PRACTICAL APPLICATION GUIDE ON THE JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANIZATIONS[4]

Guideline 1

Legal basis for the jurisdictional immunities of international organizations

The jurisdictional immunities of international organizations are derived from the intent of their Member States, expressed in constituent treaties or agreements on privileges and immunities with regard to the legal relationship between that organization and its members, in headquarters agreements, or in the national laws governing the legal relationship with the State that hosts the international organization in its territory.

Rapporteur's Notes

By virtue of the principle of *par in parem non habet imperium*, States enjoy immunity before the courts of other States. Pursuant to that principle, States cannot be defendants in court cases. This principle originated as a corollary to the principle of equality between States, and gave rise to the absolute immunity of the State.

Unlike the immunities of States, the applicable law is not the result of the evolution of a customary rule that was later codified in international law instruments. The law applicable to international organizations evolved differently, due in part to the complexity of standardizing practices in view of the diversity of legal instruments.

The law applicable to international organizations is the result of the agreement of the members of the organization that decide to concede immunity in order to give it operational capacity, through constituent treaties or through headquarters agreements concluded with States where international organizations are located.

Customarily, the constituent instrument is the treaty in which each member state sovereignly recognizes and grants it legal personality for the accomplishment of its objectives. In addition, most constituent treaties establish and regulate—although very generally—the prerogatives of the international organization in question. Some organizations draft agreements on privileges and immunities to this end.

Additionally, the specific relationship between the international organization and the State where it is located is governed by headquarters agreements that are negotiated for every activity of the organization, or on an *ad hoc* basis to regulate some specific activity of the organization in the territory of one of its Member States.

There is no treaty that codifies the immunities of international organizations at the global or regional level; rather, each organization enters into a headquarters agreement with each State in which it sets up an office. Thus, each State that accredits an international organization in its territory sovereignly recognizes it and grants diverse rights and obligations, bearing in mind each organization's purposes and objectives. Some States have adopted national laws to regulate the activity of the international organization operating in their territory, lending greater certainty to its legal relationship with those bodies.

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[4] The Guide includes recommendations arising from international practice limited to the study on which it was based.

The immunities of international organizations and, specifically, jurisdictional immunities, are thus dealt with on a case-by-case basis. Although the meeting of the minds is the principal source of obligations, such agreement must always consider and be interpreted in harmony with other relevant legal aspects, such as international human rights law. Therefore, it is advisable for the States and the organizations to update the applicable legal framework in order to bring it into line with current needs and challenges.

Guideline 2

Objective of jurisdictional immunities

Jurisdictional immunities are granted to international organizations to enable them to accomplish their object and purpose.

Rapporteur's Notes

The constituent treaty of an international organization results in the creation of a legal entity with legal personality and its own assets. By establishing that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes," Article 104 of the Charter of the United Nations established a fundamental criterion for every international organization. Privileges and immunities are granted in order for them to be able to carry out the functions for which they were created. Thus, in Article 105(1), the Charter states: "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."

In the inter-American sphere, Article 133 of the Charter of the Organization of American States similarly establishes that the OAS "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."[5]

The Agreement Establishing the Inter-American Development Bank states that, "To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be to the Bank in the territories of each member."[6] It allows for legal actions to be brought against the Bank [7] to the extent that the Bank's purpose is to provide financing to Member States for development projects and requires it to bring actions in national courts as part of its activity. Immunity, then, is strictly functional and allows, in this case, for legal proceedings to be brought in furtherance of the Bank's object and purpose.

The Member States have granted jurisdictional immunities to international organizations in order to facilitate the accomplishment of their objectives independently, economically, and free of the hindrances they could otherwise face under the jurisdiction exercised by the courts of a member state that would frustrate the intent of the majority of the Member States.

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5. Charter of the Organization of American States, signed in Bogotá on April 30, 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

6. Agreement Establishing the Inter-American Development Bank (IDB), adopted in Washington D.C. on April 8, 1959, Article XI, Section 1.

7 Ibid. "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." Article XI, Section 3, first paragraph.

The ultimate purpose of that jurisdictional immunity is to ensure the organization's independence and prevent undue influence in the performance of its mandate. Otherwise, an organization would be subject to all types of lawsuits that would make its work impossible. In the case of *Amaratunga v. Northwest Atlantic Fisheries Organization,* the Supreme Court of Canada held that, without immunity, an international organization would be vulnerable to interference in its operations by the receiving State and its courts.[8]

Guideline 3

Scope of jurisdictional immunities

International organizations, their property, and assets enjoy immunity from all judicial proceedings concerning acts carried out in the pursuit of their object and purpose, except in cases in which the organization expressly waives that immunity.

Rapporteur's Notes

Three doctrines on the nature of immunity have emerged from the practice of States: absolute immunity, classic restrictive immunity, and functional immunity. As stated in the notes to Guideline 1 *supra*, the absolute immunity of foreign States was recognized by virtue of the principle of *par in parem non habet imperium*. States enjoy immunity before the courts of other States under the principle of the legal equality of States. The need to prevent immunity for conduct that went beyond the scope of State duties resulted in the establishment of limits to absolute immunity, ushering in the restrictive immunity of States. The concept of classic restrictive immunity is applied to sovereign governments under international law and is based on the principle that when one State enters the marketplace to purchase and/or sell goods and services, it should be treated like any other commercial actor and subject to the jurisdiction of national courts.

Immunity for international organizations tends to be functional, based on the presumption that it is only admissible to recognize such immunity for the activities of those organizations that are essential and necessary to accomplish its object and purpose. The statutes of each organization establish the activities inherent to its purpose, and therefore covered by immunity. However, the Member States establish the scope of the jurisdictional immunities to be recognized by their national courts. At the same time, the host State agrees with the organization on the type of jurisdictional immunities it will enjoy in its territory.

Jurisdictional immunities are granted to the international organization as such, and cover the acts it performs in furtherance of its object and purpose. In that regard, the organization's property is also protected. Although the scope of this Guide is limited jurisdictional immunities, it bears noting that jurisdictional immunities cover property and assets, protecting them from any claim against the international organization.

Guideline 4

Limits to jurisdictional immunities

International organizations lack jurisdictional immunities for acts in which they participate as actors in the marketplace, including employment disputes that do not compromise the autonomy of the organization, or when the organization waives that immunity.

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[8] Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

Rapporteur's Notes

In the case of both States and international organizations, international law excludes the acts they perform as market actors from jurisdictional immunity. At times, those acts have been identified as *jure gestionis*. However, not every *jure gestionis* act can be excluded *per se*— only those that are not related to their object and purpose. There may be certain acts of a commercial nature that organizations carry out in furtherance of their objectives that would be protected.

Two aspects must be resolved: first, identifying the acts that are excluded from jurisdictional immunity; and second, specifying the threshold required for that exclusion.

The first aspect includes acts related to the procurement of goods and services by the organization just like any other actor, including the hiring of employees who provide support to the international organization in the receiving State. In order to assert exclusion from jurisdictional immunity, however, the threshold of "necessity" must be met.

In practice, acts related to the accomplishment of the organization's aim have been excluded from this limitation, even when commercial in nature. In the case of *Broadbent v. Organization of American States,* the U.S. Court of Appeals for the District of Columbia held that the hiring of civil service employees by the OAS is not a commercial activity and, therefore, is covered by immunity for purposes of preventing undue interference.[9]

The case law has also granted immunity to international organizations in tort cases. Even though the payment of damages for acts caused by an international organization in the exercise of its mandate can be a civil action, in the case of *Georges v. United Nations*, the U.S. Court of Appeals recognized the jurisdictional immunity of the United Nations, dismissing the claim filed by victims of the cholera epidemic attributed to the UNSTAMIH "blue helmets" in Haiti in 2010.[10]

In order to support jurisdictional immunity in disputes governed by private law, the threshold of "necessity" must be met. In the case of *Amaratunga*, the Canadian Court of Appeals found that immunity is "necessary" to preserve the autonomy of the organization. In the context of employment disputes, to the extent that employee's tasks are closer to the central function of the organization, the more likely it is that the organization's autonomy is at stake, and therefore, immunity is generally required.[11]

This criterion was expanded by the Supreme Court of Canada to hold that the *Northwest Atlantic Fisheries Organization* must be protected from "undue interference," which is determined on a case by case basis. The Court held that the NAFO must be authorized to manage its employees, especially its senior staff, in order to prevent "undue interference" in its operations.[12]

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[9]. *Broadbent v. Organization of American States*, United States Court of Appeals for the District of Columbia Circuit, January 8, 1980. 628 Fed.Rptr.2d 27 (1980).

[10]. *Georges v. United Nations*, United States Court of Appeals of the Second Circuit, On Appeal from the United States District Court for the Southern District of New York, August 18, 2016.

[11]. Docket CA 343395, Nova Scotia Court of Appeal, *Northwest Atlantic Fisheries Organization v. Amaratunga*, 23, 08, 2011.

[12]. Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

Undoubtedly, employment disputes are of central concern to the Member States. The practice examined demonstrates a tendency to limit immunity in those cases, provided that they involve the hiring of personnel as part of a commercial activity.

Immunity is maintained in cases involving the organization's civil service staff, or those who hold positions critical to the organization's mandate. As examined in Guideline 5 *infra*, the organization should in any case provide dispute resolution mechanisms so that the individual is not left unprotected.

In light of the above, jurisdictional immunity has two limits. First, that immunity is limited to acts performed in pursuit of an entity's object and purpose. Immunity is not applicable to commercial acts of another kind. The second limit arises in specific situations when the international organization waives its immunity as discussed in Guideline 10 *infra*.

Guideline 5

Means of dispute resolution

International organizations should provide means of dispute resolution in order to ensure access to justice for individuals who are parties to a dispute not covered by jurisdictional immunity.

Rapporteur's Notes

The long-standing practice in organizations is to establish a dispute resolution mechanism to handle claims arising from acts not covered by jurisdictional immunity, generally in commercial or employment matters. The UN[13] and OAS[14] agreements on privileges and immunities have provided dispute resolution mechanisms to resolve disputes involving employees that enjoy immunity. Administrative tribunals have been established in both cases.

This solution reinforces the functional nature of the immunities that international organizations enjoy. Furthermore, it makes it possible to strike a balance between immunities and the right to access to justice of private individuals who cannot avail themselves of the national courts.

A gap, however, in the UN and OAS agreements on privileges and immunities is that the availability of dispute resolution remedies is limited to staff members who enjoy immunity, and does not cover employees who have been hired under the national laws of the country in which they are serving. As mentioned in the UN Secretary General's latest report on the Administration of Justice, there are multiple differences between the remedies available to local staff and officials, even when both categories commonly perform similar duties.

Although an organization may have a dispute resolution mechanism, it may be highly onerous, and the geographic location of the respective administrative or arbitral tribunals may place the affected person at a clear disadvantage.

In the absence of effective mechanisms within the reach of local staff members, the emerging trend is for the national courts of the host State to exercise their jurisdiction in order to safeguard the involved person's right to access to justice.

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[13] Convention on the Privileges and Immunities of the United Nations of 13 February 1946, Article VIII, section 29.

[14]. Ibid, note 10 *supra*, article 12.

Nevertheless, the international organization's submission to that jurisdiction, even in cases of employment disputes, should be provided for in international instruments that limit immunity. An increasingly common practice is for headquarters agreements to establish that, in the case of locally hired staff, the organization is subject not only to local laws but also to the jurisdiction of the domestic courts.

Because this submission to the domestic courts requires the prior consent of the international organization, it will not necessarily be the route taken in every case. Therefore, international practice recommends that international organizations provide alternative means of handling individual claims in the event that their governing treaties or statutes do not include dispute resolution mechanisms. International organizations can offer, among other things, facilities for submitting disagreements to arbitration, sufficient insurance policies to cover potential damages, and the option of waiving immunity in the interest of justice. These measures may also be included in headquarters agreements.

Guideline 6

Characteristics of dispute resolution mechanisms

Dispute resolution mechanisms established by international organizations to resolve private law disputes should be adequate and effective.

Rapporteur's Notes

In the case of *Waite and Kennedy v. Germany,*[15] the European Court of Human Rights held that immunity depends on the availability of adequate and effective remedies. The European Court has specified three requirements for maintaining immunity:

(i) immunity must not restrict or diminish the right to due process;

(ii) the limitations to immunity must pursue a legitimate aim;

(iii) there must be a reasonable relationship of proportionality between the means used and the aim accomplished.

The functional nature of immunities requires that individuals' right of access to justice be preserved. Therefore, the mere obligation to establish dispute resolution mechanisms is insufficient; these mechanisms should be adequate and effective.

Those mechanisms should also be governed by the principles of independence, transparency, professionalism, decentralization, legality, and due process. Finally, the organization should properly acquaint its staff members with the mechanisms, to ensure that they are aware of their existence.

Guideline 7

Observance of the domestic legal system

International organizations and their staff members have a duty to cooperate at all times with the receiving State to facilitate the proper administration of justice, guarantee the observance of the domestic legal system and prevent the occurrence of any abuse in the enjoyment of immunities, exemptions, and privileges.

Rapporteur's Notes

[15]. Application No. 26083/94, European Commission of Human Rights, 2 December 1997.

A consistent practice in the agreements governing international organizations is their obligation to cooperate with local authorities in respecting national laws and administrative measures. This principle, borrowed from the immunities of States, allows for a balance between such obligations and jurisdictional immunities for purposes of maintaining the strictly functional nature of immunities.

Article V, Section 21 of the Convention on the Privileges and Immunities of the United Nations establishes the obligation of the United Nations to cooperate with respect to the acts of its officials, precisely to prevent abuses in connection with the enjoyment of immunities. Similarly, in the case of the OAS, Article 11 of its Agreement on Privileges and Immunities establishes the obligation of the Pan American Union to cooperate with authorities to prevent abuses by its personnel.

An obligation to cooperate with local authorities should be general and not limited to the acts of staff members. The practice followed by Mexico in its headquarters agreements is to include that obligation of the Bank's officials to cooperate generally.[16]

Guideline 8

Appearance before national courts

Without prejudice to their jurisdictional immunity, international organizations must appear before national courts to assert their immunity or present a defense.

Rapporteur's Notes

An analysis of the case of *Georges v. United Nations*[17] and others shows a consistent United Nations practice of refusing to appear in court when summonsed, and invoking jurisdictional immunity.

There is no regular practice between international organizations and the Member States on appearing before national courts when given notice that a legal action has been filed. Particularly in cases covered by jurisdictional immunities, the international organization will not want to risk appearing before the courts—even to invoke immunity. Characteristically, the organization avails itself of diplomatic channels to assert immunity through the ministry of foreign affairs.

To remedy this situation, the international organizations should avail themselves of diplomatic channels in order to assert immunity through the ministry of foreign affairs, or to raise defenses.

Nevertheless, there may be cases in which neither the ministry of foreign affairs nor any other government authority has standing to appear in national courts. In keeping with the general obligation to cooperate with national authorities, as discussed in Guideline 7 *supra,* a best practice would be for the international organization to appear in its own interest. First, it would enable the organization to assert its immunity and, secondly, it would provide the procedural opportunity to raise defenses.

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16. E.g., Agreement between the United Mexican States and the International Bank for Reconstruction and Development (IRDB) for the establishment of an office in Mexico City. Mexico City, July 31, 1987, art. 13.

17. See note 13 *supra*.

Guideline 9

Immunity from enforcement

International organizations, their property, and assets are protected from enforcement measures under treaty provisions, unless the organization has waived that protection.

Rapporteur's Notes

Immunity from enforcement is a recognized practice. Even in disputes governed by private law that reach the national courts, immunity from enforcement is fully accepted. In the case of the UN and the OAS, immunity from enforcement is provided for expressly in their agreements on privileges and immunities.[18]

Irrespective of immunity from enforcement, international organizations should make their best efforts to comply in good faith with the decisions issued by the authorities of the receiving State in those cases in which they do not enjoy jurisdictional immunity. This would be consistent with the obligation to cooperate with the Member States, provided for in Guideline 7 *supra*.

Guideline 10

Waiver of jurisdictional immunity

International organizations should consider the waiver of their jurisdictional immunity or that of their employees a corollary to their obligation to cooperate with the competent authorities of Member States. That waiver of jurisdictional immunity does not include *ipso facto* the waiver of immunity from enforcement.

Rapporteur's Notes

The waiver of immunity is a remedy available to organizations to prevent immunity from impeding justice in certain cases. The waiver maintains the functional nature of the immunities and is a corollary to their obligation to cooperate with the competent authorities of the Member States.

One constant theme in cases involving the waiver of jurisdictional immunity has to do with the means of enforcement. In the instruments examined, the waiver of jurisdictional immunity does not *ipso facto* include immunity from enforcement. For instance, Article 5, paragraph two of the headquarters agreement between the Eastern Republic of Uruguay and MERCOSUR for the operation of its administrative secretariat indicates that a separate statement will be required for a waiver of immunity from enforcement.

That said, a waiver of jurisdictional immunity must be express. By the same token, merely appearing in court does not amount to a waiver if the organization has asserted immunity, unless it puts on a defense with respect to the merits of the case.[19]

Conclusion

[18.] Article II, section II of the United Nations Convention and Article 2 of the OAS Agreement on Privileges and Immunities.

[19.] Final Judgment 2.440/2010. Supreme Court of Justice of Uruguay. *Sienra Castellanos, Félix, et al. v. Unión Postal de las Américas*, *España y Portugal- U.P.A.E.P. – Cobro de pesos y daños y perjuicios – CAUSA DIPLOMATICA*, December 24, 2010, CASE FILE 1-100/2009 "The waiver of jurisdictional immunity operates if that waiver has been made expressly; that is essential. The lawsuit enjoys jurisdictional immunity unless immunity is waived, and that has not been proven in the instant case; on the contrary, the respondent expressly affirmed that such immunity had not been waived."

Preparation of an American Convention on the jurisdictional immunities of international organizations

It is not necessary for the Organization of American States to consider the drafting of a legally binding international instrument on the jurisdictional immunities of international organizations.

The factors cited herein confirm that there is no standard treatment within the Member States with respect to the immunities of international organizations. Most of the Member States lack national laws governing the matter and there is no evidence that they are required to enact such laws. The practice of the States is regulated through headquarters agreements on their relationships with the international organizations residing in their territory.

This Rapporteurship is of the opinion that the conditions do not exist at this time for the Organization of American States to consider drafting a legally binding international instrument on the jurisdictional immunities of international organizations. The case by case approach to this matter leads us to conclude, in addition, that the administrative and judicial bodies of the States would benefit from being familiar with the practice of States that reflects and fosters an emerging international custom, in order to guide their own decisions.

It may be useful for the elements of this practical Guide to be incorporated into headquarters agreements, thereby resolving organizations' situations of conflicts in advance.[20]

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[20] The International Law Commission of the United Nations attempted unsuccessfully to draft a general instrument on the privileges and immunities of international organizations.
See: http://legal.un.org/ilc/summaries/5_2.shtml.