

ISSUES OF PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS AND THEIR OFFICIALS IN INTERNATIONAL LAW

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Annotation: *The theory that individuals are legally equal before the law and the laws of society has been developed for a long time. Although these ideas and principles are still evolving, sometimes individuals, such as international organizations and their officials, are granted “additional” immunity and other facilities. This article analyzes the existing immunities and privileges in international organizations and their officials, the legal framework and the application of immunity theories of International law in particular international organizations.*

Key words: *International organization, immunity, privileges, immunity theory, contractual obligations, financial organization.*

Introduction. Basic understanding of human rights theory often reflected in its being “inherent to all human beings”. In global scale these rights law lays down the responsibilities of authorities to act in particular methods or to avoid from certain acts so that it will sell and protect these fundamental rights and basic freedoms of individuals or corporations. In terms of international organizations, while providing and monitoring the implementation of human rights, they also have some immunities and facilities, which is granted to perform their obligations in particular circumstances. Also focusing on the protection of special privileges and immunities of persons is crucial, though everybody is seen as equal before the law. They are granted these “additional rights” so as to perform their duties independently and effectively as noted by United Nations.

Immunity in international law is often referred as “an exemption from a legal requirement, prosecution, or penalty, granted by statute or government authorities”¹ or “enjoyed by foreign states or international organizations and their official representatives from the jurisdiction of the country in which they are present”².

Methods and materials. This article discusses some of the core issues of immunities in international organizations, especially, international financial institutions and their staff. Additionally, as a result of this research the clarification of the privileges and immunities in financial institutions with specific examples suggested in the way that it enables further researches to recommend real strategies.

It should also be noted that the immunities and privileges are essential part of international organizations and also diplomatic and consular law in fulfillment of their functions. Therefore, this research helps the researchers understand the different types of immunities and have clear vision of understanding of granted privileges and immunities from theoretical view.

Results from research. These immunities are essential to “prevent the adjudication of a dispute in a particular forum without speaking to the merits of the claim or absolving any underlying responsibility of the

¹ Immunity by Will Kenton, - 04.11.2021 Available at: <https://www.investopedia.com/terms/i/immunity.asp>;

² Frey, M. L. and Frey, . Linda. "diplomatic immunity." Encyclopedia Britannica, May 2, 2013. Available at: <https://www.britannica.com/topic/diplomatic-immunity>;

state and its officials”³. But the notion of privilege is different from immunity, while privileges are more about the other facilities or opportunities that are available for international organizations and their officials. The difference “between an immunity and a privilege is not easy to define precisely, and the terms are often used interchangeably, but in general a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security, whereas an immunity does not imply any exemption from substantive law but confers a procedural law”⁴. However, the similarity of these theories can be understood by their functions, since both immunities and privileges focus on facilitation of the process and “are necessary for the fulfilment of its purposes”⁵ as stated in charter of United Nations.

The following elements are considered while deciding whether or not to give witness immunity:

The gravity of the offense - immunity is usually considered only when testimony is required for a serious crime; immunity may not be considered in smaller crimes.

The witness's trustworthiness, which means the prosecution must assess the witness's reliability as well as the extent to which his or her testimony or information can be confirmed. *Participation in criminal behavior*, would not be in the public interest to use the testimony of someone who is extensively involved in criminal behavior to convict someone who is only a minor participant in the same illegal activity, or to give someone who has committed an offense immunity from prosecution.

In terms of human rights, additional privileges and immunities are given to the officials of international organizations which is necessary to carry out their functions. First of all, international officials are persons who should act according to basic principles of international organization’s law, although they are nationals of individual members, act exclusively in the interest of the organization itself. The issue of the statutes of international organizations can be as expressed in Article 100 of the Charter of the United Nations: “In the performance of his duties, the Secretary-General and the staff will neither receive instructions from any government nor any authority outside the Organization; on the other hand, each member undertakes to respect only the international character of the responsibilities of the Secretary-General and the staff and will not seek to influence them during the performance of their duties. Also, Article 105 of the Charter of the United Nations provides that 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 and that 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.

As can be understood these privileges and immunities are necessary in order to provide effectiveness and fulfilment of functions and avoid any illegal interruptions. Also, Vienna Convention on diplomatic relations interprets the reasons and bases of adaptation of this convention and explicitly states: “believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems”.

Differentiating the “functional” immunity from “personal” is crucial when it comes to officials’ immunity. The highest officials of international organizations (chiefs of administrative bodies, their deputies and assistants) are recognized as a basic rule, and they are almost close to those who are recognized as diplomatic representatives of the states as in international law. Immunity from the jurisdiction of other officials and employees of the administrative bodies of international organizations is somewhat more limited.

³ "Immunities". In *obo* in International Law, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0027.xml>; Available at:

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⁴ Consular Law and Practice (3rd edition), Luke T. Lee, John B Quigley, Oxford Scholarly Authorities on International Law [OSAIL], Published in print: 03 July 2008, ISBN: 9780198298519, Available at: <https://opil.oup.com/view/10.1093/law/9780198298519.001.0001/law-9780198298519-chapter-21>;

⁵ Article 105 of Charter of United Nations, Available at: <https://www.un.org/en/about-us/un-charter/full-text#:~:text=Article%20105,the%20fulfilment%20of%20its%20purposes>

Although the highest officials who have immunity from the jurisdiction and others have facilities and other privileges, this does not relate to the extent of the guaranteed immunity, or whether the activities which was committed in any period or during the performing of official functions. In other words, this immunity protects higher officials if they are performing their duties or not, while the immunity of other officials of administrative bodies protects them only within the domain of their official duties. The most importantly, it means that the highest position holding officials of the administrative bodies of international organizations cannot be accountable before the authorities of the state where they are performing their duties, and in which they are located, regardless of whether they committed any minor offence or even criminal offence during their official duties or in their free time (e.g. during recreation on weekends); lower-ranking officials, however, are covered by immunity only while performing official duties⁶. For example, under the General Convention and CPISA of the United Nations, functional immunity is applicable. However, Secretary-General and Assistant Secretary-General shall enjoy privileges and immunities, exemptions and facilities accorded to diplomatic envoys in international law⁷ and executive heads of specialized agencies are granted⁸. However, it should be noted that domestic law also its role in regulation of “immunity-related” provisions, which sometimes may also refer to the state immunity. Additionally, Privileges are often used as part of Diplomatic and Consular law, however, this does not mean that privileges are only granted to diplomatic agents, but to certain persons and also states. For instance, Immunity is not granted to 'constituent states of a federal state' under the European Convention unless a contracting state issues a declaration to the contrary. There is no mention of political subdivisions. The State Immunity Act of 1978 considers "constituent regions of a federal state" to be "separate entities," with immunity granted only if section 14(2) is met (unless an Order in Council is made according immunity to a specific territory). The UN Convention adopts a different approach, equating constituent units with political subdivisions and granting protection to entities "authorized to commit acts in the exercise of sovereign authority and acting in that capacity."⁹

Analyzing the results of research. some of the organizations have limited immunities and are guided by economic considerations rather than political views. Some scholars admit this issue as the white space of qualification of immunities in international law, while others confirming that these organizations and their officials cannot be covered by immunity, which is in accordance with nature of international organizations. It should also be noted that officers of global banking and monetary establishments differ from most other categories of the international civil servants in that they perform a tangible "commercial" business enterprise, which can have a direct influence upon the growth and vitality of a single nation or group of countries. Furthermore, the officers of banks should be free from the direct coercion of a person government, whether or not that government be of his personal country, or that of another and additionally must be accepted to conduct his functions so as to protect the financial soundness of the organization employing him.

Some of International financial organizations are affiliated or linked with United Nations and this grants these organizations the opportunity of using some of the privileges of this affiliation. The International Monetary Fund (IMF) and the World Bank (WB) are both UN specialized agencies that were founded as separate and distinct international organizations under international law¹⁰. Their constitutive instruments, also

⁶ Dušan Jerojčević, Zoran Jerojčević Facilities, privileges and immunities of the representatives of international organizations and international officials, DOI: 10.18287/2542-047X-2018-4-1-47-53;

⁷ Article V, Section 19 of General Convention;

⁸ Article VII, Section 21 of CPISA;

⁹ Privileges and immunities of Foreign States, Foreign & International Law, Available at: <https://lawexplores.com/privileges-and-immunities-of-foreign-states/>;

¹⁰ Qumba, Mmiselo. (2020). Balancing international financial institutions' immunity with private individuals' right to effective remedy. South African Journal of International Affairs. 27. 1-24. 10.1080/10220461.2020.1729853, Available At:

https://www.researchgate.net/publication/339425286_Balancing_international_financial_institutions'_immunity_with_private_individuals'_right_to_effective_remedy/citation/download;

known as articles of agreement, specify their functions, mandates, and purposes. Of fact, immunity from national court jurisdiction is not a novel concept. In international law and the law of international organizations, it is a well-established principle.

The International Finance Corporation and Development, the International Monetary Fund, the International Bank for Reconstruction, and the International Development Association, these organizations are all specialized agencies of the United Nations. Moreover, the Development Association and the Finance Corporation are highly integrated with the International Bank. The Articles and basic documents of Agreement of each of these institutions provide for the privileges and facilities of the functionaries of the institution. It expresses being immune of all governors, executive directors, alternates, officers and employees from legal process with respect to acts performed by them in their official capacity only in exception when the institution waives this immunity and this also determines the same immunity of not being local nationals alien registration requirements and national service obligations, immunity from taxation, exchange and travelling facilities.

In other financial organizations this approach could be different, there is to say, economic approaches are preferred by ADB rather than political views. As in Art. 36.2 of the Agreement establishing the Asian Development Bank (ADB Charter) epitomizes this approach which has similarly also been adopted by the World Bank and other development banks, except the European Bank for Reconstruction and Development which is based on the principles of democracy and the transition to a market-based economy. As being expressed in the ADB charter, “The Bank, its President, Vice-President(s), officers and staff shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank”. Nevertheless, in practice, these MDBs and IFIs still have the right to protect their officials and belongings by bilateral agreements and based on these agreements immunity of officials can be admitted.

For instance, as in the situation of an official who is working for the Asian Development Bank in the Resident Mission of ADB in particular place as Senior Portfolio Specialist and he was covered only by the Agreement between the Asian Development Bank and the Republic where this person visited. Moreover, similarly, in the case if a staff member of ADB was covered only by the Agreement between visited state and World Bank and this demonstrates that these facilities and immunities sometimes can be violated. If in the case of basic right of the World Bank representative for a fair trial is violated, namely, the European convention on human rights determines everyone`s right to a fair trial and minimum amount of rights when the person is arrested. However, these minimum rights should be provided before protection of granted privileges and immunities. Actually, the scope of immunity of international organizations and their officials is based on agreement or treaty and in relation to the scope of work the organization does.

However, European Bank for Reconstruction and Development determines different rules in its basic documents, as in Article 51:” All Governors, Directors, Alternates, officers and employees of the Bank and experts performing missions for the Bank shall be immune from legal process with respect to acts performed by them in their official capacity, except when the Bank waives this immunity and shall enjoy inviolability of all their official papers and documents. This immunity shall not apply, however, to civil liability in the case of damage arising from a road traffic accident caused by any such Governor, Director, and Alternate, officer, employee or expert”¹¹. Moreover, Article 52 expresses privileges of these officials inclusive of travelling facilities, immunities from immigration restrictions, alien registration requirements and national service obligations. In the light of the above, it can be concluded that EBRD has a different approach to protect its officials and legal personality taking into account political considerations. To conclude, the privileges and immunities of international organizations and their officials are crucial in order to perform their duties effectively. In comparison to diplomatic relations of states, privileges and immunities, they are commonly given to defend from the intervention of the receiving country, with the diplomatic personnel remaining fully under the jurisdiction in their own country, in order that international organizations are required to extend the institution of privileges and immunities to the protection of international staff organizations from their own

¹¹ Basic Documents of the EBRD Chapter VIII: Status, immunities, privileges and exemptions;

states. This is frequently emphasized that so as to independently carry out their functions, international officials need extra protection from the possible efforts of the country whose residents are to carry out their responsibilities completely in the interest of the international organization for which they work. Those also are the primary reasons (with a series of personal ones) that have made many countries ratify (draft) the convention at the relations of States and international companies. In other words, the states on whose territories there are headquarters of international organizations, accept as true that there may be no sufficiently powerful manner to protect their interests against possible misconduct. Some of the organizations are fully covered with these facilities, while others have these to a limited extent, especially, except European bank for reconstruction and development, other multilateral development banks and international financial institutions have dominant economic considerations rather than politics in the matter of privileges and immunities. So this puts the “additional rights” of officials of these institutions under question, however, they can be covered by agreements in which the organization is a party.

Conclusions. After discussion of aforementioned problems, the necessity of provision of immunities and privileges of International financial institutions can be pointed as highlighted issue. The best way to avoid the possibility that IFIs could end up in national courts with unpredictable outcomes would be to strengthen the independence and accountability mechanisms of the IFIs¹². This action required from powerful international organizations or in co-operation with sovereign states the framework of provision of immunities and privileges for international financial institutions by drafting international treaties on immunity issues of international financial institutions which facilitate the process of this organizations internationally and prevent from discrimination between the financial institutions.

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¹² Qumba, Mmiselo. (2020). Balancing international financial institutions' immunity with private individuals' right to effective remedy. *South African Journal of International Affairs*. 27. 1-24. 10.1080/10220461.2020.1729853, Available At:

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