

THE DEBATE ON ABSOLUTE AND LIMITED IMMUNITY: A CASE STUDY OF UNITED NATIONS

Dr. Kumari Nitu*

I. INTRODUCTION

Immunities and privileges have been bestowed on public officials since ages so that the independency and efficiency of their work could be ensured. It dates back to the year when the Treaty of Westphalia was signed in 1648 which concluded the Thirty Years' War. It established a whole regime of the concept of State as an independent political entity. It was further strengthened by the development of modern international law which recognized the status of State as a legal person.¹ The concept of sovereign equality of States became a buzzword and a reality. This sovereign equality of States was furthered by the bar of immunity. The imposition of this bar of immunity was seen as a means to prevent the subjection of one State to the adjudication of disputes in another States's court.² The International Court of Justice (ICJ) also had the opportunity to comment on the foundation of the principle of immunity in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*³, where it observed that 'the principle of inviolability of the persons of diplomatic agents and the premises of the diplomatic missions is one of the very foundations of the regime of conduct of relations between States.'⁴ At both international and national level, the courts have identified the basis of immunity in the principle of sovereign equality of States. The ICJ in the *Jurisdictional Immunities Case*⁵ reiterated the principle of sovereign equality of States which is stated under Article 2, paragraph 1 of the Charter of the United Nations⁶. The national courts on the other hand, have cited the Latin maxim *par in parem non habet imperium* which means an equal has no power over an equal which again highlights the principle of sovereign equality of States. The same approach of immunity has been bestowed on the international and regional organization created by States. This has become such a common practice that it has become part of customary international law. The court in USA have even invoked the writings of highly qualified publicists which is a source

* Assistant Professor, Central University of South Bihar, Gaya.

¹ Hazel Fox, "The restrictive rule of state immunity-The 1970s Enactment and its contemporary status" in Tom Ruys, Nicolas Angelet, *et.al.* (eds.), *The Cambridge Handbook of Immunities and International law* (Cambridge University Press, Cambridge, 2019).

² Lori Fisler Damrosch, "The sources of immunity law-between international law and domestic law" in Tom Ruys, *Ibid.*

³ Case concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*); Order, 12 V 81, International Court of Justice (ICJ), *available at*: <https://www.refworld.org/cases,ICJ,4023aaf77.html> (last visited on May 19, 2019).

⁴ Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 21(4) *The European Journal of International Law* 818 (2011). The organization either sends the Peace keeping forces or special representatives in the form of rapporteurs to control and report on the situations of areas relating to human rights violations.

⁵ Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment of February 03, 2012, I.C.J. Reports 2012.

⁶ The United Nations Charter, art. 2, para. 1, *inter alia* states: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members".

of international law under the Charter of ICJ. For example, in the earliest case of *The Schooner Exchange v. MCFaddon*⁷, Chief Justice Marshall paid close attention to international authorities including Vattel and Bynkershoek in upholding the immunity of a public armed ship which had entered a US port in bad weather.⁸

II. IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS: A LINE OF DISTINCTION

The officials and key position holders of many International Organizations (IOs) and of the Governments of country are provided with diplomatic immunities and privileges so that they can carry out their work without any fear of prosecution. However, the rationale for granting immunity to international organizations is totally different from the object underlying State immunity or diplomatic immunity.⁹ The grant of privileges and immunities to international organization and their staff was based on *functionalism* which was meant to preserve and ensure the independence of the organization and to enable it to fulfill its functions, which could otherwise be compromised by unwarranted interference from the host State.

On the other hand, State immunity is based on the *par in parem non habet imperium principle*.¹⁰ This *par in parem* principle does not apply to immunity of international organizations. This principle of sovereign equality of States has no similar effect on IOs because IOs are neither sovereign nor equal and are fundamentally different from States. They have no territory and are generally weaker and more vulnerable than States. It is because of this reason that IOs need immunity protection even from States. It is based on the principle of functional necessity that IOs need immunity to perform their function.

Many scholars such as Blokker have debated the concept of absolute immunity of IOs. He contends that:

*“...the concept of immunity of international organization does not mean that they are immune from any jurisdiction. Rather it means that they enjoy immunity from the jurisdiction of national courts of their members. From the early days in which immunity rules became part of the law of international organizations, it has been recognized that such immunity should not leave complainant without any remedy”*¹¹

III. IMMUNITY OF REGIONAL ORGANIZATIONS

At the organizational level, let us have a look at the provision with respect to some of the major regional organization and then we will proceed to the debate of use and misuse of immunity under the international legal regime.

⁷ *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (U.S. Mar. 02, 1812).

⁸ *Supra* note 2 at 23.

⁹ Eric De Brabandere, “Measures of Constraint and the Immunity of International Organisations” in Tom Ruys, *supra* note 1 at 328.

¹⁰ Neils Blokker, “Jurisdictional Immunities of International Organizations- Origins, Fundamentals and Challenges” in Tom Ruys, *Id.* at 185.

¹¹ *Id.* at 186.

One of the biased approaches commonly found under legal scholarship is inadequate focus on the regional organizations in the studies of international organizations.¹² Regional organizations are defined as international organizations whose membership is restricted to States of a particular global region. Most of the regional organizations were founded after 1945 and hence were inspired by the immunity granted to the UNO in order to allow the regional organizations to carry out its task without any obstruction like the UNO. Regional organizations and sub regional organizations, hence, in matters relating to immunity are guided by the Convention on the Privileges and Immunities of United Nations, and the Convention on the Privileges and Immunities of the Specialized Agencies in addition with the headquarters agreements concluded between the organization and the host State.¹³

Regional organizations such as the Council of Europe (CoE) in its Statute refers to the immunities and privileges of the organization in its Article 40.¹⁴ African Union (AU) does not entail a provision on the immunities and privileges of the organization its Constitutive Act. It relies on the General Convention on the Privileges and Immunities of the Organization of African Unity¹⁵ which is largely based on the UN Convention on Privileges and Immunities.¹⁶ In addition, specific rules on immunities can be found in the 1980 Additional Protocol to the OAU General Convention on Privileges and Immunities.

The Organization of American States (OAS) which is considered as a Pan-American Organization aiming to bring together States in both North and South America is regulated by the OAS Charter with respect to immunities clause.¹⁷ Asia, unlike other global regions is characterized by a singular lack of regional organizations as compared with Europe, the Americas and Africa. However, there are some objective specific sub regional organizations such as the Asia Pacific Economic Cooperation (APEC), Association of South East Asian Nations (ASEAN) etc. APEC cannot be considered as a full-fledged sub regional organization because even Canada and USA are members of it. ASEAN on the other hand is a well-known sub

¹² Ramses A. Wessel, “Jurisdictional Immunity of Regional Organisations- Substantive Unity in Instrumental Diversity?” in Tom Ruys, *supra* note 1 at 214.

¹³ *Id.* at 216.

¹⁴ The Statute of the Council of Europe, 1949, art. 40, *inter alia* states: “The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions” [See <https://rm.coe.int/1680306052> (last visited on May 19, 2019); also see Ramses A. Wessel, *Id.* at 234].

¹⁵ The General Convention on the Privileges and Immunities of the Organization of African Unity, art. IV(2), *inter alia* states: “The Organization of African Unity shall have the right to use codes and to despatch and receive its official correspondence, either by courier or in sealed bags which shall have the same immunities and privileges as diplomatic couriers and bags” [See https://au.int/sites/default/files/treaties/7760-treaty-0001_-_general_convention_on_the_privileges_and_immunities_of_the_oau_e.pdf (last visited on May 19, 2019)].

¹⁶ *Supra* note 12 at 219.

¹⁷ Charter of the OAS, art. 103, states that: “The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes” [See Organization of American States (OAS), Charter of the Organisation of American States, April 30, 1948, *available at*: <https://www.refworld.org/docid/3ae6b3624.html> (last visited on May 19, 2019)].

regional organization. Its legal personality was acknowledged by the 2007 Asian Charter. However, the provisions with respect to its immunities and privileges were codified much later in a separate 2007 Agreement on the Privileges and Immunities of the ASEAN.¹⁸ This agreement again is largely based on the UN Convention.

IV. IMMUNITY OF INTERNATIONAL ORGANIZATIONS: THE CASE OF UNITED NATIONS

The immunity to International Organizations consists of two basic elements: First, claims against international organizations are not submitted before any domestic tribunal or court because of the existence of immunity from jurisdiction of international organizations. Second, international organizations' immunity from execution which means an exemption from pecuniary obligation or liability.¹⁹

The prominent international organizations such as the International Criminal Court (ICC), United Nations Organizations, International Organization for Migration, International Renewable Energy Agency²⁰ etc. have in their own Statutes incorporated the provisions regarding immunity. For instance, Article 3 of the Agreement on the Privileges and Immunities of ICC states that the Court enjoys 'such privileges and immunities as are necessary for the fulfillment of its purpose'.²¹ Similarly, Article 23 (1) of the Constitution of the International Organization for Migration provides that 'the Organization shall enjoy such privileges and immunities as are necessary for the exercise of its functions fulfillment of its purpose'.²²

The United Nations Organization provides for such immunities in Article 105 of the Charter. The protection covers not only the organization but also its officials and representatives of its members.²³ A detailed outline dealing with immunities and privileges of UN is also found

¹⁸ Agreement on the Privileges and Immunities of the ASEAN, 2007, art. 3, *inter alia* states: "ASEAN and the property and assets of ASEAN 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" [See <https://asean.org/wp-content/uploads/2021/09/Agreement-on-Privileges-and-Immunities.pdf> (last visited on May, 19, 2019)].

¹⁹ *Supra* note 9 at 327.

²⁰ Agreement on Privileges and Immunities for the International Renewable Energy Agency, 2012, *available at*: https://www.irena.org/-/media/Files/IRENA/Agency/About-IRENA/Assembly/Third-Assembly/A_3_13_Privileges-and-Immunities.pdf (last visited on July 10, 2019).

²¹ Agreement on the Privileges and Immunities of ICC, *available at*: <https://www.icc-cpi.int/news/agreement-privileges-and-immunities-icc> (last visited on July 12, 2019).

²² Constitution of the International Organization for Migration, *available at*: <https://www.iom.int/iom-constitution> (last visited on April 12, 2019).

²³ The United Nations Charter, art. 105 *inter alia* states:

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

in Convention on Privileges and Immunities of UN.²⁴

The immunities and privileges extend to both ad hoc and resident representatives and also to persons who are on mission or are doing in house jobs in the host country. The immunity and privileges extend to immunity from arrest, inviolability for all papers and archives, use of codes, exemption from immigration restrictions, facilities in respect of currency restrictions and baggage etc. but they have no right to claim exemption from custom duties on goods imported or from excise duties or sales taxes.²⁵ The UN peace keeping forces or experts on mission which are sent on the soil of the member state cannot be prosecuted for anything done in course of their business. If such a protection is not provided, then it will be impossible for them to accomplish the mission. Who would like to bear the pain of doing the work and then be ready for the prosecution? The immunities provide them security. The immunities continue not only till the mission last but after that also. The scope of immunity was extended so that the person in question should not be brought to the jurisdiction of the host state after they are over with the designated work of their mission. They continue to enjoy the immunity until their mission is terminated either by the sending or the receiving state.

With respect to UN, it can either appoint a member from the home country or can send its representatives to carry out its assigned objectives in the host country. The immunity will extend to both categories, so there is no concept of *extra-territoriality* as in the case with diplomatic envoys. It becomes all the more important to protect them with such shield as they work in all the corners of the world protecting the realm of human rights and fighting for peace and stability. The organization either sends the Peace keeping forces or special representatives in the form of rapporteurs to control and report on the situations of areas relating to human rights violations.²⁶ The approach of governments of all the countries of the world is not the same. Some are running in an autocratic manner and some are riddled in conflict zones. The UN officials visit all those countries and carry out detailed report. It is hence necessary that they are saved from the wrath of governments so that they can come out with a true report of the situations.

Despite of clear provisions relating to immunities and privileges laid down in both UN charter and UN Convention on privileges and immunities there have been cases where the officials have been questioned and brought to the court for their act (done outside the course of employment). The Secretary General has often come to their rescue by declaring that the officials were covered under the immunity clause. The immunity and privilege are given to ensure the independence of work which is free from any fear or pressure from the host country.²⁷ However, the immunity which the UN officials, representatives, experts, and peace keeping officials enjoy by virtue of being employee of UN and to carry out specific tasks has in some cases did not have the smooth journey of unfettered privilege. There have been instances where they have been

²⁴ UN General Assembly, Convention on the Privileges and Immunities of the United Nations, February 13, 1946, available at: <https://www.refworld.org/docid/3ae6b3902.html> (last visited on May 19, 2019).

²⁵ Leo Gross, "Immunities and Privileges of Delegations to the United Nations" 16(3) *International Organization* 48, 52 (1962), available at: <http://www.jstor.org/stable/2705179> (last visited on July 20, 2019).

²⁶ Anthony J. Miller, "Privileges and Immunities of United Nations Officials" 4 *International Organisation Law Review* 169 (2007).

²⁷ Rosemary Rayfuse, "Immunities of Human Rights Special Rapporteurs: Who Decides?" 7(1) *Australian Journal of Human Rights* 169 (2001).

deliberately troubled by the host states. However, in all the cases it was finally established that they had the immunity.

The immunity saves them from the long and lethargic process of trial prevalent in each member state. Moreover, it was also contended that it is very undesirable on the part of the courts to determine the legality of the acts of the United Nations because every court has different modes of interpretation. It also leaves the organization at the mercy of the countries hence impairing their work. The organization has its own system to check the working of its officials posted anywhere in the world. The United Nations reserves the right to waive the immunity of its officials where it exceeds its limits.²⁸

Immunity to the United Nations and its officials is provided only within the territorial limits of the member states and only with respect to their work.²⁹ Anything done out of the course of employment stresses the organization to put the obligation of waiving the immunity on the member state. The Convention deals with such cases in Article IV section 14 which states the provision of 'waiver'.³⁰ Hence, it becomes the prerogative of the member state and not of the Organization to decide.³¹ Member states who are not party to the Convention are governed by provision of the Charter.³²

V. LIMITATIONS: *JUS GESTIONIS* V. *JUS IMPERII* ANALOGY

An international organization enjoys those immunities that are 'necessary for the fulfillment of its purpose.' Though the phrase does not contain any explicit limitation of immunity but can it be impliedly understood that if the organization works beyond that purpose or if they fail to fulfill the objective then the cover of immunity will have its limitation?

The mothers of Srebrenica case manifest a potential example where it was alleged that UN failed to fulfill its purpose. The case represents the story of 6000 women who lost their family members during the Srebrenica genocide in 1995.³³ The Mothers of Srebrenica was an

²⁸ William C. Gordon, "International Law: Immunity of United Nations Representative from Jurisdiction of Municipal Courts" 47(7) *Michigan Law Review* 1025,1026, available at: <http://www.jstor.org/stable/1284396> (last visited on May 04, 2019).

²⁹ As stated in Article 105 of the UN Charter that Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

³⁰ Section 14 of the General Convention states that privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently, a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

³¹ Yu-Long Ling, "A Comparative Study of The Privileges And Immunities Of United Nations Member Representatives And Officials With The Traditional Privileges And Immunities Of Diplomatic Agents" 33(1) *Washington and Lee Law Review* (1976), available at: <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2225&context=wlulr> (last visited on June 11, 2019).

³² Ehrenfeld Alice, "United Nations Immunity Distinguished From Sovereign Immunity" 52 *International Law and the Political Process* 88, 94 (April 24-26, 1958), available at: <http://www.jstor.org/stable/25657402>. (last visited on June 08, 2019).

³³ *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Appl. No. 65542/12, ECtHR, June 11, 2013 (hereinafter referred to as 'Mothers of Srebrenica').

NGO who fought for the rights of the victims. The NGO contended that since UNPROFOR (UN protection force) had the responsibility to protect them, the genocide proved that they failed in their responsibility. Hence, they brought a suit against UN and asked for compensation.³⁴ The case centred on the July 1995 genocide in which the Safe Haven of Srebrenica in Bosnia and Herzegovina was attacked by Bosnian Serb forces resulting in the death of approx. 10,000 people.³⁵ Members of the Dutch battalion working under the UN command responsible for the safeguarding of the enclave were completely overturned by the forces of General Mladic.

The case went on for hearing on 10 July 2008 and the Dutch court citing the immunity provisions of the UN refused to entertain the case against the organization. The matter was then brought to the European Court of Human Rights (ECtHR) contending the violation of right to bring a claim³⁶ as the case was dismissed by the Dutch court. The ECtHR though entertained the petition at the first instance citing absence of alternative means to settle the dispute could not grant relief to the petitioners holding that the UNPROFOR were covered under the protection of the immunity clause.³⁷

Also in Haiti Cholera Case, the question of accountability of UNPKF (UN peacekeeping forces hereinafter referred to as ‘peacekeepers’) and its role in outbreak of cholera in the earthquake effected Haiti in 2010 was raised. In this case UN peace keeping forces who were previously deployed in cholera affected Nepal were called on to provide their services in earthquake hit regions of Haiti.³⁸ The organization by allowing the peacekeepers without any medical screening committed an act of gross negligence due to which cholera broke out in Haiti too.³⁹ As a consequence, more than 8000 people were killed due to the epidemic.⁴⁰ Cholera was unheard of for over a period of 100 years in Haiti but the 2010 relief work by UN brought more destruction than construction. Even though there were clear evidence for such negligence, United Nations declined to take any responsibility for its act.⁴¹ However, in December 2012, Secretary-

³⁴ Maria Irene Papa, “The Mothers of Srebrenica Case before the European Court of Human Rights United Nations Immunity versus Right of Access to a Court” 14 *Journal of International Criminal Justice* 893, 896 (2016).

³⁵ Selma Leydesdorff, “Stories from No Land: The Women of Srebrenica Speak Out” *Human Rights Review* (April- June 2007), available at: <https://link.springer.com/content/pdf/10.1007%2Fs12142-007-0005-7.pdf> (last visited on April 20, 2019).

³⁶ The right is laid down in article 6(1) of ECHR which states that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

³⁷ Maria Irene Papa, *supra* note 34 at 896.

³⁸ Kristen E. Boon, “The United Nations as Good Samaritan: Immunity and Responsibility” *Chicago Journal of International Law* 341, 342 (2016).

³⁹ Farhan Haq: “Spokesman for U.N. Secretary-General Ban Ki-moon and a 2011 study by the U.S. Centre for Disease Control and Prevention admitted that U.N. peacekeepers from Nepal were the possible cause of introduction of cholera to Haiti” (See Anastasia Moloney, “U.S. judge upholds U.N. immunity in Haiti cholera case” *Health News*, Aug. 19, 2016, available at: <https://www.reuters.com/article/us-haiti-cholera-idUSKCN10U1H6> (last visited on July 07, 2019).

⁴⁰ *Ibid.*

⁴¹ Felix Boos, “The Haiti Cholera case – Limits to the Immunity of the United Nations from Domestic Jurisdiction?”, available at: http://studzr.de/medien/beitraege/2015/1/pdf/StudzR-WissOn_2015-1_Boos_Haiti_Cholera_case.pdf. (last visited on July 07, 2019).

General Ban Ki-moon announced a \$2.27 billion initiative to help eradicate cholera in the impoverished Caribbean nation.⁴²

Similarly, for instance, in some cases the UN officials have gone out of their course of employment and committed wrongs which have brought defamation to the organization. The acts committed by UNPKF in Central African Republic shows that such acts were completely out of their functional domain and added to the misery in the affected regions.⁴³ Similar allegations were made in Burundi, Ivory Coast, East Timor, Congo, Cambodia, and Bosnia as well.⁴⁴ Due to the acts there have been strong resentment that United Nations should take some responsibility of the act of its officials which has been done outside the course of employment.

Considering the huge number of resentments, the UN General Assembly and Security Council (SC) took certain measures to tackle the issue. The matter was first taken up by the General Assembly (GA) in its resolution A/RES/59/300 adopted on 30 June 2005 wherein it affirmed the need for the Organization to adopt without delay a comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations.⁴⁵

In tandem with the succeeding resolutions by the GA requesting the Secretary General (SG) to prepare a report and suggest recommendations, the SG came up with various reports from time to time, the recent one being 2018 submitted to the GA under resolution A/72/751 on 15 February 2018.⁴⁶ 11 The measures suggested by SG ways back to 2009 wherein it suggested a strategy to deal with the problem. It was submitted as GA res. A/64/176 on 27 July 2009 titled “Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel” which tended to ensure that victims of sexual exploitation and abuse by United Nations staff and related personnel receive appropriate assistance and support in a timely manner and in the form of medical care, legal services, support for psychological and social care and immediate material care, including food, clothing and shelter, as necessary.⁴⁷ The Security Council further adopted resolution 2272 on 11 March 2016 wherein it emphasised that, “...*sexual exploitation and abuse by United Nations peacekeepers undermines the implementation of peacekeeping mandates, as*

⁴² UN 'immune' from Haiti cholera lawsuit, *Al Jazeera*, Jan. 10, 2015, available at: <https://www.aljazeera.com/news/americas/2015/01/un-immune-from-haiti-cholera-lawsuit-201511042941667258.html> (last visited on May 19, 2019).

⁴³ Marie Deschamps, Hassan B. Jallow, *et.al.*, “Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic” (Dec. 17, 2015), available at: <http://www.un.org/News/dh/infocus/cenafrirepub/Independent-Review-Report.pdf> (last visited on June 06, 2019).

⁴⁴ The U.N. sex-for-food scandal, *The Washington Times*, available at: <https://www.washingtontimes.com/news/2006/may/9/20060509-090826-9806r/> (last visited on June 06, 2019).

⁴⁵ A/RES/59/300, “Comprehensive review of a strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations”, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/300 (last visited on July 01, 2019).

⁴⁶ A/72/751, “Special measures for protection from sexual exploitation and abuse: Report of the Secretary-General” (Feb. 15, 2018), available at: <https://undocs.org/en/A/72/751> (last visited on March 15, 2019).

⁴⁷ A/64/176, “Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel”, available at: <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/secretary-generals-reports> (last visited on April 07, 2019).

well as the credibility of United Nations peacekeeping...” and urged “...all Member States to take concrete steps aimed at preventing and combating impunity for sexual exploitation and abuse by members of United Nations peace operations.”⁴⁸

The international organization enjoy absolute immunity both in cases of immunity from jurisdiction and immunity from execution. Even though there have been reported incidents of alleged misuse of power by the officials of prominent IOs such as the UN, much less has been said and done to rectify the damage. The least that was expected since the misuse came to light was to at least acknowledge the wrong. The draft article on state responsibility entails apology as one of the means of reparation.⁴⁹

The divide between acts *jure imperii* and *jure gestionis* is inextricably linked with the development of the rationale and rules on State immunity especially with the emergence of the call for restrictive immunity and the demise of the absolute immunity.⁵⁰ As there have been demands for State accountability for human rights and other international law violations, similar has been the demand in context of international organizations as well to exempt their wrong doings from the scope of immunity.

The absolute immunity grants a blanket cover to all acts of the entity concerned whereas the restrictive doctrine looks at the nature of the work and then decides the immunity. In due course of time, the discussion was supplemented by the division of sovereign and non-sovereign acts.

However, the category of non-sovereign acts (*acta jure gestionis*) is not about exceptions to the category of *acta jure imperii*. Nor has the restrictive doctrine developed as a pattern of exceptions from any pre-existing general and absolute rule on immunity. Instead, the restrictive rule has emerged as an alternative to, if not as a consequence of, the wholesale abolition of the absolute immunity rule as a general standard. This has amounted to replacing one standard by another, not to one standard evolving into another.⁵¹

The analogy which the author is trying to draw here is within the functional limit as analogous to the sovereign acts (*acta jure gestionis*) and outside the functional limits as similar to non- sovereign acts (*acta jure imperii*) of the States. In addition, the distinction between sovereign and non- sovereign acts has to be based on legal and normative background. The acts can be distinguished on the basis of their purpose, motive, context or nature.

VI. UNDERSTANDING *RATIONE PERSONAE* AND *RATIONE MATERIAE* IN CONTEXT OF UN

⁴⁸ UN Security Council, SC Res 2272, SCOR, UN Doc S/RES/2272 (2016) on sexual exploitation and abuse by United Nations peacekeepers, available at: <https://www.refworld.org/docid/56e915484.html> (last visited on May 12, 2019).

⁴⁹ Richard Bilder, “The Role of Apology in International Law and Diplomacy” 46(3) *Virginia Journal of International Law* (Spring 2006), University of Wisconsin Legal Studies Research Paper No. 1028, available at: <https://ssrn.com/abstract=932609> (last visited on May 02, 2019).

⁵⁰ Alexander Orakhelashvili, “Jurisdictional immunity of States and General International Law- Explaining the *Jus Gestionis v. Jus Imperii* divide” in Tom Ruys, *supra* note 1 at 106.

⁵¹ *Id.* at 109.

Immunity *ratione materiae* is attached to the functions of the official, while immunity *ratione personae* relates to the position of the official. These are immunities of State officials under international law but since the immunity clause of international organizations have developed from the concept of immunity to the States, reference can be made to these two maxims in context of international organizations as well.

The ‘Mazilu’⁵² and ‘Cumaraswamy’⁵³ cases are good examples of *ratione materiae* while the Ranallo case adequately represents *ratione personae*.

In ‘Mazilu’ case the cause of dispute of the case was the applicability of Article VI, section 22, of the Convention on The Privileges and Immunities of The United Nations, 1989.⁵⁴ The parties to the case were United Nations and the Government of Romania. The case involved the immunity question of Mr. Dumitru Mazilu who was appointed as a special rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities in Romania. Despite of continuous efforts from UN to reach the rapporteur and for submission of the report, the message did not reach. The report was supposed to be submitted in 1986 but no whereabouts of Mazilu were heard until 1988. Mr. Mazilu somehow managed to inform the under-Secretary General of human rights that he has not received the communication of the centre. He also informed that he was also forced to retire from the government posts he was holding and was not allowed to travel to the office of the commission. Not only this, he and his family were also being pressurized so that he can voluntarily decline the submission of the report. The sub commission then requested the Secretary General to establish contacts with the Romanian government to find about the whereabouts of Mr. Mazilu. The Romanian government on the other hand instead of cooperating alleged that any investigation carried out in Bucharest will be considered as an intervention in the internal affairs of Romania. Unfettered by the statement, the under Secretary asked the Romanian government to cooperate. The issue came up to International Court of Justice (ICJ) when the Romanian government declined to recognize the “expert” status of Mr. Mazilu and held that the convention on privileges and immunities apply only when the person on mission travel in respect of its mission and not otherwise. The court interpreted the meaning of the term mission and held that a person can be on mission irrespective of the fact that whether he travels or not. It was also held that the immunities are provided to the person on mission in the interest of the organization and such persons on mission are provided with certain independency so that they can carry out their effectively and this is the essence of the privilege clause in the convention. And this independence should be respected by all states including state of nationality and state of residence.

⁵² International Court of Justice (advisory opinion), Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, *available at*: <https://www.icj-cij.org/en/case/81> (last visited on May 01, 2019).

⁵³ International Court of justice (advisory opinion), Difference relating to immunity from legal process of a special rapporteur of the commission of human rights, *available at*: <https://www.icj-cij.org/en/case/100> (last visited on May 02, 2019).

⁵⁴ *Supra* note 52.

In the 'Cumaraswamy' case, the issue involved the immunity of a special rapporteur of the commission of human rights from legal process.⁵⁵ The parties to the case were the United Nations and the Malaysian government. Mr. Cumaraswamy, a Malaysian jurist was appointed as the special rapporteur to inquire into the independence of judges and lawyers in Malaysia. Mr. Cumaraswamy in its findings reported the instances of involvement of corporate sector in the judiciary which affected the impartiality of the judiciary. The lawyers and the people from the corporate sector filed defamation case against the rapporteur claiming the report to be malicious and false. The district court declined to give any relief citing that he was not covered within the immunity clause. The Secretary General conveyed a message to the Malaysian Government that Mr. Cumaraswamy was an expert on mission and was covered within the immunity clause. But the Malaysian government did not convey it to the Malaysian court. When the matter was brought to the International Court of Justice, it decided that the special rapporteur on UN mission was within the immunity provisions and hence no case lies against him.

Ranallo case was the first case where the US court had the opportunity to analyze the immunity provision of an UN employee.⁵⁶ Ranallo was an employee of the United Nations organization and was driving a car for UN business purpose and was at the time accompanied by the Mr. Trygve Lie, Secretary-General of the Organization. He was charged for violation of speed laws of the Westchester County Park Commission. The matter was brought to the City court of New Rochelle. It was contended on the part the defendant that since he was an employee of the UN, he was covered under the immunity clause and hence was liable to be released. The court, however, did not release him instantly and ordered for the trial and ordered that the decision of the fact that whether he was covered under the immunity or not can only be determined after the trial.⁵⁷ The temporary order upheld the rule of natural justice and maintained the ethos of equality of law. However, on the other hand it also took notice of the fact that America was not party to the General Convention, so whether the immunity can be provided by it was also a question to be decided.

The UN employees are accorded immunity only in the territory of those member parties which are either party to the General Convention or to the UNO. America at the time of the incident was not party to the General Convention. USA though voted in favour of the United Nations convention on privileges and immunities but did not become a party to it. However, USA had the International Organization Immunities Act, 1945 in place which was enacted to extend the provision of immunities to international organizations as were provided to diplomatic envoys. Under the act USA will grant immunities to those organizations only to which it is a member.⁵⁸ Hence, Ranollo was granted immunity taking into consideration the Immunities Act, 1945 and Article 105 of the Charter.⁵⁹

⁵⁵ *Supra* note 53.

⁵⁶ David Monroe Geeting, "Privileges and Immunities" 37(6) *Journal of Criminal Law and Criminology* 480, 483 (1947), available at: <http://www.jstor.org/stable/1138959> (last visited on July 19, 2019).

⁵⁷ Lawrence Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case" 41(3) *The American Journal of International Law* 555, 556 (July, 1947).

⁵⁸ Lawrence Preuss, "The International Organizations Immunities Act" 40(2) *The American Journal of International Law* 332, 345 (1946), available at: <http://www.jstor.org/stable/2193194> (last visited on June 18, 2019).

⁵⁹ *Supra* note 31 at 556.

The other prime objective is also to assert that no member state may hinder in any way the working of the organization or take any measure which can increase the financial liability of the organization.⁶⁰ Moreover, it would be a serious burden if the organization has to defend itself in the local courts of the diverse countries in which it operates or maintains an office. For instance, the working of the United Nations Relief and Work Agency (UNRWA)⁶¹ for Palestine has suffered great difficulty due to the numerous suits filed in different countries where the agency has been operating and recruiting employees.⁶² In defence, the agency repeatedly insisted on its international character and immunity granted to it. The suits hindered the effective working of the relief programme. The courts in Lebanon, Jordan, Syria, and Egypt entertained actions against the agency.⁶³ Though the courts have acknowledged and accepted the immunity provision, the acceptance has been slow accompanied by the long and lethargic court proceedings. In many cases the ministries had to intervene and recognize the immunity given to the officials. The works carried on by United Nations cuts across national borders.

In view of this, it becomes all the more essential that the United Nations official should be provided with adequate immunity so that they can complete the work assigned to them.

VII. WAIVERS OF JURISDICTIONAL IMMUNITY

An understanding of the immunity provisions outlines some basic principles of immunity which are as follows:

- a) Functional necessity is the basis of immunity
- b) Organizations can waive immunity

However, the immunity that is enjoyed by the international organizations is absolute in practice and the immunity is rarely waived. For instance, even if there has been a waiver of immunity from jurisdiction, there has to be a second waiver of immunity from execution which is impossible to achieve. So, technically the organizations and its staff/experts/employees end up having absolute immunity having no obligation towards the victim. Section 2 of the Convention on the Privileges and Immunities of the United States, after providing that '*the United Nations, its property and assets... shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity*', adds the following final clause: '*It is, however, understood that no waiver of immunity of waiver shall extend to any waiver of execution*'.

The persons entitled to immunities and privileges under the General Convention enjoy it from the moment they enter the premises of other state. Immunity to the United Nations and its

⁶⁰ *Supra* note 32.

⁶¹ The agency was established in 1949 by a resolution of General Assembly to carry relief and works programmes for the Palestine refugees. The Governments concerned were called upon to accord to the Agency all privileges, immunities, exemptions and facilities necessary for the fulfilment of its function [See William Dale, "UNRWA: A Subsidiary Organ of the United Nations" 23(3) *The International and Comparative Law Quarterly* 579, 581 (1974), available at: <http://www.jstor.org/stable/757888> (last visited on May 14, 2019).

⁶² *Ibid.*

⁶³ *Ibid.*

officials is provided only within the territorial limits of the member states and only with respect to their work.⁶⁴ Anything done out of the course of employment stresses the organization to put the obligation of waiving the immunity on the member state. The Convention deals with such cases in Section 20 which reads as follows:

*“...Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.”*⁶⁵

In addition, abuse of immunities by UN officials can also be tackled by separate agreement between the organization and member states. In same context, Section 13 of the United Nations Headquarter Agreement with United States of America, gives USA the right to require an official of the United Nations or a representative of a member government to leave the territory of the United States in case of abuse of privileges in matters outside official duties.⁶⁶ Under the headquarters agreement the right to require a representative to leave the United States is designed to protect the United States against the abuse of privileges and immunities which are performed outside the activities.⁶⁷

The matter has been much debated and discussed within the realm of UN General Assembly as well. In its resolution A/RES/74/181 of 27 December 2019, the GA raised concerns about this matter with the caveat that the “the present resolution is without prejudice to the privileges and immunities of United Nations officials and experts on mission and the United Nations under international law”.⁶⁸ The objective is to bring harmony and balance between the allegations against UN officials and the original intent of the Charter of the United Nations which states that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, without due process. However, the allegations if not investigated and in light of available evidence, if not prosecuted, would create the negative impression that United Nations officials and experts on mission operate with impunity. Hence, it strongly urged States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under

⁶⁴ *Supra* note 29.

⁶⁵ *Supra* note 30.

⁶⁶ United Nations Headquarters Agreement, 42(2) *The American Journal of International Law* 445, 447 (1948), available at: <http://www.jstor.org/stable/2193692> (last visited June 19, 2019).

⁶⁷ *Ibid.*

⁶⁸ A/RES/74/181, “Criminal accountability of United Nations officials and experts on mission” (Dec. 27, 2019), available at: <https://undocs.org/en/A/RES/74/181> (last visited on June 19, 2019). The General Assembly has been reiterating the issue of misuse of immunity by its experts on mission since 2005; for more details please visit, <https://www.un.org/en/sections/documents/general-assembly-resolutions/index.html> (last visited on June 19, 2019).

international law, and in accordance with international human rights standards, including due process.

It also requested the Secretariat to prepare a report in this regard and urges the Member States to also impart them with due training that persons who serve in that capacity should meet high standards in their conduct and behaviour and be aware that certain conduct may amount to a crime for which they may be held accountable. As requested by the resolution, the SG submitted its report at the 73rd session of the GA in which it provided a general overview of the information received from Member States since 2007 regarding the establishment of jurisdiction over their nationals whenever they serve as United Nations officials or experts on mission.⁶⁹

VIII. CONCLUSION

The immunities provided to the United Nations and its officials are no doubt necessary for the impartial and proper functioning of the United Nations and its special mission. However, there should not be a blanket impunity for all the misuse of power and privileges. It is hence contended that the immunity which is granted to the United Nation personnel is functional immunity and cannot be extended to include immunity from every act i.e., absolute immunity. The blanket protection given to the UN personnel though is necessary for their impartial functioning tends to flout several principles of the Charter itself. It flouts the basic principle of the United Nations itself which asserts in its preamble the principle of equality.

In Ranallo case, the court raised its concern over the inequality being practiced under the garb of immunities and privileges. The court contended that if the immunity from traffic regulation is included in the term privileges and immunities, then the principle of both public law and the charter of the United Nations will get defeated. The court asserted that the primary purpose of the United States of America with United Nations was to promote peace and safety for every person in the world. Traffic regulations exist all over the world to protect the person and property. It follows that every person who drives a motor vehicle is under a moral obligation to exercise due care and diligence that no harm is caused to others irrespective of the country where they are driving. This duty of care applies to all whether he is a common person, a high commissioner, or a United nation envoy. No exception should be allowed on any ground. The countries which claim themselves to be a democratic country should never forget that equality of justice and equal protection for all is the fundamental principle of democracy.

The charter of the United Nations also conforms to the principle of equal status for all. Hence, the granting of immunity on every and any ground without going into the merits of the case is violative of the principle of equality. It also violates the principle of natural justice. This unrestricted immunity often proves to be against the principles of natural justice. The officials are considered above all judicial proceedings. The ordinary court of law cannot determine their accountability and they are declared to be immune even without considering the grievances of the aggrieved person.

⁶⁹ The full report is *available at*: https://digitallibrary.un.org/record/1637561/files/A_73_128-EN.pdf (last visited on May 19, 2019). In addition, a summary table of information received from member states since 2007 can be *accessed at*: http://www.un.org/en/ga/sixth/gov_comments/criminal_accountability.shtml (last visited on May 19, 2019).

The immunity bestowed has acted as a protective shield for the UN officials against prosecution, it at the same time has also been used as an excuse to do unethical acts as seen in the cases of Liberia, Congo, Haiti etc. It is also a matter of grave concern that despite having an internal mechanism to deal with such issues, they have never been invoked. In light of the past misuses of immunity and to act as a check on any such acts in future it is high time that the United Nations as the super organization to maintain peace and security in the world should review the use and misuse of the immunity provisions. It has been reiterated in several of the resolutions of GA and reports of the Secretary General that the Organization has the high repute to carry and should lead by example. It at the same time has also recognized that some uncalled-for acts of some its officials have brought bad name to the organization. In some of the incidents they have done things out of their course of employment or have put the Organization into bad light. However, in all the cases it was finally established that they had the immunity and were released. But this did not exempt from the international criticism when they were involved in acts outside their course of employment or did acts negligently which brought untold misery (as witnessed in Haiti Cholera Case). The General Assembly (GA) Resolutions has helped in addressing the issue of misuse of the immunity provision and also in the development of a soft normativity in this regard. These resolutions and reports help in evolution of soft normativity to address a particular problem. These soft laws though are not binding, play an essential role in development of international law and in gradual hardening of soft normative structure. Soft normative framework is also appealing and convenient for the state parties as it gives them sufficient time to consider the matter and adopt them gradually. However, it is desirable that timely action should be initiated. This will help in maintaining the trust over the rule of law that in case of gross violations of human rights, nobody is above law.