



**U.S. Department of Justice**

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October 31, 2007

**BY HAND**

The Honorable Robert W. Sweet  
United States District Judge  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1920  
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*, 06 Civ. 3432 (RWS)

Dear Judge Sweet:

On October 2, 2007, the United States submitted a letter in this matter pursuant to 28 U.S.C. § 517 in order to advise the Court of the immunities afforded to the United Nations ("U.N.") and its officials under certain treaty and statutory provisions. On the same date, the U.N. moved to dismiss on immunity grounds. On October 16, 2007, plaintiffs filed a memorandum in opposition to the U.N.'s motion, contending principally that if the Court were to determine that the action should be dismissed on immunity grounds, such a dismissal would "violate the plaintiffs' fundamental rights under the U.S. Constitution found in the 1st, 5th, 7th and 14th amendments." Pls.' Mem. at 5. The United States submits the instant letter in order to respond, briefly, to plaintiffs' argument – which is in essence a challenge to the constitutionality of the treaty and statutory provisions that govern the immunities of the U.N. and its employees.<sup>1</sup>

Plaintiffs' constitutional challenge is meritless. Fundamentally, their argument conflates various procedural rights guaranteed by the Constitution with a substantive right to a remedy for the specific conduct alleged in their complaint. The latter is nowhere found in the Constitution. *See Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990) (reprinting district court decision adopted by the circuit court, rejecting similar constitutional challenge to sovereign immunity and official immunity defenses raised by federal defendants: "The Constitution does not create a fundamental right to pursue

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<sup>1</sup> As stated in our October 2, 2007 letter, the United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case. We write only to defend the constitutionality of the immunities afforded to the U.N. and its officials as a general matter.

specific tort actions.”); *see generally* *Bowman v. Niagara Mach. and Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) (“The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts’ processes to vindicate such rights as he may have, as opposed to the extent to which rights actually are extended to protect or compensate him.”).

The immunities of governmental entities and officials of various kinds have been accepted as part of U.S. law since the founding. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (noting immunity of the United States); An Act for the Punishment of certain Crimes against the United States, § 25, 1 Stat. 112, 117-18 (1790) (granting absolute immunity to diplomats). While plaintiffs are correct that dismissal of their case on immunity grounds would leave them without a remedy in court, this consequence is an unremarkable, indeed wholly intended, consequence of immunity, the very function of which is to shield against the burdens of litigation where it applies, regardless of the merits of the case. *Cf., e.g., United States v. Bein*, 214 F.3d 408, 413 (3rd Cir. 2000) (“[A]pplication of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse.”). If this consequence were sufficient to give rise to a constitutional violation, then no form of immunity would be constitutionally permissible – an absurd result given that concepts of immunity are well-established fixtures of our law and essential, in particular, for the conduct of international relations. *See Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) (“If our plaintiffs are right, it would seem that the due process clause is violated by the immunity enjoyed by foreign diplomats within the United States; where a foreign diplomat has been immune from suit even though, for example, he kills or injures a U.S. citizen while recklessly driving a car. Similarly the due process clause would prevent U.S. diplomats abroad from claiming immunities in foreign courts. The answer of course is that due process is not infringed by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim.”); *see also* *Mistretta v. United States*, 488 U.S. 361, 401 (1988) (“[T]raditional ways of conducting government . . . give meaning to the Constitution.”) (internal quotation marks omitted); *accord* *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Despite plaintiffs’ portrayal of their constitutional arguments as novel, *see* Pls.’ Mem. at 4, courts have specifically rejected such arguments before with respect to the immunities pertaining to international organizations. *See Weinstock v. Asian Development Bank*, 05 Civ. 174 (RMC), 2005 WL 1902858, \*3 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenges to immunity afforded to international organizations under the International Organizations Immunities Act (“IOIA”), 28 U.S.C. 288b); *Ahmed v. Hoque*, 01 Civ. 7224 (DLC), 2002 WL 1964806, \*7 (S.D.N.Y. Aug. 23, 2002) (rejecting constitutional challenge to diplomatic immunity invoked by foreign minister to the U.N.). As the court explained in *Weinstock*:

It is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g., Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (“Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . .”). One method by which it can do so, and which it employs quite

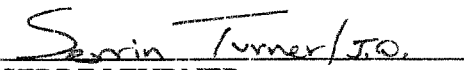
frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

2005 WL 1902858, at \*3 (some citations omitted). By the same token, there is nothing unconstitutional about such immunities being codified by treaty, as are the immunities of the U.N. and its officials, as well as other foreign officials, such as diplomats and consular officers. *See Ahmed*, 2002 WL 1964806, at \*7. Indeed, the immunities of the U.N. and its officials have repeatedly been recognized and respected by this Court over many years, without their constitutionality ever having been called into question. *See, e.g., Van Aggelen v. United Nations*, 06 Civ. 8240 (LBS), 2007 WL 1121744 (S.D.N.Y. Apr. 12, 2007); *D'Cruz v. Annan*, 05 Civ. 8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005), *aff'd*, 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y.1999), *aff'd*, 208 F.3d 203 (2d Cir.2000); *Askir v. Boutros-Ghali*, 933 F.Supp. 368 (S.D.N.Y.1996); *De Luca v. United Nations Org.*, 841 F. Supp. 531 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir.1994); *Klyumel v. United Nations*, 92 Civ. 4231, 1993 WL 42708 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y.1987).

Accordingly, this Court should reject plaintiffs' contention that the immunities afforded to the U.N. and its employees under treaty and statutory law violate the U.S. Constitution.<sup>2</sup> I thank the Court for its consideration of this submission and respectfully request that it be docketed and made part of the record in this matter.

Respectfully,

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<sup>2</sup> In addition to challenging the constitutionality of the immunities of the U.N. and its officials, plaintiffs also contend that these immunities violate Article 2 of the International Covenant on Civil and Political Rights ("ICCPR"), *done* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sep. 8, 1992), by depriving them of an effective remedy for their claims. Putting aside that Article 2 does not require remedies of a judicial form, *see* ICCPR art. 2, the ICCPR in any event is not self-executing and thus does not by itself provide the basis for a private cause of action. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 257-58 (2d Cir. 2003).