Applying Derivative United Nations Immunity to Humanitarian NGOs

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Abstract

United Nations (U.N.) privileges and immunities, enshrined in the Convention on Privileges and Immunities, protect U.N. personnel from legal proceedings and facilitate U.N. missions in volatile contexts. Today, non-governmental organizations (NGOs) are essential providers of emergency humanitarian assistance in some of the most dangerous states. Even though some NGOs work under U.N. funding agreements, they lack the protective immunities of the U.N. This Comment assesses the bases for U.N. immunity and the similar concept of derivative sovereign immunity, whereby sovereign governments extend their immunity to quasi-government entities and private contractors. It argues that derivative immunity from states is based on a principal-agent relationship and that this relationship may be found in some U.N.-NGO partnerships. This provides a legal basis for states that recognize derivative immunity to grant NGOs immunity for actions taken on projects under U.N. funding. Legal precedent for extending U.N. immunity to U.S. contractors also exists in the United States. A second route to NGO immunity is through the U.N. This Comment shows that the U.N. contemplates derivative immunity by extending it to specific types of U.N. employees through the Convention on Privileges and Immunities and to U.N. contractors broadly through host country agreements, again based on a principal-agent relationship. This bolsters the legal argument for states to grant a limited form of derivative U.N. immunity to humanitarian NGOs to protect them from political bias while preserving their accountability to vulnerable populations.

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I. INTRODUCTION

A. Motivating Problem

In 2017, a U.S. federal district court dismissed the final class action suit lodged against the U.N. for allegedly causing a cholera outbreak in Haiti.[1] Although an independent U.N. panel found clear evidence that the infection spread from U.N. peacekeepers, the U.N. easily invoked immunity, which, through the Convention on Privileges and Immunities of the United Nations, entitles the U.N. to "immunity from every form of legal process" except where it has "expressly waived its immunity."[2] The U.N. is not the only international body endowed with global immunity. The Convention on Privileges and Immunities of the Specialized Agencies similarly immunizes international organizations that work with the U.N. through negotiated agreements, such as the World Health Organization (WHO) and World Bank Group (World Bank).[3]

Unlike the sovereign immunity of states, which is partially grounded in a notion of divine sovereign superiority, U.N. immunity is solely based on its utility to the U.N.'s mission. As a global, multi-lateral organization with the unique task of maintaining global peace and security, the U.N. requires a degree of protection from the administrative, adjudicatory, and executive powers of Member states to function effectively and efficiently.[4] At a high level, this prevents national courts from having to decide questions of international policy and diplomacy.[5] At a ground level more relevant to this Comment, immunity protects U.N. personnel who are working in dangerous contexts. When states are beset by war, political upheaval, or natural disaster, the U.N. is uniquely capable of diplomatic engagement and negotiation with quasi-legitimate governments because, as a multi-member body, it brings an air of neutrality and legitimacy that is usually lacking in bilateral engagement. Furthermore, because of its legitimacy, size, and resources, the U.N. can negotiate humanitarian access and coordinate humanitarian response on a wider scale than any country or non-governmental organization (NGO).

To carry out its mission safely and maintain independence and neutrality, it is critical that representatives, officials, and other U.N. personnel enjoy

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1 Rick Gladstone, *Court Dismisses Remaining Lawsuit Against U.N. on Haiti Cholera*, N.Y. TIMES (Aug. 24, 2017), https://perma.cc/VJ5S-VKB9.

2 Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, 1422 (1946) [hereinafter U.N. Privileges and Immunities Convention].

3 Convention on the Privileges and Immunities of the Specialized Agencies, 33 U.N.T.S. 261 (1947).

4 Kristen E. Boone, *The United Nations as a Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 350 (2016).

5 *Id.* at 349.

immunity from arrest or detention, and from legal proceedings in the states in which they work. One reason is that, as a neutral body, the U.N. must work with multiple parties to a conflict, whether to deliver emergency assistance to vulnerable populations or to negotiate ceasefire agreements. In conflict contexts with weak or no rule of law, it may be tempting for parties to a conflict to pressure neutral actors against aiding political opponents.[6] Consequently, immunity from arrest and legal processes helps the U.N. efficiently move throughout a state and carry out humanitarian missions. Although the appropriate strength of U.N. immunity has been questioned in recent years, most scholars agree that at least limited immunity is essential.[7]

It is easy to forget, however, that the big players in humanitarian assistance—multilateral organizations and government aid agencies—are not the only organizations on the frontlines. NGOs have become major partners in humanitarian assistance, working directly with multilateral organizations and government aid agencies in some of the most volatile conflict environments in the world.[8] In 2018, 30 percent of all humanitarian assistance funding (from governments and private actors) went directly to NGOs.[9] They also receive funding from the U.N., such as through Country-Based Pooled Funds (CBPF) and Central Emergency Response Funds (CERF).[10]

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6 *See, e.g.*, *Tigray: Ethiopia Forces 2 International NGOs to Cease Work*, DW NEWS (Mar. 8, 2021), https://perma.cc/V2H9-YMEK (reporting that the Ethiopian government ordered two INGOs to stop working in the opposition area of Tigray and that the government has accused aid workers of bias in favor of and arming rebel groups in Tigray).

7 Limited immunity would provide immunity for actions related only to its core mission and require alternative dispute mechanisms or liability funds to settle claims unrelated to its core mission. *See* Boone, *supra* note 4 (arguing that the U.N. should: revert to functional immunity that the author argues was originally envisioned in the U.N. Charter, obtain third-party insurance for mass torts or maintain a fund to settle private claims, and consider alternative modes of dispute resolution); Rosa Freedman, *U.N. Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239, 245 (2014) (stating that U.N. peacekeepers require immunity to fulfill their duties and protect them from courts that lack fair process but that dispute resolution mechanisms should exist).

8 I define INGOs as NGOs that receive funding from more than one country (including through U.N. funds) and either directly fund or manage programs in several other low and lower middle-income countries. This is distinct from local NGOs (LNGOs) that only work in one country. NGOs includes both INGOs and LNGOs. *See* Stephen Commins, *INGOs*, *in* INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY (H.K. Anheier, S. Toepler eds., 2010).

9 DEVELOPMENT INITIATIVES, GLOBAL HUMANITARIAN ASSISTANCE REPORT 2020 46 (2020), https://perma.cc/T9ZT-NP89.

10 *See, e.g.*, *About CBPFs*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OHCA) (2020), https://perma.cc/FDR4-2E34 (CBPFs are pools of unearmarked funds to support local humanitarian efforts. In 2019, over 817 million USD was allocated to U.N. agencies, NGOs and INGOs, and Red Cross and Red Crescent organizations from CBPFs); U.N. OCHA, CERF ANNUAL RESULTS REPORT (2020), https://perma.cc/VYJ5-8UY6 (CERF funding supplements humanitarian response when needs exceed the capacity to respond either because the emergency is underfunded or because rapid response is needed. CERF funding exceeded 639 million USD in 2020).

As the humanitarian and development industry has grown, so too has the role of private companies that provide a variety of consulting services, such as monitoring and evaluation of humanitarian projects, research, and data collection for the U.N., NGOs, and government aid organizations.[11] CBPFs are a good example of how these actors work together in practice. As manager of pooled funds, the U.N. Office for the Coordination of Humanitarian Affairs (OCHA) decides how to disperse funds to "implementing partners" (NGOs) to carry out humanitarian responses rather than the U.N. implementing such responses itself. Implementing partners apply for funding by submitting a project proposal. If selected, the partner signs a grant agreement specifying terms and conditions and implements the project. OCHA monitors partner work by requesting narrative and financial reports and arranging for third-party monitoring, which it contracts out to private companies through competitive bidding processes.[12]

Clearly, the humanitarian field relies on far more than just the U.N. But there is a disturbing dichotomy whereby humanitarian NGOs that receive U.N. funding—and with it much oversight and direction—do similar or identical work in extremely dangerous areas but lack any of the privileges or immunities enjoyed by the U.N., and, indeed, any form of legal personality that would confer status on the international stage.[13] Instead, they are subject to the varying rules and systems of each country or region in which they are registered. This lack of protection has two key impacts on humanitarian NGOs.

First, NGOs are vulnerable to politically inspired harassment, which forces them to cease operating or, if they are an international NGO (INGO), leave the state when they are most needed.[14] Humanitarian NGOs operate under core humanitarian principles of independence, impartiality, and neutrality.[15] This means that in conflict contexts, NGOs are not aligned with any government, do not take sides, and assist all parties without bias. However, parties to a conflict are not necessarily happy about NGOs assisting perceived rivals. Most frequently, NGOs viewed with suspicion are discouraged from providing aid

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11 Examples of such companies include Chemonics, Development Alternatives, Inc. (DAI), Dexis Consulting, i-APS, Proximity International, and SREO Consulting.

12 *See, e.g.*, OCHA, IRAQ HUMANITARIAN POOLED FUND OPERATIONAL MANUAL 10 (2015) https://perma.cc/PT3S-FN7D.

13 Casey Jedele, *Domestic Restrictions on Non-Governmental Organizations and Potential Protections Through Legal Personality: Time for a Change*, 21 CHI. J. INT'L L. 118, 121 (2020).

14 *See* Commins, *supra* note 8.

15 *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), THE FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT (2015), https://perma.cc/9RWX-3H3U.

through physical intimidation or extremely strict registration laws.[16] Consequently, it can be difficult for NGOs to gain access to certain vulnerable populations due to lack of permission from the relevant government or lack of security amongst various non-state armed groups operating in a security vacuum. Furthermore, when there is political upheaval in the middle of a conflict, INGOs may leave the country because of physical insecurity, uncertainty about their registration status (whether they can operate), visa status (whether they can enter and leave the country), or general standing with whomever is in power.[17] Immunity could relieve some of these pressures, giving NGOs more ability to keep operating when humanitarian situations become dire. While registration and visa laws may still be obstacles, NGOs would have to worry less about political backlash from unfriendly governments because they would have the legal backing of the U.N. and an air of immunity that comes from U.N. support.

Second, lack of immunity means NGOs can be sued for their words or actions in local courts. This is potentially harmful because rule of law in the states needing humanitarian assistance is often weak or non-existent. It is especially relevant for INGOs because of host country bias, i.e., bias against foreigners. In fact, such bias is the reason multi-national companies usually submit their disputes to international arbitration.[18] While NGOs operating under a U.N. contract may arbitrate disputes with the U.N., they resolve disputes with the local government in local courts. NGOs providing life-saving assistance in extremely challenging environments should not have to worry about whether they could be held unfairly liable in a potentially biased local court for their work, as this could be financially devastating and hamper their humanitarian missions.

To be clear, NGOs must be accountable to their donors and the communities in which they work. However, this Comment draws attention to the inherent tension between a need for accountability and the potential misuse of legal sanctions in the politically divided contexts in which humanitarian NGOs work. One solution is to remove claims against NGOs from potentially biased domestic forums to an independent forum, such as the U.N. or another body.

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16 RELIEFWEB, AID WORKERS ARRESTED, 2019 (May 8, 2020), https://perma.cc/TAY5-WH83; Jedele, *supra* note 13, at 122–25 (explaining a rise in increasingly cumbersome and targeted domestic restrictions on NGOs).

17 *See, e.g.*, Rodion Ebbughausen, *Myanmar: Time Running Out for Humanitarian NGOs to Avoid Catastrophe*, DEUTSCHE WELLE (June 14, 2021), https://perma.cc/F8WC-V77E (describing how conflict and politics negatively impact the ability of NGOs and INGOs to work in Myanmar, which is undergoing a civil war).

18 NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 28–29 (6th ed. 2015).

It is concededly uncommon to see a host country sue an NGO—likely because if the community or government is unhappy with the NGO, it can push it out through other means and is not necessarily as litigious as, for example, the U.S. But it is not unheard of for government aid agencies and international organizations to be sued for the unintended ethical or economic effects of their projects.[19] Compared to the U.N.-Haiti case, lack of protection could be exposing NGOs to substantial liability, especially as they continue to provide emergency aid during a global pandemic. Project-related liability could be financially and reputationally crushing for an NGO. Without a neutral dispute forum, NGOs could also be chilled from assisting the states that need it most. Even if such a case has not occurred yet, the fact remains that NGOs are currently operating without any legal safety net. It is also possible that we will see more legal action taken against NGOs as they continue to fill the shoes of international governmental organizations like the U.N. It would behoove the international community to reckon with this legal gap before such issues arise.

Ideally, NGOs providing emergency humanitarian assistance would have a form of limited immunity that automatically requires a local dispute to be heard by a neutral body. This begs the question of whether there is a legal basis to extend U.N. immunity to those NGOs. Though known by various names, I refer to this concept as *derivative immunity*.

B. Potential Solution

Sovereign immunity is a customary international law principle that protects a foreign state from the jurisdiction of its own courts and those of other states. Some common law jurisdictions, such as the United States, have evolved this concept to provide derivative immunity to government contractors working on behalf of the government and to state-owned enterprises (SOEs).[20] Although the

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19 *See, e.g.*, Sam Jones, *Ethiopian Farmer Drops Case Alleging U.K. Aid Helped Fund Evictions*, THE GUARDIAN (Mar. 6, 2015), https://perma.cc/AL7A-6G5Q (reporting that a lawsuit filed in British courts by an Ethiopian farmed against the U.K. Department for International Development (DfID) for funding a controversial development project, which was run by the World Bank, had been dropped); Vijaya Ramachandran, *The World Bank Must Clean Up Its Act*, NATURE (Mar. 19, 20219) https://perma.cc/3MKZ-FGGT (reporting that the Supreme Court held that an environmental damages lawsuit could proceed against the International Finance Corporation (IFC), a unit of the World Bank). These two cases were filed in U.K. and U.S. courts, not in the host country because the respondents, DFiD and IFC, were based in these countries. But if such a case were filed against an INGO, it could be filed against the INGO locally because they are locally registered.

20 *See, e.g.*, Yee-Fui Ng, *In the Moonlight? The Control and Accountability of Government Corporations in Australia*, 43 MELB. U.L. REV. 303 (2019) (assessing Crown immunity for statutory corporations in Australia); Vincent Connor, *The Immunity of Chinese State-Owned Enterprises in Hong Kong and Along the Belt and Road*, 19 ASIAN DISP. REV. 166 (2017) (assessing the impact of *TNBF v. China Coal* on whether Chinese state-owned enterprises can claim Crown or state immunity in Hong Kong).

degree to which this doctrine has been stretched to protect private contractors in the U.S. has been criticized,[21] analogous U.N. immunity could be considered as an option for NGOs with a true need for immunity to perform critical humanitarian missions.

Derivative immunity usually refers to extending the immunity of a sovereign government, as opposed to an international organization, but it is not unheard of with respect to the U.N. One U.S. federal district court case, *Askir v. Brown & Root Services Corp.*,[22] extended U.N. immunity to a U.S. government contractor working under a U.N. contract in Somalia based on U.S. derivative immunity doctrine. Oddly, this case has not drawn scholarly attention. Nor are any subsequent decisions factually similar. This may be because *Askir* arose in the unique case of a U.S. defense contractor working under the U.N. due to the joint U.S.-UN military presence in Somalia. Later, defense contractors have been able to protect themselves more easily using statutory law, specifically through the foreign country exception or military activities exception in the Federal Tort Claims Act (FTCA), which preserves derivative immunity granted to contractors working sufficiently under control of the U.S. government.[23] However, *Askir* is important as a model case for protecting NGOs through U.N. immunity.

C. Roadmap

The motivating question of this Comment is whether U.N. immunity can be extended to NGOs working under U.N. contracts. This Comment argues that there is an existing legal basis for extending U.N. immunity to NGOs through the principal-agent logic of derivative sovereign immunity. Countries that recognize derivative sovereign immunity often extend it to non-governmental entities if they work sufficiently under the direction of the government. The same logic has led one U.S. court to extend U.N. immunity to a non-governmental U.N. contractor, even though U.N. immunity is based in a treaty rather than natural law. The U.N. itself also contemplates contractual derivative immunity for U.N. contractors in host country agreements. Although derivative immunity is not customary international law, local courts should turn derivative U.N. immunity into a more consistent practice because of its preexisting legal basis, the similar approach of the U.N., and overriding need for limited NGO immunity in conflict zones. This Comment focuses on NGOs providing humanitarian aid in conflict contexts because NGOs have the greatest

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21 *See, e.g.*, Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969 (2020) (explaining the history and case law of derivative sovereign immunity in the U.S. and its normative implications).

22 Askir v. Brown & Root Serv. Corp., No. 95 CIV. 11008 (JGK), 1997 WL 598587 (S.D.N.Y. Sept. 23, 1997).

23 Federal Tort Claims Act, Pub. L. 79-601, 60 Stat. 812, 28 U.S.C. (1946).

need for immunity in this type of situation, though the logic could apply to NGOs working in other settings as well.

This Comment proceeds in the following five parts. Part II provides a background on the evolution of the humanitarian field, the expansion of the aid industry, and U.N. involvement with NGOs and private companies. This section also highlights modern challenges that humanitarian actors face and the need for international protection.

Part III introduces the principle of sovereign immunity and its evolution within various states, with a focus on derivative sovereign immunity. Although derivative immunity is not a customary practice among states, this Part identifies instances in which derivative immunity is most often given, to what kinds of non-governmental bodies, for what reasons, and under what circumstances. It shows that sovereign immunity is most commonly extended to quasi- or non-governmental bodies when those entities act as agents of the government and that courts usually look for some form of a principal-agent relationship. Part III also discusses *Askir v. Brown & Root* to connect the idea of derivative immunity to the U.N. context, demonstrating that, in at least one circumstance, courts have recognized U.N. contractors as having derivative immunity. This is one route by which NGOs could claim derivative U.N. immunity.

Part IV examines a second route for derivative U.N. immunity through the U.N. itself. It shows that the U.N. contemplates derivative immunity for specific types of employees in the Convention on Privileges and Immunities of the United Nations. This document gives immunity to the U.N. generally but also spells out specific privileges and immunities given to "representatives," "officials," and "experts on mission." Part IV argues that the privileges and immunities are also given based on a principal-agent theory. While NGOs don't fall into a protected category that automatically receives U.N. immunity through the Convention, the U.N. *has* extended immunity to NGOs and consultants through host country agreements. In practice, the U.N. constricts this default immunity through individual NGO contracts, however, Part IV argues that the principal-agent theory underlying its initial grant of immunity provides a legal basis for local courts to extend U.N. immunity to NGOs under U.N. contract. From a policy perspective, the U.N. should also consider granting immunity to NGOs that perform the same functions as the U.N. in conflict contexts.

Part V links theory and practice between sovereign and U.N. derivative immunity. It argues that states that recognize derivative immunity extend it to government contractors and state-owned enterprises through a principal-agent theory and that a principal-agent relationship exists for some humanitarian NGOs working under the U.N. Consequently, states have a legal basis for extending U.N. immunity to NGOs. Case precedent in the U.S. provides additional support and is a model to be replicated. Additionally, the U.N. *can* and *has* extended immunity to humanitarian actors under its existing host country

agreements based upon a principal-agent relationship between NGOs and the U.N., and practical needs. Although derivative immunity is not part of customary international law, this Comment argues that because of the commonalities between derivative immunity rationale in states that do recognize it and in U.N. immunity, there is a strong legal basis for courts and the U.N. to broaden derivative immunity protections for humanitarian NGOs. Part V also discusses what qualified immunity could look like for humanitarian NGOs working under the UN. Finally, Part V examines policy rationales for extending and not extending immunity to humanitarian actors. Part VI concludes.

II. EVOLUTION OF HUMANITARIAN ASSISTANCE AND MODERN CHALLENGES

A. Background

The modern field of humanitarian aid can be traced back to 1864 and the founding of the International Committee of the Red Cross (ICRC).[24] Henry Dunant, a Swiss businessman, was shocked by the carnage and suffering of soldiers wounded at the 1859 Battle of Solferino and resolved to establish a neutral organization to care for wounded soldiers, no matter which side of the conflict they fought for. His idea also spurred a multi-state meeting in Geneva that resulted in the first Geneva Convention.[25] Since then, ICRC has been at the forefront of humanitarian aid and human rights law, developing standards followed by humanitarian actors globally.

Prominent INGOs such as Save the Children were founded as early as 1919, but the true NGO boom began post-World War II in response to post-war reconstruction[26] and was enabled by an increasingly interconnected world. Some scholars also attribute the proliferation of NGOs to an institutional vacuum left by the end of Cold War politics and decolonization.[27] By 2018, 5,161 NGOs (humanitarian and non-humanitarian) had consultative status with the U.N. and thousands more had other types of arrangements with other

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24 Johannes Paulmann, *Conjunctures in the History of International Humanitarian Aid During the Twentieth Century*, 4 HUMANITY 215 (2013), https://perma.cc/L2Y3-L8FJ; *see also* CHRISTY SHUCKSMITH, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND ITS MANDATE TO PROTECT AND ASSIST: LAW AND PRACTICE (2017) (providing an extensive documentation of the governance structure, legal nature, and core humanitarian principles of ICRC and its contribution to international human rights law).

25 *Founding and Early Years of the ICRC (1863-1914)*, ICRC (May 12, 2010), https://perma.cc/N7W3-NSZ5.

26 For example, PLAN International was founded in response to the Spanish Civil War, Oxfam in response to World War II, and World Vision International in response to the Korean War. *See* Commins, *supra* note 8.

27 Paulmann, *supra* note 24, at 222.

intergovernmental bodies.[28] There are various levels of consultative status an NGO can apply for through the U.N. Economic and Social Council (ECOSOC) that allow them to make expert contributions to ECOSOC, such as attending meetings as observers, submitting written statements, and proposing agenda items. Regardless of status, the NGO does not have any of the rights, privileges, or immunities of a U.N. member.[29]

Since 1864, the humanitarian aid and development industry has become a professionalized, monetized industry, which has expanded into a thick network of international relief and development agencies, multilateral organizations, INGOs, local NGOs and community service organizations (CSOs), government aid agencies, individual consultants, private development and consulting firms, journalists, activists, and academics.[30]

Indeed, the aid industry has become far more professionalized in the sense that at least hundreds of thousands of individuals work full-time in the humanitarian/development field, have accumulated a specific body of knowledge and skills unique to the profession, and utilize these skills in a specific environment (environment of the disaster, complex conflict zones, etc.).[31] There are also many degree programs tailored to the aid sector.[32] The industry still has a long way to go towards solidified professionalization, as there is no professional certification system for aid workers or professional body to organize them. However, NGO working groups and academics have suggested professional certification and accreditation systems.[33]

Along with increased civil conflict and a modern focus by Western nations on state-building and poverty reduction that has spurred the creation of NGOs, private companies supporting aid efforts have also proliferated. Development

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28 Jedele, *supra* note 13, at 128; Commins, *supra* note 8.

29 Jedele, *supra* note 13, at 128–29.

30 *See* Paulmann, *supra* note 24, at 220.

31 It is nearly impossible to accurately estimate the number of humanitarian professionals given that it is not a strongly defined category and that there is no formal information sharing between aid agencies about their staff numbers. Individual consultants are also of unknown quantity. *See* PETER WALKER & CATHERINE RUSS, PROFESSIONALISING THE HUMANITARIAN SECTOR: A SCOPING STUDY 10–11 (2010), https://perma.cc/VLC3-CZLB (discussing what professionalization of the aid industry would look like and estimating the number of professionals in the industry).

32 For example, Masters in Humanitarian Action (Uppsala University); Disaster Risk Management & Climate Change Adaptation (Lund University); and International Development & Humanitarian Response (London School of Economics).

33 Walker & Russ, *supra* note 31, at 16 (discussing calls for a professional body of humanitarian managers by Management Accounting for Non-Governmental Organizations (MANGO) and a feasibility study on developing a common professional certification and accreditation system by the Interagency Working Group on Emergency Capacity, which consists of many INGOs such as CARE, Save the Children, Oxfam, et al.).

companies such as Chemonics, Development Alternatives, Inc. (DAI), and Adam Smith International are frequent U.S. and U.K. government contractors on multi-million-dollar projects worldwide, forming a multi-billion-dollar industry.[34] They are often contracted to improve local governance capacity to deliver public services.[35] These giants of development then fund smaller sub-contractors, with direct access to conflict zones.[36] They do everything from project design and implementation to monitoring and evaluation.[37]

This Comment focuses exclusively on the role of humanitarian NGOs in conflict zones, given that they are the organizations most often on the frontlines of emergency humanitarian assistance and experience the most political pressure.

B. Modern Challenges

Despite the ubiquity and criticality of non-U.N. humanitarian workers to the aid industry, NGOs are largely on their own when it comes to operations and access in the states they work, resulting in physical and legal challenges. Physically, aid workers must provide for their own security and ensure proper coordination with political and military elements in each country to access vulnerable populations and keep themselves and their own staff safe.[38] Legally, NGOs, including INGOs, operate under the laws of each country in which they work.[39] They must be properly registered and provide for staff visas and

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34 Once pejoratively termed "beltway bandits" for existing on the largess of federal government aid, these companies are now a staple in the humanitarian and development field. *See* Vijay Kumar Nagaraj, *'Beltway Bandits' and 'Poverty Barons': For-Profit International Development Contracting and the Military-Development Assemblage*, 46 DEV. & CHANGE 585, 588–90 (2015). For example, "if Chemonics were a country, it would have been the third-largest recipient of USAID funding in the world in 2011, behind only Afghanistan and Haiti." *Id.* at 589.

35 *See, e.g.*, *Transforming Healthcare in Rwanda*, CHEMONICS INT'L (Oct. 29, 2015) https://perma.cc/L393-UPZU; DEVELOPMENT ALTERNATIVES, INC., IRAQ: GOVERNANCE AND PERFORMANCE ACCOUNTABILITY (IGPA)/TAKAMUL (2022), https://perma.cc/A6YU-2G7V.

36 Nagaraj, *supra* note 34, at 588, 598.

37 Over time, it became apparent that more money was being funneled into development efforts without much accountability, most prominently during the NATO-led war in Afghanistan. *See* SIGAR, WHAT WE NEED TO LEARN: LESSONS FROM TWENTY YEARS OF AFGHANISTAN RECONSTRUCTION 83–92 (2021), https://perma.cc/268N-KJPC (discussing corruption and the lack of monitoring and evaluation of U.S. aid to Afghanistan).

38 The lack of a common system for NGO security has given rise to organizations such as the International NGO Safety Organization (INSO), which provides NGOs free services to manage risk and improve their situational awareness, including real-time incident tracking, crisis management support, and staff training. *See About Us*, INSO (2022), https://perma.cc/HY3J-HXM8.

39 *See* ICNL, *Legislation for Non-Profit Organizations: Recognition and Protection of NGOs in International Law*, 2 INT'L J. NOT-FOR-PROFIT L. (Dec. 1999), https://perma.cc/KH35-SGXU (explaining that because NGOs do not have any international status, all NGOs, including INGOs, have no choice

residencies. They are also subject to the jurisdiction of local courts for claims raised by citizens under local laws.[40]

While sovereign states surely have the right to determine which organizations work in their country and to regulate NGOs, this right is easily abused by non-state armed groups and states hostile to NGOs helping opposition populations. For example, the Ethiopian government recently ordered two highly respected international NGOs, Doctors Without Borders (Médicens Sans Frontières, MSF) and Norwegian Refugee Council (NRC), to cease their operations and accused them of assisting armed opposition groups in the Tigray region.[41] Such political targeting inhibits humanitarian assistance from reaching vulnerable populations. It could potentially be avoided if NGOs working under U.N. contracts were more visibly and legally under the umbrella of U.N. protection.

One common workaround to security issues is for the U.N. and INGOs to partner with local NGOs who are better positioned to work in specific local areas. However, especially in conflict zones and developing countries, local NGOs lack the expertise, capacity, and resources of INGOs.[42] Consequently, the presence of both local and international NGOs on the ground is a benefit to be protected.

In volatile contexts, physical threats such as arbitrary arrest, detention, and intimidation are often the main tools that threaten NGOs. But they also face significant legal risks associated with the effects of aid programming. For example, in 2015, an Ethiopian farmer sued the U.K.'s Department for International Development (DfID) for funding a development project that allegedly led to the Ethiopian government forcing people off their land and physically abusing them.[43] The case fell under U.K. jurisdiction, but it is not far-fetched to imagine that NGOs could be subject to the same risk at the hands of local courts.

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but to obtain private status under the law of a given country in order to employ staff, rent offices, and open bank accounts).

40 NGO employees with claims against the NGO likely have a forum selection clause in their employment contracts that might require the dispute to be heard elsewhere, for example, where the NGO is headquartered. *See* EDWARD KEMP & MAARTEN MERKELBACH, CAN YOU GET SUED? LEGAL LIABILITY OF INTERNATIONAL HUMANITARIAN AID ORGANISATIONS TOWARDS THEIR STAFF 13 (2011).

41 *See, e.g.*, *Tigray Ethiopia Forces 2 International NGOs to Cease Work*, *supra* note 6 (reporting that the Ethiopian government ordered MSF and NRC to cease aid operations and accusing them of supporting armed groups in Tigray).

42 Capacity building is a large area in the humanitarian/development field. It is generally recognized that co-partnership between international and local NGOs is a benefit, although the way that INGOs manage often asymmetrical relationships is an ongoing challenge. *See, e.g.*, Deborah Eade, *Capacity Building: Who Builds Whose Capacity?*, 17 DEV. PRAC. 630 (2007).

43 Jones, *supra* note 19.

This Comment does not argue that NGOs should be immune from *all* dispute resolution. To the contrary, NGOs must be accountable both to donors and beneficiary communities by answering for any harms committed. However, they ought to have some assurance that, should a dispute arise, a neutral forum would adjudicate the dispute. Lacking these protections, it is common for NGOs to cease operating and for INGOs to leave countries when upheaval occurs and then return when things stabilize. This means that there are fewer organizations and resources in country to provide humanitarian assistance when the need may be increasing. Qualified privileges and immunities would give NGOs more ability to adapt to changing circumstances and continue humanitarian assistance.[44]

While some U.N. personnel who fall under the Convention enjoy specific privileges and immunities to facilitate their missions,[45] NGOs do not enjoy any of these protections. Nor do they have legal personality in the international legal system that would give them access to international courts.[46]

The following sections first explore the principle of derivative sovereign immunity in different countries to understand when and how it is applied to non-governmental actors. Parts III and IV explore under what conditions U.N. staff and affiliates enjoy certain privileges and immunities and how the principles of U.N. and state derivative immunity might provide NGOs limited protections to facilitate their life-saving work.

III. DERIVATIVE SOVEREIGN IMMUNITY

A. Principles Underlying Sovereign Immunity

Sovereign immunity is an internationally recognized principle that shields sovereign states from the jurisdiction of other sovereign courts and from private action by citizens, except when sovereign states waive immunity.[47] Sovereign immunity is not absolute, but rather has developed into a restrictive theory of immunity whereby sovereigns are only immune from suits concerning governmental activities.[48] This excludes private or commercial acts.

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44 *See* Anne Decobert, *Myanmar's Coup Might Discourage International Aid, But Donors Should Adapt, Not Leave*, THE CONVERSATION (Feb. 18, 2021), https://perma.cc/6JAJ-3WRA.

45 U.N. Convention on Privileges and Immunities, *supra* note 2, at 1422.

46 *See* Jedele, *supra* note 13.

47 Manuel R. Garcia-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 25 VA. L. REV. 335, 335–39 (1956).

48 Joseph M. Rafols, *Sovereign Immunity: Comparative Perspective*, 29 ATENEO L.J. 49, 49 (1985).

There are a variety of justifications for sovereign immunity. First, the nature of sovereignty was originally thought to imply invulnerability.[49] It follows that no jurisdiction can have authority over a sovereign government. In British common law, the Crown thus could not answer to a lesser authority.[50]

Sovereign immunity also has functional justifications. Given that a sovereign uses public funds and acts on the behalf of citizens, immunity prevents frivolous suits from draining the public coffers and impeding government work. In the U.S., immunity also relates to separation of powers whereby Congress, not the judiciary, makes decisions of policy and allocates funds.[51]

Customary international law refers to binding international obligations of states that arise from established practice. Because it is norm-based, customary international law only arises when a practice among states is relatively consistent and conformed with out of a sense of legal obligation.[52] Although sovereign immunity is part of customary international law, it has developed differently within various states. In some, there exists a doctrine of derivative sovereign immunity, whereby the state's immunity is extended to actors working on behalf of the government. The following Section describes some of these developments as they relate to state-owned enterprises and government contractors in the U.S., Australia, China, and Hong Kong. These countries were chosen for geographic diversity and because their derivative immunity doctrines are more developed. This is not a full accounting of every country that recognizes or ever has recognized derivative immunity.

B. Derivative Sovereign Immunity

1. United States

In the U.S., derivative immunity is an expanding yet highly contested doctrine that has been used to shield state-owned enterprises (SOEs) and private contractors.[53] Federal sovereign immunity derives from English common law but has been shaped by both statute and common law in the U.S. The Foreign Sovereign Immunities Act (FSIA),[54] for example, is the basis of derivative immunity claimed by foreign SOEs, whereas domestic contractors claim

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49 Victoria Eatherton, *Is Derivative Sovereign Immunity Jurisdictional? An Analysis and Resolution of the Circuit Split*, 47 PUB. CONT. L.J. 605, 608 (2018).

50 *Id.*

51 *Id.*

52 BRIAN D. LEPARD, REEXAMINING CUSTOMARY INTERNATIONAL LAW 8–10 (2017).

53 *See generally* Elengold & Glater, *supra* note 21 (arguing that derivative immunity has become too broad in the U.S.).

54 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq.

derivative immunity through different bases developed in caselaw and statute.[55] Despite the dizzying array of cases, sources, and methods, this Part shows that derivative immunity is ultimately rooted in a principal-agent relationship between the federal government and the entity in question.

a) State-Owned Enterprises

Although sovereign immunity is a core principle in international law, the trend in the U.S. and many countries is towards more restrictive immunity that allows foreign states to be sued in certain circumstances.[56] In the U.S., those circumstances are codified in the FSIA. The FSIA assumes that foreign states receive a presumption of immunity but carves out specific exceptions such as explicit or implicit waiver of immunity, actions based on commercial activity, expropriation as when property is taken in violation of international law, when money damages are sought for tortious action (except when the claim is based on the exercise of a discretionary function), and terrorism.[57]

The FSIA is also applicable to SOEs under the statute's definition of "foreign state," which includes agencies and instrumentalities of the state.[58] Through caselaw, SOEs organized as separate entities under applicable corporate laws are presumed separate from the State.[59] Overcoming this presumption requires showing either that the SOE is "so extensively controlled by its owner [the State] that a relationship of principal and agent is created" or that treating the SOE as an independent entity would "work fraud or injustice."[60] For example, in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), Cuba transferred its assets to separate entities to avoid the requirements of international law, which constituted fraud and injustice,

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55 *See generally* Elengold & Glater, *supra* note 21 (describing three theoretical bases for derivative immunity relied upon by U.S. courts).

56 *See generally* Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT'L L. 1 (1986) (summarizing the development of sovereign immunity in the U.S., Canada, U.K., France, Italy, and Germany).

57 28 U.S.C. § 1605. Other exceptions include enforcement of arbitral decisions, enforcement of a maritime lien, and actions to foreclose a mortgage.

58 28 U.S.C. § 1603(b) provides:

> An "agency or instrumentality of a foreign state" means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

59 First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 626–27 (1983).

60 *Id.* at 629.

allowing the entities to be considered agents of the government.[61] Courts may also disregard the separateness presumption if day-to-day operations are controlled by a foreign state.[62]

Under the separateness presumption, subsidiaries are assumed to be separate from their state-owned parent companies, although this is rebuttable. Often, a suit against a subsidiary would come under the commercial activities exception to the FSIA, whereby a government entity is not immune when it engages in commercial as opposed to state activities.[63] Because a parent company generally does not engage in the same activities as a subsidiary that would create a claim, the test is whether the actions of the subsidiary can be attributed to the parent company because it functions as an "alter ego" of the SOE.[64] Following *Bancec*, this depends on whether the SOE so extensively controls the subsidiary that it amounts to a principal-agent relationship.[65] The court might look, for example, at whether the SOE dictates funding allocations, resource management, or corporate culture.[66]

This framework has been criticized as disallowing proper attribution, either because SOEs bear the brunt for state-directed actions or because subsidiaries bear it for SOE-directed actions.[67]

b) Non-Governmental Entities

Derivative immunity for non-governmental entities is a different legal framework from that of foreign SOEs. It is mostly grounded in federal common law rather than statute, but it still considers whether, among other factors, the government and a contractor have a principal-agent relationship. As discussed deftly by Elengold and Glater, there are multiple overlapping and entangled

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61 *Id.* at 633.

62 *See* Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 932 F.3d 126 (3d Cir. 2019) (overcoming the presumption of separateness between the Venezuelan government and a state-owned oil company, Petróleos de Venezuela, S.A., because the government had extensive control over its daily affairs, for example, through presidential appointment of its senior board members and shareholder council).

63 Paula Kates, *Immunity of State-Owned Enterprises: Striking a New Balance*, 51 N.Y.U. J. INT'L L. 1223, 1236 (2019).

64 *Id.* at 1237.

65 *Id.* at 1239.

66 *See id.* (discussing In re Chinese-Manufactured Drywall Prods. Liab. Litig., 168 F. Supp. 3d 918 (E.D. La. 2016)). In the U.K., SOEs are also presumed separate from the government unless proven otherwise. However, the SOE must also show that its activities are governmental in nature to receive derivative Crown immunity. *See* Michael Godden & Jonathan Hawkins, *State-Owned Entities and the Limits of Sovereign Immunity*, NORTON ROSE FULBRIGHT (Sept. 15, 2021), https://perma.cc/4LL5-ZPDV.

67 *See generally* Kates, *supra* note 63.

bases of derivative immunity in the U.S., which have been codified in different cases and used somewhat inconsistently by judges.[68]

Two key Supreme Court cases, *Yearsley v. W.A. Ross Construction Co.*[69] and *Boyle v. United Technologies Corp.*,[70] provide guidance for determining whether courts should extend sovereign immunity to government contractors. Although the former is rooted in sovereign immunity and the latter in a theory of preemption, both essentially hold that when a contractor is employed to do the bidding of the government, it is shielded from legal liability by derivative sovereign immunity when its actions fall within the scope of employment.

In *Yearsley*, a private company was contracted by the federal government to build dikes in the Missouri River. Plaintiffs claimed that diversion of the river eroded their land, constituting a taking of their property and claimed just compensation under the 5th Amendment.[71] The Court held that "there [was] no liability on the part of the contractor for executing [the government's] will."[72] *Yearsley* did not use the terminology of immunity explicitly but remains the key originator of derivative sovereign immunity in U.S. caselaw.[73] Today, courts generally look to two factors to determine whether to extend immunity. First, the relationship between the government and the contractor. Second, the nature and extent of the government's role in specifying how the contractor must perform.[74] The more the government dictates to the contractor what work will be done and how, the more likely it is that immunity will be extended. This is very similar to the test for overcoming a separateness presumption between the government and an SOE.

In *Boyle*, the Court created a new "government contractor defense" based on the principles of preemption and the Federal Tort Claims Act (FTCA).[75] Under the FTCA, the federal government waives its immunity for tort claims, except in certain circumstances. One exception is when the governmental action giving rise to the claim was a "discretionary function."[76] In *Boyle*, a Marine helicopter co-pilot drowned when his helicopter crashed off the Virginia coast, giving rise to a product defect claim under Virginia tort law against the helicopter manufacturer that had supplied the helicopters under a government

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68 Elengold & Glater, *supra* note 21.

69 Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940).

70 Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

71 *Yearsley*, 309 U.S. at 21.

72 *Id.* at 20–21.

73 Elengold & Glater, *supra* note 21, at 989.

74 *Id.* The Yearsley test differs slightly at the state and tribal level. *Id.* at 988 n.81.

75 FTCA, 28 U.S.C., *supra* note 23.

76 *Id.* § 2680(a).

contract.[77] The Court held that in areas of "uniquely federal interests," state law is preempted by federal law and that the procurement of equipment by the U.S. is a uniquely federal interest, so the FTCA applies.[78] Furthermore, under the FTCA, selecting the appropriate design for military equipment is a "discretionary function," which immunizes the federal government from tort suits. Finally, such immunity extends to the contractor when: (1) the U.S. reasonably approved precise specifications, (2) the equipment conformed to those specifications, and (3) the contractor warned the U.S. about dangers known to the contractor and not the U.S.[79] Some courts have also applied the *Boyle* test to non-military contractors.[80]

Elengold and Glater show that, despite the different logics employed in *Yearsley* and *Boyle*, there are common factors that courts use to determine whether a contractor may be afforded immunity. First, courts consider whether Congress intended to extend derivative immunity, for example by implicitly or explicitly preempting state law.[81]

Second, courts consider the character of the contracted institution and the contract. If the contractor is not a public institution, they assess whether it performs an important governmental function or acts as an "arm" or "instrumentality" of the government.[82] Contracts also provide evidence about whether there is a principal-agent relationship. For example, courts have declined to extend immunity to those termed in contracts as "independent contractors", in other words, those hired for their expertise and discretion in figuring out how to best get the job done.[83]

Third, courts consider the extent of the contractor's discretion in implementing the contract. Because the point of derivative sovereign immunity is to shield contractors for actions directed by the government, the more discretion a contractor has, the less any resultant harm can be attributed to the government, and thus the less deserving they are of immunity. Courts will ask first whether the contractor sufficiently lacked discretion in the contract. If it did, the court will look to a fourth factor—whether they exceeded their authority under the contract.[84] The scope of a contractor's authority is generally very narrowly scoped.[85]

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77 *Boyle*, 487 U.S. at 502.

78 *Id.* at 505.

79 *Boyle*, 487 U.S. at 512–13.

80 Elengold & Glater, *supra* note 21, at 881.

81 *Id.* at 995–96.

82 *Id.* at 998–1000.

83 *Id.* at 1000–01.

84 For an application of this inquiry, see In Re KBR, Inc., Burn Pit Litigation, 744 F.3d 326 (4th Cir. 2014) (remanding a case to assess whether KBR has discretion in its waste management and water

Altogether, these factors approximate the relationship between the government and the contractor and degree of control the government had over the contractor's functions, in other words, whether there is a principal-agent relationship. It assesses how much responsibility can be attributed to the government, which, if the government were the main actor, would trigger sovereign immunity.

c) Derivative United Nations Immunity: Askir v. Brown & Root

The U.S. has also used the doctrine of derivative sovereign immunity to extend immunity from the U.N. to a U.N. contractor. In *Askir v. Brown & Root*, a U.S. government contractor (Brown & Root, now Kellogg, Brown & Root) was originally under a government contract to provide logistics services to a U.S. military compound in Somalia.[86] After the U.S. transferred control of the compound to the U.N., the contractor received a supplemental contract to provide logistics services to the U.N. When it expired, the contractor received a U.N. contract to provide essentially the same services.[87] The plaintiff claimed damages related to unlawful possession of their property in Mogadishu.[88] The Fourth Circuit held that the government contractor defense should be extended to Brown & Root on the basis of U.N. immunity. Citing the Convention on Privileges and Immunities, it stated that "[f]or reasons similar to those that protect government contractors, when a contractor acts under the authority and direction of the [U.N.], it should also share in the immunity of the [U.N.]."[89] Unfortunately, the court did not discuss the contractual specifications of Brown & Root's contract that would allow us to determine just how much discretion the contractor exercised.

Unpublished and barely written on, *Askir* is an interesting and rare case.[90] It is the only instance of U.N. immunity being extended by a court of law to any

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treatment duties and holding that if it did have discretion, it does not qualify for sovereign immunity); Taylor Energy Co. v. Luttrell, 3 F.4th 172 (5th Cir. 2021) (granting derivative immunity to a private government contractor in part because the Statement of Work listed goals, tasks, and deliverables even though it did not include detailed directives); *see also* Elengold & Glater, *supra* note 21, at 1002–04 (discussing application of this principle).

85 Elengold & Glater, *supra* note 21, at 1004. A fifth factor concerns whether state law or regulation impermissibly affects federal policymaking and decision-making but is not relevant to the INGO context. *See id.* at 1007–10.

86 Askir, *supra* note 22, at *4.

87 *Id.*

88 *Id.*

89 *Id.* at *6.

90 *Askir* has been briefly cited as an example of the government contractor defense being applied to a U.N. contract, but I have not seen its reasoning discussed in any case or secondary source. W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 28.22, at n.8 (3d ed. 2022).

entity that the U.N. does not itself give immunity to. Nor has this fact likely to be repeated because the situation of a U.S. military contractor working for the U.N. and being sued in U.S. federal court is rare. It is important precedent, and a critical example of what derivative U.N. immunity could look like for humanitarian NGOs.

2. Australia

In Australia, derivative immunity (traditionally referred to as "extending Crown immunity") mostly manifests as immunity from legislation rather than tort actions.[91] Federal government immunity from tort, originally part of common law, was eliminated by the Judiciary Act of 1903.[92] This is similar to the U.S., where government immunity from tort was regulated by the FTCA. But whereas the FTCA has a variety of exceptions that provide loopholes for government and non-governmental contractors,[93] the Judiciary Act does not. The Australian government is still immune from some tort claims when legislation specifies.[94] Legislative reforms to civil liability have also introduced a policy defense for public entities that lowers the standard of care, but it is not full immunity.[95] In some cases, the defense could apply to non-governmental entities performing public functions, in recognition of government outsourcing.[96] But it has been applied very unevenly across states.[97] The following sections thus focus on derivative immunity from statute, the most common form of derivative immunity in Australia.

a) Government Corporations

Australian derivative immunity exists for government and statutory corporations[98] in some cases. This depends on whether the statute expresses an intention to give immunity.[99] Where it does not, a court will assess whether

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91 Nick Seddon, *Crown Immunity and the Unlevel Playing Field*, 5 AGENDA J. POL'Y ANALYSIS & REFORM 467, 468 (1998).

92 Judiciary Act 1903 (Cth) §§ 56, 64.

93 FTCA, 28 U.S.C., *supra* note 23, at §§ 2680(a)–(n).

94 *See* AUSTRALIAN LAW REFORM COMMISSION, IMMUNITY FROM CIVIL LIABILITY IN TRADITIONAL RIGHTS AND FREEDOMS: ENCROACHMENTS BY COMMONWEALTH LAWS (ALRC REPORT 129) (2016), https://perma.cc/53DP-KVTB.

95 Mark Aronson, *Government Liability in Negligence*, 32 MELB. U.L. REV. 44, 76 (2008).

96 *Id.* at 49.

97 Justine Bell-James & Kit Barker, *Public Authority Liability for Negligence in the Post-IPP Era: Sceptical Reflections on the 'Policy Defence'*, 40 MELB. U.L. REV. 1, 3 (2016).

98 A statutory corporation is a corporation created by statute. It may or may not be a state-owned enterprise. *See* Ng, *supra* note 20, at 309. Examples of statutory corporations include Australia Post and Airservices Australia.

99 *Id.* at 331.

immunity is implied through two tests.[100] The first is a control test, which asks whether the government has a high degree of control over the corporation.[101] The second is a function test, which asks whether the corporation's action can be characterized as "public."[102] One scholar has suggested that the control test is more common, given that what is public versus commercial is more ambiguous in an era of extensive outsourcing.[103] Like derivative immunity in the U.S., the concern of both tests is to what degree a quasi- or non-governmental entity can be characterized as an arm of the government or under government control.

b) Non-Governmental Entities

Derivative immunity also exists for private entities, although this is still a developing area of law.[104] In 1979, *Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd.*[105] first extended Crown immunity to a private body because it functioned as an instrumentality of the Crown. In this case, the Commissioner for Railways of the State of Queensland purchased rolling stock to operate a new railway and entered into contracts with two private companies to supply relevant equipment. However, it did not award the contracts through a competitive tender, possibly running afoul of the Trade Practices Act (TPA). The court held that the Commissioner, as an agent of the Crown, was immune from the TPA and that its immunity extended to private companies in a contractual relationship with the Crown.

From *Bradken* until recently, the law was that those engaging in transactions with the Crown in circumstances where it was not carrying on business could also be immune if a legitimate entitlement to Crown immunity could be established.[106] This depends in part on whether there is an intention in the statute that has allegedly been violated to bind the Crown based on all relevant circumstances.[107]

There are also elements of a principal-agent relationship whereby non-governmental entities can claim immunity if the private party is acting as an

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100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *See, e.g.*, W. AUSTL. LEGIS. COUNCIL, DISCUSSION PAPER OF THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION IN RELATION TO THE REMEDIES AVAILABLE TO RECIPIENTS OF CONTRACTED-OUT GOVERNMENT SERVICES (2000) (a discussion paper written in part to address the uncertainty about the extent to which Crown immunity extends to government contractors at a time when contracting-out was becoming more pervasive and calling for legislation to clarify).

105 145 CLR 107 (1979).

106 Erica Brooke Taylor, *The Baxter Saga: The Role of Competition Law in Government Procurement*, 18 TRADE PRAC. L.J. 188, 190 (2010).

107 *See* Seddon, *supra* note 91, at 468 n.6 (discussing Bropho v. Western Australia, HCA 24 (1990)).

"arm" of the government to implement a government-initiated program.[108] However, non-governmental entities cannot claim immunity for independent actions outside the scope of the Crown's authority.[109]

In the most recent major derivative immunity case in 2007, the High Court of Australia restricted the scope of derivative Crown immunity for non-governmental entities in *Australian Competition and Consumer Commission (ACCC) v. Baxter Healthcare Pty. Ltd.*[110] Baxter was the sole manufacturer of sterile fluids (which are essential in hospitals) in Australia and also competed with manufacturers of other kinds of fluids.[111] Baxter responded to tenders from state purchasing authorities (SPAs) to provide both essential and non-essential fluids to the government.[112] The ACCC claimed that Baxter's offer violated the TPA because it leveraged its monopoly over essential fluids to achieve a virtual monopoly on competitive products.[113] The ACCC conceded that the SPAs were not carrying on business and thus were immune from the TPA.[114] Baxter argued that it was also immune from the TPA through derivative immunity because the SPA was immune and binding Baxter would inhibit the freedom of the Crown to enter into contracts of its choosing, thus adversely affecting its rights.[115] The trial judge and Full Court initially found *Baxter* sufficiently similar to *Bradken* to extend derivative immunity to the company.[116]

However, the High Court overturned this decision. It first noted that *Bradken* did not decide whether an act applied to a corporation in *precontractual* dealings with the government, only an agent of the Crown.[117] It narrowed the scope of *Bradken*, holding that whether the legal interests of the Crown are implicated by applying legislation to an entity in a contractual relationship with it

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108 *See* Woodlands v. Permanent Trustee Co. Ltd.,147 ALR 419 (1996)*; see also* Seddon, *supra* note 91, at 476–77 (discussing the holding and implications of Woodlands, which he terms the "second leg of *Bradken*").

109 PARLIAMENT INFO. & RSCH. SERVS., CAN PRIVATE GOVERNMENT CONTRACTORS CLAIM CROWN IMMUNITY? 2 (1999).

110 HCA 38 (2007).

111 *Id.* ¶¶ 7–8.

112 *Id.* ¶ 10.

113 *Id.* ¶¶ 25–26. Specifically, Baxter offered the government the choice between an exclusive bundled offer, whereby it would be the exclusive seller of both monopoly and competitive products at a discounted price, and an unbundled offer, whereby monopoly and competitive products would be priced as separate line items and the government could procure from multiple suppliers. ACCC argued that because the exclusive bundle was cheaper and Baxter had a monopoly on essential fluids, it was forcing the government to accept the exclusive bundle and thereby give Baxter a monopoly on non-essential fluids.

114 *Id.* ¶ 16.

115 *Id.* ¶ 60.

116 *Id.* ¶ 74.

117 *Id.* ¶ 52.

depends on the statutory construction of the statute.[118] In this case, the court found it absurd that Baxter, in carrying on its own business, would be immune from liability when the government *itself* would not be immune in carrying on such business. This result also contravened the purpose of the statute, which was to "enhance welfare of Australians by promoting competition and fair trading."[119] Additionally, extending immunity to Baxter was unnecessary to protect legal interests of the government because States can legislate to protect governmental interests.[120] On the Crown's right to freely to enter into any contract, the court found that it can be legal for the Crown to enter into a contract and yet illegal for the other party to do so. Consequently, even if Baxter were denied immunity, the immunity of the Crown in this dealing would be preserved.[121]

Australian caselaw, including key cases such as *Bradken*, *Bropho*, *Woodlands* and *Baxter*, provides three key factors determining extension of Crown immunity to non-governmental entities: (a) whether the government is immune based on statutory construction; (b) whether not giving immunity would divest the government of proprietary, contractual, or other legal rights or interests; and (c) whether the non-governmental entity is a functional arm of the government, for example, implementing a government program. In *Baxter*, control was not a factor because it related to a precontractual negotiation. What counts as government rights and interests and what it means to "divest" them is still unsettled in the caselaw.[122]

3. China and Hong Kong

Contrary to the global trend, Chinese law provides for absolute sovereign immunity—immunity for both sovereign *and* commercial acts.[123] Although China does not have a law on state immunity, the government's litigating position in a variety of cases as well as some laws suggest that it seeks to legally separate the government from SOEs. In *Scott v. People's Republic of China*, the Chinese

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118 *Id.* ¶ 62.

119 *Id.* ¶ 73.

120 *Id.* ¶ 34.

121 Justice Kirby's concurring opinion has an interesting discussion of the archaic foundations of derivative immunity in Australia. He argues that because Australia's polities are created by the Constitution, they are not "subsumed" in the Crown and thus cannot based derivative immunity on English common law notions. He notes that in the U.K., Crown immunity is governed by statute, not common law. *Id.* ¶ 123 (Kirby, J., concurring).

122 *See* Robert Wrightson, *Derivative Governmental Immunity: Lessons from Baxter and the Trade Practices Act*, AUSTRALIAN COMPETITION AND CONSUMER LAW, *38–41 (2008).

123 Vincent Connor, *The Immunity of Chinese State-Owned Enterprises in Hong Kong and Along the Belt and Road*, 19 ASIAN DISP. REV. 166, 167 (2017).

government was the defendant in a product liability case involving fireworks.[124] The Chinese government argued that a certain Chinese SOE involved in exporting the fireworks should be a party to the suit instead, arguing that Chinese SOEs are independent legal persons with their own rights and duties.[125] The Constitution of the People's Republic of China further states that "state-owned enterprises have decision making power," and the Provisional Regulations for Supervision and Administration of State-Owned Assets in Enterprises states that SOEs enjoy operational autonomy.[126] Both documents clearly attempt to assert that the SOEs function independently of the government, and thus are not acting as government agents and consequently are individually responsible for their actions.[127]

The situation differs in Hong Kong, which also has absolute immunity.[128] State-owned enterprises may be granted derivative Crown immunity if, as in Australia and the U.S., they pass a "control" test.[129] The main inquiry is whether the entity has independent management powers, free from governmental involvement in the entity's day-to-day business operations and decision making.[130]

Overall, derivative immunity frameworks in the U.S., Australia, and Hong Kong share a key common attribute—the principal-agent theory. All attempt to measure the extent to which the government with sovereign immunity exercises control over a quasi-government or non-governmental entity either through influencing daily operations or by providing contractual specifications. The U.S. and Australia consider to some extent the legislative intent in statutes and Australia alone heavily considers how extending immunity affects the interests of the government. But the key inquiry is whether the actions of an entity without a presumption of immunity can be attributed to the government, and thus whether it is deserving of immunity. Although the Chinese government has

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124 Scott v. People's Republic of China, No. CA3-79-0836-d (N.D. Tex. June 29, 1979); *see also International Arbitration Newsflash: Immunity for State-Owned Enterprises?*, HOGAN LOVELLS (June 20, 2011), https://perma.cc/96H7-EG2X (discussing the case).

125 *Id.* The Chinese government's litigating position has not stopped SOEs from claiming sovereign immunity under other state laws. *See* Matthew Miller & Michael Martina, *Chinese State Entities Argue They Have 'Sovereign Immunity' in U.S. Courts*, REUTERS (May 11, 2016), https://perma.cc/J35W-JMLU (describing a U.S. district court case in which Chinese SOEs in the aviation industry claim sovereign immunity under the FSIA).

126 XIANFA art. 16 (2004); Provisional Regulations for Supervision and Administration of State-Owned Assets in Enterprises (promulgated by the State Council, March 2003), art. 10.

127 *See* Guan Feng, *Do State-Owned Enterprises Enjoy Sovereign Immunity?*, CHINA L. INSIGHT (Sept. 27, 2018), https://perma.cc/N5S7-3EBH.

128 Connor, *supra* note 123, at 167.

129 *Id.*

130 *Id.* Sovereign immunity either does not exist or exists in a limited form and is not generally given to SOEs in Malaysia, Myanmar, the Philippines, Singapore, and Vietnam. *Id.* at 169.

distanced itself from SOEs to avoid giving them derivative immunity, it seems to recognize that the lynchpin is whether a principal-agent relationship can be established.

Scholars and legislators in the U.S. and Australia worry that an automatic presumption of derivative immunity for non-governmental actors will lead to a slew of claims for such immunity, which could deprive consumers of remedies for harm and shield contractors that are not politically accountable.[131] Consequently, it is a best practice for the principal-agent relationship to be proven.

Similarly, an automatic presumption of immunity for humanitarian NGOs could deprive aid beneficiaries of remedies for real harm. Nonetheless, if an NGO is acting under a detailed U.N. contract, sovereign derivative immunity suggests it is possible to extend some form of U.N. immunity to NGOs if they are acting as agents of the U.N. This is certainly true in the U.S., where *Askir* is good law, but it is also transferrable to other states that recognize derivative immunity. However, derivative immunity is not customary international law, and sovereign immunity has become more restricted over time. It is therefore helpful to assess the U.N.'s approach to its own immunity to determine whether NGOs have a recourse through the U.N. itself.

IV. UNITED NATIONS IMMUNITY

A. Convention on Privileges and Immunities

U.N. immunity has been recognized from its founding in 1945. Article 105 of the U.N. Charter established the fundamental principle 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."[132] Contrary to sovereign immunity, the rationale for immunity is not hierarchy but function; given that the U.N. is the preeminent multi-lateral global institution for peace, security, and assistance and works in extremely political contexts, allowing single nations to sue the U.N. could result in abuse of local courts and bog down U.N. efforts.[133] Other concerns include maintaining the U.N.'s independence; refraining from having national courts rule on issues of international policy; and avoiding inconsistent treatment of similar questions across states.[134]

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131 *See, e.g.*, Elengold & Glater, *supra* note 21; Seddon, *supra* note 91.

132 Charter of the United Nations, 1 U.N.T.S. XVI (1945).

133 *See* Anthony J. Miller, *United Nations Experts on Mission and Their Privileges and Immunities*, 4 INT'L ORG. L. REV. 11, 15–16 (2007) (explaining that U.N. immunity is based on function, contrary to League of Nations immunity, which was diplomatic).

134 *See* Boone, *supra* note 4, at 350–51; Freedman *supra* note 7.

The Convention on the Privileges and Immunities of the United Nations, adopted in 1946, specifies in more detail *who* within the U.N. orbit is accorded what privileges and immunities.[135] The Convention, along with host country agreements that the U.N. negotiates with each country in which it works, show that the U.N. contemplates the possibility of derivative immunity for all its employees and contractors, including NGOs. As Part IV will show, the U.N. purposefully keeps the definition of protected categories of employees, such as "experts on mission," flexible to accommodate changing U.N. needs. It also sometimes negotiates immunity for all foreign employees in host country agreements. Although the U.N. often denies immunity to NGOs in individual contracts, it has created a default framework to allow for immunity should the need arise. This provides more impetus for local courts to consider a default extension of U.N. immunity to NGOs working under close U.N. direction.

The Convention delineates three categories of persons afforded certain privileges and immunities: "representatives," "officials," and "experts on mission." Representatives are "representatives of Members to the principal and subsidiary organs" of the U.N. and U.N. conferences.[136] Representatives receive immunity from arrest and detention, seizure of their baggage, and immunity from legal processes related to words spoken or written or actions done by them while exercising their functions.[137] They also have many of the immunities of diplomatic envoys.[138]

"Officials" are defined as persons who can theoretically be assigned any task by the Secretary-General.[139] They have also been defined by the General Assembly as U.N. staff, except those recruited locally and paid hourly rates, persons elected or appointed by the General Assembly on a full-time basis, and anyone else given the status of "official" by the General Assembly.[140] Officials also have immunity from legal processes in respect of words spoken or written or actions taken in their official capacity and diplomatic immunities given to "officials of comparable ranks" in the "diplomatic mission of the government concerned," but they are not immune from personal arrest or detention.[141]

The scope of "experts on mission" is far less clear. It was not a category that existed in the U.N. Charter and is not fully explained in the Convention. At first blush, it could logically include organizations or individuals on temporary U.N. contracts, such as consultants, contractors, or NGOs, because they are

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135 U.N. Privileges and Immunities Convention.

136 *Id.* art. IV, § 11.

137 *Id.* art. IV, § 12.

138 *Id.* art. IV, § 12(b)–(g).

139 Miller, *supra* note 133, at 12.

140 *Id.* at 19.

141 U.N. Privileges and Immunities Convention art. V, § 18.

hired for their expertise to carry out specific tasks. Prior scholars have used U.N. interpretation of the Convention and International Court of Justice (ICJ) opinions to deduce a more precise definition.[142]

The ICJ in *Mazilu* reviewed the status of experts on mission and held that "the essence of the matter lies not in their administrative position but in the nature of their mission."[143] The purpose of the immunities is "to protect the interests of the organization in preventing any coercion or threat thereof in respect of the performance by the experts of their missions."[144]

The ICJ later noted that the decisive quality of experts on mission is that they have been entrusted with a specific mission by the U.N. requiring professional expertise.[145] Though this definition is still ambiguous, the court in *Mazilu* also relied on a list of examples of experts on mission, which includes members of commissions, committees, and other treaty organs; peace-keeping missions; government officials on loan; Special Representatives of the Secretary General; experts investigating alleged use of chemical weapons; consultants and independent contractors on Special Service Agreements (SSA); and short-term technical assistance experts on SSAs.[146] Notably, it does not include NGOs.

It also seems clear that experts on mission are contemplated to be working full-time for the U.N. while on mission. The Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission states that officials and experts on mission must make a written declaration stating that they make the following promise:

> [E]xercise in all loyalty, discretion and conscience the functions entrusted to me by the United Nations, to discharge these functions and regulate my conduct *with the interests of the United Nations only in view*, and not to seek or accept instructions in regard to the performance of my duties from any Government *or other source* external to the Organization.[147]

Unfortunately, NGOs are unlikely to fall within any Convention category that automatically receives U.N. immunity, even the ambiguous "experts on mission" category. Given the need to be tasked, be full-time, and prioritize the interests of the U.N., "experts on mission" likely does not include NGOs that operate through grants or other types of contracts. These organizations are not

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142 *See, e.g.*, Miller, *supra* note 133.

143 Applicability of Article VI Section 22 of the Convention on the Privileges and Immunities of the U.N., Advisory Opinion, 1989 177 I.C.J. (Dec. 15) [hereinafter *Mazilu*]; *see also* Miller, *supra* note 133.

144 U.N. Privileges and Immunities Convention art. IV, § 11.

145 *See* Miller, *supra* note 133.

146 *Mazilu*, *supra* note 143, at 194–95, Annex I.

147 Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, U.N. Doc. ST/SGSB/2002/9 (2002), https://perma.cc/KA3H-E2GF (emphasis added).

working as exclusive agents of the U.N., per se, but rather as partners. Their goals, though similar, do not wholly align. NGOs have their own mission statements, principles, and protocols that they must prioritize ahead of U.N. interests. If they had to prioritize U.N. interests above their own, it is possible they would reject immunity.

This discussion shows that the U.N. *can* provide a form of derivative immunity to persons it has a legal relationship with. As one scholar has noted, the definition of "experts on mission" is possibly left vague to allow for flexibility to adapt it to U.N. needs.[148] But it has not done so to date.

B. Host Country Agreements

Apart from categories of persons extended U.N. privileges and immunities through the Convention, the U.N. can also negotiate special protections for employees, contractors, etc. through assistance agreements with host states. Some agreements explicitly provide for derivative U.N. immunity as a default, showing that the U.N. contemplates derivative immunity for NGOs as a possibility and functional benefit for the U.N. mission.

When the U.N. provides assistance to a state, its units, such as the U.N. Development Programme (UNDP) and the U.N. Children's Fund (UNICEF), sign an assistance agreement with the government specifying the nature of the relationship, duties of each party, etc. For example, the Standard Basic Assistance Agreement (SBAA) signed between UNDP and the Government of Iraq in 1976 still forms the basis of the government's relationship with UNDP and other U.N. agencies *mutatis mutandis*.[149] Article IX, § 4(a) of the SBAA states that "except as the Parties may otherwise agree in Project Documents relating to specific projects, the Government shall grant all persons, other than Government nationals employed locally, *performing services on behalf of the UNDP*, a Specialized Agency or the IAEA . . . the same privileges and immunities as officials of the United Nations, the Specialized Agency concerned or the IAEA . . . ."[150] In other words, any consultant or contractor under a UNDP contract would get derivative U.N. immunity, except for local nationals.

However, the U.N. often strips default immunity in specific project contracts with language such as the following:

> The Contractor shall have the legal status of an *independent* contractor vis-à-vis UNFPA, and nothing contained in or relating to the Contract *shall be*

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148 Miller, *supra* note 133, at 27.

149 UNFPA, COUNTRY PROGRAMME ACTION PLAN: 2011–2014 2 (2011), https://perma.cc/V53L-JATP.

150 Agreement Concerning Assistance by the United Nations Development Programme to the Government of the Republic of Iraq, 1025 U.N.T.S. 328 (1976), https://perma.cc/XP3S-72MT (emphasis added).

> *construed as establishing or creating between the Parties the relationship of employer and employee or principal and agent*. The officials, representatives, employees, or subcontractors of each of the Parties shall not be considered in any respect as being the employees or agents of the other Party, and each Party shall be solely responsible for all claims arising out of or relating to its engagement of such persons or entities.[151]

A more restrictive granting of privileges and immunities appears in a 2019 Standard Form of Agreement between UNICEF and a host country for World Bank-funded projects.[152] It defines "consultant" as an individual other than "Staff who has signed an individual service or consultant agreement with the U.N. Partner and gives them the status of an expert on mission." By contrast, a "contractor," including "implementing partners" and "partner organizations," is a "legal entity which has concluded a commercial or corporate contract with the U.N. Partner." This includes NGOs because they are not on individual service contracts and are referred to by the U.N. as "implementing partners." The agreement does not specify any status that would afford contractors privileges or immunities.

On one hand, this shows that the U.N. is very selective about who it allows to benefit from its own privileges and immunities. Similar to derivative sovereign immunity in the U.S., Australia, and Hong Kong, it appears more likely to extend these to persons or organizations most closely under the direction and supervision of the U.N. For example, consultants working full-time for the U.N. as opposed to contractors who, although on a U.N. contract, have more discretion in how to complete the work and prioritize their own interests. On the other hand, based on the SBAA above, it is possible for the U.N. to grant immunity to humanitarian actors and, indeed, it is in a better negotiating position to do so with host governments given its size and leverage. However, some SBAAs (like the one above) exclude local nationals, meaning that only international NGOs would likely receive immunity, and even then, only non-local employees would receive immunity. This is extremely limiting since local NGO and local INGO offices employ many local nationals.

All in all, obtaining any form of immunity directly from the U.N. depends on the U.N.'s voluntary decision to include NGO grantees in the definition of "experts on mission" or to contract for derivative immunity in host country agreements. Based on past practice, the U.N. is unlikely to do either of these any time soon and possibly for good reason, the most obvious of which is that NGOs with U.N. funding are not solely working under the U.N. They may

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151 UNFPA, ANNEX I: GENERAL CONDITIONS OF CONTRACT: CONTRACTS FOR THE PROVISION OF GOODS AND SERVICES (2012), https://perma.cc/3JA7-DWJK (emphasis added).

152 WORLD BANK, STANDARD FORM AGREEMENT FOR USE BY WORLD BANK PARTNERS: DELIVERY OF OUTPUTS BY UNICEF UNDER BANK-FINANCED PROJECTS (2019), https://perma.cc/W34N-J567.

receive grants from multiple donors to fund the same or different projects. Consequently, the U.N. may be unwilling to give legal cover for actions that are not clearly funded or directed by the U.N. This problem could be solved by requiring that immunity only extend to those actions done with U.N. funding and within the scope of the U.N.-funded project.

But even so, the U.N. may not want to be responsible for immunizing the actions of an organization that does not explicitly follow all U.N. guidelines and organizational practices. Although derivative U.N. immunity does not expose the U.N. to legal risk and is merely a source of immunity for NGOs, the U.N. may not want to be associated with covering the actions of a plethora of NGOs ranging in size, sophistication, and professionalism for reputational reasons. This is especially so because the U.N. is already criticized for the extent of immunity granted to U.N. employees.

It is possible that these incentives could change as the structure of humanitarian NGOs and U.N. immunity changes. For example, if U.N. immunity were pared back from absolute immunity to a more qualified form of immunity, as some scholars argue for, or if NGOs became more professionalized or subsisted on U.N. funding alone, the U.N. would have more reason to bring NGOs under its immunity umbrella via host agreement.

V. DERIVATIVE UNITED NATIONS IMMUNITY FOR HUMANITARIAN NGOS

A. Comparing State Sovereign and United Nations Immunity

The overarching commonality between derivative sovereign immunity systems addressed in this Comment is the requirement of a principal-agent relationship between the government and a quasi-government or non-governmental contractor. To qualify for immunity from harms arising from its actions, the subsidiary actor must have acted according to sufficient government direction and not exceeded the scope of its authority. This means that the logic used in *Askir* to extend U.N. immunity to a U.N. contractor is likely transferrable to other states that recognize derivative immunity. If a principal-agent relationship can be established between an NGO and the U.N., legally the NGO should be entitled to immunity in those states. The obstacle is that derivative immunity is not recognized in enough states to be considered customary international law. Even in states where it is robust, its boundaries are contested and still shifting.

U.N. immunity has a flavor of principal-agent theory but is more fragile because the U.N. itself decides whether and when to extend immunity, rather than courts of law attempting to define a uniform standard for applying derivative immunity to different cases. Thus, the U.N. focuses first on whether

an individual belongs to a specific category granted immunity in the Convention on Privileges and Immunities. Representatives and officials are accorded quasi-diplomatic immunity and clearly don't include NGOs, which don't resemble diplomatic or permanent U.N. staff. Experts on mission are closer to the role of a consultant and are thus more similar to an NGO on a short-term contract. It is a more flexible category, amenable to change based on U.N. needs. But currently, NGOs do not fit into this category because they do not work exclusively under the U.N.

Because the U.N. focuses on category first, if someone is accorded one of these statuses, the specific details of the contract are irrelevant. The U.N. thus does not explicitly require that these persons lack discretion, as the U.S., Australia, China, and Hong Kong do for non-governmental contractors or SOEs. However, like these states, the U.N. only accords privileges and immunities for actions taken or words spoken in these persons' official capacities.

Outside of categories of persons named in the Convention, the U.N. is very aware that a principal-agent relationship could draw a connection between itself and the actions of its contractors. Thus, the U.N. handles immunity contractually. On one hand, as discussed in Part IV, host country agreements sometimes have a blanket default grant of immunity to anyone working with the U.N. On the other hand, many contracts and service agreements explicitly define the contractor as an "independent contractor," which includes "implementing partners" and "partner organizations" that have a commercial or contractual relationship with the U.N. This is reminiscent of the Chinese government's attempts to separate itself from SOEs by making legal statements about their operational autonomy. The U.N.'s specifications are an attempt to firewall itself from contractor liability. As a corollary, this might prevent U.N. immunity from flowing down to the contractor. But it also shows the U.N. recognizes that contractual agreements could establish a principal-agent relationship in theory.

In sum, both states and the U.N. recognize that a principal-agent relationship does or could establish a basis for granting derivative immunity to contractors, including NGOs. This should assure local courts that a principal-agent test is appropriate for determining whether to grant NGOs derivative U.N. immunity. The U.N.'s additional consideration of functionality provides an additional lens for courts.

B. NGOs as Agents of the United Nations

Does the principal-agent theory of derivative immunity imply that NGOs could logically be afforded derivative U.N. immunity? This Part argues that NGOs in their current form are quasi-arms of the U.N. but maintain some discretion. With more specific contractual terms and project specification, local

courts would have a plausible basis for granting immunity to NGOs providing humanitarian assistance in conflict zones under a principal-agent theory of derivative immunity. Furthermore, if enough of a nexus between U.N. direction and NGO action can be shown and immunity helps NGOs function better, courts in states recognizing derivative immunity *and* the U.N. could shield NGOs from possible liability for their actions. Doing so would allow NGOs operating in dangerous contexts and under volatile conditions to provide humanitarian assistance without fear of litigation. It could also reduce the number of political threats they face because they would be viewed as closer to the U.N.

The challenge in identifying a principal-agent relationship between NGOs and the U.N. is that NGOs often operate under grant agreements, whereby they propose a project to the relevant U.N. agency, are granted funding, and then implement it subject to some U.N. specifications and oversight. In contrast to a military contractor agreement, far fewer details are spelled out by the U.N. ex ante. As mentioned, the U.N. also casts NGOs as "partners" rather than agents in contracts, for example, by allowing both U.N. and NGO branding to be used on the project.[153] In other words, their identities are separated as the funder and the implementer.

However, there are some aspects of U.N.-NGO partnerships that give the U.N. a degree of control over NGO activities that would contribute to a principal-agent relationship. First, as a condition of funding, NGOs must include certain mechanisms in their projects to give the U.N. oversight. This includes strict audit and reporting requirements and third-party monitoring.[154] U.N. agencies contract third parties to monitor and evaluate NGO projects to make sure they are implementing the project as planned, assess efficacy, and detect any red flags such as corruption. The NGO, in accepting funding, is required to facilitate all monitoring activities to their project sites.[155] They must also adhere to strategic and technical criteria including beneficiary targeting and guidance on cross-cutting issues of access, protection mainstreaming, and gender responsiveness in humanitarian response.[156] These mechanisms don't amount to day-to-day control of NGO operations, but if NGOs implement extremely poor projects or simply do not comply, the U.N. can pull or refuse to continue funding, which gives it some leverage over how the NGOs implement projects.

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153 *See* INT'L COUNCIL OF VOLUNTARY AGENCIES, A COMPARISON REVIEW OF U.N. PROJECT PARTNERSHIP AGREEMENTS FOR NGO IMPLEMENTATION OF HUMANITARIAN PROJECTS 28 (2015), https://perma.cc/CY53-R544.

154 *Id.* at 23–25.

155 *Id.*

156 *See, e.g.*, UNOCHA, SYRIA CROSS-BORDER HUMANITARIAN FUND (2021), https://perma.cc/B5RS-XWGJ.

This suggests an element of control, but more specific contractual provisions may be needed to establish a less contestable principal-agent relationship.

Recall also that one of the purposes of derivative sovereign immunity is to protect contractors from liability for actions that the government would not be liable for if it had done them itself, which includes public but not commercial actions.[157] The same reasoning applies to NGOs in partnership with the U.N. If NGOs were not implementing these projects, the U.N. would be providing aid directly. Indeed, the U.N. does provide humanitarian assistance—NGOs just increase its reach and capacity. Additionally, as NGOs are, by definition, not profit-seeking enterprises and do not fall neatly into either the public or private sector. Their activities thus cannot be characterized as purely commercial. In this way, it makes even more sense to extend immunity to an NGO than to a private contractor. The U.N. has contracted itself out of this situation in some agreements by defining a contractor as a "legal entity which has concluded a commercial or corporate contract with the U.N. Partner" including "implementing partners" and "partner organizations."[158] It has essentially stated that NGOs are engaged in commercial activities, but this conclusion is not obvious or mandatory based on their structures and functions.

U.N.'s privileges and immunities aim to "protect the interests of the organization in preventing any coercion or threat thereof in respect of the performance by the [experts of their missions]."[159] If an NGO is implementing a project fully funded by the U.N., this purpose appears to fit their activities as well as those of an expert on mission.

Overall, by the logic above, states that recognize derivative immunity have a good argument for extending U.N. immunity to humanitarian NGOs based on a principal-agent theory, case precedent, and the U.N.'s interpretation of its own powers. Whether a court grants immunity in a particular case may depend on how much discretion an NGO has under a particular type of contract. But if courts take a functional approach like the U.N. does, there is ample room to find immunity for NGOs providing emergency humanitarian aid in politically biased contexts. They should recognize that not affording NGOs immunity when they implement U.N.-funded projects ultimately hurts the interests and effectiveness of the U.N. by exposing NGO partners to legal liability and increasing their vulnerability to political coercion in volatile contexts.

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157 *See* Rafols, *supra* note 48.

158 *See* GENERAL CONDITIONS OF AGREEMENT, *in* STANDARD FORM AGREEMENT FOR USE BY WORLD BANK PARTNERS, *supra* note 152, § 1(c).

159 U.N. Privileges and Immunities Convention art. IV, § 11.

C. Limited Immunity

Any grant of immunity to NGOs should be limited to remain in step with current trends in sovereign and U.N. immunity and provide accountability to vulnerable populations.

Although immunity from lawsuits has many benefits, unlimited immunity erodes accountability leaving room for abuse of power. Consequently, sovereign immunity has gradually turned into a form of restrictive immunity, whereby many states allow suits against the government for activities that are not inherently governmental.[160] Following this trend, derivative immunity in the U.S. and Australia is still in flux. In Australia, it has been narrowed for non-governmental entities.[161] By contrast, U.S. derivative immunity has expanded to cover a variety of non-governmental entities, but the trajectory of this expansion has been heavily criticized. Elengold and Glater persuasively show that derivative immunity that is too broad prioritizes the interests of the federal government, executive branch and contractors over states, legislatures, and consumers.[162] It most obviously reduces avenues for consumers to recover for harms committed by contractors. Derivative immunity can also shift the balance of power in federal systems and between branches of government.[163]

Multiple scholars have similarly criticized the U.N.'s absolute immunity as enabling human rights violations.[164] Per the Convention on Privileges and Immunities, the U.N. is supposed to provide alternative mechanisms for resolving disputes "arising out of contracts or of a private law character to which the U.N. is a party."[165] There is an emerging view that this obligation must exist even where immunity applies in order to avoid violating international human rights law.[166] However, the U.N. does not always create dispute forums for such claims, possibly violating individuals' right to access a court and pursue a

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160 *See* Rafols, *supra* note 48, at 49–52 (discussing the evolution of sovereign immunity in Europe, the U.K., and the U.S. from absolute to restrictive immunity).

161 *See* Ng, *supra* note 20, at 331 (stating that the recent tendency of the High Court is to not grant immunity to private bodies dealing with statutory authorities unless it is clearly the intent of the legislature).

162 Elengold & Glater, *supra* note 21, at 1033–34, 1038–41.

163 *Id.* at 1041–46. Derivative immunity allows private actors to evade state regulation, upsetting the balance of power between states and the federal government. It also allows them to use their relationship with the executive to avoid liability allocated by Congress. *Id.*

164 *See, e.g.*, Freedman, *supra* note 7; Boone, *supra* note 4. In recent years, some U.S. cases have taken small steps towards restricting U.N. immunity, but the traditional view is that its immunity is absolute. *See* Freedman, *supra* note 7, at 243–45.

165 U.N. Privileges and Immunities Convention art. VIII, § 29(a).

166 *See* Freedman, *supra* note 7, at 246.

remedy.[167] Furthermore, it seems odd that an international organization, which is at best a quasi-state, should have more immunity than states do.[168]

To balance the need for accountability with the need to protect NGOs from political bias and intimidation, they should be granted limited immunity whereby claims against them arising out of a U.N. contract must be submitted to an independent alternative dispute forum. In fact, the same argument has been made about U.N. peacekeepers. Namely, that without immunity, weak judicial systems in conflict states might violate peacekeepers' rights and impede their functions. Full immunity, however, raises an accountability problem.[169]

The peacekeeping context shows that it may ineffective to place the responsibility for creating an alternative forum with the U.N., which has a stake in the outcome. Per the Convention and Model Status of Forces Agreement for Peace-Keeping Operations (Model SOFA), the U.N. is supposed to establish claims commissions for claims against peacekeepers but has never actually created a standing commission.[170] Sometimes it uses alternative mechanisms such as lump-sum payments or local claims review boards.[171] However, the breadth of U.N. discretion runs contrary to appropriate and predictable redress of claims.

The U.N. is no more likely to set up alternative dispute forums for NGOs. Even though NGOs would be liable for claims instead of the U.N., there are still reputational concerns. It has been suggested that the U.N. uses dispute resolution methods other than those mandated by the Model SOFA to avoid public scrutiny.[172] There is no reason to think differently in the case of a U.N. contractor or grantee. Additionally, if capacity constraints explain the lack of claims commissions, they would similarly impede establishment of an alternative forum for NGOs.

Unfortunately, state derivative immunity doesn't provide a model for NGOs either, since government contractors with derivative immunity are fully immune from suit—there is no mandatory alternative forum. Local courts would need to develop an alternative mechanism themselves, for which there is no precedent, agree to one through a host country agreement with the U.N., or simply decline jurisdiction, similar to a *forum non conveniens* approach.

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167 *Id.* at 247 (stating that the U.N. has never created claims commissions for private law claims against peacekeepers, despite its obligation under the Convention and Model Status of Forces Agreement for Peace-Keeping Operations).

168 *Id.* at 242.

169 *Id.* at 246–47.

170 *Id.* at 247.

171 *Id.* at 247–48.

172 *Id.* at 248.

D. Policy Considerations

1. Humanitarian Response

Providing derivative immunity could relieve some physical and legal risks faced by NGOs in dangerous or volatile contexts. Merely operating more visibly under the umbrella of U.N. immunity could dissuade government or military actors from arbitrarily detaining or charging NGO staff out of intimidation. This in turn would allow NGOs to operate more easily in challenging contexts, incentivize them to stay when political dynamics become unfavorable, and consequently result in more stable humanitarian assistance to vulnerable populations.

2. Sovereignty

It is certainly advisable that local courts extend U.N. immunity to both local and international NGOs working sufficiently closely under the U.N. However, if they do not and the U.N. is the one who must extend immunity, for example, through host agreements or other pronouncements, derivative immunity might only be possible for INGOs. In conflict zones with divided governments and governments divided from the people, if local NGOs were given any sort of immunity, they might easily be painted as partisan opposition units or shielded from the government. As mentioned, it is not uncommon for governments with tenuous legitimacy to target NGOs and civil society organizations aiding opposition populations. Thus, it is important for NGOs to maintain the perception and function of neutrality and independence. Local governments might view U.N. immunity accorded to local organizations as an infringement on its sovereignty, which could negatively impact both local NGOs and the U.N.'s broader mission.

3. Accountability and Transparency

Although valuable, immunity must not be used to weaken NGO transparency and accountability. Already the U.N. is criticized for the extent of its immunity and the fact that, although it is supposed to provide dispute resolution forums, it does not always do so.[173] Immunity should not prevent NGOs from having to answer to take responsibility for the effects of their projects. Rather, the purpose is to avoid the risk of biased local political and military actors unnecessarily interfering in NGO support to vulnerable persons and to ensure that NGOs are not disincentivized from carrying out local projects due to the threat of liability from unintended effects. In other words, it is to bolster the credibility and effectiveness of emergency humanitarian response. For this reason, derivative U.N. immunity should be qualified such

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[173] *Id.* at 247.

that NGOs must mediate or resolve any disputes through a neutral forum. They should also have the option to waive this immunity and resolve disputes locally if they feel they would not be biased or that their community relationships would benefit from local dispute resolution.

VI. CONCLUSION

This Comment has identified a key gap in humanitarian assistance, whereby NGOs are increasingly essential to providing emergency humanitarian assistance in conflict contexts and yet lack any of the privileges or immunities held by the U.N. Such privileges and immunities enable the U.N. to carry out diplomatic, humanitarian, and development missions all over the world without fear of political coercion or reprisal and thereby retain its status as a neutral arbiter and coordinator of humanitarian assistance. The U.N. outsources many humanitarian functions to NGOs but explicitly retains its immunities through contractual provisions. Consequently, local and international NGOs are vulnerable to liability in each local country they operate in. This could plausibly lead to another U.N.-Haiti situation, in which the U.N. was sued for inadvertently spreading cholera, except that an NGO could face massive financial liability instead of getting immunity. Although accountability is necessary, the potential for local bias is high in areas with a divided political context. NGOs thus require some protection that allows them to remain neutral and independent. A lack of formal protections also makes NGOs easier targets for intimidation. Ultimately, this inhibits local NGO work and causes international NGOs to leave challenging states when aid is most needed.

This Comment also demonstrated that there is a legal basis for extending U.N. immunity to NGOs based on the principles underlying both sovereign and U.N. immunity. It showed that the concept of derivative sovereign immunity, whereby governments extend their immunity to quasi-governmental and private actors, although not ubiquitous among nations, is often grounded in a principal-agent analysis. If the contractor can be shown to be under the direction or control of the government, actions arising out of its scope of authority should be granted immunity on the theory that an entity cannot be sued for doing what the government itself would not be liable for. Indeed, this logic has been used in the U.S. to extend U.N. immunity to a U.N. contractor in the past.

U.N. immunity is similarly extended to specific categories of persons working exclusively under the U.N. and in the U.N.'s sole interests. However, U.N. immunity is also more functional in that it exists to facilitate the U.N. in its missions. It is also based in treaty through the Convention and in contracts through host country agreements. Consequently, the U.N. retains the flexibility to extend immunity to a variety of actors working under the U.N. by negotiating such immunity in host country agreements and then selectively denies default

immunity in specific contracts. This shows that the U.N. believes it can extend immunity to NGOs, even if it chooses not to. Given the criticality of NGOs to U.N. humanitarian work, there is a strong policy argument that the U.N. should extend immunity to NGOs more often. At the least, however, the U.N.'s contemplation of derivative immunity gives local courts reason to consider derivative U.N. immunity more seriously.

Finally, this Comment argues that the U.N. exerts a degree of control over NGO activities through, for example, mandatory project requirements and reporting and monitoring mechanisms. Such controls may not be sufficient to establish a principal-agent relationship in every instance, but they can be bolstered by the argument that extending immunity to NGOs is also functional. While implementing projects under U.N. funding and supervision, NGOs are acting in the interests of the U.N. It would thus behoove the U.N. to consider extending immunity to NGOs on U.N. contracts, particularly in volatile contexts where they might need the clout of U.N. protection. Alternatively, there is still a basis for courts to consider extending immunity to NGOs themselves. This occurred once in *Askir* for a U.N. contractor and could happen again for NGOs.

The inescapable reality of this dilemma is that the very courts that would need to grant derivative immunity—local courts in volatile countries where humanitarian NGOs work—are the least likely to do so because they may have less developed judicial systems or exhibit host country bias. At the same time, the U.N. is currently unwilling to extend immunity to the vast variety of NGOs working with the U.N. Even if it would help NGOs carry out their—and the U.N.'s—humanitarian mission, NGOs are possibly perceived as too independent or removed for the U.N. to risk its reputation by shielding them. This puts NGOs working in conflict zones between a rock and a hard place. With state immunity becoming increasingly restrictive, the most promising route is to lobby the U.N. to better protect NGO partners contractually. Antecedent improvements in NGO professionalization and accreditation would help their case, as would working exclusively under U.N. grants.

At the very least, states and the U.N. should recognize that NGOs have become and will remain critical components of the aid industry. Their nimbleness, local expertise, and impartiality complement the U.N.'s high level political leverage and coordinating role and supplement its slower-moving and more political structure. NGOs fulfill many functions the U.N. otherwise would have to fulfill, such as delivering food, water, shelter, medical care, psychosocial support, and more to conflict-affected persons in hard-to-access locations. As such, individual states and the U.N. must try to strike a balance between fostering accountability in aid programming and shielding NGOs from bias and coercion.