

USING A SHIELD AS A SWORD: ARE INTERNATIONAL ORGANIZATIONS ABUSING THEIR IMMUNITY?

Daniel D. Bradlow *

Over the course of his distinguished career, Henry Richardson has been concerned with promoting justice for the countries and peoples of Africa. As Professor Richardson has recognized,¹ international organizations (IOs) have both promoted and retarded justice in Africa. The topic of how they can be held accountable for their actions is therefore one that is of continuing relevance to his intellectual and political concerns.

The starting point for this discussion is that IOs have their own independent legal personality and status as subjects of international law.² Their international rights and duties are determined and limited by their founding treaties.³ They may be legally responsible for many of the international legal wrongs that they may commit.⁴ They are also obliged to comply with any treaties that they sign and with all applicable principles of customary international law and general principles of law recognized by all nations.⁵

Most IOs, unlike states, do not control territory or a population and so always operate within the jurisdiction of one of their member states.⁶ This makes them vulnerable to interference by these states. In order to mitigate this risk, IOs have

* SARCHI Professor of International Development Law and African Economic Relations, Centre for Human Rights, University of Pretoria; Emeritus Professor of Law, American University Washington College of Law. Email: danny.bradlow@up.ac.za. All Rights Reserved. The author thanks Nthope Mapefane for her research assistance.

1. See Henry J. Richardson, III, *International Law and the Continuation of Sanctions Against South Africa*, 3 TEMP. INT'L & COMP. L.J. 249, 249 (1989) (discussing the role of the United Nations and International Court of Justice in bringing peace and stability to South Africa); see also Henry J. Richardson, III, *African Contributions to the Law of Peacekeeping*, 96 AM. SOC'Y INT'L L. PROC. 135, 135 (2002) (highlighting many IOs involved in addressing peace in Africa).

2. See JAN KLABBERS, *ADVANCED INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS* 17 (2015) ("While the standard definition of international organizations does not insist on organizations possessing international personality, there is a strong feeling that organizations somehow need to possess such personality in order to be able to act under international law.").

3. See *id.* at 22–26 (discussing the powers and duties of IOs).

4. See *id.* at 32 (indicating that although most IOs hold some privileges and immunities, negotiations with the host state determine the precise scope of those privileges and immunities).

5. See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–91 (Dec. 20) ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.").

6. See KLABBERS, *supra* note 2, at 16 (indicating that most of first IOs were hosted by the government of their home states).

been granted qualified immunity, usually referred to as functional immunity, from the jurisdiction of their member states.⁷ This means that the IOs and their officials are immune from domestic judicial oversight as long as they are performing the functions that the member states have delegated to them in their founding treaties.⁸

For most of the twentieth century, this grant of functional immunity made sense for two reasons. First, the founding states envisaged that IOs would have limited capacity to act on their own initiative and that they would only undertake specific operations with the consent and active support of their member states.⁹ Thus, IOs would only undertake activity on the territory of a member state or involving the citizens of that state at the invitation of its government and in cooperation with its officials.¹⁰ The citizens of the state, therefore, would look to hold their government accountable if they disapproved of or they suffered any harm because of the IO's activity. The state, if it deemed it appropriate, could seek to hold the IO accountable through the IO's governance arrangements, in which the state participated.¹¹

This arrangement ensured that the IO respected the sovereignty of the state. In addition, it allowed citizens to hold their government, which had invited the IO to enter its territory and approved its operations, either legally or politically accountable for the IO's actions.¹² The citizens of the state did not have a direct mechanism for holding the IO accountable. However, if the citizens did not approve of the IO's actions, they could petition their government to deny the IO access to the state or to use the levers of institutional governance to hold the IO accountable.

The second reason why functional immunity made sense was that individuals were not generally recognized as subjects of international law.¹³ This meant that

7. *See id.* at 30 (“One of the consequences of functionalist theory is the idea that if organizations are to exercise their functions effectively, they should be allowed to work without any interference.”).

8. *See id.* (noting that these functional privileges and immunities are considered practical exception to host state's jurisdiction).

9. *See id.* at 16, 30–31 (noting the close relationship between most early IOs and their host states); *see generally* PETER H.F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (1994).

10. *See* KLABBERS, *supra* note 2, at 31 (indicating the first IOs were financed and staffed by the host state).

11. *See id.* at 32 (noting the host state's involvement in the negotiation of an IO's privileges and immunities).

12. *See id.* at 30–31 (noting that the host state's laws continued to apply to the IOs even if those laws could not be enforced against the IO).

13. *See* ANTONIO CASSESE, *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS* 88–89 (2008) (discussing the expansion of universal human rights). Prior to the key international human rights treaties entering into force, individuals did not have a well-accepted status as subjects of international law. This began to change once these treaties became operational and to gain wide acceptance. *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553–55 (7th ed. 2008) (discussing brief history of the formation of individual human rights). The U.N. Charter provides a base line for human rights. *Id.* at 555.

individuals had no international legal standing and so they could not bring a claim in any international forum against the IOs. Any wrong that an IO caused was, under international law, an injury to their state, who could then bring a claim against the IO.¹⁴ If they tried to bring a domestic suit they would, in effect, be interfering with the functionality of the IO, which is why functional immunity was granted to protect the IO. As a result, domestic courts usually dismissed cases brought against IOs on jurisdictional grounds.¹⁵

This paper argues that with the passage of time, however, both of these reasons have lost their validity. First, IOs have expanded the scope of their activities to include operations that involve exerting direct authority over and/or directly impacting the lives of individual citizens and communities.¹⁶ As a result of these expanded operations and the fact that their functional immunity has not been reduced, IOs are currently operating with less public accountability than governments. Second, developments in human rights law since the Second World War mean that individuals now have rights that are cognizable under international law.¹⁷ One of these rights is the right to an effective remedy.¹⁸

IO immunity is also becoming politically untenable. IOs cannot credibly continue to advocate that their member states should respect human rights and practice good governance while they fail to respect their stakeholders' right of access to an effective remedy.¹⁹ This can be seen most clearly in regard to the activities of the United Nations (U.N.), the World Bank Group (WBG), and the International Monetary Fund (IMF), which are the three IOs this paper focuses on.

In order to make this argument, this paper is divided into five sections. The first is a brief overview of the doctrine of IO immunity. The second discusses the evolution in IO operations and its implications for IO immunity. The third is a discussion of the right to an effective remedy as a principle of customary international law. The fourth considers how this principle should be applied to IOs. The fifth concludes that the doctrine of immunity is no longer appropriate without adaptation.

14. *Nottebohm (Liech. v. Ger.)*, Second Phase Judgment, 1955 I.C.J. Rep. 4, 24 (April 6); *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. Rep. 3, 33 (Feb. 5).

15. See Aaron I. Young, *Deconstructing International Organization Immunity*, 44 GEO. J. INT'L L. 311, 312–14, 324–28 (2012) (indicating that courts continue to grant absolute immunity to international organizations). For example, the United States Court of Appeals for the D.C. Circuit found the Inter-American Development Bank (IDB) entitled to absolute immunity in a suit to garnish wages. *Id.* at 312–13 (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1336–37 (D.C. Cir. 1998)).

16. See *infra* Section II (discussing the evolution of IO activity and immunity).

17. See CASSESE, *supra* note 13, at 430–90 (discussing the recognition of international human rights).

18. See *infra* Section III (discussing the development of the right to an effective remedy).

19. See *infra* Section III.

I. IOS AND FUNCTIONAL IMMUNITY

The first modern IOs were technical organizations, focused on issues such as managing navigation on specific cross-border rivers or dealing with specific issues such as postal services.²⁰ Given their specialized mandates, many of these organizations did not have and generally did not need immunity.²¹ The necessity of immunity for IOs and their officials became more important after the First World War, when the League of Nations was created to preserve international peace and security in global governance.²² The founding states decided that its officials needed the equivalent of diplomatic immunity so that they could operate effectively and without interference from their member states.²³

The immunity of these officials did not prevent member states undermining the League. Consequently, after the Second World War, the architects of the institutional arrangements for global governance sought to ensure that IOs had the legal authority and protection needed to perform their intended functions.²⁴ They endowed them with international legal personality so that they would have the status of subjects of international law.²⁵

The architects of the global governance order also granted the three IOs discussed in this article and their officials functional immunity so that they could perform their intended functions free from member state interference.²⁶ Article 105 of the U.N. Charter stipulates that the U.N. should have the immunity needed to perform its functions.²⁷ Article IX of the Articles of Agreement of the IMF states that it shall have immunity from judicial process and that its officers shall be immune for actions performed in their official capacity, unless the organization

20. See BOB REINALDA, ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS: FROM 1815 TO THE PRESENT DAY 90–91 (2009) (indicating that a new form of IO, the public international union, came into being around 1865 to serve functional aims, such as regulating telecommunications and postal traffic).

21. See *id.* (giving examples of some of the specialized mandates of IOs in the nineteenth century); see also Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 829–30 (1947) (“Prior to 1920 granting of diplomatic privileges and immunities to international organizations was clearly an exception, based on particular treaties or statutes.”).

22. See League of Nations Covenant pmb. (establishing the League of Nations to achieve international peace and security); see also Kunz, *supra* note 21, at 829–30 (noting a great increase in the number of grants of diplomatic immunity to international organizations after 1920).

23. See League of Nations Covenant art. 7 (providing officials of the League diplomatic immunity while engaged in the business of the League); see also Kunz, *supra* note 21, at 832 (indicating the League of Nations Covenant gives to representatives of Members and the agents of the League diplomatic privileges and immunities).

24. See Kunz, *supra* note 21, at 839 (discussing recognition of functional immunity of the U.N. after World War II).

25. See *id.* at 848 (indicating that although only sovereign states are ordinarily recognized as full persons in international law, non-states can be recognized if international personality is expressly or impliedly granted).

26. See BEKKER, *supra* note 9, at 1–2, 54–63 (discussing deliberate recognition of legal personality of U.N. after World War II).

27. U.N. Charter art. 105.

explicitly waives immunity.²⁸ Article VII of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), an organization within the WBG,²⁹ stipulates that it shall have the immunities and privileges set forth in Article VII in order “[t]o enable the Bank to fulfill the functions with which it is entrusted”.³⁰ The article goes on to specify that an action can only be brought against the IBRD in a member state in which it has an office, has appointed an agent for service of process or, has issued securities.³¹ It adds that its officers will also have immunity for acts performed within their official capacity.³² In all three cases—the IMF, the IBRD and the U.N.— their articles specify that the property of the IO is immune from attachment before final judgment against the IO.³³

The member states of these IOs decided to elaborate on the meaning of this immunity in subsequent international treaties. The U.N. member states elaborated on the nature of the U.N.’s immunity in the Convention on the Privileges and Immunities of the United Nations (CPIUN).³⁴ There is an analogous treaty on the privileges and immunities of the U.N.’s specialized agencies, which includes both the IMF and the WBG.³⁵ The provisions of these treaties make clear that the immunity of the U.N. is limited to functional immunity.³⁶ Section 29 of the CPIUN stipulates that the U.N. is expected to provide “appropriate modes of settlement”

28. Articles of Agreement of the IMF, Art. 9, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF Articles of Agreement].

29. See *About the World Bank*, WORLD BANK, <http://www.worldbank.org/en/about> (last visited Feb. 27, 2017) (listing the organizations that make up the WBG).

30. Articles of Agreement of the International Bank for Reconstruction and Development, Art. VII, § 1, Dec. 27, 1945, 2 U.N.T.S. 134 [hereinafter IBRD Articles of Agreement].

31. *Id.* § 3.

32. *Id.* § 8.

33. See *id.* § 3 (“Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.”); IMF Articles of Agreement, *supra* note 28, 60 Stat. at 1413 (“The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.”); U.N. Charter art. 105(1) (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”); Convention on the Privileges and Immunities of the United Nations art. II(2), Feb. 13, 1946, 21 U.S.T. 1419, 1 U.N.T.S. 15 [hereinafter CPIUN] (“The 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. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”).

34. CPIUN, *supra* note 33.

35. Convention on the Privileges and Immunities of the Specialized Agencies, *approved* Nov. 21, 1947, 33 U.N.T.S. 262 (entered into force Dec. 2, 1948).

36. See, e.g., CPIUN, *supra* note 33, 21 U.S.T. at 1426–30, 1 U.N.T.S. at 21–23.

for disputes arising from the contracts that it entered into and for “other disputes of a private law character to which the United Nations is a party.”³⁷

It is interesting to note that Section 24 of the Convention on the Privileges and Immunities of the Specialized Agencies deals with the situation in which an IO abuses its immunity.³⁸ The section provides that the state and the IO should try and resolve the matter through consultations.³⁹ If this does not result in a satisfactory outcome, the question of whether the abuse “occurred shall be submitted” for an advisory opinion of the International Court of Justice (ICJ).⁴⁰ If the ICJ finds abuse, the state shall have the right, after notification, to deny the IO the benefits of the privilege or immunity that has been abused.⁴¹

Some states have domesticated the principle of IO immunity in statutes stipulating that IOs would have jurisdictional immunity in their domestic courts.⁴² Most importantly, since it is the home for the headquarters of all three IOs discussed in this paper, the United States (U.S.) in 1945 promulgated the International Organizations Immunity Act,⁴³ which provides that organizations declared by the President to be IOs “shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments”.⁴⁴

This approach to IOs was prudent because the post-World War II IOs were novel institutions. It was unclear how member states would respond when they began implementing their assigned functions. While the U.N. assumed many of the League of Nations’ functions, it did so with some innovations that limited the sovereignty of its member states, such as the veto for the permanent members of the Security Council, the Security Council’s capacity to take coercive actions to protect peace and security under Chapter VII of the U.N. Charter, and the General Assembly’s ability to adopt resolutions by majority vote.⁴⁵ The Bretton Woods Institutions in some ways were even more innovative.⁴⁶ In the case of the IMF, the

37. CPIUN, *supra* note 33, at 30.

38. Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 35, at 277–78.

39. *Id.*

40. *Id.*

41. *Id.*

42. See *infra* Section III.; see, e.g., International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (2012); see also THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (August Reinsich ed. 2013) [hereinafter PRIVILEGES AND IMMUNITIES IN DOMESTIC COURTS] (examining variation in IO immunity among domestic courts in depth).

43. International Organizations Immunities Act of 1945 § 288a(b).

44. *Id.*

45. U.N. Charter ch. VII.

46. In July 1944, forty-three countries met in Bretton Woods, New Hampshire for the Bretton Woods Conference. The countries set up the meeting to rebuild the shattered post-war economy and to promote international economic cooperation. This meeting resulted in the creation of the Bretton Woods Institutions: the World Bank and the International Monetary Fund. See *What are the Bretton Woods Institutions?*, BRETTON WOODS PROJECT (Aug. 23, 2005), <http://www.brettonwoodsproject.org/2005/08/art-320747/> (explaining the objectives and results of the Bretton Woods conference).

participating states agreed that they would create an international monetary system overseen by an international organization with the authority to monitor state compliance with the rules of the system.⁴⁷ The IBRD was authorized to raise funds in capital markets and then loan it to states or with state guarantees to support government-sponsored projects in their member states.⁴⁸ It was unclear how states would react if the IBRD sought to enforce its rights under their loan agreements against a debtor state.

It is important to note that the IO immunity granted after the Second World War was not conceived to preclude any form of IO accountability to its stakeholders. In fact, it was anticipated that the IOs would offer an alternative means of dispute settlement in the case of disputes of a “private law character” and would waive their immunity in their contractual relations with funders and suppliers.⁴⁹ Thus, Section 29 of the CPIUN stipulates that the U.N. should create a means of resolving disputes involving contractual claims and other cases of a “private law character.”⁵⁰ The IBRD was expected to waive its immunity in its transactions with private creditors and private contractors and suppliers.⁵¹ Similarly, it was anticipated that the IMF could “expressly waive[] its immunity for the purpose of any proceedings or by the terms of any contract.”⁵²

There are a few additional points about IO immunity that should be noted. First, since the IOs are only granted functional immunity, it is important to identify their functions. These are stipulated in the IOs’ founding treaties. Pursuant to the U.N. Charter, the U.N.’s purposes are: maintaining worldwide peace and security, fostering cooperation between nations in order to solve economic, social, cultural, or humanitarian problems, and promoting human rights.⁵³ The purpose of the WBG, pursuant to its Articles of Agreement, is to promote economic and social progress in developing countries by helping to raise productivity and living standards of their citizens.⁵⁴ The purpose of the IMF, according to its Articles of Agreement, in general terms, is to oversee and maintain a stable international monetary system.⁵⁵ In all three cases, the functional immunity of the IOs is

47. Second Amendment of the Articles of Agreement of the International Monetary Fund, Art. IV, § 3(a) *approved* Apr. 30, 1976, 29 U.S.T. 2203, 2209 (entered into force Apr. 1, 1978).

48. IBRD Articles of Agreement, *supra* note 30, Art. III.

49. CPIUN, *supra* note 33, at 30.

50. *Id.*

51. *Id.*; Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 35, at 280.

52. IMF Articles of Agreement, *supra* note 28, at 1413.

53. UN Charter art. 1, ¶ 4.

54. See IBRD Articles of Agreement, *supra* note 30, at 134 (“To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.”).

55. IMF Articles of Agreement, *supra* note 28, at 1401.

understood to also apply to their implied powers.⁵⁶

Second, unlike diplomats, IO officials are only granted immunity when they are on official business.⁵⁷ This made sense since the purpose of the immunity is to protect the functioning of the IO rather than the official *per se*. Consequently, the officials would only need immunity while actually undertaking their official business.

Third, as can be seen from the CPIUN, it was assumed that the IOs should be willing to either waive their immunity when dealing with commercial suppliers or provide a reasonable alternative remedy.⁵⁸ Thus, these three IOs rely on arbitration as the alternative remedy in dealing with suppliers and other contractors.⁵⁹

Fourth, IOs have long recognized that, in order to attract qualified staff and out of respect for the rights of these employees, they needed to offer their employees some alternative forum to domestic courts for dealing with employment related issues.⁶⁰ The League of Nations and the International Labour Organization (ILO), established an international administrative tribunal in 1927 to hear employment cases relating to IOs.⁶¹ After the demise of the League of Nations, the ILO took over the tribunal, which continues to function.⁶² The three IOs discussed in this article each have their own tribunals to deal with employment matters.⁶³

Fifth, it was understood that the IOs might, on occasion, be a party in a torts claim. The member states agreed that the U.N. would deal with individual claims under the “private law character” exception in Section 29 of the CPIUN.⁶⁴ The IMF

56. Reparation for Injuries Suffered in the Service of United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (“Under International law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”)

57. CPIUN, *supra* note 33, at 1432; IMF Articles of Agreement, *supra* note 28, at 1414; IBRD Articles of Agreement, *supra* note 30, at 182.

58. CPIUN, *supra* note 33, at 1434; *see also* KLABBERS, *supra* note 2, at 34 (noting CPIUN provides that the U.N. shall make an effort to settle private claims, likely because otherwise commercial service providers would not work with the U.N. for fear of not getting paid and being unable to enforce contractual obligations).

59. CPIUN, *supra* note 33, at 1438 (“The United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.”).

60. August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals* 1 (Int'l Law & Justice Working Papers, Paper No. 2007/11, 2007), <http://www.iilj.org/wp-content/uploads/2016/08/Reinisch-The-Immunity-of-International-Organizations-and-the-Jurisdiction-of-Their-Administrative-Tribunals-2007-2.pdf> (explaining the importance of establishing alternative tribunals to settle IO employment disputes).

61. *See ILO Administrative Tribunal*, INT'L LABOR ORG., <http://www.ilo.org/tribunal/lang-en/index.htm> (last visited Feb. 19, 2017) (brief history on the ILO Administrative Tribunal).

62. *Id.*

63. *IMF Administrative Tribunal*, INT'L MONETARY FUND, <http://www.imf.org/external/imfat/> (last visited April 5, 2017); *World Bank Administrative Tribunal*, WORLD BANK GRP., <https://webapps.worldbank.org/sites/WBAT/Pages/default.aspx> (last visited Feb. 19, 2017); U.N. OFFICE OF ADMIN. OF JUSTICE, <http://www.un.org/en/oaj/> (last visited Feb. 26, 2017).

64. *See* Kristen Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 354 (2016) (explaining how Section 29 of the CPIUN

and IBRD, as financial institutions, were perceived to be less likely to face such claims outside the context of their relations with their employees and suppliers.⁶⁵ Nevertheless, the CPIUN orders all specialized agencies to create appropriate settlement methods for disputes arising out of a “private law character.”⁶⁶ It also has a provision which anticipates that the U.N. could lose its immunity if it abuses this privilege.⁶⁷

To summarize, it made sense in the immediate post-World War II period to grant IOs functional immunity. They were expected to play new roles in international affairs and could be vulnerable to pressure from and to interference by their member states. The most effective way to protect IOs from such pressure and interference was to grant them, their officials, their property, and their records immunity from the jurisdiction of their member states when they were performing their mandated functions. In those relatively rare cases where the IOs did harm private citizens, those cases could be addressed through the means of dispute settlement envisaged in the CPIUN or in the analogous convention for specialized agencies.

II. THE EVOLUTION OF IO IMMUNITY

The concern that states might use their authority over the IOs operating in their territories to interfere with or to undermine IOs has proven to be largely unfounded. With rare exceptions, member states have respected the legal and operational independence of IOs and their officials.⁶⁸ In fact, over time member states of these IOs have acquiesced, either explicitly or implicitly, to the IOs performing a broader range of functions.⁶⁹ This has resulted in an increase in the number and intensity of direct interactions between IOs and the citizens of their member states.⁷⁰ However, this has not been accompanied by any adjustment in the

distinguishes between public and private claims).

65. *See Review of the Fund's Systems for Resolving Staff Disputes*, INT'L MONETARY FUND (Apr. 15, 2002), <http://www.imf.org/external/hrd/dr/> (emphasizing IMF's internal procedure for resolving employment disputes to avoid individual tort claims); *see also* World Bank, *Alternative dispute resolution—when it works, when it doesn't*, PREMNOTES, Sept. 2009 (emphasizing World Bank's alternative dispute resolution in order to avoid individual tort claims).

66. Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 35, at 280.

67. *Id.* at 276.

68. Two exceptions are the Mazilu and the Cumaraswamy cases, both of which involve state treatment of their own citizens. *See* [The ECOSOC initiated case concerning the Applicability of Article IV, Section 22 of the Convention on Privileges and Immunities of the United Nations] (Mazilu Case) 1989 I.C.J. Rep. 177; [Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights] (Cumaraswamy), Advisory Opinion, 1999 I.C.J. Rep. 43.

69. *See* Kim R. Holmes, Assistant Secretary for International Organization Affairs, U.S. Dep't of State, Remarks to the World Federalist Association and Oxfam (Dec. 5, 2003), <https://2001-2009.state.gov/p/io/rls/rm/2003/26949.htm> (praising international organizations for reinforcing global advance of democracy).

70. *See* Mareike Oldemeinen, *How has globalisation changed the international system?*, E-

immunity of the IOs. Instead, the functional immunity of the IOs has expanded to cover their new activities.⁷¹ This means 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. The significance of these developments can be best understood if each IO is considered separately.

The U.N. now plays a greater operational role than originally anticipated in those member states that have needed help ending internal conflicts or dealing with humanitarian crises. For example, it assumed interim governmental functions in countries undergoing political transitions like Namibia,⁷² Timor L'Este,⁷³ Cambodia,⁷⁴ and Kosovo.⁷⁵ It has also assumed responsibility for assisting vulnerable populations, including refugees, in countries like Bosnia,⁷⁶ Central African Republic,⁷⁷ Liberia,⁷⁸ and Rwanda;⁷⁹ and it has helped countries like Haiti

INTERNATIONAL RELATIONS (July 27, 2011), <http://www.e-ir.info/2011/07/27/how-has-globalisation-changed-the-international-system/> (“An intensification of cross-border interactions and interdependence between countries has brought about major change in the international system.”).

71. See KLABBERS, *supra* note 2, at 23 (indicating IOs can imply certain powers from existence of explicitly granted powers).

72. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *Namibia - UNTAG Mandate*, <http://www.un.org/en/peacekeeping/missions/past/untagM.htm> (last visited Feb. 20, 2017) (“UNTAG was established . . . to assist the Special Representative of the Secretary-General to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations.”).

73. See generally Geoffrey Robinson, Report Commissioned by the U.N. Office of the High Commissioner for Human Rights (OHCHR), East Timor 1999 Crimes against Humanity (July 2003), <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf>.

74. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *Cambodia - UNTAC Background*, <http://www.un.org/en/peacekeeping/missions/past/untacbackgr1.html> (last visited Feb. 20, 2017) (explaining the transition U.N. oversaw in Cambodia that led to restoration of civil rule after years of civil war and foreign intervention).

75. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *UNMIK: United Nations Interim Administration Mission in Kosovo*, <http://www.un.org/en/peacekeeping/missions/unmik/background.shtml> (last visited Feb. 20, 2017) (explaining U.N. intervention in Kosovo that followed massive human rights violations by Serbian authorities there).

76. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *Bosnia and Herzegovina - UNMIBH - Background*, <http://www.un.org/en/peacekeeping/missions/past/unmibh/background.html> (last visited Feb. 20, 2017) (explaining U.N.'s contribution to establishment of the rule of law in Bosnia and Herzegovina).

77. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *MINUSCA: United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic*, <http://www.un.org/en/peacekeeping/missions/minusca/> (last visited Feb. 20, 2017) (explaining the U.N.'s involvement with human rights protection in Central African Republic).

78. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *UNMIL: United Nations Mission in Liberia*, <http://www.un.org/en/peacekeeping/missions/unmil/> (last visited Feb. 20, 2017) (explaining the U.N.'s assistance in implementing the cease fire agreement in Liberia).

79. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, *Rwanda - UNAMIR Background*, <http://www.un.org/en/peacekeeping/missions/past/unamirS.htm> (last visited Feb. 20, 2017)

rebuild after significant natural disasters.⁸⁰ The U.N. Development Program is also involved in development projects that directly impact on the lives of the citizens of these countries.⁸¹

The IBRD's member states created the International Development Association⁸² (IDA) to fund development projects in low income countries, the International Finance Corporation (IFC)⁸³ to fund private sector development, and the Multilateral Investment Guarantee Agency (MIGA)⁸⁴ for providing political risk insurance for foreign investors. This group of entities, collectively referred to as the WBG, has become involved in a much broader range of activities in their member states than just funding hard infrastructure projects. They are now helping their member states draft statutes, reforming government institutions and whole sectors of economic activity, and expecting their member states to pay more attention to the social, environmental, cultural, and institutional implications of their projects and programs.⁸⁵ The WBG has also increased its direct consultations with the citizens of those member states in which it operates about the projects they are funding or supporting.⁸⁶

The IMF was forced to modify its activities when the Bretton Woods system of par value was replaced with a system that allowed member states to choose their own exchange rate regimes.⁸⁷ The IMF could no longer restrict the scope of its

(explaining the U.N.'s involvement in Rwanda to prevent abusive use of military force).

80. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, MINUSTAH: United Nations Stabilization Mission on Haiti, <http://www.un.org/en/peacekeeping/missions/minustah/> (last visited Feb. 20, 2017) (explaining the U.N.'s involvement in stabilizing aftermath created by earthquake in Haiti).

81. See U.N. DEV. PROGRAMME, Overview, <http://www.undp.org/content/undp/en/home/overview/overview.html> (last visited Feb. 20, 2017) (introducing objectives and operations of the U.N. development programme).

82. International Development Association Articles of Agreement, Jan. 24, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249 [hereinafter IDA Articles of Agreement].

83. International Finance Corporation Articles of Agreement, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117 [hereinafter IFC Articles of Agreement].

84. Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, T.I.A.S. No. 12089, 1508 U.N.T.S. 99 (entered into force Apr. 12, 1988) [hereinafter MIGA Convention].

85. See *generally* DEVESH KAPUR ET AL., THE WORLD BANK: ITS FIRST HALF CENTURY (1997).

86. See Press Release, World Bank, World Bank Board Approves New Environmental and Social Framework (Aug. 4, 2016), <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework> (discussing safeguards review and adoption of new environmental and social framework); *Access to Information: Overview*, WORLD BANK, <http://www.worldbank.org/en/access-to-information/overview> (last visited Feb. 26, 2017) (providing an overview on the World Bank's Policy on Access to Information).

87. See JAMES M. BOUGHTON, THE SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND 1979–1989, at xviii (2001) (explaining that par value was the gold equivalent of one U.S. dollar, which changed to floating exchange rate system, where each country designed own exchange rate policies pegged to another currency).

surveillance to those issues that directly affect the par value of a country's currency. The IMF now concerns itself with any macroeconomic issues that could affect the balance of payments and exchange rate of a country.⁸⁸ In addition, the conditions the IMF attaches to its financing have come to include anything that could affect the country's ability to reduce its budget and current account deficits. For example, the conditions attached to its funding have included such issues as privatization of specific state owned enterprises and tax and pension system reforms.⁸⁹ The IMF also now plays a critical role in helping countries manage sovereign debt crises, using its ability to provide financing to pressure either sovereign debtors or their creditors to reach an agreement.⁹⁰ In short, the IMF has evolved from a purely international monetary institution into a macroeconomically focused institution that gets involved in a broad range of advisory reviews, capacity building initiatives, and funding operations in its member countries.⁹¹

The expansion in the scope of these IO operations has changed the universe of actors with which they interact. All three IOs are now engaged in activities that involve decisions and actions that can directly influence the policies, projects, and governance of their member states. This means that, in effect, they are playing a role in the policy-making and implementation process of many of their member states. Their decisions and actions are directly affecting the communities and citizens of these states.⁹²

The problem is that, unlike the governments in these states, IOs are not directly accountable to the citizens of these countries. First, IOs are immune because their functional immunity has expanded to the same degree that their mission has expanded.⁹³ Second, primarily because these citizens and communities do not have a contractual relationship with IOs in their states, they do not have access to an alternate forum in which they can seek to hold IOs accountable for

88. See *About the IMF*, INT'L MONETARY FUND, <http://www.imf.org/en/About> (last visited Feb. 16, 2017) (describing how the IMF's monitoring is done specifically through surveillance, lending, and capacity development).

89. See *IMF Conditionality*, INT'L MONETARY FUND (Sept. 27, 2016), <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> (stating that conditionality is used by the IMF to ensure resources are safeguarded and nations do not use harmful measures to make payments).

90. See *IMF Policy Paper: Reforming the Fund's Policy on Non-Toleration of Arrears to Official Creditors*, IMF 15 (Dec. 2015), <http://www.imf.org/external/np/pp/eng/2015/101515.pdf> (recommending that creditors and debtors be made to reach consensus on debt).

91. See generally *id.*

92. See generally THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy et al. eds., 2010).

93. See PRIVILEGES AND IMMUNITIES IN DOMESTIC COURTS, *supra* note 42, at 8 (indicating that in practice, functional immunity frequently leads to *de facto* absolute immunity); see generally *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015); PIETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES (1994).

their actions.⁹⁴

The fact that affected citizens cannot hold the IOs accountable demonstrates that it is becoming untenable to maintain that IOs should be immune from the jurisdiction of their member states so long as they are performing their designated functions. It is hard to see why IOs should be less accountable to affected people than governments when acting in comparable circumstances. This is particularly the case if IOs, through their actions or inactions, cause harm to those who are impacted by their operations.

Unfortunately, the problems created by IO immunity can be profound. For example, people in Haiti and Kosovo have suffered death and serious health problems because of the decisions and actions of the U.N.⁹⁵ The IMF has required member states such as Greece to make significant cuts in its health and education budgets without fully assessing the impact that these cuts have on the rights of the citizens of these countries to health and education.⁹⁶ The WBG's failure to comply with its own policies and procedures in its operations has resulted in it funding projects and programmes that have had serious adverse effects on people and communities in its borrower countries.⁹⁷ If governments had taken these decisions and actions, the affected individuals would have been able to hold the government officials legally or politically accountable.

IOs, to some extent, have taken steps to address this problem. During the 1990s, the WBG created the first mechanisms through which affected non-state

94. The only partial exceptions to this second point are the World Bank Group, which has established independent accountability mechanisms to investigate complaints brought by groups of two or more individuals who claim they have been harmed by the Bank's failure to follow its own operational policies and procedures in its operations, and the United Nations Development Program, which has established a similar mechanism. See *infra* notes 100–101, 107 for further discussion of these accountability mechanisms.

95. *Georges, supra* note 93, at 247.

96. See generally Pensioners' Union of the Agric. Bank of Greece (ATE) v. Greece, 2012 E.C.S.R. 80; COMMITTEE FOR THE ABOLITION OF ILLEGITIMATE DEBT, Preliminary Report of the Truth Committee on Public Debt (June 18, 2015), <http://cadtm.org/Preliminary-Report-of-the-Truth>; Margot E. Salomon & Olivier De Schutter, *Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015* (Dec. 15, 2015); Matthias Goldmann, *Human Rights and Sovereign Debt Workouts*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 79 (Juan Pablo Bohoslavsky & Jernej L. Cernic eds., 2014); INDEPENDENT EVALUATION OFFICE OF THE IMF, *THE IMF AND THE CRISES IN GREECE, IRELAND, AND PORTUGAL* (2016).

97. See generally WBG, *World Bank Operating Procedures*, Operating Procedures 2014 (Apr. 2014), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf>; Ibrahim Shihata, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2000); Daniel D. Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 HEIDELBERG J. INT'L L. 392 (1994); Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994); Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403 (2005).

actors could seek to hold the Group accountable for its actions. It created the Inspection Panel⁹⁸ to deal with cases relating to the IBRD and IDA and the Compliance Advisor Ombudsman (CAO)⁹⁹ to deal with cases relating to the work of the IFC and MIGA. These mechanisms were carefully crafted so as to be consistent with the immunity of the WBG and with the sovereign prerogatives of the member states.¹⁰⁰ Thus, non-state actors can only request the Inspection Panel to investigate claims that they had been harmed by the failure of the WBG to comply with its own operational policies and procedures.¹⁰¹ They cannot request investigations of the actions of the sovereign borrower.¹⁰² The CAO, which only deals with private sector projects, is able to offer affected parties both compliance review and problem-solving opportunities.¹⁰³ However, in both cases, the outcomes of the accountability mechanism are at most advisory and the senior leadership of the institution are free to accept or reject the findings of the mechanism.¹⁰⁴

Parts of the U.N. have also recognized that they need to provide some form of independent accountability mechanism. The U.N. Development Programme has created an independent accountability mechanism to ensure that it complies with its own policies and procedures in its activities.¹⁰⁵ The mechanism is relatively new and so it may be too soon to judge its effectiveness. Similarly, the Security Council recognized that its sanctions regimes may result in individual citizens being unfairly targeted for sanctions and it created an ombudsman with the power to investigate cases of people who allege that they have been wrongly included on the U.N. sanctions list.¹⁰⁶ To date, the U.N. has not created any analogous permanent mechanisms to deal with the problems that have arisen in other U.N. activities,

98. See generally *About Us*, THE WORLD BANK INSPECTION PANEL, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> (last visited Feb. 17, 2017); International Bank for Reconstruction and Development & International Development Association, *World Bank Inspection Panel* No. IBRD 93-10, IDA 93-6 (Sept. 22, 1993), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf>.

99. *Our Mandate*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, <http://www.cao-ombudsman.org/>; <http://www.cao-ombudsman.org/about/whoweare/> (last visited Feb. 16, 2017).

100. See *Georges*, *supra* note 93, at 247 (stating that IOs are generally immune and not accountable to citizens of the countries they interact with).

101. WBG, *How to File a Request for Inspection to the World Bank Inspection Panel: General Guidelines* 3, http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines_How%20to%20File_for_web.pdf (last visited Feb. 27, 2017).

102. See *id.* (indicating a panel is a mechanism for *people* who have complaints based on harm).

103. *How We Work: Compliance*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, <http://www.cao-ombudsman.org/howwework/compliance/> (last visited Feb. 17, 2017).

104. *Jam v. International Finance Corporation*, 172 F. Supp. 3d 104 (D.C. Cir. 2016).

105. See U.N. DEV. PROGRAMME, *Social and Environmental Compliance Review and Stakeholder Response Mechanism*, <http://www.undp.org/content/undp/en/home/operations/accountability/secu-srm/> (last visited Feb. 27, 2017) (providing overview of social and environmental standards).

106. Case C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of the E.U. & Comm'n of Eur. Cmty.*, 2008 E.C.R. I-6351; *The Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee*, OFFICE OF THE OMBUDSPERSON, <https://www.un.org/sc/suborg/en/ombudsperson> (last visited Feb. 17, 2017).

such as operating refugee camps, temporarily assuming some governmental powers during transition periods in their member states, and providing support to states dealing with natural disasters.¹⁰⁷

The IMF faces a more complex situation than the WBG or the U.N. Given its macro-economic focus, its operations usually have society-wide impacts. It is harder to attribute actions that directly affect clearly identifiable groups of individuals to the IMF. Nevertheless, the IMF has also recognized that its expanding operations require it to be more responsive to the concerns of its various stakeholders.¹⁰⁸ It has created the Independent Evaluation Office partially to conduct studies that address these concerns.¹⁰⁹ While the Office does invite comments on its proposed work plan, it does not have a mechanism for formally receiving complaints or requests for investigations from affected parties.¹¹⁰ It also does not have the mandate to make findings regarding impacts on specific groups of individuals.¹¹¹

It is clear from this brief description of the public accountability situation in these three IOs that they appear to acknowledge that their relationship with the citizens of their member states is changing and that this has implications for their accountability. However, none of them seem willing to acknowledge that these changes might require adjustments in their immunity or require them to waive their immunity in certain cases.

III. IO OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW

The IOs' position on immunity is intriguing. All of them are subjects of international law, and, as a consequence, they are bound by whatever treaties they have signed and by customary international law.¹¹² To date, while the U.N. has sponsored a number of human rights treaties, none of these IOs are signatories to

107. See *What We Do*, U.N., <http://www.un.org/en/sections/what-we-do/> (last visited Feb. 17, 2017) (explaining that the U.N. is involved in a plethora of activities globally, ranging from building peace to humanitarian aid).

108. See *Making the IMF's Independent Evaluation Office (EVO) Operational*, INT'L MONETARY FUND (Aug. 7, 2000), <http://www.imf.org/external/np/eval/evo/2000/Eng/evo.htm> (stating that the creation of the EVO was to enhance the learning culture within the IMF, help build the IMF's external credibility, and promote greater understanding of the IMF's work).

109. INDEPENDENT EVALUATION OFFICE OF THE INT'L MONETARY FUND, <http://www.ieo-imf.org/ieo/pages/IEOHome.aspx> (last visited Feb. 27, 2017).

110. *Id.*

111. *Id.*

112. See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–91 (Dec. 20) (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”); see generally Jan Wouters & Philip De Man, *International Organizations as Law-Makers*, in RESEARCH HANDBOOKS ON THE LAW OF INTERNATIONAL ORGANISATIONS 190 (Jan Klabbers & Åsa Wallendahl eds., 2011) (“study[ing] the impact of international organizations on the adoption of treaties and the development of customary international law”).

any relevant human rights treaties.¹¹³ However, customary international law has evolved since these IOs were created. At the time of creation of the U.N., IBRD, and IMF, the international community had not adopted the Universal Declaration of Human Rights.¹¹⁴ Since its adoption in 1948, at least some of its provisions have become part of customary international law.¹¹⁵ Two related provisions that have attained this status are Article 8, which states that “everyone has the right to an effective remedy” in national tribunals, and Article 10, which states that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.”¹¹⁶ Not only are these provisions an expression of the practice of most states but they are recognized as legal obligation by most states.¹¹⁷ Almost all states have signed and ratified international treaties that enshrine these principles.¹¹⁸ They are incorporated into the International Covenant on Civil and Political Rights;¹¹⁹ the International Convention on Elimination of All Forms of Racial Discrimination;¹²⁰ the American Declaration on the Rights and Duties of Man;¹²¹ the African Charter on Human and Peoples’ Rights;¹²² the Arab Charter on Human Rights;¹²³ the European Convention for the Protection of Human Rights and Fundamental Freedoms;¹²⁴ the ASEAN Human

113. See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited Mar. 2, 2017) (listing only countries as parties to human rights treaties).

114. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

115. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 238 (2nd ed. 1999); Christian Dominice, *Morgan v. World Bank (Ten Years Later)*, in IBRAHIM F.I. SHIHATA, INTERNATIONAL FINANCE AND DEVELOPMENT LAW 155, 165 (2001).

116. UDHR, *supra* note 114, arts. 8, 10.

117. SHELTON, *supra* note 115, at 238; A.A. CANCADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW 4 (1986).

118. See, e.g., UDHR, *supra* note 114.

119. International Covenant on Civil and Political Rights art. 2, ¶ 3(a, b), art. 14, ¶ 1, Dec. 19, 1966, K.A.V. No. 2306, 999 U.N.T.S. 171 [hereinafter ICCPR] (including seventy-four signatories and 168 parties); see also *id.* General Cmt. 31, ¶ 15 (“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.”).

120. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *approved* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Mar. 23, 1976) (including eighty-eight signatories and 177 parties).

121. American Declaration on the Rights and Duties of Man art. XVIII, Apr. 30, 1948, K.A.V. 7225.

122. African Charter on Human and Peoples’ Rights art. 7, ¶ 1, *adopted* June 27, 1981, 27 I.C.J. 76, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (including all members of the African Union, fifty-four signatories and parties). This Charter is also known as the Banjul Charter. *Id.*

123. Arab Charter on Human Rights art. 12, May 22, 2004, 56 I.C.J. 57 (entered into force Mar. 15, 2008) (having thirteen of twenty-two member states signed and ratified).

124. Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 (including forty-seven member states). All Council of Europe member states are signatories and all new members are expected to ratify the convention at its earliest opportunity. *Id.*

Rights Declaration,¹²⁵ and the Vienna Declaration and Program of Action.¹²⁶ Moreover, almost all states of the world have incorporated the right to an effective remedy into their domestic laws.¹²⁷ There is no state that has persistently objected to this right being seen as a principle of customary international law.¹²⁸ Thus, it is clear that the right to an effective remedy is not only part of state practice, but it is also seen as being a legal obligation (“*opinio juris*”), thereby meeting the requirements for being a principle of customary international law.¹²⁹ The fact that the right to an effective remedy is recognized as a principle of customary international law means that it is a legally binding obligation on all subjects of international law, including IOs.

The requirement to provide an effective remedy calls into question the validity of IOs’ claim that actions in domestic courts should be dismissed because of their functional immunity, even if this assertion would result in complainants being denied an effective remedy. Nevertheless, IOs have received a largely supportive response from national courts, although the rationale has varied depending on the courts. European courts, while acknowledging that the IOs immunity should be respected, have stated that immunity needs to be balanced against the claimant’s right to an effective remedy.¹³⁰ They have held that IOs’ immunity should be respected provided they offer the claimants a reasonable alternative means for obtaining an effective remedy.¹³¹ In the case of employees of IOs, European courts have usually found that the existence of an administrative tribunal constitutes a reasonable alternative means for remedy.¹³² They have pointed out that these tribunals have independent judges, offering claimants a predictable and fair process and the possibility of a meaningful remedy.¹³³ The courts have stated that the remedy, to conform to the reasonable alternate means standard, does not have to be identical to what would be obtainable in a court.¹³⁴

125. Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, General Princ. 5, Nov. 18, 2012, http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (ten member states).

126. Vienna Declaration and Program of Action art. 27, July 12, 1993, UN. Doc A/CONF.157/23 (adopted by 171 states by consensus).

127. See M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 216–18, 229, 263–64 (2006) (discussing a victim’s right to an effective remedy).

128. See BROWNIE, *supra* note 13, at 562 (“The vast majority of States and authoritative writers would now recognize that the fundamental principles of human rights form part of customary or general international law, although they would not necessarily agree on the identity of the fundamental principles”).

129. See *id.* at 3, 6–10 (discussing *opinio juris* within the context of customary international law).

130. See *Waite & Kennedy v. Germany*, App. No. 26083/94, 1999 Eur. Ct. H.R. 1 (1999); *Beer & Regan v. Germany*, App. No. 28934/94, 1999 Eur. Ct. H.R. 1 (determining whether applicants had available reasonable alternative means to protect their rights under Convention).

131. *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 15; *Beer & Regan*, 1999 Eur. Ct. H.R. at 14.

132. *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 15; *Beer & Regan*, 1999 Eur. Ct. H.R. at 14.

133. *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 9; *Beer & Regan*, 1999 Eur. Ct. H.R. at 8.

134. See Hof ‘s-Gravenhage 28 september 2007, JAR 2007, 281 m.nt. P.J.M. von Schmidt

Courts in the U.S. have been much more respectful of IO immunity, based on the International Organizations Immunity Act (IOIA) and their own precedents.¹³⁵ These courts tend to find that, in the absence of guidance from Congress, they should continue to hold that the immunity granted by the IOIA is equivalent to what states had at the time of the enactment of the statute.¹³⁶ Courts in other countries also tend to be very respectful of IO immunity, although there are some exceptions in cases involving either employees of IOs or parties that have a contractual relationship with an IO.¹³⁷

IV. IO COMPLIANCE WITH THE RIGHT OF ACCESS TO AN EFFECTIVE REMEDY

IOs' international legal obligation to ensure access to an effective remedy raises three important questions. First, are there any parties that are excluded from the requirement of access to an effective remedy? Second, what qualifies as an "effective remedy"? Third, is any forum empowered to judge if an IO is meeting its obligation to provide access to an effective remedy? Each of these questions are discussed below.

A. *Are all IO stakeholders entitled to access to an effective remedy?*

An IO's stakeholders are its member states, employees, creditors, suppliers, consumers, consultants with which it has a contractual relationship, and those communities and individuals that are directly impacted by the operations of the IO or the projects that it helps support. In deciding if an IO meets its obligation to provide access to an effective remedy, it is necessary to consider each category of stakeholder separately.

IO member states are able to participate in the governance structures of an IO and in principle, can hold it accountable through those structures. Specifically, the member states of the U.N. all participate in the General Assembly and its various committees. All of the member states of the IMF and the WBG appoint a representative to the Board of Governors of each institution and are represented on the Board of Executive Directors of each institution.¹³⁸ This does not mean that each member state *de facto* has the same voice in the governance of an IO, but it does mean that, in principle, if a state feels aggrieved by the decisions or actions of

auf Altenstadt (Bertrand/European Patent Org.) (Neth.) (holding that it suffices that the IO provides comparable legal protection, implying less far-reaching review); Cour du Travail [Cour Trav.] [Labor Court] 4th ch. Sept. 17, 2003, JOURNAL DES TRIBUNAUX [JT] 2004, 617 (Belg.) (examining the internal procedure concerning administrative disputes within the IO in detail to judge whether it was fair and equitable legal process).

135. See, e.g., *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983); *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998); *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010).

136. See *Mendaro*, 717 F.2d at 610, 613–614; *Atkinsin*, 156 F.3d at 1340; *Brzak*, 597 F.3d at 112–113 (all upholding immunity of the IOs, citing the IOIA).

137. See AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS, 165 (2000) (providing examples of employment immunity).

138. U.N. Charter art. 9; IMF Articles of Agreement, *supra* note 28, at 1415; IBRD Articles of Agreement, *supra* note 30, at 158–72.

an IO, it can raise them and have them addressed by the governance bodies of the IO.

The employees of an IO are able to seek an effective remedy for their employment-related claims in the administrative tribunals of the IO.¹³⁹ The creditors, suppliers, and consultants of an IO are granted access to a remedy through their contracts with the IO.¹⁴⁰ Usually the contracts will entitle them to take the IO to arbitration if they are unable to satisfactorily resolve their grievance through negotiation.¹⁴¹ Similarly, the consumers of the services of an IO may be able to rely on contractual rights to resolve their disputes with the IO. For example, the WBG's loan agreements contain an arbitration clause.¹⁴² In the case of the U.N., provisions for dealing with disputes are contained in Status of Forces Agreements and in analogous agreements with those member states on whose territory it has operations.¹⁴³ The IMF maintains that most of its financial transactions with its member states are not based on contract and so the documentation for these transactions do not include dispute settlement provisions.¹⁴⁴ Any disputes that may arise are handled through negotiation or at the Executive Board level, where the Board member representing the member state or the member state itself will present its case in the Board discussion.¹⁴⁵

The one group of stakeholders that does not necessarily have access to an effective remedy are those non-state actors who do not have a contractual relationship with the IO. This group would include communities that claim that they have been harmed by World Bank-funded projects, groups that claim that they have been harmed by the conditionalities attached to IMF funding, and individuals and groups that claim that they have been harmed by the acts or omissions of the U.N. in its various operations. Under current arrangements, these groups cannot bring a claim against an IO in any domestic court unless either the IO waives its immunity or the court decides to strip the IO of its immunity.¹⁴⁶ Non-state actors'

139. August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 285 (2008).

140. *Id.* at 288.

141. *Id.* at 296.

142. See IBRD, GENERAL CONDITIONS FOR LOANS, § 8.04(a) (2012), http://siteResources.worldbank.org/INTLAWJUSTICE/Resources/IBRD_GC_English_12.pdf (“Any controversy between the parties to the Loan Agreement or the 28 parties to the Guarantee Agreement, and any claim by any such party against any other such party arising under the Loan Agreement or the Guarantee Agreement which has not been settled by agreement of the parties shall be submitted to arbitration by an arbitral tribunal as hereinafter provided (‘Arbitral Tribunal’).”).

143. G.A. Res. 45/595, ¶ 51, Model Status-of-Forces Agreement for Peace-keeping Operations (Oct. 9, 1990).

144. See generally JOSEPH GOLD, *THE LEGAL CHARACTER OF THE FUND'S STAND-BY ARRANGEMENTS AND WHY IT MATTERS* (1980).

145. *Review of the International Monetary Fund's Dispute Resolution System: Report of the External Panel*, INT'L MONETARY FUND (Nov. 27, 2001), <https://www.imf.org/external/hrd/dr/112701.pdf>.

146. See PRIVILEGES AND IMMUNITIES IN DOMESTIC COURTS, *supra* note 42, at 7–11 (discussing IO immunity from legal process).

own governments are unlikely to take up their case because, in most cases, they have either actively or passively supported the operation that has caused the problem. The existing international forums cannot accept these cases. Individuals and communities do not have access to the International Court of Justice.¹⁴⁷ The international forums that affected groups can access, such as international human rights bodies, are not empowered to hear claims directly against IOs because they are not signatories to the relevant treaties.¹⁴⁸ The one exception is the WBG, which has created independent accountability mechanisms, specifically to investigate claims that groups of individuals or communities harmed by the failure of the relevant institution in the WBG to comply with its own policies and procedures.¹⁴⁹ However, it is important to note that these mechanisms only have the power to make findings and, in the case of the CAO, recommendations based on their investigations.

The lack of effective remedial forums available to these individuals and communities means that, ironically, the one group of stakeholders that does not have access to an effective remedy are those IO stakeholders who are the intended beneficiaries of most IO operations. It is thus this group (hereinafter Non-Contractual Stakeholders) on which the remainder of this section will focus.

B. Defining an “effective remedy”

The customary international legal principle of a right of access to an effective remedy does not specify what qualifies as an effective remedy.¹⁵⁰ However, there are a number of court decisions and international declarations that suggest the criteria that should be taken into account in deciding if a person is being given an effective remedy. For example, the *Waite & Kennedy* case from the European Court of Human Rights states that all European citizens have a right to an effective remedy, and that unless IOs provide a reasonable alternative means to a court, the court may strip the IO of its immunity so that the court can hear the case.¹⁵¹ In subsequent cases, the European Court of Human Rights has provided some guidance on the criteria that should be looked at in determining what counts as a reasonable alternative means. The criteria are that the forum should be independent, impartial, fair, and the remedy should be meaningful.¹⁵² In these

147. “Only States may be parties in cases before the Court.” Statute of the International Court of Justice art. 34, ¶ 1, June 26, 1945, 9 Stat. 1055.

148. *Status of Ratification Interactive Dashboard*, *supra* note 113.

149. See *Network of Independent Accountability Mechanisms*, WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/Related%20Organizations.aspx> (last visited Feb. 27, 2017) (identifying systems within international financial institutions, in addition to WBG’s Inspection Panel, to which individuals may direct concerns and receive assistance).

150. SHELTON, *supra* note 117, at 85.

151. See, e.g., *Waite & Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (ser. A) at 11–12 (1999); *Golder v. United Kingdom*, App. No. 4451/70, 18 Eur. Ct. H.R. (ser. A) 14 (1975); *Beer & Regan v. Germany*, App. No. 28934/94, Eur. Ct. H.R. (ser. A) at 12; *Osman v. United Kingdom* App. No. 23452/94, 101 Eur. Ct. H.R. 40 (1998).

152. *Golder*, 18 Eur. Ct. H.R. at 14; *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 11–12; *Beer & Regan*, 1999 Eur. Ct. H.R. at 12; *Osman*, 101 Eur. Ct. H.R. at 40.

cases, the court has usually concluded that the IO offered a reasonable alternative means because the case involves employees and the IO's administrative tribunal satisfies the four criteria identified above.¹⁵³

The few non-employment or non-contractual cases in which the European courts have had to determine if an IO is providing a reasonable alternative means to a court deal with the sanctions regimes that the U.N. Security Council imposed following the attacks on the World Trade Center in New York in 2001.¹⁵⁴ However, the focus of these cases has been on the obligations of the European states in relation to the implementation of these sanctions regimes, rather than on the IO immunity issue.¹⁵⁵ Nevertheless, it should be noted that these decisions and their intimation that the U.N. was not offering claimants a fair hearing, contributed to the establishment of the U.N. ombudsman for dealing with sanctions-related cases.¹⁵⁶ The few other court decisions dealing with situations involving a tortious injury allegedly caused by an IO in the course of its operations have upheld the IO's immunity.¹⁵⁷ As a result, these cases do not provide any guidance on what would be a reasonable alternate forum for resolving these claims.

There are some other sources that can help enrich our understanding of the criteria to be used in assessing what constitutes a reasonable alternative remedy for non-contractual stakeholders. One such instrument, albeit non-binding, is the U.N. Guiding Principles on Business and Human Rights (UNGPs).¹⁵⁸ This is a useful comparison standard because it explicitly deals with alternative remedies to judicial forums.¹⁵⁹ It does this in the context of business activities, which are analogous to the operations of IOs in the sense that both involve projects, decisions, and activities that directly impact non-contractual stakeholders. The UNGPs also gain credence from the fact that at least two other sponsors of international norms for businesses—the Organization for Economic Co-operation and Development (OECD)¹⁶⁰ and the International Organization for

153. Beer & Regan, 1999 Eur. Ct. H.R. at 14–15; Waite & Kennedy, 1999 Eur. Ct. H.R. at 15.

154. C–402/05 P and C–415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-6351; *Al-Jedda v. United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. (2011); *Behrami & Behrami v. France*, App. No. 71412/01, Eur. Ct. H.R. (2007).

155. *Kadi & Al Barakaat Int'l Found.*, 2008 E.C.R. I-6351; *Behrami & Behrami*, 2007 Eur. Ct. H.R. 1.

156. August Reinisch & Christina Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administrative Justice System Within the United Nation*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 447–483 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2008).

157. *See, e.g.*, *Georges v. United Nations*, 84 F. Supp. 3d 246, 251 (S.D.N.Y. 2015); *Jam et al. v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 112 (D.D.C. 2016); *see also* AUGUST REINISCH, *supra* note 137, at 165–66 (providing examples of tort cases where immunity was upheld).

158. United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

159. *Id.*

160. Organisation for Economic Co-operation and Development, *OECD Guidelines for*

Standardization (ISO)¹⁶¹—have seen fit to incorporate the substance of the UNGPs into their own norms and standards for business conduct and they have influenced the performance standards of the International Finance Corporation (IFC)¹⁶² and the commercial bank's Equator Principles.¹⁶³ Pillar 3 of the UNGPs stipulates that companies should establish operational level grievance mechanisms as part of their human rights responsibilities.¹⁶⁴ The commentary to these Principles states that such mechanisms need to satisfy seven criteria in order to be considered meaningful and effective.¹⁶⁵ These criteria, which are set out in Principle 31, state that the mechanism must be legitimate, accessible, predictable, equitable, transparent, rights compatible, and a source of continuous learning.¹⁶⁶

There is considerable overlap between these criteria for identifying an effective remedy and the situation of an effective remedy in the IO context. They both require that the mechanisms are impartial, fair, and offer a meaningful remedy. In addition, given the fact that many of the claimants are likely to lack legal expertise, it is desirable that the mechanisms be easily accessible. Finally, in order to enhance confidence in their decisions, the mechanisms should be independent. In sum, this means that the criteria for determining the efficacy of the IO remedy could be: accessibility, impartiality, fairness, independence, and the meaningfulness of the remedy.

These overlaps in requirements for effective remedies mean that the test of the adequacy of any IO mechanism will be the extent to which the mechanism, wherever located, complies with the criteria set out above. Thus, the customary international law standard can be satisfied regardless of whether the remedy is obtained from an IO directly, or from some other international or domestic body.

The independent accountability mechanisms established by the WBG and the U.N. Development Programme purport to offer the relevant stakeholders a qualifying remedy but do not unequivocally meet the above criteria. They are accessible to the stakeholders who meet their jurisdictional requirement. Their procedures are only partially transparent because the complaining party knows what the procedures are, but they are not necessarily kept informed about what is happening at each step in the process.¹⁶⁷ The procedures are only partially fair because, while the complaining party is able to present information to support its

Multinational Enterprises (May 25, 2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

161. International Organization for Standardization, ISO 26000 Guidance on Social Responsibility (Nov. 1, 2010), <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>.

162. *Performance Standards on Environmental and Social Sustainability*, INT'L FIN. CORP.: WBG (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

163. EQUATOR PRINCIPLES (June 4, 2013), http://www.equator-principles.com/resources/equator_principles_iii.pdf.

164. Guiding Principles, *supra* note 158, at 31.

165. *Id.* at 34.

166. *Id.* at 33–34.

167. Operating Procedures, WORLD BANK: INSPECTION PANEL, <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf>; U.N. Dev. Programme, *supra* note 105.

claim and will be offered an opportunity to meet with the mechanism, it is not necessarily given an opportunity to respond to the evidence and arguments presented by the IO's management.¹⁶⁸ The mechanisms are not clearly impartial because their decision-makers, their Boards or their senior management, retain final decision making powers.¹⁶⁹ Moreover, it is not assured that the mechanism can provide the complainants with a meaningful remedy because they only have investigatory and/or advisory powers, and their findings and recommendations are non-binding.¹⁷⁰ The problematic nature of this situation is evident from the fact that there have been cases in the WBG where the Board has instructed the management to follow up on the findings or recommendations of the mechanism and correct the situation, but it has failed to do so, sometimes without any consequences for the management.¹⁷¹

C. Who can judge if the IO is giving an effective remedy?

It is not clear that a state, which is one subject of international law, has the power to sit in judgment over how another subject of international law, an IO, implements its customary international law obligation to provide an effective remedy.¹⁷² The effect of each state being able to determine for itself that an IO is meeting its international legal obligations could be to empower each state to interfere with the IO's operations. This could lead to states reaching mutually inconsistent decisions on how well the IO is meeting its international obligation and on what, if any, corrective action the IO needs to take to comply with this obligation. This situation would inevitably adversely affect the ability of the IO to perform its mandated functions. This situation would also be incompatible with the rationale for granting IOs' functional immunity. On the other hand, if the states cannot intervene to offer a reasonable alternative remedy to its citizens when they are harmed by IO actions, they may, in effect, be assisting an IO to violate its international legal obligations.

One way for the state, or at least its courts, to resolve this dilemma is to submit claims against an IO to the following test. Initially, they need to determine if the IO is offering any form of remedy to the claimant. If so, the court needs to decide if the remedy satisfies the criteria for an effective remedy, namely, that it is accessible, independent, impartial, fair, and offers a meaningful remedy. If the remedy offered by the IO satisfies all of these criteria, the courts should dismiss the claim. If it only satisfies some criteria, the court should determine if the imperfect remedy offered by the IO is capable of granting the injured party a

168. Operation Procedures; *supra* note 167; U.N. Dev. Programme, *supra* note 105.

169. Operation Procedures; *supra* note 167; U.N. Dev. Programme, *supra* note 105.

170. Operation Procedures; *supra* note 167; U.N. Dev. Programme, *supra* note 105.

171. Centre for Research on Multinational Corporations, *Glass Half Full? The State of Accountability in Development Finance* (Jan. 2016), <https://www.somo.nl/glass-half-full-2/>.

172. Cf. Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2034–35 (2013) (discussing the tension between foreign state immunity and the right to court access).

reasonable alternative level of relief to what a court could give. If the court determines that the IO's mechanism is able to offer reasonably comparable relief, it should respect the immunity of the IO and dismiss the case. If the court cannot make such a determination, it should accept the case and deny the IO's claim for immunity.

The proposed test thus protects both the rights of the injured party to an effective remedy and the immunity of any IO that is meeting its own international legal obligation to provide access to an effective remedy. It will only enable a court to intervene in cases where an IO is not offering a remedy that meets the basic criteria for effectiveness. An IO, therefore, can always preserve its immunity from domestic jurisdiction by ensuring that it offers all its stakeholders an effective remedy.

V. CONCLUSION

This article has argued that the doctrine of functional immunity needs updating. IOs, over time, have come to play a more extensive role in the affairs of their member states than their founders anticipated. In many states, they have in effect, if not intent or in form, become part of the policy-making process in the state. As a result, the doctrine of immunity that was developed to protect institutions from interference by their member states is no longer appropriate without adaptation. It should be adjusted to state that IOs should only have immunity from suit if they can demonstrate that they are offering an internationally legally compliant effective remedy to all their stakeholders. If IOs cannot satisfy this test, they should lose their immunity and the relevant court should hear the case against them.