MEETING ITS IMMUNITY OBLIGATIONS: THE UNITED NATIONS AND EMPLOYEE SEXUAL HARASSMENT CLAIMS

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[N]obody’s above the law—except in the U.N. . . .

—Cynthia Brzak

Abstract: The United Nations and its officials have long received immunity in matters related to the organization’s functions, leaving employees with only one forum in which to seek redress: the U.N.’s own internal justice system. Unfortunately, this forum has not properly addressed employee allegations of sexual harassment. Although recognition of the internal justice system’s failings led the U.N. to institute significant reforms in 2009, this Comment argues that further reforms are needed to ensure employee claims are properly handled in the future.

Introduction

Cynthia Brzak, a U.S. citizen and long-time employee of the United Nations High Commissioner for Refugees (UNHCR) in Geneva, Switzerland, uttered the opening quotation in response to sexual harassment and retaliation she allegedly suffered at the hands of United Nations (U.N.) officials. Pursuing her claims within the U.N. internal justice system, only for the Secretary-General to ignore findings confirming a U.N. official’s impropriety, Brzak attempted to sue the U.N. in the United States. Although the Second Circuit Court of Appeals

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3 See Brzak v. United Nations (Brzak II), 597 F.3d 107, 110 (2d Cir. 2010), cert. denied, 131 S. Ct. 151 (2010).
dismissed Brzak’s claims, her case nonetheless provides a rare look at the U.N.’s internal mechanisms and culture.4 It provides a glimpse of the long-standing inadequacies of the U.N.’s internal justice system in handling employee allegations of sexual harassment and highlights the need for reform.5 Recent changes have significantly improved the U.N. internal justice system; however, further reforms are necessary to ensure employee claims are properly handled.6

Part I of this Comment describes the journey of Brzak’s case, which reached the Second Circuit in the United States only after Brzak unsuccessfully attempted to navigate the U.N.’s own internal justice system. Part II addresses the basis for U.N. immunity before focusing on the internal workings of the U.N., including its internal justice system and its treatment of sexual harassment claims. Part III considers the institutional reforms needed to provide U.N. employees like Brzak with an adequate judicial process, taking into account the recent transformation of the U.N. internal justice system. Lastly, this Comment discusses the need to implement additional reforms in order to provide U.N. employees with a satisfactory internal justice system.

I. Background

On March 2, 2010, the Second Circuit Court of Appeals affirmed the dismissal of a complaint filed by Cynthia Brzak and Nasr Ishak against the U.N. and various U.N. officials alleging, among other claims, sex discrimination and retaliation.7 In affirming the district court’s holding that the court lacked subject matter jurisdiction, the Second Circuit echoed the district court’s reasoning that the U.N. and its officials were granted immunity according to the Convention on Privileges and Immunities of the United Nations (Convention).8

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7 Brzak v. United Nations (Brzak II), 597 F.3d 107, 110 (2d Cir. 2010), cert. denied, 131 S. Ct. 151 (2010). Nasr Ishak is a French and Egyptian national who worked in Geneva for the UNHCR. In addition to alleging sex discrimination and retaliation in violation of Title VII, the plaintiffs also alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, and various state common law torts. Id.
8 Id. at 110–13.
Brzak’s claims against the U.N. and its officials were not initially pursued in the federal courts of the United States; they reached the Southern District of New York and the Second Circuit only after Brzak engaged in internal U.N. proceedings.9

On April 27, 2004, Brzak filed a complaint with the U.N. Office of Internal Oversight Services (OIOS) after she sought advice from co-plaintiff Ishak regarding an alleged incident of sexual harassment.10 According to Brzak, the alleged incident occurred following a December 18, 2003 afternoon meeting in the office of Ruud Lubbers, former U.N. High Commissioner for Refugees.11 Lubbers allegedly “placed his hands on Brzak’s waist, pulled her towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her,” while others were present.12

After Brzak filed a complaint with OIOS, she and Ishak allegedly experienced retaliation.13 Brzak was subjected to hostility and verbal harassment, and was given inadequate work assignments once her identity as a whistleblower became known.14 Because of this retaliation, Brzak lodged two additional complaints with OIOS.15

On June 4, 2004, following its investigation, OIOS issued a report to then-U.N. Secretary-General Kofi Annan confirming Brzak’s allegations and recommending disciplinary action.16 Annan, claiming the OIOS report findings could not be verified and “would not hold up in a formal procedure to dismiss Lubbers,” did not pursue disciplinary action.17 Brzak subsequently filed a formal appeal with the U.N. internal justice system, only to experience increased retaliation.18

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9 See id. at 110.
11 Complaint, supra note 2, at 3. Lubbers was previously the prime minister of the Netherlands, Stecklow, supra note 4.
12 Complaint, supra note 2, at 3. Lubbers, however, alleges that “he merely ushered her out of the room with a hand on her back” and that it “was a friendly gesture.” Toby Sterling, Former Top UN Refugee Official Calls Sexual Harassment Accuser ‘Pitiful,’ ASSOCIATED PRESS, Oct. 25, 2005, available at 10/25/05 APWORLD 11:58:59 (Westlaw). Lubbers has said that he is “troubled by some people involved in this, but not by [Brzak]—she’s pitiful, I can’t do anything with her.” Id.
13 Complaint, supra note 2, at 4 (noting that Ishak was denied a promotion recommendation).
14 Id.
15 Id.
16 Id.
17 Id.; Sterling, supra note 12; Wadhams, supra note 1 (noting that OIOS investigators, on the other hand, “insisted that the report was properly done and accurate”).
18 Complaint, supra note 2, at 4-5.
Brzak’s claims garnered significant attention that affected Lubbers’ ability to work, he ultimately resigned.\textsuperscript{19}

In October 2004, Brzak withdrew her complaint from the U.N.’s internal justice system.\textsuperscript{20} She then filed a Title VII claim against the U.N. and its officials, including Annan and Lubbers, with the Equal Employment Opportunity Commission (EEOC) on October 28, 2005.\textsuperscript{21} The EEOC dismissed the case on January 31, 2006 because it lacked jurisdiction over the claim.\textsuperscript{22} On May 4, 2006, Brzak and Ishak brought suit in the Southern District of New York.\textsuperscript{23} The district court dismissed plaintiffs’ claims, holding that it lacked the subject matter jurisdiction to hear claims against the U.N. and its officials due to immunity granted by the Convention.\textsuperscript{24} Plaintiffs’ appeal of the district court decision to the Second Circuit was unsuccessful, as that court affirmed the dismissal of the case.\textsuperscript{25}

\section*{II. Discussion}

The Second Circuit Court of Appeals’ dismissal of Brzak’s case is consistent with U.S. and international recognition of U.N. immunity in matters related to the organization’s functions.\textsuperscript{26} The U.N. and its senior officials derive immunity not only from international instruments such as the Convention and the U.N. Charter, but also from U.S. legislation as found in the International Organizations Immunities Act (IOIA).\textsuperscript{27} Whereas the Convention grants the U.N. organization absolute immunity, former U.N. officials are granted immunity only if the actions at issue were undertaken in the individuals’ official capacity.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{19} Sterling, \textit{supra} note 12.
\item \textsuperscript{20} Plaintiffs’ Memorandum of Law in Opposition to Motion of the Defendant United Nations to Dismiss at 11, \textit{Brzak I}, 551 F. Supp. 2d 313 (No. 06 Civ. 3432). The U.N. noted that Brzak could have sought U.N. Administrative Tribunal review of a Joint Appeals Board (JAB) decision if she had not withdrawn her JAB complaint. Reply Memorandum of Law in Support of the Motion of the United Nations to Dismiss and to Intervene at 9, \textit{Brzak I}, 551 F. Supp. 2d 313 (No. 06 Civ. 3432).
\item \textsuperscript{21} \textit{Brzak I}, 551 F. Supp. 2d at 315.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 318–19.
\item \textsuperscript{25} \textit{Brzak II}, 597 F.3d at 110.
\item \textsuperscript{26} See \textit{Brzak v. United Nations (Brzak I)}, 551 F. Supp. 2d 313, 319 (S.D.N.Y. 2008), aff’d \textit{Brzak II}, 597 F.3d 107 (2d Cir. 2010).
\item \textsuperscript{27} See \textit{Brzak v. United Nations (Brzak II)}, 597 F.3d 107, 111–14 (2d Cir. 2010), \textit{cert. denied}, 131 S. Ct. 151 (2010); \textit{Brzak I}, 551 F. Supp. 2d at 317.
\item \textsuperscript{28} See \textit{Brzak II}, 597 F.3d at 112–13. The Convention grants U.N. officials the same form of functional immunity that former diplomats enjoy under international law. Id. at 113.
\end{itemize}
Because U.S. courts have held that employment-related decisions and actions fall within the individuals’ official functions and are thus immune, former U.N. officials are in practice granted absolute immunity from challenges by U.N. employees. Courts cannot consider whether the conduct underlying an official act was wrongful; thus immunity has been granted even in cases involving “gross negligence, mismanagement, corruption, embezzlement and other types of abuses.” A U.N. official’s alleged harassment and assault of a U.N. employee similarly falls within an official’s functional immunity.

Unable to sue the U.N. in the courts of its member states, U.N. employees can utilize, as Brzak did initially, the U.N.’s own internal justice system. Established in 1946, the system has been characterized by employees, attorneys, and academics as “slow, underresourced, inefficient” and “fail[ing] to meet many basic standards of due process.” U.N. employees, considering the internal justice system to be “arbitrary, unfair, and mired in bureaucracy,” have expressed little confidence in the system’s ability to handle employee complaints.

Criticisms have been leveled at the system for a variety of issues, including the underdeveloped role of its informal process and, within its formal system, the inadequate appeals process, the unavailability of

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31 See Brzak II, 597 F.3d at 113. Because Brzak’s sexual harassment and retaliation allegations involved acts undertaken by the defendants in exercise of their official functions (abuse of authority in their management of the office in which the plaintiffs worked), the courts determined that the defendants were immune. Id.; Brzak I, 551 F. Supp. 2d at 319–20. The Second Circuit did not, however, address whether the defendants were immune from the state law tort of battery alleged by Brzak. Brzak II, 597 F.3d at 113–14.

32 See Stecklow, supra note 4.


34 Chris de Cooker, Ethics and Accountability in the International Civil Service, in Accountability, supra note 30, at 50; Stecklow, supra note 4.
counsel, and the lack of oral hearings. The system is vulnerable to the Secretary-General's influence, lacks transparency in its dealings, provides little protection for whistleblower employees, and proceeds at an unacceptably slow pace.

Transparency is a particular problem in employee claims of sexual harassment, because although there are a number of such claims, the reports and findings created as a result of the internal justice process are not readily available. Even if investigative reports were more accessible, the recommendations they offer are not independent findings binding on the Secretary-General, who can determine whether to pursue disciplinary action against an accused official. Added to these issues of transparency and independence is the slow pace with which complaints and appeals work their way through the internal justice system. The time it takes for a claim to be adjudicated is significant in

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35 See Reinisch & Knahr, supra note 33, at 451–53. Employees' claims were reviewed by volunteer panels of their peers, the JAB and the Joint Disciplinary Committee (JDC), which have been described as "deficient, unreliable, and inconsistent." Loriot, supra note 30, at 92; Old and New System, supra note 6. To challenge a decision, an employee could seek the review of the Office of Human Resource Management; if the employee wished to appeal a decision rendered by the Secretary-General, it could seek recourse from the Administrative Tribunal. Old and New System, supra note 6. Beginning in 2003, employees were allowed to hire outside counsel at their own expense for representation in JAB and JDC proceedings; otherwise, voluntary assistance was provided by the Panel of Counsel. Loriot, supra note 30, at 92; Old and New System, supra note 6.


37 See Loriot, supra note 30, at 74; Haynes, supra note 36, at 209–11; Stecklow, supra note 4.

38 See Loriot, supra note 30, at 75, 82 (describing the Secretary-General’s ability to ignore OIOS recommendations and calling for U.N. justice to be provided by an independent outside entity); Bantekas, supra note 36, at 242–43 (stating that “no separation of powers has been found to exist and the Secretary-General has until now been acting as legislator, judge and enforcer of employment relations”); Old and New System, supra note 6.

39 See Loriot, supra note 30, at 93 (explaining that complainants commonly wait up to one year for respondent’s responses and for the Secretary-General’s decisions); Stecklow, supra note 4; Old and New System, supra note 6. Brzak withdrew her complaint with the U.N. system in part because complaints could take up to five years to wind through the system. Plaintiffs’ Memorandum of Law in Opposition to Motion of the Defendant United Nations to Dismiss, supra note 20, at 11 n.6.
light of the inadequate protections afforded to whistleblowers, who may face retaliation as severe as termination.\footnote{See Loriot, supra note 30, at 77 (noting that former Secretary-General Annan emphasized the need for more robust whistleblower protections); Wadhams, supra note 1 (describing employees’ disappointment in their supervisors and unhappiness about the absence of strong protections for whistleblowers); infra note 46 and accompanying text.}

Faced with a system that lacks independence, transparency, timely proceedings, and whistleblower protections, U.N. employees bringing sexual harassment claims—particularly women—must also contend with a U.N. subculture that accepts ideas of female inequality and ignores incidents of sexual harassment and discrimination.\footnote{See Gross, supra note 36, at 192; Tamar Lewin, U.N. Furor: Harassment Is Investigated, N.Y. Times, Dec. 20, 1992, available at http://www.nytimes.com/1992/12/20/nyregion/un-furor-harassment-is-investigated.html (describing the U.N. as “a workplace at which the advancement of women has been slow, sexual favors have sometimes been prerequisites for promotions or keeping jobs, and where many women believe that if they resist sexual advances from their superiors, they will lose their jobs”). However, it should be noted that the U.N. periodically addressed this issue by circulating bulletins containing policies on sexual harassment and discrimination. See U.N. Secretariat, Secretary-General’s Bulletin: Prevention of Workplace Harassment, Sexual Harassment and Abuse of Authority, U.N. Doc. ST/SGB/2005/20 (Nov. 28, 2005); U.N. Secretariat, Secretary-General’s Bulletin: Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority, U.N. Doc. ST/SGB/2008/5 (Feb. 11, 2008); de Cooker, supra note 34, at 23–24, 38; Lewin, supra.}

As an international organization, the U.N. faces the significant challenge of merging into a cohesive workplace the varied cultures, attitudes, and belief systems of its member states.\footnote{See Haynes, supra note 36, at 178; Office of Administration of Justice, UN Internal Justice System: Why Do We Need an Internal Justice System, http://www.un.org/en/oaj/unsj/why.shtml (last visited Jan. 10, 2010) [hereinafter Need for Internal Justice].}

Because some of its employees do not consider women to be equal counterparts to men, the personal attitudes of employees in a “male-dominated” workplace create a situation ripe for sexual harassment and discrimination.\footnote{Bantekas, supra note 36, at 232, 240; see Haynes, supra note 36, at 209; Lewin, supra note 41.}

Women are also vulnerable to sexual harassment, particularly at the hands of their superiors, because their residency is often contingent on their employment with the U.N.\footnote{See Gross, supra note 36, at 193–94; Lewin, supra note 41.}

With a significant number of women holding short-term employment contracts, sexual harassment whistleblowers share a real concern that their complaints will result in termination.\footnote{See Gross, supra note 36, at 193–94; Stecklow, supra note 4.} Such fears are indicative of the lack of protection and broader retaliation experienced by employees alleging sexual harass-
ment. As a Former Secretary of the U.N. Joint Appeals Board (JAB) and Joint Disciplinary Committee (JDC) stated, “No staff member is foolish enough to make a complaint. They would not be believed, and if they were believed they would not be protected.”

III. Analysis

The Second Circuit Court of Appeals held that the U.N. and its officials are immune in the United States from employee suits alleging sexual harassment in the workplace. Consequently, the U.N. internal justice system is the only avenue for employee recourse.

Because the U.N. system in which Brzak unsuccessfully sought redress was inadequate, reform—including the system’s recent transformation—has become essential. Assuming the Second Circuit’s decision to uphold U.N. immunity and dismiss Brzak’s case was correct (in order to safeguard U.N. independence and avoid an impossibly difficult scenario in which the U.N. must attempt compliance with all of its member states’ employment policies to prevent suit in national courts), there still remains an expectation that the U.N. will provide a satisfactory forum for employees to seek redress. This expectation is based not only upon U.S. and international understandings of due process and an individual’s right to an adequate justice system, but upon the text of the Convention. The U.N. contradicts its duty to provide “ap-

46 See Stecklow, supra note 4 (describing, in cases in which employees claimed sexual harassment, instances in which a supervisor accused of sexual harassment failed to renew a female employee’s short-term employment contract; the Secretary-General decided not to renew a complainant’s employment contract while she was pursuing an appeal; and a U.N. agency accused a complainant of “misrepresentation,” yet censured the accused for his inappropriate contact with female employees and his sexual remarks). In the highly publicized Catherine Claxton case, a senior male U.N. official found to have sexually harassed a female employee received a temporary unpaid position with U.N. Development Program after he resigned. Tamar Lewin, Charge by Woman at U.N. is Upheld, N.Y. Times, Mar. 7, 1994, available at http://www.nytimes.com (search “Charge by Woman at U.N. is Upheld”; then follow hyperlink); see also Gross, supra note 36, at 194–95.

47 Gross, supra note 36, at 190, 194; see also Lewin, supra note 41 (stating that an attorney and former U.N. employee warned potential female complainants that filing grievances could worsen, instead of improve, their circumstances).

48 See Brzak v. United Nations (Brzak II), 597 F.3d 107, 110 (2d Cir. 2010), cert. denied, 131 S. Ct. 151 (2010).

49 See Stecklow, supra note 4.

50 See Reinisch & Knahr, supra note 33, at 449.

51 See Brzak v. United Nations (Brzak I), 551 F. Supp. 2d 313, 319–20 (S.D.N.Y. 2008), aff’d 597 F.3d 107 (2d Cir. 2010); Bantekas, supra note 36, at 229; Reinisch & Weber, supra note 29, at 68.

propriate modes of settlement” when it fails to provide an adequate legal forum.\(^53\) Furthermore, the U.N. falls short of its Charter’s goal of protecting individual rights when employees alleging sexual harassment are left without appropriate legal recourse.\(^54\)

If the U.N. does not provide employees with an adequate, just, and impartial system of redress—“the cornerstone upon which the legitimacy of any administrative [t]ribunal must rest”—it may lose the respect of not only its employees, but its member states.\(^55\) There is an extreme possibility that, in this era of increased accountability, member states may revoke U.N. immunity.\(^56\) Such an action would have an adverse effect on the U.N., which must be seen by the world as an autonomous entity outside the influence of its member states.\(^57\) The internal justice system Brzak navigated thus requires serious reform.\(^58\)

To its credit, the U.N. recognized the need for a “complete overhaul” of its internal justice system.\(^59\) In 2005, the General Assembly sought, and the Secretary-General established, an expert independent panel to assess the internal justice system.\(^60\) After receiving the panel’s findings, the General Assembly decided in 2007 to implement many of the recommended changes.\(^61\) The panel’s significant reforms went into effect on July 1, 2009.\(^62\)

\(^{53}\) See Reinisch & Weber, supra note 29, at 68–69 (quoting language of the Convention, art. VIII, § 29(a)). The U.N. acknowledges that “[i]t is a fundamental right of staff at all levels to have recourse to an internal justice system.” Need for Internal Justice, supra note 42.

\(^{54}\) See Reinisch & Weber, supra note 29, at 70 (quoting Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 15)).


\(^{56}\) See Reinisch & Weber, supra note 29, at 68; Kingsbury & Stewart, supra note 55, at 1, 15.


\(^{58}\) See Reinisch & Knahr, supra note 33, at 448–49.

\(^{59}\) Id. at 454.

\(^{60}\) United Nations: UN’s Internal Justice System Marks One-Year Anniversary with Hundreds of Cases, M2PressWIRE, July 2, 2010, available at 7/2/10 M2PW 00:00:00 (Westlaw); About the System, supra note 5.

\(^{61}\) About the System, supra note 5.

\(^{62}\) Id.
The new U.N. system addresses some of the problems Brzak faced when bringing her sexual harassment claim in 2004. First, the new two-tier system, which allows U.N. Dispute Tribunal (UNDT) decisions to be appealed to the U.N. Appeals Tribunal (UNAT), is wholly independent of the Secretary-General. The Secretary-General is bound by UNAT judgments and can no longer choose to disregard JAB and JDC recommendations. Now that cases will be reviewed by qualified judges, instead of peer-based JABs and JDCs, sexual harassment complainants can expect more professional and impartial evaluation of their claims. Overall independence of the entire system has been strengthened by the establishment of the Office of Administration of Justice, which oversees the new system in its entirety.

Secondly, the U.N. has instituted a more robust informal system that includes mediation and, as a first step in the formal system, a management evaluation to encourage resolution of claims before litigation is needed. These steps demonstrate the U.N.’s aim to diffuse conflicts and remedy faulty decisions from an early stage; efforts that could protect employees from a prolonged process of pursuing a claim in court. Consistent with this endeavor is the new system’s focus on timeliness, as the first step in the formal process must now meet specific deadlines.

Although these reforms have created a system more amenable to employee claims, there is still more to be done to create an internal justice system that parallels the protections afforded in national courts. The United States could supplement U.N. employees’ calls for accountability and U.N. leadership’s current reforms by pressuring the organization to implement further changes. Transparency is still a concern,

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63 See Old and New System, supra note 6.
64 Id.
65 Id.
66 Reinisch & Knahr, supra note 33, at 460-61; United Nations: Secretary-General Attends Swearing-In Ceremony for 15 Judges of New United Nations Internal Justice System, M2 PRESS-WIRE, June 24, 2009, available at 6/24/09 M2PW 00:00:00 (Westlaw); Old and New System, supra note 6.
69 See Formal Resolution, supra note 67; Informal Resolution, supra note 68.
70 See Old and New System, supra note 6.
71 See Reinisch & Weber, supra note 29, at 89.
72 See Gross, supra note 36, at 195; Kingsbury & Stewart, supra note 55, at 17.
as investigative reports are not readily available to claimants.\textsuperscript{73} Also, access to the system could be broadened to include non-staff members and staff associations.\textsuperscript{74} If staff associations were able to bring suits on behalf of U.N. employees, it could temper the possible retaliation experienced by a lone employee bringing his or her individual claim.\textsuperscript{75}

Finally, the U.N. internal justice system adjudicates disputes only with regard to the contractual terms and conditions of a staff member’s employment.\textsuperscript{76} As an organization responsible for protecting individual rights, it could expand applicable law in employee grievances to include not only the contractual terms of employment, but broader concepts such as a duty of care owed to the employee and notions of the employee’s basic rights.\textsuperscript{77} Such measures would go a long way in gaining U.N. employees’ trust in the new system.\textsuperscript{78}

\section*{Conclusion}

The Second Circuit Court of Appeals’ dismissal of Brzak’s claims in \textit{Brzak v. United Nations} shed much-needed light on the U.N. internal justice system. Implicit in the United States’ generous grant of immunity to the U.N. is an expectation that employees will have access to a justice system that meets fairness and due process requirements. As Brzak’s case demonstrates, the U.N. system is ill-equipped to meet the needs and rights of employees alleging sexual harassment in the workplace. However, the significant reforms recently implemented by the U.N. have created a more autonomous, authoritative, and professional internal justice system that can better serve U.N. employees. Although the system’s extensive transformation is commendable, further reforms are needed to ensure employee claims are properly handled in the future.