

legal profession's fifty-year history of impatience with the privilege itself.²⁵ Indeed the waiver doctrine has been one of the chief means by which courts unfriendly to the privilege have sought to undermine it.²⁶ Barred by the Constitution from frontal attacks, courts attack indirectly. In the *Rogers* decision a majority of the Supreme Court gave impetus to this trend.

25. Criticism of the privilege goes back to Jeremy Bentham, that Utopian empiricist, who termed the privilege a "double-distilled and treble-refined sentimentality." 8 WIGMORE 305. Since then many have agreed with him. Mr. Justice Cardozo expressed himself delicately (but decisively) as follows:

"Justice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry." *Palko v. Conn.*, 302 U.S. 319, 326 (1937).

A Wisconsin committee of the bar recommended its abolition. 8 WIGMORE 313. But in 1937 the ABA considered the privilege worth preserving as a necessary protection against overzealous district attorneys. 8 WIGMORE § 2251. (See note 9 *supra*.)

Wigmore seems self-contradictory: basically distrustful of the privilege and opposed to it, he yet recognizes the dangers which would attend its abolition, so that he is in a position where he can neither accept it nor propose doing away with it. Compare statement at 8 WIGMORE 309 with his later and typical statement that the privilege "should be kept within limits the strictest possible." *Id.* at 318.

Two eminent professors intimate that police brutality and the third degree are rather understandable techniques of law enforcement, considering the handicap of the privilege, and suggest—with an ingenious logic—the abolition of the privilege as a remedy for police illegality. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW*, 102-19 (1947); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, J. CRIM. L. & CRIMINOLOGY 1014 (1934).

For other typical if unenlightening criticisms, see 15 YALE L. J. 127 (1905); 18 KY. L. J. 18 (1929); 12 CONST. REV. 157 (1928). See also 48 MICH L. REV. 230, 231-2 (1949), discussing *Smith v. United States*, 337 U.S. 137 (1949), an OPA case involving compulsory disclosure:

"[A]s governmental regulative functions increase there is a great need for some complete limitation to compel testimony in order to facilitate the enforcement of these regulations."

26. See Frank, J., dissenting, in *United States v. St. Pierre*, 132 F.2d 837, 847-50 (2d Cir. 1942); and Black, J., dissenting, in *Rogers v. United States*, 340 U.S. 367, 375-6 (1951).

FEDERAL JURISDICTION OVER INTERNATIONAL ORGANIZATIONS

THE operation of international organizations in the United States has brought a new class of litigants knocking at the doors of American federal courts.¹ International law now recognizes the "legal personality"² of the United Nations,³ since it permits that organization, and several others,⁴ to

1. The International Refugee Organization knocked in vain in *I.R.O. v. Republic Steamship Corp.*, 92 F. Supp. 674 (D. Md. 1950). But the United Nations was granted audience in *Balfour, Guthrie & Co. v. U.S.*, 90 F. Supp. 831 (N.D. Cal. 1950). See page 114 *infra*.

2. "Legal personality" is a convenient label to indicate that the entity possessing the "personality" has an identity apart from that of its members, and is capable of entering into legal relations. But "to regard legal personality as a thing apart from the legal relations is to commit an error of the same sort as that of distinguishing title from the rights, powers, privileges, and immunities for which it is only a compendious name. Without the relations, in either case, there is no more left than the smile of the Cheshire Cat after the cat had disappeared." Smith, *Legal Personality*, 37 *YALE L.J.* 283, 294 (1928).

3. The International Court of Justice recognized the legal personality of the United Nations in an advisory opinion. *Reparations for Injuries Suffered in the Service of the United Nations*, I.C.J. REP'TS (1949), 43 *AM. J. INT'L L.* 589 (1949). The case involved the U.N.'s efforts to obtain reparations for the murder of Count Folke Bernadotte while he was serving as U.N. Mediator in Palestine. The International Court held unanimously that the U.N. could demand reparations through diplomatic channels from the state of Israel for injuries to the Organization. In its advisory opinion, the Court reasoned that by entrusting certain functions to the U.N. its Members intended the Organization to possess the "competence" to discharge those functions by bringing diplomatic claims. A majority of the Court held that the Organization could also bring a claim against a State on behalf of its injured agent or those claiming through him. Judges Hackworth, Krylov, Pasha, and Winiarski dissented from this proposition, asserting that such claims should be brought by the State of which the U.N. agent was a national. The case is discussed in Sloan, *Reparation for Injuries to Agents of the United Nations*, 28 *NEB. L. REV.* 401 (1949), Wright, *The Jural Personality of the United Nations*, 43 *AM. J. INT'L L.* 509 (1949), *The U.N. and Its Agents*, 2 *STAN. L. REV.* 193 (1950). On the effect of Advisory Opinions, see Hudson, *The Effects of Advisory Opinions of the World Court*, 42 *AM. J. INT'L L.* 630 (1948).

The Reparations Case is the first judicial recognition of the legal personality of an international organization. The traditional view is that only "States" can be "subject" to international law. See Lauterpacht, *The Subjects of the Law of Nations*, 63 *L. Q. REV.* 438, 446 *et seq.* (1947). The status of the League of Nations was never determined. See Corbett, *What is the League of Nations?*, 5 *BRIT. Y.B. INT'L L.* 119 (1924). With the establishment of the U.N. complex of organizations the problem reappeared. See Jenks, *The Legal Personality of International Organizations*, 22 *BRIT. Y.B. INT'L L.* 267 (1945).

For treaty recognition of the U.N.'s legal personality see note 4 *infra*.

4. There is no reason why the logic of the Reparations Case should not apply with equal force to the Specialized Agencies. For a list of these organizations, see note 5 *infra*. They are associated with the United Nations by agreement, but operate as independent entities with their own budgets and secretariats. Like the U.N., the functions imposed upon the Specialized Agencies by their constituent documents are such that "legal personality" under international law is required to carry them out. *But see I.R.O. v. Republic SS Corp.*, 92 F. Supp. 674, 677 (1950). See Sharp, *The Specialized Agencies and the United Nations*, 1 *INT'L ORG.* 460 (1947), 2 *id.* 247 (1948).

enforce rights independently of their member states. Moreover, by signing the Charter of the United Nations and the Constitutions of the Specialized Agencies, the United States agreed to grant these organizations the legal capacity necessary for the exercise of their functions on American soil.⁵

Congress has taken some steps to fulfill the commitments made to these international organizations in their charters.⁶ The International Monetary Fund and the International Bank have been given access to federal courts on any cause of action.⁷ Other organizations must look to the International

Whether other inter-governmental organizations like the Pan American Sanitary Bureau or non-governmental organizations like the International Federation of Friends of Young Women possess legal personality under the I.C.J. holding is more problematic. Some of these organizations are performing functions similar to the U.N. organizations, while others enjoy a "consultative status" with the U. N. bodies. Several groups and writers are demanding recognition of their legal personality. See, *e.g.*, WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS (1951).

The legal personality of the United Nations, as well as the Specialized Agencies, has also been recognized by treaty. The Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, adopted by the General Assembly on Feb. 13, 1946 and Nov. 21, 1947 respectively, provide that these organizations "shall possess juridical personality". They further provide that "they shall have the capacity a) to contract, b) to acquire and dispose of immovable and movable property, c) to institute legal proceedings." U.N. Convention, § 1; Specialized Agencies Convention, § 3. Other sections accord the organizations, their officers, representatives, and other selected personnel broad immunities from suit, taxation, confiscation, and search. The United States, unfortunately, has not yet signed either of these conventions. Interview with Oscar Schachter, Deputy Director of the General Legal Division of the United Nations Secretariat, at Lake Success, N.Y., Nov. 21, 1950.

5. Art. 104 of the U.N. Charter provides: "The Organization shall enjoy in the territory of each of its Members such capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." Substantially similar provisions are contained in the Constitutions of the Specialized Agencies: World Health Organization, Art. 66; International Refugee Organization, Art. 13, § 1; International Labour Organization, Art. 39; International Bank for Reconstruction and Development, Art. VII, § 1; International Monetary Fund, Art. IX, § 2; Food and Agriculture Organization, Art. XV, § 1; United Nations Educational Scientific and Cultural Organization, Art. XII; and International Civil Aviation Organization, Art. 47. No such provisions appear in the constituent documents of two older Specialized Agencies: the Universal Postal Union, organized in 1874, and the International Telecommunications Union, which is the latest incarnation of the International Telegraph Union organized in 1865. These two organizations are comprised within the scope of the Convention on the Privileges and Immunities of the Specialized Agencies. See note 4 *supra*.

6. Art. 104 of the U.N. Charter was said to be self-executing in *Curran v. City of New York*, 191 Misc. 229, 77 N.Y.S.2d 206, 212 (Sup. Ct. 1947), cited with approval in *Balfour, Guthrie & Co. v. U.S.*, 90 F. Supp. 831, 832 (N.D. Cal. 1950). Congressional action would, therefore, be required only for purposes of giving federal courts jurisdiction over suits by these organizations. *But cf.* *United Nations v. Adler*, 90 F. Supp. 440 (S.D.N.Y. 1950) (jurisdictional issue not raised in case turning on immunity from summons of a non-resident witness).

7. 59 STAT. 516 (1945), 22 U.S.C. § 286g (1947). See note 17 *infra*.

Organizations Immunities Act⁸ for their rights and remedies in American courts. That Act grants "public international organizations" designated by Executive Order the capacity to contract, to own and dispose of property, and to institute legal proceedings.⁹ But it makes no special reference to the federal courts.

Two organizations, the International Refugee Organization and the United Nations, have attempted to gain access to federal courts under this provision. In *International Refugee Organization v. Republic Steamship Corp.*,¹⁰ a district court dismissed for lack of jurisdiction a suit by the I.R.O. against a Panamanian corporation. The court held that the suit on a ship charter breached in the United States presented no "federal question" upon which the court could take jurisdiction.¹¹ Another district court, in *Balfour, Guthrie &*

8. 59 STAT. 669 (1945), 22 U.S.C. §288 (1947). Organizations entitled to its privileges are:

1) United Nations;

2) Specialized Agencies: F.A.O., I.L.O., Bank, Fund, UNESCO, I.C.A.O., I.T.U., I.R.O., W.H.O.;

3) other organizations: Pan American Union, Inter-American Institute of Agricultural Sciences, Inter-American Statistical Institute, Pan American Sanitary Bureau, International Wheat Council, International Cotton Advisory Committee, Caribbean Commission, and the South Pacific Commission.

9. 22 U.S.C. §288a (1947). These privileges are made available to organizations designated under the Act only "to the extent consistent with the instrument creating them." *Ibid.* In order to be entitled to the privileges of the Act, an organization must be "a public international organization in which the United States participates pursuant to any treaty or under the authority of any act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive Order." *Ibid.* The President is authorized to use his discretion in extending, withholding, or revoking any of the privileges and immunities specified by the Act "in the light of the functions performed by any such international organization." *Ibid.*

Immunities from "every form of judicial process", duties, taxes, registration, search and confiscation may be extended to organizations on an equal footing with foreign states. 22 U.S.C. §288a(b) (1947). Officers, employees, and representatives of foreign governments associated with designated organizations receive immunities from taxation and suit (when relating to acts performed by them in their official capacity) only at the discretion of the Secretary of State. 22 U.S.C. §288b, d-f. Whatever benefits are extended to them are specifically stated not to amount to "diplomatic status", and they may be revoked at the discretion of the Secretary of State. 22 U.S.C. §288e(b). These latter sections of the Act are severely criticized in Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT. L. 332 (1946).

10. 92 F. Supp. 674 (D. Md. 1950).

11. The court interpreted the suit as "merely one to recover damages for fraudulent breach of a contractual relationship between two aliens." 92 F. Supp. 674, 680 (1950). Hence the suit could not be brought under Section 1332 of the Judicial Code. The only other basis for jurisdiction would be the presence of a "federal question" under Section 1331. To determine whether jurisdiction could be taken on this basis, the Court adopted the test approved by Cardozo, J. in *Gully v. First National Bank in Meridian*, 299 U.S. 109, 114 (1936): "the federal nature of the right to be established is decisive—not the source of the authority to establish it." Thus, although the Immunities Act conferred

Co., Ltd. v. United States,¹² permitted the U.N. to sue the United States under the Suits in Admiralty Act for cargo loss.¹³ The court there found that the U.N.'s capacity to bring suit was established by the Immunities Act; however, the jurisdiction of the federal court over the subject-matter was based upon the Suits in Admiralty Act.¹⁴ These cases indicate that unless some basis of federal jurisdiction other than the Immunities Act is presented, suits by these organizations will be barred from federal courts.¹⁵

The absence from the Immunities Act of an explicit grant of federal jurisdiction warrants this conclusion. A case cannot "arise under the laws of the United States" unless the intention of Congress to create a "federal question" is clear and specific.¹⁶ Congress expressed such an intention only in regard to the International Bank and the International Monetary Fund. It provided that any action brought by them is deemed to arise under the laws of the United States and gave federal district courts original jurisdiction over all such suits.¹⁷

on I.R.O. its right to contract, the suit at bar involved no "federal right", and federal jurisdiction could not be assumed.

12. 90 F. Supp. 831 (N.D. Cal. 1950), 15 ALBANY L. REV. 128 (1950), 99 U. OF PA. L. REV. 554 (1951).

13. The suit arose out of defendants' negligence in handling a cargo of powdered milk shipped to Italy and Greece by the United Nations' International Children's Emergency Fund (UNICEF). This organization is an administrative sub-division of the U.N. rather than a Specialized Agency and was therefore unable to sue in its own name. The vessel was owned by the United States, but operated under a bareboat charter by a steamship company.

14. 41 STAT. 525-8 (1920), 46 U.S.C. §§ 741-752 (1947). The general scheme of the Act is to prevent the arrest of vessels owned or controlled by the U.S. by substituting a libel in personam against the U.S. for any libel in rem against the ship. Sec. 742, upon which the capacity of the U.N. to sue was based provides: "In cases where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States. . . ." The court found the prerequisite capacity to sue a private party in admiralty in the Immunities Act, 22 U.S.C. § 288a(a) (iii). *Balfour, Guthrie & Co. v. United States*, *supra* note 12.

15. For the Judicial Code provisions enumerating bases of federal court original jurisdiction, see 62 STAT. 930-35 (1948), 28 U.S.C. §§ 1331-59 (1948). The provision giving district courts jurisdiction over admiralty cases, § 1333, is the only one of these sections of probable use to international organizations.

16. *Gully v. First National Bank in Meridian*, 299 U. S. 109 (1936). See note 11 *supra*.

17. 59 STAT. 516 (1945), 22 U.S.C. § 286g (1947):

"For the purpose of any action which may be brought within the United States or its territories or possessions by or against the Fund or the Bank in accordance with the Articles of Agreement of the Fund or the Articles of Agreement of the Bank, the Fund or the Bank, as the case may be, shall be deemed to be an inhabitant of the Federal judicial district in which its principle office in the United States is located, and any such action at law or in equity to which either the Fund or the Bank shall be a party shall be deemed to arise under the laws of the United States, and the District Courts of the United States shall have original

Failure to grant other international organizations rights of access to federal courts such as the Fund and Bank enjoy seems unreasonable. The United States has made substantially similar treaty commitments to the United Nations and all of its agencies.¹⁸ Moreover, their functions also require that they have rights enforceable in federal courts. The United Nations, its Specialized Agencies, and several other inter-governmental bodies carry on activities in the United States. Many of these organizations own property and make contracts.¹⁹ Such organizations should be capable of enforcing property rights and contracts, and of redressing tortious wrongs. Relief available to them through diplomatic channels is too uncertain to meet the needs of these organizations in their conduct of every day affairs.²⁰ Nor does capacity to sue in state courts offer a satisfactory alternative.²¹

jurisdiction of any such action. When either the Fund or the Bank is a defendant in any such action, it may at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law."

18. See note 5 *supra*.

19. The Headquarters Agreement between the United Nations and the United States, 22 U.S.C. Supp. IV § 287 (1951), gives the U.N. limited sovereignty over its Headquarters District in New York City. Similar arrangements were made for the headquarters of the Pan American Union in Washington, D.C. See Kunz, *The Pan American Union in the Field of International Administration*, 31 IOWA L. REV. 58 (1945).

In all contracts signed by the United Nations, the following clause is included for the protection of the adverse party because the U.N. is immune from suit: "Any claim or controversy arising out of or relating to this agreement or to the breach thereof shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association or such other rules as it may designate. [Then follow provisions for selecting three arbitrators.] The cost and expense of the arbitration shall be borne by the parties as assessed by the majority decision of the arbitrators. The parties agree to be bound by any award so made as to the final adjudication of any such claim or controversy." Interview with Oscar Schachter, Deputy Director of the General Legal Division of the U.N. Secretariat, at Lake Success, N.Y., Nov. 21, 1950.

Among other organizations with headquarters in the United States, the International Bank is perhaps the most active. Bonds of the Bank, payable in dollars, were sold on the U.S. market in 1947, 1950, and 1951. This form of dollar indebtedness now totals \$400,000,000, most of which is held by American citizens. INTERNATIONAL BANK, SIXTH ANNUAL REPORT TO THE BOARD OF GOVERNORS, 43 (1951).

20. The only certain method of obtaining satisfaction on international claims is to amass sufficient power behind the claim to make the adverse state realize that it is in her interest to pay up. An adjudication by the International Court of Justice may help; however, this in no way guarantees that the claim will be paid. Cf. *The Corfu Channel Case*, I.C.J. REPTS 15 (1949); Wright, *The Corfu Channel Case*, 43 AM. J. INT'L L. 491 (1949); Note, 58 YALE L.J. 187 (1948). Or the claim may be adjudicated by a Mixed Claims Commission; this is probably the most effective method. See FELLER, *THE MEXICAN CLAIMS COMMISSIONS* (1935), MOORE, *INTERNATIONAL ARBITRATION* (1914). International organizations are handicapped in prosecuting diplomatic claims by their lack of real power or authority.

21. Since American treatment of international organizations is likely to have international repercussions, such organizations should be treated as nearly as possible like

Congress should amend the Immunities Act to give international organizations access to federal courts irrespective of other jurisdictional requirements. The amendment should grant district courts original jurisdiction over suits by international organizations against a state or citizen of the United States or on any cause of action arising within the United States.²² Under a provision already contained in the Act,²³ the president could then designate those organizations²⁴ whose effective operation requires access to federal courts.

The constitutionality of such a provision is open to little question.²⁵ Suit by international organizations would fall under Article III of the Constitution as a case arising under the laws and treaties of the United States.²⁶ Congress is undoubtedly authorized to enact legislation implementing the president's power over foreign affairs.²⁷ And the cases indicate that Congress may confer federal court jurisdiction over any matter on which it may properly legislate.²⁸ If the

nations for purposes of federal jurisdiction. Inter-governmental organizations, like sovereign states, should therefore have access to the *national* judicial system. Despite the fact that uniformity of substantive law throughout the United States cannot be achieved in federal courts under *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938), (state substantive law must be applied by federal courts except in matters governed by the Constitution or acts of Congress), these courts follow a single set of procedural rules in civil cases. This not only simplifies litigation, but in some suits determines whether an action may be maintained.

22. This proposal is narrower than the present provision in regard to the Bank and Fund, *supra* note 17. On its face that statute allows suits against aliens on causes of action arising abroad to be heard in federal courts.

For purposes of venue, organizations entitled to the privilege of suing in federal courts should be considered "an inhabitant of the Federal judicial district in which its principle office in the United States is located", as is provided for the Bank and Fund. The privilege of removal whenever an organization, having waived its immunity, appears as defendant should also be made explicit.

23. 59 STAT. 669 (1945), 22 U.S.C. § 288a (1947).

24. For the statutory prerequisites of designation see note 9 *supra*.

25. See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 137 *et seq.* (1949).

26. See note 28 *infra*.

27. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding Congressional resolution authorizing president to invoke arms embargo).

28. *Osborn v. Bank of the United States*, 9 Wheat. 739 (U.S. 1824) (national bank); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885) (federally incorporated railroad); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (federal land grant); *National Mutual Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (residents of the District of Columbia); *Wilson & Co. Inc., v. United Packinghouse Workers of America*, 83 F. Supp. 162 (S.D.N.Y. 1949) (labor contracts in industries affecting interstate commerce).

To confer federal-question jurisdiction Congress must 1) be constitutionally capable of legislating concerning the subject-matter, and 2) state clearly and explicitly its intention to extend federal jurisdiction. See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 137 (1949).

Since *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803), (statute expanding original jurisdiction of Supreme Court held unconstitutional), no federal court has ever invalidated an explicit Congressional grant of federal court jurisdiction over adversary proceedings. Cf. *Muskrat v. United States*, 219 U.S. 346 (1911) (statute conferring federal juris-