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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CYNTHIA BRZAK and NASR ISHAK, Plaintiffs, -against- THE UNITED NATIONS, KOFI ANNAN, WENDY CHAMBERLIN, RUUD LUBBERS, et al., Defendants.	:	06-CV-03432 (RWS)

MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION
OF THE UNITED NATIONS
TO DISMISS AND TO INTERVENE

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTS 1

A. The Immunity of the UN and Its Officials 1
B. The Authority of the Secretary-General 3
C. The UN's Internal Dispute Resolution Mechanism 5
D. Proceedings in This Court 7

ARGUMENT 10

I. THIS CASE SHOULD BE DISMISSED AS TO THE UNITED NATIONS ON THE GROUND OF ABSOLUTE IMMUNITY. 10

II. THIS CASE SHOULD BE DISMISSED AS AGAINST THE INDIVIDUAL DEFENDANTS ON THE GROUND OF FUNCTIONAL IMMUNITY. 10

A. The Secretary-General's Immunity Determination Is Entitled to the Greatest Weight By This Court 11
B. The Functional Immunity of the United Nations Officials Depends on the Objective Context of the Alleged Acts, Not Their Nature 12
C. Defendants Annan, Chamberlin, and Lubbers Are Immune from Suit for Acts Performed in the Exercise of Their Functions. 19

III. THE UNITED NATIONS IS ENTITLED TO INTERVENE IN THE INDIVIDUAL DEFENDANTS' CASES FOR THE SOLE PURPOSE OF ASSERTING IMMUNITY IN THEIR CASES. 22

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

Ahmed v. Hoque, No. 01-7224, 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002) 22

Askir v. Boutros-Ghali, 933 F. Supp. 368 (S.D.N.Y. 1996) 20, 22

Avero Blg. Ins. v. Am. Airlines, 423 F.3d 73 (2d Cir. 2005).....12

Bisson v. United Nations, No. 06-6352, 2007 U.S. Dist. LEXIS 54334 (S.D.N.Y. July 27, 2007).....22

Boimah v. United Nations Gen. Assembly, 664 F. Supp. 69 (E.D.N.Y. 1987).....10, 20

Broadbent v. Org. of Am. States, 628 F.2d 27 (D.C. Cir. 1980).....17, 19

Burtis v. Annan, 7 Fed. Appx. 104, 106 (2d Cir. 2001), *cert. denied*, 534 U.S. 884 (2001).....22

D'Cruz v. Annan, No. 05-8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005) 17, 19

De Luca v. United Nations Organization, 841 F. Supp. 531 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994).....10, 17, 19, 20

Donald v. Orfilla, 788 F.2d 35 (D.C. Cir. 1986) 21

McGehee v. Albright, 201 F. Supp. 2d 210 (S.D.N.Y. 1999).....18, 19

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 16, 17

Morgan v. International Bank for Reconstruction and Development, 752 F. Supp. 492 (D.D.C. 1990).....17, 20

Tachiona v. Mugabe, 186 F. Supp. 2d 383 (S.D.N.Y. 2002), *aff'd Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004) 23

TREATIES AND FEDERAL STATUTES

Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945).....1, 3, 5

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418 ..... passim

Diplomatic Relations Act of 1978, 92 Stat. 808, 809 (1978) (codified at 22 U.S.C. §

254d).....1, 2

International Organizations Immunities Act, 59 Stat. 669 (1945).....1, 2, 13

Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972.....2, 12, 13, 19

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340..... 12

INTERNATIONAL CASES

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (11 April) 14

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, (15 December) 23

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (29 Apr.) 11, 12

United Nations Administrative Tribunal Judgment No. 560, *Claxton* (1992).....7

United Nations Administrative Tribunal Judgment No. 805, *El Aoufi* (1996).....7

United Nations Administrative Tribunal Judgment No. 1043, *Mink* (2002).....7

STATE CASES

Hunter v. United Nations, No. 106796/04, 2004 WL 3104829 (Sup. Ct. N.Y. Nov. 15, 2004).....17, 20

People v. Leo, 407 N.Y.S.2d 941 (N.Y. Crim. Ct. 1978) 20

MISCELLANEOUS

Executive Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946) 3

Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record 10 January–14 February 1946, Verbatim Plenary Record (Jan. 10-Feb. 14, 1946).....14

Statute of the Administrative Tribunal of the United Nations , G.A. Res. 351(A)(IV), art 7(2) (Dec. 9, 1949), *as most recently amended by* U.N. Doc. A/RES/59/283 (Apr. 13, 2005).....6

GA Res. 590/VI (Feb. 2, 1952) *as amended by* UN Doc. ST/SGB/2007/4 (Jan. 1, 2007).....5

G.A. Res. 42/219 U.N. Doc. A/RES/42/219 (Dec. 21, 1987).....3

G.A. Res. 45/240 U.N. Doc. A/RES/45/240 (Dec. 21, 1990).....3, 14

U.N. Doc. ST/AI/371 (Aug. 2, 1991) 6

U.N. Doc. ST/AI/379 (Oct. 29, 1992).....5, 6

G.A. Res. 47/28 U.N. Doc. A/RES/47/28 (Nov. 25, 1992).....14

G.A. Res. 48/218 B U.N. Doc. A/RES/48/218 B (July 29, 1994).....18

UN Doc. ST/SGB/2002/1 (Jan.1, 2002) *as amended by* UN Doc. ST/SGB/2007/1 (Jan. 1, 2007).....5

First Report of the Sub-Committee on Privileges and Immunities, UN Doc. A/C.6/17 (Jan. 25, 1946).....15

Study prepared by the Secretariat on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities, UN Doc. A/CN.4/118 and Add.l and 2, *published in the* 1967 *United Nations Yearbook of the International Law Commission*, Vol. II, 154-324 (March 8, May 5 and May 23, 1967) 11

Letter to the Permanent Representative of a Member State, 1976 *United Nations Juridical Yearbook* 11, 12

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Report of the Secretary-General, Personnel Questions: Respect for the Privileges and Immunities of Officials of the United Nations and the Specialized agencies and Related Organizations, U.N. Doc. A/C.5/44/11 (Nov. 2, 1989).....21

Report of the Secretary-General on Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations, delivered to the Fifth Committee of the General Assembly, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995) 22

73 Am. Jur. 2d *Statutes* (2001) 12

Philippe Sands & Pierre Klein, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS (2001) 14

PRELIMINARY STATEMENT

This action arises out of the employment by the United Nations (the "Organization" or "UN") of Cynthia Brzak ("Brzak") and Nashr Ishak ("Ishak") (collectively "Plaintiffs") and includes claims of sexual discrimination and employment retaliation in the workplace allegedly occurring in 2003 and 2004.

In accord with the Court's directions during the conference on June 6, 2007, the UN moves to, *first*, dismiss this case in its entirety pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis of the immunity from all legal process and suit under international law and the laws of the United States conferred on the Organization and its officials, and *second*, in order to eliminate any possible doubt about its right to assert its immunity in the cases of the individual defendants, to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in their cases for the sole purpose of asserting that immunity.[1]

FACTS

A. The Immunity of the UN and Its Officials

Article 105 of the Charter of the United Nations ("UN Charter"), June 26, 1945, 59 Stat. 1031 (1945), *ratified* Aug. 8, 1945, provides that the Organization "shall enjoy...such privileges and immunities as are necessary for the fulfillment of its purposes," and that its officials "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of

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[1] The United Nations reserves, and expressly declines to waive, any and all privileges and immunities, including jurisdictional immunities, to which it is entitled pursuant to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993; the 1946 Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; the International Organizations Immunities Act, 22 U.S.C. § 288a (1945); Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972; the Diplomatic Relations Act of 1978, 92 Stat. 808, 809 (1978) (codified at 22 U.S.C. § 254d); and any other applicable treaty, statute, or source of law.

their functions in connexion with the Organization." In 1946, as that Article contemplated, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations ("General Convention"), Feb. 13, 1946, 21 U.S.T. 1418, *acceded to by the United States* Apr. 29, 1970, to which 153 states have become parties.

The General Convention defines the privileges and immunities enjoyed by the Organization and its officials. The Secretary-General and all high officials serving at the level of Assistant Secretary-General and above are granted the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention § 19. Under Articles 31 and 39 of the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972, current high officials have absolute immunity, and former high officials enjoy continuing immunity "with respect to acts performed...in the exercise of [their] functions." Under United States law, suits against UN officials who are immune under these provisions must be dismissed. *See* Diplomatic Relations Act of 1978, 92 Stat. 808, 809 (1978) (codified at 22 U.S.C. § 254d) (dismissal mandated where immunity conferred by Vienna Convention "or under any other laws extending diplomatic privileges and immunities").

In addition to the diplomatic immunity granted the Secretary-General and high officials, the General Convention provides the Secretary-General and all UN officials immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity." General Convention § 18(a). The functional immunity of UN officials is recognized by the International Organizations Immunities Act ("Immunities Act" or "IOIA"), 59 Stat. 669 (1945) (codified at 22 U.S.C. § 288 *et seq.*), which provides United Nations officials

and employees "immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such...officers, or employees." 22 U.S.C. § 288d(b); *see* Executive Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946) (designating United Nations as an international organization covered by the Immunities Act).

B. The Authority of the Secretary-General

The Secretary-General is the chief administrative officer of the United Nations. UN Charter, art. 97. As such, he is charged "to act as the focal point in promoting and insuring the observance of the privileges and immunities of officials of the United Nations...by using all such means as are available to him." G.A. Res. 42/219, ¶ 11, U.N. Doc. A/RES/42/219 (Dec. 21, 1987); *see also* G.A. Res. 45/240, Preamble, U.N. Doc. A/RES/45/240 (Dec. 21, 1990) (noting "the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials"). Under Article 100(2) of the Charter, Member States have the obligation "to respect the exclusively international character of the responsibilities of the Secretary-General," including his sole authority to make immunity determinations.

At the same time, under Section 20 of the General Convention, the Secretary-General has "the right and the duty to waive the immunity of any official in any case where, *in his opinion*, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (emphasis added). Section 21 further provides that the United Nations "shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article."

The practice of the Secretary-General in exercising his authority has been clear, consistent, and responsible. With respect to functional immunity, when a Host State seeks to

prosecute or when a civil suit is filed by a third party against an official, the Secretary-General first makes a determination as to whether the acts in question were performed in the course of official duties. If the acts in question were not performed in the course of official duties, the Secretary-General will inform the local authorities that functional immunity does not attach. If the act has some connection to official duties (such as an accident caused by driving a United Nations vehicle while under the influence of alcohol), the Secretary-General will waive the immunity if he determines that the General Convention, Section 20 test is met – that is, if he determines that continued immunity would impede the course of justice and the immunity can be waived without prejudice to the interests of the United Nations.

Accordingly, in criminal matters, the United Nations cooperates fully with national law enforcement authorities, including through the waiver of immunity accorded to UN officials, in order to prevent abuse of the privileges and immunities under the General Convention.[2]

In civil matters, the uniform practice is to maintain immunity, while offering, in accord with Section 29 of the General Convention, alternative means of dispute settlement. In disputes with third parties, the alternative means of dispute settlement offered is usually negotiation, conciliation, mediation and/or arbitration. In disputes raised by staff in the employment context, the General Assembly has established the means of dispute settlement through a binding internal dispute resolution mechanism. *See* Part C. below. This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national court systems, but at the same time it eliminates the prospect of impunity, as the United Nations provides the

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[2] Most recently, in the United States, the United Nations has voluntarily, and to the fullest extent, responded to numerous requests for cooperation from the United States Attorney for the Southern District of New York and the Federal Bureau of Investigation in connection with their investigations into potential criminal activity by certain UN officials in the Procurement Service and in connection with the Oil-for-Food Programme, including by providing documents and making staff available for interviews and trial testimony.

appropriate mechanisms to resolve all complaints of a private law nature.

C. The UN's Internal Dispute Resolution Mechanism

Article 101 of the United Nations Charter stipulates that the staff of the United Nations "shall be appointed by the Secretary-General under regulations established by the General Assembly." The General Assembly adopted, in resolution 590(VI) of 2 February 1952, the Staff Regulations of the United Nations ("Staff Regulations"), which "embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat," and which have been updated by the General Assembly several times since then.[3] The Staff Regulations adopted by the General Assembly and the Staff Rules promulgated by the Secretary-General ("Staff Rules") provide, with respect to employment related claims, that staff pursue such claims through the internal justice system established by these Regulations and Rules. *See* Staff Regulations Chapter XI; Staff Rules, UN Doc. ST/SGB/2002/1, Ch. XI (Jan.1, 2002) *as most recently amended by* UN Doc. ST/SGB/2007/1 (Jan. 1, 2007).

Section 29 of the General Convention provides that the Organization must "make provisions for appropriate modes of settlement of...[d]isputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General." Consistent with Section 29, and as set forth in the Administrative Instruction entitled "Procedures for Dealing with Sexual Harassment," U.N. Doc. ST/AI/379 (Oct. 29, 1992), staff members who allege sexual harassment by colleagues or supervisors may choose either informal means to resolve the situation or formal means to seek redress for their claims. "In circumstances where informal resolution is not appropriate or has

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[3] The Staff Regulations adopted by the General Assembly in resolution 590(VI) replaced the provisional staff regulations adopted by the General Assembly in earlier sessions. GA Res. 590/VI (Feb. 2, 1952) *as most recently amended by* UN Doc. ST/SGB/2007/4 (Jan. 1, 2007).

been unsuccessful," the aggrieved staff member may make a written complaint to the Assistant Secretary-General for Human Resources Management, who is then required to launch a prompt investigation and fact-finding process. *Id.* ¶ 8-9.

If the Assistant Secretary-General, in the exercise of the delegated powers of the Secretary-General,[4] concludes that the allegation of misconduct cannot be sustained, the complainant may request review of this administrative decision by the Secretary-General. *See* Staff Regulation 11.1; Staff Rule 111.2(a). If the Secretary-General declines to grant the requested relief, the complainant may file an appeal with the relevant Joint Appeals Board ("JAB"), one of a number of formal dispute resolution mechanisms established under Chapter XI of the Staff Regulations and Staff Rules with jurisdiction to hear appeals submitted by staff members contesting an administrative decision. Staff Regulation 11.1; Staff Rule 111.1. A Panel of Counsel provides services free of charge to assist staff members in pursuing their claims; as of January 2004, a staff member may choose to be represented by private counsel at his or her own expense.

A staff member who is not satisfied with the JAB's recommendation and the Secretary-General's decision thereon may institute appeal proceedings before the United Nations Administrative Tribunal, an independent judicial body appointed directly by the General Assembly.[5] The Tribunal has the power to order either equitable relief in the form of rescission

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[4] *See Revised Disciplinary Measures and Procedures*, U.N. Doc. ST/AI/371, ¶¶ 5, 9 (Aug. 2, 1991) (administrative instruction on disciplinary procedures, explicitly referenced in U.N. Doc. No. ST/AI/379, stating that the Assistant Secretary-General acts on behalf of the Secretary-General in determining disposition of initial complaint).

[5] Statute of the Administrative Tribunal of the United Nations , G.A. Res. 351(A)(IV), art 7(2) (Dec. 9, 1949), *as most recently amended by* U.N. Doc. A/RES/59/283 (Apr. 13, 2005). Article 3 of its Statute requires each member of the Tribunal to have "judicial experience in the field of administrative law or its equivalent within their national jurisdiction." There are currently seven members of the Tribunal, all of whom are experienced attorneys in their

of the challenged decision, or compensation, or both.

The Administrative Tribunal has characterized sexual harassment as "a form of prohibited gender-based discrimination," and affirmed that the UN must examine the facts and circumstances of any case alleging sexual harassment "carefully and thoroughly," in order "to determine what, if anything, occurred and whether it constituted sexual harassment." Judgment No. 560, *Claxton* ¶¶ VI-VIII (1992). As the Tribunal has pointed out, the UN has not only "strong interests in protecting staff rights," but also equally strong interests "in protecting itself against the consequences of their abrogation through misconduct by officials." *Id.* According to the Tribunal:

> Article 8 of the United Nations Charter, action by the General Assembly, and the Tribunal's jurisprudence make it crystal clear that the terms of appointment of every staff member include the right to be free from invidious gender-based discrimination by any official of the Organization. The corollary is that officials engaging in such serious misconduct have obviously failed to fulfill their moral and contractual obligations to the Organization. As a matter of principle, it is unacceptable for such reprehensible and disrespectful conduct to be tolerated at any level.

Id. The Tribunal recently reemphasized "the responsibility of the Organization to address [claims of sexual harassment] promptly and effectively." Judgment No. 1043, *Mink* ¶ II (2002) (citing Judgment No. 707, *Belas-Gianou* (1995)).[6]

D. Proceedings in This Court

According to the Complaint, Plaintiffs worked for the Office of the United Nations High

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respective countries, including the United States member, Jacqueline R. Scott, founding partner of Fortney Scott and an experienced Washington DC practitioner and arbitrator.

[6] *See also* Judgment No. 805, *El Aoufi* ¶¶ IX-XI (1996) (reaffirming the holdings in *Claxton* and *Belas-Gianou*, noting that the UN had since introduced the procedures for the investigation of sexual harassment set forth in U.N. Doc. ST/AI/379, and ordering the Secretary-General to establish an independent panel to investigate the applicant's claim of sexual harassment in conformity with that Administrative Instruction).

Commissioner for Refugees ("UNHCR") in Geneva. Compl. ¶¶ 7-8. Defendant UN is an international organization created by treaty in 1945. Compl. ¶ 9. At the time of the acts alleged in the Complaint, Defendant Kofi Annan was the Secretary-General of the UN, Defendant Ruud Lubbers was the UN High Commissioner for Refugees, and Defendant Wendy Chamberlin was a senior official in the Office of the UNHCR (collectively, "Defendants"). Compl. ¶¶ 10-12. None of the Defendants is currently employed at the United Nations.

Plaintiffs bring claims for (1) sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Compl. ¶¶ 27-33, 40-42); (2) intentional infliction of emotional distress (*id.* ¶¶ 34-36); (3) intentional battery (*id.* ¶¶ 37-39); and (4) violations of the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* *See id.* ¶ 1. Plaintiffs allege that on December 18, 2003, at the end of a meeting held in the office of Mr. Lubbers and in front of other staff members, Mr. Lubbers "placed his hands on Plaintiff Brzak's waist, pulled her back towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her." *Id.* ¶ 19. Plaintiffs also allege that on April 27, 2004, Ms. Brzak filed a complaint against Mr. Lubbers and another official before the UN's Office of Internal Oversight Services, and that as a result of that complaint, Ms. Brzak was subjected to retaliation at work, including dissemination of her identity as a complainant, open hostility from co-workers, withholding of annual performance evaluations, verbal harassment, threats against her career, and refusal by her supervisors to assign work and responsibilities commensurate with her position. *Id.* ¶¶ 21-24. Plaintiffs further allege that because Mr. Ishak urged Ms. Brzak to file a complaint, he failed to be promoted. *Id.* ¶ 24. The Complaint makes no specific allegations of harassment or retaliation against Mr. Annan or Ms. Chamberlin.

Ms. Brzak, at least initially, and Mr. Ishak made use of the UN's internal dispute

resolution mechanisms available to them. Compl. ¶ 22. By letter to then Secretary-General Annan, Ms. Brzak (through counsel) sought review by the Secretary-General of a series of administrative decisions in her case, including decisions relating to both her initial allegations and her subsequent claims of retaliation. Compl. ¶ 22-23. When that review failed to provide her with relief, she initially exercised her right to institute an appeal against those administrative decisions in the Geneva JAB, but then elected to withdraw the appeal before her submissions were complete. Had she been dissatisfied with the Secretary-General's decision in response to the JAB's recommendation, Ms. Brzak would have been entitled to initiate proceedings before the UN Administrative Tribunal, whose decisions are binding on the Secretary-General. *See* Part C above. Mr. Ishak, meanwhile, has appeals pending before the JAB.

On October 28, 2005, Ms. Brzak filed a Title VII claim against the defendants with the Equal Opportunity Employment Commission ("EEOC"). On January 31, 2006, the EEOC issued a Dismissal and Notice of Rights, in which the EEOC determined that it had "no jurisdiction" over her claim.

The complaint in this matter was filed on May 4, 2006. After requesting several extensions of the time to serve, Plaintiffs filed certificates of service purporting to reflect service on the UN and, by service on the UN, Mr. Annan on October 16, 2006; Ms. Chamberlin on May 8, 2007; and Mr. Lubbers on June 8, 2007. Consistent with the UN's regular practice, all papers purporting to constitute service at UN Headquarters were formally returned by the United Nations to the United States Mission to the United Nations.

At a status conference held on June 6, 2007, the Court requested that the United States and, if appropriate, the United Nations, brief the issue of immunity by September 17, 2007, which was subsequently extended by the Court to Oct 2, 2007. On July 24, 2007, with Plaintiffs'

consent, the Court dismissed the case against all defendants except the United Nations, Messrs. Annan and Lubbers, and Ms. Chamberlin. Also on July 24, 2007, the Court stayed the action with respect to all other issues pending the briefing on immunity.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED AS TO THE UNITED NATIONS ON THE GROUND OF ABSOLUTE IMMUNITY.

Under the General Convention, the United Nations is cloaked with absolute immunity "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Art. II, § 2. Accordingly, where, as here, the United Nations has not waived, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction. *See, e.g., Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (dismissing *sua sponte* employment-related claim against United Nations, subject to confirmation that United Nations did not wish to waive immunity); *see also De Luca v. United Nations Organization*, 841 F. Supp. 531, 534-36 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). On that basis, without more, this Court should dismiss the case as against the United Nations.

II. THIS CASE SHOULD BE DISMISSED AS AGAINST THE INDIVIDUAL DEFENDANTS ON THE GROUND OF FUNCTIONAL IMMUNITY.

As the Legal Counsel of the Organization advised the Deputy Permanent Representative of the United States of America by letter dated 15 May 2006 and the Permanent Representative of the United States by letter dated 19 October 2006 (attached as Exhibits A and B, respectively), the Secretary-General has determined that the individual defendants named in the *Brzak* case are immune. That determination is entitled to the "greatest weight" in this Court, but in any event, is plainly correct under both international and United States law.

A. The Secretary-General's Immunity Determination Is Entitled to the Greatest Weight By This Court.

The UN Charter and the General Convention establish a regime that places immunity determinations in the hands of the Secretary-General, who, as those instruments stipulate, is the only person in a position to assess the institutional interests of the United Nations.[7] In Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights ("*Cumaraswamy*"), Advisory Opinion, 1999 I.C.J. 62 (29 Apr.), the International Court of Justice was called upon to assess the immunity under the General Convention of a special rapporteur of the United Nations Human Rights Commission. In reaching that determination, the Court first observed that "the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents...by asserting their immunity." *Cumaraswamy* ¶ 60. It then held that the Secretary-General has the "authority and responsibility" to request that Member States act in accordance with his immunity

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[7] The United Nations has consistently asserted that the competence to determine the application of functional immunity rests with the Secretary-General. *See, e.g., Study prepared by the Secretariat on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities,* UN Doc. A/CN.4/118 and Add.1 and 2, *published in the* 1967 United Nations Yearbook of the International Law Commission, Vol. II, 154-324 (March 8, May 5 and May 23, 1967); *Supplementary study prepared by the Secretariat on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities,* UN Doc. A/CN.4A.383/Add.1, (May 24, 1985); Letter to the Permanent Representative of a Member State, 1976 *United Nations Juridical Yearbook* 236, 237–38 ("[I]t is exclusively for the Secretary-General to determine the extent of their authority, duties and functions of United Nations officials."); Statement made by the Legal Counsel at the 59th meeting of the Fifth Committee of the General Assembly on 1 December 1981, 1981 *United Nations Juridical Yearbook* 161, ¶ 3 (same).

determination, and that that determination "creates a presumption which can only be set aside for the *most compelling reasons* and is thus to be given the *greatest weight* by national courts." *Cumaraswamy* ¶¶ 60-61 (emphasis added).

If the Secretary-General's authority in this area is to mean anything, it must mean that national authorities may not ignore the determinative effect of the Secretary-General's decision simply because they would come to a different conclusion in an individual case as to the scope of immunity or the UN's institutional interests. As the UN Secretariat observed some time ago, "[i]t is clear that if [national] courts could overrule the Secretary-General's determination that an act was 'official', a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity." Letter to the Permanent Representative of a Member State, 1976 *United Nations Juridical Yearbook* 236, 237. Hence, it is precisely in cases that may be viewed as difficult on their own terms, for whatever reason, that it is most important that Member States rigorously abide by the Secretary-General's determination.

B. The Functional Immunity of the United Nations Officials Depends on the Objective Context of the Alleged Acts, Not Their Nature.

While the greatest deference is due the Secretary-General's determination, that determination is plainly correct, in any event, under both international and United States law.

A treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties ("VCLT"), art. 31(1), 23 May 1969, 1155 U.N.T.S. 331, 340.[8] Under the General Convention, the Secretary-General and high officials are granted the

[8] United States courts recognize the applicability of the VCLT to questions of treaty interpretation. *See, e.g., Avero Blg. Ins. v. Am. Airlines*, 423 F.3d 73 (2d Cir. 2005); *see also* 73 Am. Jur. 2d *Statutes* § 70 (2001) ("[T]he proper course in all cases is to adopt that sense

same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention § 19. Hence, as the former Secretary-General, Mr. Annan, and as former high officials of the United Nations, Ms. Chamberlin, and Mr. Lubbers, have immunity under the Vienna Convention for "acts performed in the exercise of their functions." Vienna Convention, Art. 39(2); *see also* General Convention § 18(a) (all UN officials "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity"); Immunities Act, 22 U.S.C. §288d(b) ("immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such...officers, or employees").

The plain import of both the treaty and statutory language requires that the immunity be determined on the basis of the objective circumstances of the alleged acts—whether they occur in the course of an official's exercise of functions—and not on the nature of the underlying conduct. The object and purpose of the relevant instruments confirm that understanding. In particular, the object and purpose require that the functional immunity language achieve two goals: *first*, the independence of the United Nations and its officials from the effect of national law and the jurisdiction of national courts in the Member States in which the United Nations operates; and, *second*, the effectiveness of the immunity as protection from litigation or process of any kind in a national forum – as distinct from liability, which may be addressed through the alternative dispute resolution procedures made available pursuant to Section 29 of the General Convention.

First, the object of the General Convention is to "give the [UN], in every Member State,

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of the [statutory] words which promotes in the fullest manner the policy of the legislature in the enactment of the law, and to avoid a construction which would alter or defeat that policy.") (Internal footnotes omitted.)

a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its functions independently, impartially, and efficiently."[9] Since drawing up the General Convention, the General Assembly has repeatedly reiterated the importance of the immunity of UN officials to the independence and proper functioning of the Organization itself.[10] The International Court of Justice has also recognized the importance of the independence of UN officials:

> In order that the [UN] agent may perform his duties satisfactorily, he must feel that protection is assured to him by the Organization and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization.... If he had to rely on [his own] State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter....[11]

The independence established by the UN Charter and the General Convention can only be achieved if standards of immunity are applied broadly, uniformly, and effectively in the more than 190 Member States in which the United Nations operates. On the full range of subject

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9 Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record 10 January–14 February 1946, Verbatim Plenary Record, at 452 (remarks of the representative of the United Kingdom, urging adoption of the resolution proposing the General Convention); *see also* Philippe Sands & Pierre Klein, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 498 (2001) (purpose of immunity for international organization staff members is "to enable organisations to function effectively and to fulfill their mission without being impeded in any way by the adverse action of a state or of (groups of) private individuals").

10 *See, e.g.*, G.A. Res. 47/28, ¶ 9, U.N. Doc. A/RES/47/28 (25 November, 1992) ("[D]isregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programs assigned to the organizations of United Nations system by Member States."); G.A. Res. 45/240, Preamble, U.N. Doc. A/RES/45/240 (21 December 1990) ("Stressing that respect for the privileges and immunities of officials of the United Nations...is becoming even more imperative owing to the growing number of assignments entrusted to the organizations of the United Nations system by the Member States.").

11 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (11 April).

matter, the national law of the many states in which the United Nations operates will vary widely, often conflicting with the law of some Member States, or even offending their fundamental policies. Likewise, the legal systems of those many states will also vary widely, both in procedure and, at least in the view of some Member States, reliability and impartiality. For example, even where there may be agreement on a specific norm, the procedures by which it is enforced in a particular legal system may be viewed by other states as burdensome, unfair, or misguided as a matter of policy, and the sanctions and remedies available, too, may reflect widely varying approaches.

Second, it follows from the character of the immunity as an immunity from service and suit that the objective of the General Convention can be achieved only if the immunity may be asserted on the basis of readily ascertainable and easily applicable criteria.[12] In the case of absolute, diplomatic immunity, the immunity turns only on the status of the individual; even as to private conduct, a person entitled to diplomatic immunity may not be prosecuted or sued. In the case of functional immunity, the immunity turns not only on the individual's status but, in addition, on whether the conduct occurred while that person was acting in that status.

These General Convention objectives apply with special force to disputes arising from UN officials' employment. Given the wide range of issues and approaches, in few if any areas will the variety of national law be greater than in employment regulation, and, given the potential for employee grievances that any organization employing some 100,000 persons worldwide will

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[12] *See First Report of the Sub-Committee on Privileges and Immunities* ¶ 3, UN Doc. A/C.6/17 (25 January 1946)(explaining choice of convention as the best means to implement the application of Article 105 of the Charter because "the immunities necessary for the fulfillment of the purposes of the Organization and the independent exercise of their functions by its officials ... should be laid down in a manner which was as precise as possible," and "the method should be adopted which would be likely to lead to the greatest uniformity in application").

face, in few if any areas would the potential administrative burden of defending against employee complaints in national courts be greater.

For those precise reasons, US courts have regularly pointed out that an international organization's ability to self-regulate in the area of employment is so essential to its purpose and functioning that it lies at the very core of activities to which immunity should extend. For example, in *Mendaro v. World Bank*, 717 F.2d 610, 612 (D.C. Cir. 1983), the D.C. Circuit held that, notwithstanding a broad waiver in the World Bank's founding treaty, the Bank was immune under the Immunities Act from a Title VII suit by a former employee who alleged that she had been the victim of sexual discrimination and physical and verbal sexual harassment by her coworkers. The Court excluded employment suits from the waiver solely on the basis of the practical consequences of a different reading, observing that implementing employment policies of each of the over 100 Member States would be "nearly impossible," *id.* at 619, and noting that "one of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship." *Id.* at 615. The Court explained that the immunity of international organizations from employee suits

> is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide. But beyond economies of administration, the very structure of an international organization...requires that the organization remain independent from the intranational policies of its individual members.

Id. at 615-16.[13]

The same objective requires the application of functional immunity to employment-related suits against officials of international organizations. *See Broadbent*, 628 F.2d at 34 ("International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics."). This Court quoted *Mendaro*'s rationale at length to explain why it afforded UN officials functional immunity from suit for acts committed within the employment context, in spite of the "rather serious" nature of the plaintiff's allegations. *De Luca*, 841 F. Supp. at 536 (holding officials immune against claims that they, among other things, initiated a retaliatory tax audit and forged plaintiff's pay statement); *see also D'Cruz v. Annan*, No. 05-8918, 2005 WL 3527153 (S.D.N.Y. 22 December 2005) (current and former UN officials immune under the General Convention and Immunities Act from employment discrimination and retaliation claims).

In sum, the purposes of immunity, absolute or functional, are to secure the independence of international organizations and their officials from regulation under national law and to relieve

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[13] *See also Broadbent v. Organization of American States*, 628 F.2d 27, 35 (D.C. Cir. 1980) (international organization's employment of plaintiff could not constitute "commercial activity" under restrictive theory of immunity; "[d]enial of immunity [for employment claims against international organizations] opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies....[thereby] [u]ndercutting uniformity in the application of staff rules...[and] undermin[ing] the ability of the organization to function effectively"); *Morgan v. International Bank for Reconstruction and Development*, 752 F. Supp. 492, 493 (D.D.C. 1990) (international organizations are immune under Immunities Act and international law from suits "arising out [of] their internal operations"; "[d]ecisions in this Circuit have uniformly upheld immunity in cases involving relations between an international organization and its employees") (citing cases); *Hunter v. United Nations*, No. 106796/04, 2004 WL 3104829, at ***4 (Sup. Ct. N.Y. 15 November 2004) (observing, in declining to find UN had waived immunity from employment discrimination suits, that "[i]t appears clear from the case law that an international organization's self regulation of its employment practices is an activity essential to the 'fulfillment of its purposes,' and thus an area to which immunity must extend") (quoting UN Charter art. 105).

them of exposure to litigation in national courts and tribunals. For those purposes to be met in the context of employment, the immunity must apply whenever a claim or dispute arises from or relates to the employment relationship, based on the objective context of the alleged conduct. Conversely, the immunity cannot depend upon a determination whether the alleged conduct actually occurred, or whether it was the result of improper motive, or whether it was wrongful as a matter of organizational policy, or national law, or widely shared values.

Likewise, while the Secretary-General may consider the nature of the alleged conduct and any conclusions that may have been reached as a result of investigation by the UN's Office of Internal Oversight Services,[14] his determination of immunity does not depend upon – and cannot be construed as a determination of – the truth or falsity of the allegations. In making an immunity determination, the Secretary-General does not sit as a first-instance judicial officer. To the contrary, the grant of immunity necessarily contemplates that, in many individual cases, it will apply to conduct that absent the immunity would be actionable under otherwise applicable law. Instead, in making an immunity determination, the Secretary-General takes account of – as he must – the broad objectives of the General Convention and the overall interests of the Organization.

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[14] The Office of Internal Oversight Services ("OIOS") was established to perform various oversight tasks, including "to investigate reports of violations of United Nations regulations, rules and pertiment administrative issuances and transmit the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken." G.A. Res. 48/218 B, ¶ 5(c)(iv), U.N. Doc. A/RES/48/218 B (29 July 1994). OIOS conclusions need not be, and indeed are not, adopted in every case. *See, e.g.*, *McGehee v. Albright*, 201 F. Supp.2d 210, 212, 217-18 (S.D.N.Y. 1999) (Secretary-General functionally immune in employment suit in which OIOS recommendation to reinstate plaintiff's position was rejected by Under-Secretary-General in charge of relevant office). Decisions regarding the implementation of OIOS recommendations are subject to administrative review.

C. Defendants Annan, Chamberlin, and Lubbers Are Immune from Suit for Acts Performed in the Exercise of Their Functions.

The Secretary-General's determination that the individual Defendants are immune from suit in this case, which is entitled to the "greatest weight," is dispositive here and in any event plainly correct. The Complaint does not specify any allegations against Ms. Chamberlin and Mr. Annan; Ms. Chamberlin is named only in the context of identifying her as a senior official in the Office of the UNHCR in Geneva, Compl. ¶ 12, and Mr. Annan is named only in the context of the administrative decision he rendered as part of the UN's internal dispute resolution mechanism, Compl. ¶ 25. Plaintiffs' allegations of employment discrimination and retaliation are addressed against Mr. Annan only as a decision-maker in the internal employment dispute resolution process and the allegations against Ms. Chamberlin only as a senior supervisor in the Office of the UNHCR. Hence, they pertain solely to the Plaintiffs' employment as staff members of the United Nations and the alleged acts or decisions of their supervisors taken within the internal operations of the Organization. Plaintiffs and Mr. Annan and Ms. Chamberlin were employed by the UN at the time of the alleged acts; all of the alleged acts occurred within United Nations offices while the parties were engaged in carrying out day-to-day work activities; and all of the disputes relate to the conditions of plaintiffs' employment at the UN. As such, there can be no question that those alleged acts fall squarely within Mr. Annan's and Ms. Chamberlin's functional immunity, as "acts performed by [them] in the exercise of [their] functions." United States courts have routinely so held. *See, e.g., Broadbent*, 628 F.2d at 34; *De Luca*, 841 F. Supp. at 536; *D'Cruz*, No. 05-8918, 2005 WL 3527153 at *1; *McGehee v. Albright*, 201 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999).[15]

[15] In any event, because the purported service was made at a time when Mr. Annan served as Secretary-General, at a minimum it would be ineffective as a result of his absolute immunity from service at that time. General Convention ¶ 19; Vienna Convention ¶ 31.

Equally, the allegations against Mr. Lubbers of sexual harassment and "indecent battery" in the form of unwanted contact in the course of a meeting within United Nations offices in Geneva and later attempts to dissuade Ms. Brzak from pursuing her complaint, Compl. ¶¶19-23, are allegations of abuse of authority in the workplace. In light of the objective workplace circumstances, Plaintiffs' characterization of Mr. Lubbers' actions as various causes of action are irrelevant to the determination of whether Mr. Lubbers is immune. Specifically, whether Mr. Lubbers' alleged acts were intended or perceived as sexual in nature may be relevant to their wrongfulness, but not to the determination of functional immunity. For example, in *De Luca*, the court rejected the notion that immunity did not apply to UN officials' alleged forgery and other wrongful conduct in the workplace—acts clearly outside the scope of the officials' job descriptions. Instead, the court held that, "[n]otwithstanding how improper any of these actions may have been, they represent precisely the type of official activity which § 7(b) of the IOIA was intended to immunize." *De Luca*, 841 F. Supp. at 535.[16]

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[16] *See also Askir v. Boutros-Ghali*, 933 F. Supp. 368, 373 (S.D.N.Y. 1996) ("The plaintiff's allegations of malfeasance [in failing to pay rent for property occupied during peacekeeping action] do not serve to strip the United Nations or [its official] of their immunities afforded under the U.N. Convention."); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 72 (E.D.N.Y. 1987) (in a harassment and assault case, UN officials would have been immune because "employment-related decisions by officers charged with such responsibilities fall within the scope of [Immunities Act] immunity....even where the motives underlying the action are suspect"); *Hunter v. United Nations*, No. 106796/04, 2004 WL 3104829, at ***5 (Sup. Ct. N.Y. 15 November 2004) (finding individual defendants immune in employment discrimination case because "employment-related decisions by officers charged with such responsibilities fall within the scope of [Immunities Act] immunity....even where the motives underlying the action are suspect"); *People v. Leo*, 407 N.Y.S.2d 941, 943 (N.Y. Crim. Ct. 1978) (Immunities Act conferred no immunity with respect to criminal assault charges, where the official's "acts took place wholly within the context of a personal, domestic matter," away from the office, and resulted from a third party's presence, which was not "in any way connected with defendant's employment"); *cf. Morgan*, 752 F. Supp. at 493-94 (dismissing on grounds of immunity civil suit alleging, *inter alia*, intentional affliction of emotional distress and false imprisonment, because, although these allegations were "a most serious infringement of an employee's rights," it

In other words, the employment circumstances out of which the allegations arise, not the character of the allegations themselves, are determinative. If the rule were otherwise, routine allegations of wrongful conduct or improper motive would defeat the immunity, and "the solid protection" that "Congress intended to afford" international organizations and their officials "would indeed be evanescent." *Donald v. Orfilla*, 788 F.2d 35, 37 (D.C. Cir. 1986).

The importance of protecting the immunity of UN officials from national court proceedings around the world cannot be overstated. Absent immunity, individuals employed by the United Nations outside their own state, including US nationals employed in international organizations around the world, could find themselves vulnerable to criminal prosecution and civil suit in local courts everywhere, including in states that that national's own state might view as hostile or oppressive. And any instance in which a national court asserted a right to override the Secretary-General's determination of immunity would inevitably undermine his subsequent ability to protect UN officials in sensitive or dangerous circumstances, because that instance would provide justification to another national court that, in different circumstances, might wish to substitute its own judgment for that of the Secretary-General.[17] By preserving the immunity conferred here, this Court would not only ensure that the United States abides by its international obligation to recognize the individual defendants' immunity in these circumstances, but it would also help to ensure that United States nationals working for international organizations remain

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"cannot be doubted" that it "concerns an employment relationship," and therefore, any allegations "that the conduct of [the World Bank] officials may have been improper is irrelevant" to the Bank's immunity).

[17] The Secretary-General is routinely faced with the need to protect UN officials by asserting their immunity in myriad circumstances. *See, e.g., Report of the Secretary-General, Personnel Questions: Respect for the Privileges and Immunities of Officials of the United Nations and the Specialized agencies and Related Organizations* ¶¶ 11-13, U.N. Doc. A/C.5/44/11 (2 November 1989) (discussing detention of UN staff in the Gaza Strip and West Bank, Lebanon, Ethiopia, Chad, Syria, Egypt and Mauritius).

well protected abroad.[18]

This case should be dismissed in its entirety for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See, e .g., Bisson v. United Nations*, No. 06-6352, 2007 U.S. Dist. LEXIS 54334, at *13 (S.D.N.Y. 27 July 2007; *Burtis v. Annan*, 7 Fed. Appx. 104, 106 (2d Cir. 2001), *cert. denied*, 534 U.S. 884 (2001); *Askir*, 933 F. Supp. at 370.[19]

III. THE UNITED NATIONS IS ENTITLED TO INTERVENE IN THE INDIVIDUAL DEFENDANTS' CASES FOR THE SOLE PURPOSE OF ASSERTING IMMUNITY IN THEIR CASES.

Intervention of right under Federal Rule of Procedure 24(a)(2) is appropriate when the applicant "claims an interest relating to the property or transaction that is the subject of the action;" the applicant "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest;" and the applicant's interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2).

The immunity at issue here is a right belonging to and waivable only by the UN itself. *See* General Convention, § 20 (privileges and immunities are granted "in the interests of the

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[18] *See, e.g., Ahmed v. Hoque*, No. 01-7224, 2002 WL 1964806, at *5 (S.D.N.Y. 23 August 2002) (holding member of permanent mission to UN immune under Headquarters Agreement, despite "plaintiff's very serious claims" of abuse, because "'by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled.' The 'most secure way' to guarantee protection to American diplomats 'is through blanket immunities and privileges without exception.'") (quoting *767 Third Ave. Assocs. v. Permanent Mission of Rep. of Zaire*, 988 F.2d 295, 296 (2d Cir. 1993)).

[19] While the immunity determination deprives Ms. Brzak and Mr. Ishak of access to an American court, it did not deprive them of a means of seeking redress for their claims. As they both recognized by filing claims, they were entitled to seek redress within the UN's internal dispute resolution mechanisms. *See* Staff Regulations arts. X-XI; Staff Rules chs. X-XI. Ms. Brzak, however, voluntarily withdrew her appeal to the JAB. Allowing a staff member to effectively "forum shop" by circumventing this internal justice system would seriously undermine the system set up by the General Assembly, on which the United States, too, relies. *See* Facts, Part C., above.

United Nations" and "and not for the personal benefit of the individuals themselves"); *id.* (Secretary-General holds "the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations"). In other words, the "[functional] immunities appertain exclusively to the Organization."[20]

Hence, there can be no question that the disposition of the immunity issue in the cases of the former Secretary-General and former high officials of the Organization will have a direct impact on the right held by the UN itself. In order to eliminate any doubt that the UN has the right to assert the immunity of the individual officials in their cases before this Court and, if necessary, on appeal, the UN seeks to intervene in those cases for the sole purpose of asserting the immunity. *See, e.g., Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 397 (S.D.N.Y. 2002), *aff'd Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004) (granting United States's motion to intervene in order to allow the United States to appeal that court's denial of immunity). At a minimum, the UN's immunity right constitutes "a claim or defense that shares with the [cases of its officials] a common question of law or fact." Fed. R. Civ. P. 24(b).

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[20] *Report of the Secretary-General on Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations* ¶ 27, *delivered to the Fifth Committee of the General Assembly*, U.N. Doc. A/C.5/49/65 (24 April 1995); *see* UN Charter, Art. 105 ("The *Organization* shall enjoy....") (emphasis added); Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, 195 (15 December) (International Court of Justice confirming that "[t]he privileges and immunities of Article V and VI are conferred with a view to ensuring the independence of international officials ... *in the interests of the Organization*") (emphasis added).

CONCLUSION

For the aforementioned reasons, the United Nations motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in the cases of the individual defendants for the sole purpose of asserting its immunity should be granted and this case should be dismissed in its entirety for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis of the immunity conferred on the Organization and its officials under international law and the laws of the United States.

Respectfully Submitted,

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