

## UN AGENCY DUTY OF CARE & LEGAL LIABILITY

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An examination and explication of the duty of care owed by the United Nations and its various constituent agencies towards its own employees and other third parties injured by such organizations would seem to be a fairly simple and straightforward subject to cover; unfortunately, as is the case with most things UN, nothing could be farther from the truth. Indeed, the present examination recalls the famous line delivered by US Supreme Court Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), when he opined, in an attempt to differentiate between criminally punishable pornography on one hand, and “art” on the other, that “...I know it when it see it”. In some sense, such is the case with UN Agency duty of care and its attendant legal liability.

The reasons for this difficulty are numerous, and most are beyond the scope of this article; however, several of the more salient explanations can be noted. First and foremost, the United Nations and most of its various agencies are generally immune from national laws, and therefore their transgressions towards their staff and others cannot be brought to book in national courts. Such immunity emanates either from the General Convention on the Privileges and Immunities of the United Nations or other national laws<sup>2</sup>. Staff are left to vindicate their rights in the UN’s so-called internal justice

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<sup>2</sup> See General Assembly resolution 351 A (IV) of 9 December 1949 which has been ratified by most sovereign states--the UN Charter only very generally provides in its Article 104 that “[t]he 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 fulfillment of its purposes”, and in Article 105, at paragraph 1, “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes”, so the UN founders attempted to forge a shield for the fledgling organization and its officials by assigning to them an amalgamation of sovereign state and diplomatic immunity, even though the UN is not a sovereign state, nor its officials envoys (diplomats) of sovereign states. For a succinct but in-depth examination of the immunity of the United Nations by University of Vienna Professor of International Law August Reinsich, go to: <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>. A parallel immunity convention for UN Specialized Agencies, also discussed in the referenced Reinisch monograph, has been ratified by far fewer States, most notably the United States, which relies on the International Organisation Immunities’ Act (IOIA) to assign immunity to international organizations other than the UN (22 USC §288—see <http://www.scribd.com/doc/24429759/United-States-International-Organizations-Immunities-Act-of-1945>). Interestingly, the immunity afforded to an intergovernmental organization, the Inter-American Investment Corporation, under the IOIA was recently pierced, and such piercing upheld in US federal courts. *Vila v IIC*, DC Court of Appeals Case N° 08-7042 –see <http://caselaw.lp.findlaw.com/data2/circs/dc/087042p.pdf>.

system<sup>3</sup> which is primarily administered through two parallel administrative tribunals—the United Nations Appeals Tribunal (UNAT), and the International Labour Office Administrative Tribunal (ILOAT)<sup>4</sup>. For aggrieved parties that are not current or former UN staff (such as some independent contractors engaged by the UN, and particularly the refugee girls and women who are continually, sexually abused by UN peace-keepers and aid workers), there is no formal forum in which to vindicate their rights on account of the UN's immunity<sup>5</sup>.

For those claimants lucky enough to have access to the UN internal justice system, as national laws are not applicable, the first inquiry to be made of such a claim is what law applies. As a general proposition, a claimant's rights against an international organization such as the UN rights are those derived from the Staff Regulations and Staff Rules and from the general principles of law applicable to such organisations (ILOAT Judgment N° 2662, Spina v UNIDO). Ultimately, the final determination of the applicable law is made by the previously mentioned Administrative Tribunals (UNAT and ILOAT). Unfortunately, a review of the two main annotation sources for the two tribunals (ILOAT-[http://www.ilo.org/dyn/triblex/triblexmain.advancedSearch?p\\_lang=en](http://www.ilo.org/dyn/triblex/triblexmain.advancedSearch?p_lang=en) and the UNAT-[http://untreaty.un.org/unat/dtSearch/Search\\_Forms/dtSearch\\_EF.html](http://untreaty.un.org/unat/dtSearch/Search_Forms/dtSearch_EF.html)) reveals no

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<sup>3</sup> Under the newly reformed so-called UN internal justice system, which new system went into effect on 1 July 2009, aggrieved UN staff must bring their complaints first to their hierarchical management for a preliminary review of their claims, and after 90 days or the rejection of their claims by the organization, the staff may then seize the UN Dispute Tribunal (UNDT), which adjudicates disputes before a single judge panel (which judges are all former national court judges, who in theory are appointed to a single seven year term, unlike the prior UN administrative appeals tribunals in which the "judges" were not required to have any judicial or even legal training, and were nominated to the UN General Assembly solely by the UN Secretary General to multiple, three year renewable terms, effectively making them "contract judges, a practice which was in gross violation of the UN's own principles on the independence of the judiciary. Under the reformed system, all the judges of the UNDT and the appellate instance called the UN Appeals Tribunal [UNAT] are required to be serving or retired national court judges with extensive experience, and were shortlisted by a joint staff-management council that then submitted their names to the General Assembly for election). Either party may now appeal a disputed judgment of the UNDT to the UNAT which functions as a true appellate body unlike the previous UN Administrative Tribunal. Unfortunately, the other main adjudicative body for other UN organizations, the International Labour Office Administrative Tribunal (the ILOAT, which is in fact the successor to the League of Nations Administrative Tribunal), while requiring its judges to be serving or retired national court judges, still appoints them without staff participation of any sort, and maintains a regrettable "contract judge" system, calling into question the neutrality of the judges appointed to multiple terms, and raising at least an appearance of conflict in every one the ILOAT's judgments.

<sup>4</sup> The main UN secretariat and most of its major affiliated organs (UNEP, UNHCR, UNDP, UNOPS, UNHCHR, etc.) are submitted to the jurisdiction of the UNAT; the majority of other UN agencies (such as WHO, ILO, UNIDO, UNESCO, WIPO, WTO, etc.—a total of more than 40 international and intergovernmental organizations enjoying immunity from national laws, at least in their seat of residence, predominantly in Switzerland) are submitted to the jurisdiction of the ILOAT. A limited number of other UN bodies such as the World Bank and the IMF have their own separate administrative tribunals.

<sup>5</sup> Besides the moral affront caused by this breach of the fundamental legal maxim that for every right there must be a remedy, the author has also come to the conclusion after 15 years of litigating against the various UN organs in both administrative justice systems that the immunity from national laws afforded to UN agencies, both in the context of its staff as well as other third parties, in addition to the fact that the UN is not a sovereign state and its officials are not diplomats of sovereign states, violates the fundamental principles of natural law generally, but also Articles 6 (due process) and 13 (adequate remedy) of the European Convention on Human Rights, as well as the 1<sup>st</sup> Amendment (right to petition the government), the 5<sup>th</sup> Amendment (right to due process, right of access to court, right to equal protection of law, right to compensation for a taking of a property interest), 7<sup>th</sup> Amendment (right to trial by jury), and 14<sup>th</sup> Amendment (right to equal protection of law) of the US Constitution. He is currently lead counsel in two actions presently pending before the US 2<sup>nd</sup> Circuit Federal Court of Appeals in New York challenging the immunity of IOs (Brzak v UN, Lubbers, Annan et al., [08cv2799—while this article was being finalized, the US Federal Appeals Court for the 2<sup>nd</sup> circuit entered its judgment in this case, upholding the UN's immunity—the plaintiffs intend to appeal to the US Supreme Court—the judgment may be found at [http://www.ca2.uscourts.gov/decisions/isysquery/86d8291c-5ce9-41f8-b959-3bb1e7859d9d/3/doc/08-2799-cv\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/86d8291c-5ce9-41f8-b959-3bb1e7859d9d/3/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/86d8291c-5ce9-41f8-b959-3bb1e7859d9d/3/doc/08-2799-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/86d8291c-5ce9-41f8-b959-3bb1e7859d9d/3/hilite/)], and Veiga v WMO, Jarraud et al., [08cv3999]), and six applications presently pending before the European Court of Human Rights (five filed against Switzerland, one against Germany) also challenging the immunity of IOs. The author has also has published a paper which recounts the practical failings of the current internal justice system followed by most IOs, and the particularly oppressive effect it has on international civil servants. The paper, "LEGAL PROTECTION IN INTERNATIONAL ORGANISATIONS FOR STAFF—A Practitioner's View" can be accessed at: <http://tinyurl.com/IOstafflegalprotection>.

category entitled “duty of care”. Indeed, the seminal published work in this area, “The Law of the International Civil Service “ (Oxford University Press, 2<sup>nd</sup> edition, 1994) by the dean of this legal discipline, CF Amerasinghe (he a one-term judge of the former UNAT and Registrar of the World Bank Administrative Tribunal) in its index also omits any reference to “duty of care”!

A more in-depth review of the judgments of the two subject tribunals reveals various attempts to set out a working definition of the applicable duty of care. In a seminal judgment addressing the service-incurred death of a UN staff member while on mission for the UN, the UNAT stated (UNAT Judgment N° 1204, Durand<sup>6</sup>):

“XIV. The Tribunal has previously held that the Organization has a legal obligation to protect its staff members and not put them in dangerous situations, if these can be avoided. (See Judgement No. 1125, *Mwangi* (2003).) In *Mwangi*, the Tribunal emphasized the importance it attaches to the duty of safe care by the Respondent, stating:

‘[E]ven were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being ....’

XV. The Tribunal has further held in its Judgement No. 872, *Hjelmqvist* (1998) that a staff member has:

‘reason to expect that the organization for which [the staff member] volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide [the staff member] the greatest opportunity to recover fully from any injury to [the staff member’s] physical or mental health that resulted from that service’.

XVI. This duty of care on the part of the Organization is now codified and incorporated into the Staff Regulations and Rules, thus ensuring such protection to all staff members as a term of their employment, in staff regulation 1.2, which provides:

‘Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.’”

Realizing that its attempt to define and ground the UN duty of care in the constituent UN documents and its own prior jurisprudence was somewhat wanting, the UNAT then reached for assistance from the jurisprudence of other tribunaux (including the ILOAT):

‘XVII. An authoritative statement reflecting this general principle of the duty to exercise reasonable care to ensure the safety of staff members is also found within the jurisprudence of other international administrative tribunals, including the Administrative Tribunal of the International Labour Organization. In *in re* Grasshoff (Nos. 1 and 2), Judgement No. 402 (1980), the ILOAT stated: <It is a fundamental principle of every contract of

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<sup>6</sup> The Durand case also has an exceedingly rare but very spirited dissent from one of the panel judges, and is worth reading on its own on account of the opinion’s erudition and well-reasoned albeit tough conclusions—demonstrating once again the maxim that “hard cases make bad law”—the case may be found at: [http://untreaty.un.org/UNAT/UNAT\\_Judgements/Judgements\\_E/UNAT\\_01204\\_E.pdf#x=1&y=1](http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01204_E.pdf#x=1&y=1) [http://untreaty.un.org/dtSearch/dtisapi6.dll?cmd=getpdfhits&DocId=2038&Index=D%3aUNTREATY\UNTREATY.ORG\UNAT\dtSearch\Indexes\E\UNAT\\_ENG&HitCount=15&hits=7b8+7b9+7ba+987+988+989+1067+1068+1069+11da+11db+11dc+17b1+17b2+17b3+&.pdf](http://untreaty.un.org/dtSearch/dtisapi6.dll?cmd=getpdfhits&DocId=2038&Index=D%3aUNTREATY\UNTREATY.ORG\UNAT\dtSearch\Indexes\E\UNAT_ENG&HitCount=15&hits=7b8+7b9+7ba+987+988+989+1067+1068+1069+11da+11db+11dc+17b1+17b2+17b3+&.pdf)

employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. ... If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. ... It is sufficient to say that, if [the staff member] accepts the order [to work in an unsafe place] ... and the employer has failed to exercise due skill and care in arriving at his judgement, the [staff member] is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.>

XVIII. Similarly, in *Bares (ibid.)* the ADBAT [Asian Development Bank] recognized the same right of its employees to be reasonably cared for in matters involving their safety, health and security. The ADBAT stated that:

<the [employer]'s duty is only to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health and security of its staff.>

XIX. In *Bares*, the ADBAT further expanded the duty of care to the agents and representatives of the international organization, finding that the employer "can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the [employer] must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so. ... In short, though the [employer] is free to hire a contractor to provide a service ... that it might otherwise itself perform directly through its own employees, the [employer] must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment."

So while a review of the UN's constituent documents and even the case law of the two main UN administrative fora<sup>7</sup> fails to find a clear and single, definitive statement of the duty of care of UN Agencies (as is often the case in many national law systems), it is certain that such a standard exists, albeit in a more muted and apparently ad hoc state, at least for UN staff members. The greater problem for such staff (obviously, those injured third parties who cannot avail themselves of the UN's internal justice mechanisms have even greater problems in seeking redress for and recovery of damages as they currently have no formal mechanism in which to vindicate their rights) is obtaining enforcement of the acknowledged duty of care within the current, flawed internal justice system of the UN and its other agencies. While the jury is still out on the effectiveness and fairness of the newly reformed UNDT/UNAT system, it having gone into effect only as of 1 July 2009, the sad reality in the opinion of the author is that the applicable duty of care detailed above is not consistently and uniformly enforced by the ILOAT on account of a number of flaws inherent in that Tribunal (including

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<sup>7</sup> As of the present date, the ILOAT has rendered more than 2800 judgments since its inception in 1945; the now defunct UN Administrative Tribunal rendered nearly 1500 judgments through its demise on 31 December 2009. The newly constituted UNAT has not yet rendered any reported decisions as of the writing of this article in early March 2010. The UNDT as of this writing has rendered more than 135 judgments which are available at: <http://www.un.org/en/internaljustice/#UNDT>.

the use of “contract judges”, the failure of the ILOAT to hold evidentiary hearings or oral argument at all since 1989, the often derisory measure of damages when same are awarded, and its refusal to apply and enforce obviously binding human rights standards [such as those found in the ECHR] to the UN and other IOs<sup>8</sup>, to name just a few).

Without an independent and unbiased arbiter to uniformly apply the applicable standard of care to the UN, its officials and its other agencies (which the UNDT/ UNAT may well prove to be in the near future), and until such mechanism is also made available to third parties injured by international organizations currently enjoying immunity from national laws, the author is of the concerted opinion that the existence of such a standard is a mere mirage for those attempting to hold the UN and its officials accountable for their breach of such duty of care.

It is perhaps also worthwhile to note in closing that the above discussed duty of care applicable to the United Nations, its subsidiary organs and officials, is of course also applicable at a minimum to international NGO's that work and operate alongside the UN around the world. Unlike UN actors however, such NGO's (with the exception perhaps of the ICRC, which, while constituted as an international NGO, enjoys a special status and immunity under the Geneva Conventions<sup>9</sup>) would also be primarily subject to the national law duties of care in the jurisdictions in which they operate; in the event of a failed-state environment, the NGOs might also be subject to some secondary sources of liability such as the American Alien Tort Claims Act. As a result of their general lack of immunity, such NGOs have not only a moral motivation to observe such applicable duties of care, but an acute self interest as well in determining and observing the applicable duties of care to avoid finding themselves in the legal dock of some far-flung jurisdiction.

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<sup>8</sup>In its Judgment N°. 2662,( found at <http://www.ilo.org/public/english/tribunal/fulltext/2662.htm> ) at consideration 12, the ILOAT expressly and unequivocally held: “12. The Applicant contends that there was a violation of Article 6 of the European Convention on Human Rights, which relevantly provides that “[i]n the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Reliance on the Convention is misplaced as it is not applicable to international organisations (emphasis added).”

<sup>9</sup>For a concise discussion of the ICRC's legal status, see an article by former ICRC Legal Officer Gabor Rona at : <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5W9FJY> . To its credit, the ICRC regularly waives the immunity of its staff in the field when the interests of justice dictate, unlike the UN.