

Striking a Balance: Navigating Privileges, Immunities, and Accountability in International Organizations

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Abstract: *This paper delves into the nuanced landscape of Privileges and Immunities (P&Is) granted to international organizations (IOs) and the contentious issue of denial of justice. Critically analyzing this aspect, the paper justifies the criticism by dissecting key international instruments that aim to balance protection and accountability. It examines the limitations of IO immunity, the concept of waiver, administration of justice, cooperation with member states, and provisions to prevent justice abuse. The debate over determining the functional nature of IO acts is explored, considering the dangers of empowering member states and national courts. The paper concludes by suggesting a recalibration of the current system to strike a more equitable balance.*

Keywords: International organizations, privileges and immunities, denial of justices, access to justice

1. Introduction

In the expansive realm of international law, the discussion surrounding Privileges and Immunities (P&Is) conferred upon international organizations (IOs) emerges as a focal point, engaging both legal scholars and public interest alike. Rooted in the need to facilitate seamless IO functioning, P&Is intersect with the contentious issue of denial of justice. This article undertakes an extensive exploration of the multifaceted landscape of P&Is within IOs, critically evaluating the criticisms surrounding the denial of justice. Additionally, it delves into the intricate network of international instruments that strive to reconcile the preservation of IO autonomy with the call for accountability.

Within a world marked by growing global interconnectedness, international organizations hold a central role in addressing intricate challenges, fostering cooperation, and upholding international peace and security. As these organizations operate across diverse jurisdictions and interact with numerous states, P&Is become a means to ensure unhampered diplomatic, administrative, and operational functions. However, the application of these P&Is raises intricate inquiries about accountability and justice, particularly when the denial of justice to affected parties is perceived.

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This study addresses fundamental research questions arising at the nexus of P&Is, accountability, and denial of justice within IOs: how P&Is granted to IOs intersect with the contentious issue of denial of justice, and what primary criticisms emerge from this intersection; what underpins the criticism associated with denial of justice, and how the intricate balancing acts between P&Is and accountability become complex; how major international instruments, aimed at regulating IOs' P&Is, navigate the complex landscape of preserving IO autonomy while ensuring accountability; how the limitations of IO immunity, concepts like immunity waiver, administration of justice, cooperation with member states, and mechanisms to prevent justice abuse are addressed within these international instruments; and what ongoing debates surround the determination of the functional nature of IO acts, and how the assignment of ultimate authority in this realm impact the equilibrium between IO autonomy and accountability, etc.

Employing a qualitative research methodology, this study conducts a comprehensive analysis of international legal instruments, scholarly works, judicial precedents, and expert perspectives relevant to P&Is and the contentious issue of denial of justice within IOs. Comparative assessments of pertinent cases and international instruments provide contextual insights into the intricate balance between IO autonomy and accountability. Through a fusion of legal doctrinal analysis and critical interpretation, the article sheds light on the intricate aspects of this subject matter.

Structured to offer an exhaustive exploration, the article comprises key dimensions within IOs' P&Is and accountability e.g., P&Is of IOs and criticism of denial of justice; justification of the criticism; international instruments and balancing protection and accountability; determining the functional nature of IO Acts: Who has the final say?; and achieving a better balance: reforming the current system. By navigating the complex dynamics of P&Is, denial of justice, and the delicate equilibrium between IO autonomy and accountability, this article aims to make a substantial contribution to the ongoing discourse concerning the evolving landscape of international organizations and their role in shaping the global governance landscape.

2. Deciphering the Power Play: Who Wields the Final Authority over International Organizations' Actions?

In this thought-provoking section, we delve into the intricate web of privileges and immunities (P&Is) enjoyed by international organizations (IOs) and explore the complex question of who truly holds the reins when it comes to determining the functional nature of IOs' actions. This exploration unfolds in two interconnected acts: firstly, an examination of the key players in this power dynamic, and secondly, an insightful analysis of why the prevailing perspective is justified.

(a) The Power Tug-of-War: IOs, Member States, and National Courts

There is constant tension among the IOs, member states, and national courts about who will have the final say in determining whether a particular act of the IOs falls within the functional necessity thesis. For example, in *Mazilu Advisory Opinion*, the Romanian authority unilaterally determined whether Mr. Mazilu, a Romanian national and UN Rapporteur, was entitled to P&Is and to what extent he was so entitled.¹ Moreover, in *Cumaraswamy Advisory Opinion*, Mr. Cumaraswamy, an UN Special Rapporteur, was brought before Malaysian courts in several lawsuits for the defamatory language used by him in an interview on the basis of which an article was published in a specialized journal.² The Legal Counsel of the UN, acting on behalf of the Secretary-General, asserted that Mr. Cumaraswamy acted in his official capacity and requested the Malaysian authority to promptly advise the Malaysian court to set aside the suits on the basis of immunity.³ In response, the Malaysian authorities claimed that “the draft set out the immunities of the Special Rapporteur incompletely and inadequately” and “invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case “only in respect of words spoken or written and acts done by him in the course of the performance of his mission”.”⁴ The two facts reflect the constant tensions between the IOs, member states, and their national courts regarding the ascertainment of immunity of the IOs.

In *Mazilu Advisory Opinion*, the ICJ determined that Mr. Mazilu shall be an “expert on mission” within the meaning of section 22 of the 1946 General Convention. The court based its argument on the practice of the United Nations in determining who will be an “expert on mission”.⁵ By emphasizing the practice of the United Nations, the court reaffirmed the authority of the IOs in determining which activities fall within their “functional necessity”. Since the head of the organization is primarily responsible for protecting the organization’s interests, he has the authority to assess the functional nature of each action carried out by the organization or its staff. Moreover, it is reiterated in the *Cumaraswamy Advisory Opinion*, where the ICJ observed that “the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, *it is up to him to assess whether its agents acted within the scope of their functions* and, where he so

¹ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations Advisory Opinion* [1989] ICJ Report 1989 177 (International Court of Justice) 185, para 24.

² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* [1999] ICJ Report 62, 67, para 5.

³ *Ibid* 67, para 6.

⁴ *Ibid* 68, para 7.

⁵ *Ibid* page 194, para 48.

concludes, to protect these agents, including experts on mission, by asserting their immunity” [emphasis added].⁶

(b) *The Battle of Interpretation - Who Decides?*

In light of the above discussion, the prevailing view is that the IOs have the final say in determining whether the activities of the IOs fall within “functional necessity”. I support the view of ICJ expressed in the *Cumaraswamy* and *Mazilu Advisory Opinion*. My main argument is that giving power to member states and the national courts would vitiate the purpose of giving immunities to the IOs, and it would paralyze the functioning of the organizations. The following part will discuss why granting power to national courts and member states is dangerous.

(c) *The Perils of Empowering the Member States:*

Granting power to determine immunities to member states would be tantamount to empowering them to interfere with the operations of the IOs.⁷ The states would reach mutually inconsistent decisions in determining whether IOs are entitled to immunity, whether IOs’ decision not to waive immunity is consistent with their obligations, what corrective actions the IOs should take to perform their obligations, etc.⁸ This situation will undoubtedly impede the ability of the IOs to perform their functions and thus goes against the rationale of the functional immunity thesis.⁹ Against this background, this part suggests that the beholder of immunities or the IOs should have the final say about the immunities issue after correcting the accountability gap in the current system.

(d) *The Pitfalls of National Court Jurisdiction:*

It is widely accepted that IOs need absolute immunity to carry on their functions independently. I think the exercising of jurisdiction by domestic courts to lift the P&Is of the IOs and fill up their accountability gap has potential risks against their independence necessary to carry on their functions. In 1944, Wood identified three dangers of giving power to national courts to entertain suits against IOs: “the danger of prejudice or bad faith in the national courts, [.....] the need of protection against baseless actions brought from improper motives, [and] [.....] the undesirability of allowing the courts of particular members to determine, quite possibly in different senses, the legal effects of acts performed in the exercise of

⁶ Ibid 87, para 60.

⁷ Daniel D Bradlow, ‘Using a Shield as a Sword: Are International Organizations Abusing Their Immunity A Festschrift in Honor of Professor Henry J. Richardson III’ (2017) 31 Temple International & Comparative Law Journal 45, 67.

⁸ Ibid.

⁹ Ibid.

the organization's functions."¹⁰ These risks are also relevant today. The following discussion will address other potential risks if the domestic court is given the power to lift the P&Is of the IOs.

Firstly, though national courts can deal with some disputes relating to torts and contracts against the IOs, they are not experts in resolving disputes concerning complex international law issues. For example, in *Srebrenica Case*, a complex international law issue involving "the potential concurrent or subsidiary liability of member states of IOs for the debts incurred by such organization is at issue, "constitutional" matters of international organizations are clearly raised."¹¹ So, in resolving such a case against IOs, the Court must interpret treaties, identify customary international law, decide upon state responsibility, etc.¹² In a nutshell, the domestic court must have expertise in international law capacity to solve complex issues of international law if it intends to deal with disputes where IOs are the party.¹³ The domestic courts generally deal with domestic laws and thus, as Reinisch argues, lack expertise in international law and in resolving such complex issues relating to IOs.¹⁴

Secondly, to legitimize the intervention of the domestic courts in lifting the P&Is and fill up the accountability gap by ensuring claimants' access to justice, the courts must guarantee fair trials enshrined under human rights instruments.¹⁵ IOs, when they are brought before domestic courts, must be given a fair or impartial process.¹⁶ There is a genuine concern that the "insistence on immunity is often precisely motivated by an apprehension of potential harassment by national litigation and undue influence of the forum state."¹⁷ Costs and harassment in such pre-motivated litigation may create another legitimate concern.¹⁸

Finally, such an intervention by national courts may impair the independence of the IOs and make them paralyzed. The policy rationale for giving the P&Is to the IOs is to protect them from external interferences so that they can carry

¹⁰ Hugh McKinnon Wood, 'Legal Relations between Individuals and a World Organization of States' (1944) 30 Transactions of the Grotius Society 141, 143–144.

¹¹ August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2014) 10 International Organizations Law Review 572, 580.

¹² Ibid 581.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid 579.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

out their functions smoothly.¹⁹ However, there is a genuine concern that if any national court judgment imposes huge financial obligations on them by piercing their P&I shield, it may cause serious budgetary problems, preventing them from fulfilling their projected tasks.²⁰

In light of the discussion, it may be concluded that allowing states or national courts to determine the functional nature of particular operations would impede the independence of the organizations and will make the immunities meaningless. For this reason, the organizations should have the final say in this regard.

3. Balancing Protection: Major International Instruments and the Privileges and Immunities of International Organizations

Privileges and Immunities of IOs are laid down in various instruments, e.g., the Constitutions of the Organizations contain a general provision on P&Is, the *1946 Convention on the Privileges and Immunities of the United Nations* ('General Convention') and the *1947 Convention on the Privileges and Immunities of the Specialized Agencies* ('Specialized Agencies Convention') contains more detailed rules on P&I, IOs may conclude bilateral treaties with States to regulate P&I, national legislations, or customary international law.²¹ Generally, those instruments allow IOs to enjoy absolute or unconditional immunities from every form of the legal process.²² However, those instruments contain counterbalancing provisions that balance immunities, accountability and access to justice. This part will first analyze how such a balance is attained, and then the next part will assess whether they reach an acceptable balance.

(a) Immunity is Limited to the Functions of International Organizations:

The immunities granted to the IOs are qualified, usually referred to as "functional immunity". IOs and their officials enjoy immunities from the jurisdiction of the national court as long as they perform the functions delegated to them by the Constituent treaty of that organization. For example, Article 105 of the UN Charter stipulates that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as *are necessary for the fulfilment of its purposes*" [emphasis mine]. The provisions of other legal instruments dealing with the IOs, like the General Convention 1946 or the Specialized Agencies

¹⁹ Ibid 581.

²⁰ Ibid 582.

²¹ Niels Blokker, 'International Organizations: The Untouchables?' (2014) 10 *International Organizations Law Review* 259, 268.

²² *Convention on the Privileges and Immunities of the United Nations* (adopted 13 February 1946, entry into force 17 September 1946) 1 UNTS 15 (General Convention), section 2; *Convention on the Privileges and Immunities of the Specialized Agencies* (adopted 21 November 1947) 33 UNTS 261 (Specialized Agencies Convention), section 4.

Convention 1947, contain that the organizations' immunity only extends to the functions assigned to them.

(b) Waiver of Immunity:

The general norm is that IOs will enjoy P&Is from the jurisdiction of national courts unless it voluntarily waives their immunity. Waiver of immunity connotes “the consent or voluntary submission by an international organization to the jurisdiction of a national court.”²³ Legal instruments regulating P&Is of the IOs keep provisions for the voluntary waiver of immunity as a counter-balancing approach. Section 2 of the General Convention 1946, read with section 4 of the Specialized Agencies Convention 1947, states that “[t]he United Nations, 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*” [emphasis mine]. It further notes that “no waiver of immunity shall extend to any measure of execution”. Thus, these convention divides between immunity from jurisdiction and immunity from execution.²⁴ Moreover, limited appearances of the IOs before national courts to assert immunity is not tantamount to a waiver of immunity.²⁵ Furthermore, the availability of an internal dispute resolution mechanism and arbitration agreement does not mean the waiver of immunity.²⁶

Though the IOs enjoy wide discretionary power in relation to their decision whether or not to waive immunity, they may have a duty to waive immunity in the case which would impede the course of justice.²⁷ Section 20 of the General Convention, for example, says that “[t]he Secretary-General shall have the right and the duty to waive 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.”²⁸ Nevertheless, such a duty to waive immunity is conditioned by the phrases “without prejudice to the interests of the United Nations”. However, practice shows that IOs tend to uphold and are reluctant to waive immunity in certain circumstances, which is visibly

²³ Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations*, vol 1 (Oxford University Press 2018) 313 <<https://academic.oup.com/book/5125>> accessed 18 December 2022.

²⁴ See also Article IX, Section 3, Articles of Agreement of the International monetary Fund.

²⁵ *United States Lines Inc v World Health Organization* (1983) 107 ILR 182 (Intermediate Appellate Court, Fourth Civil Cases Division,).

²⁶ Okeke (n 23) 315.

²⁷ *Ibid* 315–316.

²⁸ See also Article VI, Section 22, Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations.

hard to justify.²⁹ For example, the United Nations' response to compensation claims by Haitian victims of the cholera outbreak in 2010 has raised questions.³⁰

(c) Administration of Justice:

Where immunity is not waived, the legal instruments dealing with immunity require the IOs to arrange an appropriate forum alternative to the national courts to prevent denial of justice. Article VIII, section 29 of the General Convention states that: “[t]he United Nations shall make provisions for appropriate modes of settlement of (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 the Secretary-General has not waived immunity.”³¹ This provision is applicable only to “disputes arising from contracts” and “disputes of private law character”. This provision does not contemplate “dispute of public law character” e.g., “in relation to human rights violations committed in the course of a peace operation conducted by the organization”.³² For this reason, the UN declined to entertain claims of *Haitian Cholera victims*, saying that these claims are not “private law nature” and thus “are not receivable pursuant to Section 29” of the General Convention.³³

(d) Cooperation with Appropriate Authorities of Member States:

To prevent abuse of immunity, these legal instruments require IOs to cooperate with the appropriate authority of their member states, ensure observance of laws, etc. Section 21 of the General Convention, for example, states that “[t]he United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities.”³⁴ In practice, the UN and other

²⁹ Reinisch (n 11) 583.

³⁰ ‘Peacekeeping without Accountability The United Nations’ Responsibility for the Haitian Cholera Epidemic’ (Transnational Development Clinic, Jerome N Frank Legal Services Organization Yale Law School Global Health Justice Partnership of the Yale Law School and the Yale School of Public Health and Association Haitienne de Droit de L’Environnement 2013).

³¹ Article IX, section 31 of the Specialized Agencies Convention 1947 contains a similar provision.

³² Cedric Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’ (2010) 7 International Organizations Law Review 121.

³³ ‘Peacekeeping without Accountability The United Nations’ Responsibility for the Haitian Cholera Epidemic’ (n 31) 40; Michelle Nichols, ‘U.N. Says Will Not Pay Haiti Cholera Compensation Claims’ *Reuters* (21 February 2013) <<https://www.reuters.com/article/us-haiti-cholera-un-idUKBRE91K19O20130221>> accessed 26 December 2022.

³⁴ Section 23 of the Specialized Agencies Convention 1947 contains a similar provision.

specialized agencies cooperate with insurance authorities to insure their activities against personal injury and property damage claims.³⁵

In summary, this section emphasizes the importance of balancing the legal immunities granted to International Organizations with the need to prevent their abuse. It underlines the requirement for cooperation between these organizations and the national authorities of their member states to maintain the proper administration of justice and police regulations. Additionally, it highlights a practical approach involving insurance to address personal injury and property damage claims.

(e) *Provisions to Prevent Abuse of Justice:*

Section 30 of the General Convention and section 32 of the Specialized Agencies Convention contain a common article which says that if there are any differences between the organizations and their member states, a reference shall be made to the ICJ. These provisions allow the organizations to seek an advisory opinion from the ICJ. The opinion of the court “shall be accepted as decisive by the parties”.³⁶ However, these provisions are applicable on the issue of “the interpretation or application of the present Convention”. These provisions are silent in relation to the abuse of immunities by IOs or where it causes denial of justice.

Moreover, section 24 of the Specialized Agencies Convention contains counter-balancing provisions to prevent the abuse of immunities. If any state party to the convention considers that there is an abuse of immunities granted under this convention, there shall be a consultation between such state and the agencies. If consultation fails to achieve a satisfactory result, the dispute shall be submitted to the ICJ. If the court finds that there is an abuse of immunity against the interest of that state, the state can withdraw the immunity of the agency after giving proper notice.³⁷ This provision gives the states parties a shield to prevent the IOs from becoming monsters. This provision creates a balance between states and the IOs. However, the General Convention does not have a similar provision. To prevent the miscarriage of justice, as we have seen in *Mother of Srebrenica* and *Haitian Cholera* incidents, the General Convention should be amended to include a similar provision.

³⁵ Okeke (n 23) 317.

³⁶ Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947) 33 UNTS 261 (Specialized Agencies Convention); Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entry into force 17 September 1946) 1 UNTS 15 (General Convention).

³⁷ Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947) 33 UNTS 261 (Specialized Agencies Convention).

In light of the discussion above, the counterbalancing provisions in the General Convention and the Specialized Agencies Convention were designed to strike a balance between individual claimants' right to access justice and the immunities of the IOs. However, these provisions fail to address emerging "disputes arising out of public law character", which we have seen in the *Mother of Srebrenica and Haitian Cholera Victims* incidents. For this reason, Section 29 of the General Convention, read with section 31 of the Specialized Agencies Convention, should be amended to ensure remedy for those disputes. Moreover, to maintain legitimacy in global governance and to address newly emerged criticisms, the IOs should incorporate provisions allowing to refer disputes to the ICJ where states determine that there is an abuse of immunity. If the two suggestions are implemented, it will assist the organizations in achieving public confidence and carrying out their functions effectively.

4. Challenging the Veil of Immunity: Criticisms and Justifications Surrounding the Privileges and Immunities of International Organisations

In this section, this paper delves into the contentious realm of privileges and immunities (P&Is) enjoyed by international organizations (IOs) and explores the validity of the criticisms leveled against them. To comprehensively examine this subject, this section navigates through two distinct yet interconnected facets: firstly, dissecting the recent critique of IOs' P&Is, and secondly, establishing the justification for these criticisms.

(a) *The Clash: IOs' P&Is and the Cry for Justice*

There is an inherent tension between IOs' P&Is and individuals' right to access the court.³⁸ There is a legitimate concern that the sweeping immunity of international organizations may deprive potential claimants, *inter alia*, the staff and officials of the UN or even third parties of raising their voices against such organizations before the "natural forum" of a domestic court.³⁹ To mitigate such concerns, IOs keep alternative modes of settling disputes. Generally, IOs try to avoid bad publicity against it regarding third-party claims and to have a good reputation to "be a good citizen on the world stage — to be fundamentally fair in dealing with individuals injured in some manner as a direct result of United Nations actions".⁴⁰ They have a longstanding reputation for providing internal dispute resolution mechanisms through independent and impartial courts or tribunals, ombudsman services, arbitration, mediation, administrative review,

³⁸ Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015).

³⁹ Reinisch (n 11) 573.

⁴⁰ Bruce C Rashkow, 'Immunity of the United Nations: Practice and Challenges' (2014) 10 *International Organizations Law Review* 332, 342.

etc., for contractual and tort disputes.⁴¹ However, IOs have more direct contact with individuals today than at the beginning of their journey, which sometimes infringes on individuals' human rights. It creates particular challenges to the P&Is of the IOs. Two recent incidents reflect these challenges: the *Mother of Srebrenica* and *Haitian Cholera Victims*.

In the *mother of Srebrenica incident*, a UNSC resolution declared Srebrenica and its surroundings "safe", but the UN forces failed to protect the innocent civilians taking shelter in the area from death.⁴² In the *Haitian Cholera Victims incident*, the UN failed to prevent the spread of cholera bacterium due to the negligence of the UN peacekeepers, causing infections to almost 6,50,000 and death to 8,100 reported cases.⁴³ Moreover, the UN fails to "guarantee non-repetition of similar harms" and "to respect human rights—specifically, the rights to water, health, life".⁴⁴ In both incidents, the UN declined to waive immunity, acknowledge liability and give compensation. In *Haitian Cholera Victims*, the UN publicly announced that "consideration of these claims includes a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities" and declined to "waive its immunity or apologize for the harms caused by its negligence denies the victims the possibility of redress or compensation for their suffering".⁴⁵

The victims of both incidents brought their grievances before the national courts for remedy.⁴⁶ In *Georges v United Nations*, a US Court rejected the applicant's petition and upheld the immunity of the UN.⁴⁷ In the *Stitching Mothers of Srebrenica case*, the European Court of Human Rights (ECtHR) took a similar stance and rejected the petition of victims of the Srebrenica massacre.⁴⁸ Thus, the victims of two major incidents could not avail of any remedy in any forum. The UN was criticized worldwide for its role in these incidents. Furthermore, ECtHR criticised absolute immunity in *Waite and Kennedy Case*. The court observed that granting immunity should be conditioned on giving the aggrieved person an alternative dispute resolution mechanism.⁴⁹ The court noted that it would violate

⁴¹ Ibid.

⁴² *Stichting Mothers of Srebrenica and Others* (European Court of Human Rights) 6–7.

⁴³ 'Peacekeeping without Accountability The United Nations' Responsibility for the Haitian Cholera Epidemic' (n 31) 12, 35.

⁴⁴ Ibid 35.

⁴⁵ Ibid 40; Nichols (n 33).

⁴⁶ *Delama Georges, et al, vs United Nations, et al*, [2016] 834 F3d 88 (United States District Court Southern District of New York); *Stichting Mothers of Srebrenica and Others* (n 43).

⁴⁷ *Delama Georges, et al., vs. United Nations, et al.*, (n 47).

⁴⁸ *Stichting Mothers of Srebrenica and Others* (n 43).

⁴⁹ *Waite and Kennedy v Germany* [1999] ECtHR [GC] 26083/94.

Article 6 of the European Convention on Human Rights without any reasonable alternative arrangement.⁵⁰ In light of the ongoing criticism of the denial of justice by the IOs, the next section will assess whether such criticisms are justified.

(b) *Validating the Critique: A Quest for Accountability*

In the classic novel “Frankenstein”, Frankenstein created a monster with the hope that it would save human life by cheating death.⁵¹ But the monster turned into a human killer, and its creator regretted his decision of making it.⁵² Like Frankenstein, states created IOs and gave life to them to act separately with the hope that they would act for the interests of those states and their people.⁵³ They never intended to make the IOs another Frankenstein’s monster which would violate peoples’ rights instead of protecting them. If we look at the *travaux préparatoires* of the P&Is regime, they did not intend to impede access to justice to uphold the immunities of the IOs.⁵⁴ The ILO memorandum 1945 may be relevant here, which states that: “immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties. In general, such immunity confers only exemption from legal process and no exemption from the obligation to obey the law.”⁵⁵ States’ intention that granting immunity would create a denial of justice reflects on several counter-balancing provisions of legal instruments regulating it, which will be discussed in the next section. Moreover, the long-standing practices of the IOs show that they are concerned about the abuse of immunity and denial of justice and are prone to ensure access to justice.⁵⁶

Initially, the IOs had a relationship with States only. Traditionally, they were seen as “good doers” instead of wrongdoers.⁵⁷ From peacekeeping operations to development projects, the operations of IOs have expanded tremendously. They have direct and intensified effects on the lives of individual citizens than originally anticipated by the member states.⁵⁸ Generally, citizens could make their governments accountable to them before the domestic court if the governments

⁵⁰ Ibid.

⁵¹ See, Mary Shelley, *Frankenstein* (Penguin Classics 2012); A Guzman, ‘International Organizations and the Frankenstein Problem’ (2013) 24 *European Journal of International Law* 999, 999.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Bradlow (n 7) 51.

⁵⁵ ILO Official Bulletin, ‘ILO Memorandum’ (1945) 219 <<https://ilo.primo.exlibrisgroup.com>> accessed 26 December 2022.

⁵⁶ See for details, Rashkow (n 40).

⁵⁷ Blokker (n 21) 261.

⁵⁸ Bradlow (n 7) 47.

cause any harm to their rights.⁵⁹ However, the IOs are carrying out their expanded functions without redefining or reducing their immunities and thus, they are not accountable to the public like the governments. Individuals do not have standing before international courts and tribunals.⁶⁰ Their alternative remedy remains with IOs' internal dispute resolution mechanisms or national courts. If the IOs decline to waive their immunity or give an alternative internal mechanism to resolve the disputes, and if the national courts deny giving access to uphold immunities, the victims will suffer from denial of justice. We have seen such denial of justice in the recent *Mother of Srebrenica* and *Haitian Cholera Victims* incidents where individuals suffered death and serious health concerns. There was no alternative forum available to these victims to seek remedy for the alleged misconduct of the IOs and their functionaries.⁶¹ Such a denial of justice makes the UN the monster to the victims.

It is a paradox that IOs have the mandate to promote human rights, the dignity of human beings, etc. Denying justice to the victims, IOs become a violator of human rights who are beyond the jurisdiction of any forum—“untouchables”. Bradlow rightly observed that: “the immunity that IOs acquired to shield them from interference by their member states and to protect their operational independence has become a sword with which they can ward off attempts by adversely affected people to hold IOs accountable for the way in which they use their power.”⁶²

Moreover, Article 10 of the Universal Declaration of Human Rights (UDHR), Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 6 (1) of the European Convention of Human Rights (ECHR), Article 8 (1) of the American Convention of Human Rights, Article 7 of the African Charter of Human and People's Rights, etc. recognize individuals' “right to a fair proceeding before an independent and impartial court or tribunal” and impose obligations to ensure access to justice.⁶³ It is widely accepted that the immunity of IOs should not impede access to justice for individuals.⁶⁴ Moreover, almost all states have incorporated these rights into their domestic legislation, and there are

⁵⁹ Ibid 46.

⁶⁰ Ibid.

⁶¹ Nico Schrijver, ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’ in Niels M. Blokker and Nico J. Schrijver (eds), *Immunity of International Organizations* (Brill Nijhoff 2015) 331 <<https://brill.com/display/book/edcoll/9789004296060/B9789004296060-s017.xml>> accessed 15 December 2022.

⁶² Bradlow (n 7) 54.

⁶³ Edward Chukwuemeka Okeke, ‘The Tension between the Jurisdictional Immunity of International Organizations and the Right of Access to Court’ in Peter Quayle (ed), *The Role of International Administrative Law at International Organizations: AIIB Yearbook of International Law 2020* (Brill | Nijhoff 2021) 29 <<https://brill.com/view/title/56570>> accessed 18 December 2022.

⁶⁴ Okeke (n 23) 325–326.

no persistent-objecting states.⁶⁵ For this reason, this right is a rule of customary international law and thus is binding on all subjects of international law, including the IOs.⁶⁶

Considering the original intention of the framers of the instruments dealing with immunities, the long-standing practices of the organizations to give a remedy, etc., shows that immunity is designed as a shield to strengthen the IOs so that it can act for the interests of states and their people. It should be unacceptable when such immunities act as a sword to kill customary human rights norms. From that perspective, the criticisms against the unchecked absolute immunities which deny justice to common people are justified.

5. *Revamping Immunity: Bridging the Accountability Gap for International Organizations*

This section argues that this system should be changed given the emerging accountability gap in the P&Is regime of the IOs. I proposed that the IOs should be allowed to continue enjoying the P&Is. The change should be in giving alternative remedies to the aggrieved parties. This section argues why and how the current system should be changed.

The central character in Lampedusa's famous Italian novel *The Leopard* declares, "if we want things to stay as they are, things will have to change."⁶⁷ Much the same can be said about the P&Is of the IOs; if IOs want to enjoy immunities as they are enjoying, they must fill up the recently arisen accountability gap. They must ensure access to justice and effective remedy for the aggrieved third party to avoid the proceedings in national courts. If denial of justice as held in the *Mothers of Srebrenica* and *Haitian Cholera victims* incidents continues, the states and their national courts will be scared of protecting the individuals' human rights. If they start piercing the immunities of the IOs, it will vitiate the object for which it was bestowed, as I discussed in the previous section. P&Is are founded on the direct trade-off between the necessity to give the IOs powers to carry on their business effectively and the states' desire to guard them so they cannot turn into monsters.⁶⁸ States are always anxious and fearful of the potential monster, and thus, "they are overly conservative when they create IOs and have failed to take full advantage of IOs to achieve important cooperative gains."⁶⁹ Jenks tried to balance between immunities and their abuse in the following language: "I should like to re-affirm my full acceptance of the principle that it is essential that international organizations

⁶⁵ Bradlow (n 7) 61.

⁶⁶ Ibid.

⁶⁷ Giuseppe Tomasi di Lampedusa, *The Leopard* (Harvill Secker 2010) 40.

⁶⁸ Guzman (n 52) 1000.

⁶⁹ Ibid.

should act at all times with the fullest respect for established legal rights and reiterate my conviction that a more detailed examination of specific types of cases in which real dangers of abuse exist and of the particular procedural devices likely to be most effective in such cases will be found to afford a practicable and constructive approach towards the progressive solution of a problem.”⁷⁰ I agree with Jenks, and to get rid of this situation, this part suggests that the current regime regulating the P&Is of the IOs must be changed to address these concerns, i.e., the denial of justice situation, to enjoy the same P&Is as are enjoying now.

There are two ways in which the current regime may be changed, i.e., to deliver power to the states and their national courts to fill the gap and allow the IOs to retain the current power while ensuring justice by reforming and strengthening the existing internal dispute resolution mechanisms. The previous Part showed the dangers of giving power to national courts and states; thus, this part suggests going for the second option. In doing so, this part will provide some recommendations for reforming and strengthening the current dispute resolution mechanisms.

- (a) The member States and their national courts should always respect the immunities of the IOs required for the proper functioning of the organizations.⁷¹ Member states should discourage the national courts, and the national courts should have refrained from entertaining suit against the IOs where IOs have not waived their immunity.⁷² They should have refrained from piercing the immunity of the IOs.
- (b) The IOs should make provisions for the appropriate modes of dispute settlement required under section 29 of the General Convention read with section 31 of the Specialized Agencies Convention. In doing so, they should strengthen the current internal mechanisms for dispute resolution. The scope of these provisions should be widened to accommodate any other grievances of private individuals than only “disputes arising out of contracts” and “disputes of private character”. The rules of the current regime should be extended to cases in which the operations of the IOs directly harm or may harm private individuals and may affect their human rights.⁷³ In this regard, the *Institut de Droit International* rightly demanded in 1957 that “for every particular decision of an international organ or organization which involves private rights or interests, there be appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from

⁷⁰ ‘Annuaire de l’Institut de Droit International – Session d’Aix-En-Provence – Avril/Mai 1954 (Tome I)’ (L’Institut de Droit International 1954) 508 <<https://www.idi-iil.org/app/uploads/2017/05/4025-45A-OCR.pdf>>.

⁷¹ Schrijver (n 61) 340.

⁷² Ibid.

⁷³ Blokker (n 21) 275.

such a decision.”⁷⁴ A sufficient mechanism to entertain private individuals’ grievances against the IOs would prevent denial of justice situations as occurred in *Mother or Srebrenica* and *Haitian Cholera Victims* incidents.

- (c) The IOs should appoint an ombudsperson to deal with claims of damages against the IOs.⁷⁵
- (d) The Status of Forces Agreements (SOFAs) under which that peacekeeping operation takes place provides for establishing a standing claims commission to resolve third-party dispute.⁷⁶ However, no such claims commission has ever been established.⁷⁷ This paper suggests setting up such a claim commission for each peacekeeping operation. It should be constituted by the representatives of the IOs and the host state and should be permanent for the entire duration of the peace operations.⁷⁸
- (e) To review the decisions of each claims commission, there should be a central claims commission or a tribunal at the global level. It will provide more procedural fairness to the decisions of the claims commission.
- (f) The head of the organization should make reports at regular intervals mentioning the claims against the organization, the position of the organization in relation to the claims, whether the organization waived immunity or not, why it has not waived immunity, whether the claims have been sent to internal dispute resolution mechanisms or not, etc. When the organizations publish such a report at regular intervals, it will create ‘name and shame’ of the organizations to outsiders. To maintain a good reputation, the organizations would maintain their accountability. This situation would diminish the abuse of immunities by organizations.
- (g) In appropriate circumstances, the organizations could avail forms of legal redress other than financial forms, which may include “victim assistance, openness in relation to facts and relevant documents, and recognition and apologies”.⁷⁹
- (h) To prevent abuse of immunity, a provision similar to section 24 of the Specialized Agencies Convention should also be incorporated into the

⁷⁴ ‘47 Annuaire de l’Institut de Droit International – Session d’Amsterdam – Septembre 1957 (Tome I)’ (Institut de Droit International) 490 <<https://www.idi-iil.org/app/uploads/2017/05/4025-47B-OCR-min.pdf>>.

⁷⁵ Schrijver (n 61) 339.

⁷⁶ Report of the Secretary-General, ‘Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters’ (UNGA 1996) 7.

⁷⁷ Rashkow (n 40) 341.

⁷⁸ Schrijver (n 61) 339.

⁷⁹ Ibid 340.

General Convention. If the state considers there is an abuse of immunities, then there should be an arrangement to refer the dispute to the international court of justice. It will ensure the organizations' accountability and enhance their activities' legitimacy.

Conclusion

In navigating the intricate dynamics of P&Is, denial of justice, and the delicate equilibrium between IO autonomy and accountability, this article seeks to contribute meaningfully to the ongoing discourse regarding the evolving landscape of international organizations and their role in shaping the global governance framework. Through a thorough examination of the multifaceted dimensions of P&Is and accountability within the IOs, this article unravels the complexities surrounding the denial of justice, ultimately advocating for a recalibration of existing systems to achieve a balanced approach. As debates persist over the functional nature of IO acts and the authority to determine them, the article underscores the imperative of preserving IO functionality while safeguarding against abuses of power. In doing so, it underscores the role of IOs as key actors in global governance, reinforcing the need for ongoing dialogue and reform to foster a just and equitable international order.