to peace, security, and human rights. Fourth, and finally, international organizations initiated the movement towards accountability. As a result, they have created alternatives to municipal court litigation that promote a high degree of responsibility. Under these circumstances, it seems unlikely that an expansion of municipal court jurisdiction would enhance the accountability of international organizations.

In short, the reallocation of competence for international immunities seems unnecessary at best and harmful at worst. The principal effect would be to impede the controversial—but important—work of international organizations.