

## Morgan v. International Bank for Reconstruction and Development

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**MORGAN v. INTERNATIONAL BANK FOR  
RECONSTRUCTION AND DEVELOPMENT**

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I. INTRODUCTION

In *Morgan v. International Bank for Reconstruction and Development*,<sup>1</sup> the United States District Court for the District of Columbia held that a suit may not be brought against the International Bank for Reconstruction and Development (IBRD or World Bank) on the basis of any employee relations.<sup>2</sup> This ruling was derived from the court's interpretation of the provisions of the International Organizational Immunities Act (IOIA),<sup>3</sup> the Foreign Sovereign Immunities Act (FSIA)<sup>4</sup>

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1. *Morgan v. International Bank for Reconstruction & Dev.*, 752 F. Supp. 492 (D.D.C. 1990).

2. *Id.* at 494.

3. 22 U.S.C. §§ 288-288i (1988).

4. 28 U.S.C. § 1602 (1988).

and the World Bank's Articles of Agreement.<sup>5</sup> The court ultimately decided to construe narrowly the IBRD's waiver of immunity<sup>6</sup> and to define broadly discretionary activity.<sup>7</sup>

This Note initially examines the district court's reasoning in reaching its conclusion. The effect of the court's decision in *Morgan* was to allow suit only under conditions that the founders of the IBRD might have intended.<sup>8</sup> As a result, fundamental rights of individuals have been compromised in favor of the expansion of global economic interests. This Note further explores the history of the international immunity doctrine and suggests how that doctrine influenced the court's decision. In addition, this Note examines the recent trend in international law towards the recognition of human rights. Finally, this Note proposes an alternative to the court's reasoning<sup>9</sup> that will achieve greater harmony between individual rights and societal goals.

## II. STATEMENT OF THE CASE

### A. Facts

Charles Morgan, an employee of a temporary employment agency, worked for two and one half years in a secretarial position at the IBRD.<sup>10</sup> Morgan alleged that in 1989, IBRD officials and security

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5. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter Articles of Agreement].

6. *Morgan*, 752 F. Supp. at 494.

7. *See id.* at 495.

8. *See id.* at 494.

9. As explained, *infra*, the court based its decision on economic rationales, entirely disregarding human rights issues.

10. *Morgan*, 752 F. Supp. at 493. The IBRD is an international organization whose goals involve aiding the commercial development of its member nations, enhancing foreign investment, and promoting international trade. Articles of Agreement, *supra* note 5, 60 Stat. at 1440, 2 U.N.T.S. at 134. The organization is comprised of nations who participate in the International Monetary Fund (IMF) which invests capital in debtor countries experiencing payment problems. *Id.* art. II, § 1, 60 Stat. at 1441, 2 U.N.T.S. at 135. The IMF was created subsequent to World War II to encourage growth and eliminate policies that were contrary to trade. Its ultimate purpose was to make funds available to indebted countries. Each member nation contributes an amount relative to its position in the world economy.

The United States has been involved in the IBRD since receiving Congressional authorization in 1945. *See* 22 U.S.C. § 286 (1988). The other countries which originally joined to form this agreement were: Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India,

guards "forcibly detained [him] against his will and denied him access to an attorney."<sup>11</sup> They accused him of stealing money, yet presented no evidence.<sup>12</sup> Subsequently, they made "unwarranted threats in the course of continuing harassment."<sup>13</sup> Morgan sought compensatory and punitive damages for intentional infliction of emotional distress, false imprisonment, libel and slander.<sup>14</sup> In its defense, the IBRD contended that the actions of its employees were internal activities, subject to the broad protection of sovereign immunity.<sup>15</sup>

### B. Issues and Holding

The first issue addressed by the district court was whether the waiver of immunity in article VII, section 3 of the IBRD's Articles of Agreement should be read broadly to allow recovery for employee grievances.<sup>16</sup> In addition, the court questioned whether Morgan's claims fell within the "commercial activity" exception to immunity pursuant to the Foreign Sovereign Immunities Act.<sup>17</sup> It also addressed the issue of whether the conduct of the IBRD officials and agents could be considered "discretionary functions" under the FSIA, which would also exempt the IBRD from suit.<sup>18</sup>

In response to these issues, the district court ruled that article VII, section 3 of the IBRD's Articles of Agreement must be read narrowly to cover only the activity necessary for the IBRD to perform its functions.<sup>19</sup> Employee suits were not found to be such an activity. The "commercial activity" exception was found to pertain only to the

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Iran, Iraq, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippines, Poland, South Africa, the U.S.S.R., the United Kingdom, Iceland, the United States of America, Uruguay, Venezuela, and Yugoslavia. Articles of Agreement, *supra*, 60 Stat. at 1462-65, 2 U.N.T.S. at 154-56.

11. *Morgan*, 752 F. Supp. at 493.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Sovereign immunity, as fully explained, *infra*, is a doctrine that holds governmental entities non-labile for various types of conduct in foreign jurisdictions.

16. *Id.* at 494; *see also* Articles of Agreement, art. VII, § 3, 60 Stat. at 1457-58, 2 U.N.T.S. at 180.

17. *Morgan*, 752 F. Supp. at 494; *see also* 28 U.S.C. § 1602 (1988). The district court in *Morgan* explained that it is not clear whether international organizations may be deemed "states" within the meaning of the FSIA, but decided to consider the IBRD as such for the purpose of its ruling. *Morgan*, 752 F. Supp. at 494.

18. *Morgan*, 752 F. Supp. at 495; *see also* 28 U.S.C. § 1605(a)(5)(A) (1988).

19. *Morgan*, 752 F. Supp. at 494.

IBRD's external operations.<sup>20</sup> Finally, the court determined that the "discretionary function" exemption from suit applies when the alleged wrongful conduct is the exercise of a policy judgment.<sup>21</sup> The decision to detain and question Morgan was, according to the court, a policy judgment.<sup>22</sup> Therefore, the court concluded that the IBRD was immune from suit.<sup>23</sup>

This finding by the district court is the most recent in a long line of rulings that have expanded immunity for international organizations,<sup>24</sup> thereby devaluing fundamental human rights. The following analysis of this trend illustrates the basis for the court's decision. Although precedent supports the holding in *Morgan*, this Note suggests that an increased emphasis on international human rights may produce a better result in future cases, one that vindicates, rather than denigrates, human rights.

### III. LEGAL CONTEXT: BROAD IMMUNITY FOR INTERNATIONAL ORGANIZATIONS

Sovereign immunity is a doctrine of diplomacy that limits the liability of governmental entities or officials for their wrongful conduct in foreign jurisdictions. The doctrine is recognized in the courts of every nation.<sup>25</sup> Sovereign immunity was founded during a period when the sensitivities of domestic rulers were deemed more important than any infringement upon the laws of nations in which they visited.<sup>26</sup> Failure to respect a foreign ruler in one's own jurisdiction was perceived as hostility toward that ruler and his native country.<sup>27</sup> To avoid offending

20. *See id.*

21. *Id.* at 495.

22. *Id.*

23. *Id.*

24. *See Broadbent v. Organization of Am. States*, 628 F.2d 27 (D.C. Cir. 1980); *Tuck v. Pan Am. Health Org.*, 668 F.2d 547 (D.C. Cir. 1981); *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

25. *See Comment, The Jurisdictional Immunity of Foreign Sovereigns*, 63 *YALE L.J.* 1148, 1148 (1954) [hereinafter *Jurisdictional Immunity*].

26. *See Draft Convention of the Competence of Courts in Regard to Foreign States*, 26 *AM. J. INT'L L.* 451, 451 (Supp. 1932) (hereinafter *Competence of Courts*). The absolute power of each sovereign was derived from the common law notion that the "king can do no wrong." The foundation of this concept came from the Roman view of an imperial ruler. *See also* John Sanborn, *The Immunity of Merchant Vessels when Owned by Foreign Governments*, 1 *ST. JOHN'S L. REV.* 5, 5 (1926).

27. According to one source:

In such a period, influenced by the survival of the principle of feudalism, the exercise of authority on the part of one sovereign over another inevitably indi-

a visiting dignitary, the local sovereign rendered the foreign leader absolutely immune from the laws of the local forum.<sup>28</sup> As a result, many leaders in foreign territories were granted privileges that frequently led to abuse.<sup>29</sup> They could act in a harmful manner towards the residents of the locality with no fear of legal repercussions. Ultimately, national interests in avoiding the offense of foreign dignitaries were elevated above the rights of individual citizens.<sup>30</sup>

Modern courts continue to recognize absolute immunity.<sup>31</sup> However, with the rise of a global economy, a restrictive variation of immunity has been established by acts of Congress.<sup>32</sup> Like absolute immunity, restrictive immunity prevents national courts from asserting jurisdiction over a foreign government with respect to the exercise of its sovereign capacity.<sup>33</sup> More importantly, however, this emerging doctrine withholds immunity from a foreign government carrying out commercial activities, such as trade or investment.<sup>34</sup> In the words of one court, "[t]he restrictive immunity doctrine is designed to accommodate the legal interests of citizens doing business with foreign governments

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cated either the superiority of overlordship or the active hostility of an equal. The peaceful intercourse of States could be predicated only on the basis of respect for other sovereigns.

*Competence of Courts*, *supra* note 26, at 527.

28. See *Jurisdictional Immunity*, *supra* note 25, at 1149.

29. *Id.*

30. *Id.*

31. The cases of *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492 (D.D.C. 1990), *Broadbent v. Organization of Am. States*, 628 F.2d 27 (D.C. Cir. 1980), and *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), are all examples in which absolute immunity was affirmed.

32. An example of this restrictive form of immunity is expressed in the International Organizations Immunity Act which allows for international organizations to waive their immunity under certain circumstances. See 22 U.S.C. § 288a(b) (1988) and *infra* text accompanying notes 42-48, for further explanation regarding the International Organizations Immunity Act as it pertains to restrictive immunity.

33. See Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 191 (1989).

34. *Id.* In essence, restrictive immunity distinguishes between diplomatic acts, which are immune from suit, and commercial acts, which are not immune. As the Court of Appeals for the District of Columbia Circuit instructed in *Broadbent v. Organization of Am. States*:

The central feature of restrictive immunity is the distinction between the governmental or sovereign activities of a state (acts *jure imperii*) and its commercial activities (acts *jure gestionis*). Foreign states may not be found liable for their governmental activities by American courts; but they enjoy no immunity from liability for their commercial activities.

*Broadbent v. Organization of Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980).

on the one hand, with the interests of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court."<sup>35</sup>

In *Morgan*, the United States District Court for the District of Columbia first analyzed the IBRD's liability under the IOIA which provides for absolute immunity. The court found that absent waiver, international organizations are "absolutely immune from suits arising out of their internal operations."<sup>36</sup> In addition, the district court employed a restrictive immunity analysis in determining that Morgan's claims did not fall within a "commercial activity" exception.<sup>37</sup> Finally, the district court focused on a comparison between the Federal Torts Claims Act (FTCA) and the Foreign Sovereign Immunities Act to conclude that international organizations are immune from suit when exercising discretionary functions.<sup>38</sup>

#### A. Waiver of Immunity Under the IOIA

The International Organizations Immunity Act codifies absolute immunity for international organizations.<sup>39</sup> The Act grants immunity to organizations that 1) are specified by the President as entitled to provisions of the Act; and 2) are engaged with the United States pursuant to a treaty or congressional act.<sup>40</sup> The immunities of such organizations are enumerated in section 288(a) of the International Organizations Immunity Act:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.<sup>41</sup>

Consistent with this waiver provision of the IOIA, article VII, section 3 of the IBRD's Articles of Agreement details the conditions under

35. *Broadbent*, 628 F.2d at 33.

36. *Morgan*, 752 F. Supp. at 493.

37. *Id.* at 494.

38. *Id.* at 495.

39. 22 U.S.C. § 288-288i (1988).

40. The World Bank meets these two requirements through specification by Exec. Order No. 9751, 3 C.F.R. 558 (1943-1948 Comp.), and through Congressional approval of United States participation, 22 U.S.C. §§ 286, 286h (1988).

41. 22 U.S.C. § 288a(b) (1988) (emphasis added).

which suit may be brought.<sup>42</sup> While the text of article VII implies a waiver of immunity,<sup>43</sup> the breadth of its application is unclear. The provision states: "Actions may be brought against the IBRD only in a court of competent jurisdiction in the territories of a member in which the IBRD has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."<sup>44</sup> The phrase "[a]ctions may be brought" indicates an intent by the IBRD to face the consequences of its actions.<sup>45</sup> However, it is uncertain whether this language is potent enough to constitute an explicit waiver of immunity under the IOIA.

In *Mendaro v. World Bank*,<sup>46</sup> the Court of Appeals for the District of Columbia Circuit found that the language of article VII, section 3 does not waive the immunity from suit which the IBRD otherwise receives under the IOIA.<sup>47</sup> This action centered on Susan Mendaro's allegation that during her employment with the IBRD she was a victim of continuous sexual harassment and discrimination by other IBRD employees.<sup>48</sup> Despite the seriousness of Mendaro's claim, the court decided that she did not have a cause of action against the IBRD:

[W]e are unable to read the somewhat clumsy and unartfully drafted language of Article VII section 3 . . . as evincing an intent by the members of the Bank to establish a blanket waiver of immunity from every type of suit not expressly prohibited by reservations in Article VII section 3. The interpretation urged by Mendaro is logical only if the waiver provisions are read in a vacuum, without reference to the interrelationship between the functions of the Bank set forth in the Articles of Agreement and the underlying purposes of international immunities.<sup>49</sup>

Thus, the court narrowly construed section 3 and found the IBRD's members could only have planned to waive immunity from actions by

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42. Articles of Agreement, *supra* note 5, art. VII, § 3, 60 Stat. at 1457-58, 2 U.N.T.S. at 180.

43. *Id.*

44. *Id.* at 1457.

45. *Id.*

46. 717 F.2d 610 (D.C. Cir. 1983).

47. *Id.*

48. *Id.* at 612.

49. *Id.* at 614-15.



its debtors, creditors, bondholders, and other potential plaintiffs to whom the IBRD would have had to subject itself in order to realize its goals of development and reconstruction.<sup>50</sup> Clearly, complete immunity for all IBRD actions would dissuade these external entities from investing with the IBRD; the ultimate risk of transacting with an agency that is entirely unaccountable for its actions is generally too great for any business entity to undertake.

For this reason, the court determined whether the necessary "intent to waive" existed by analyzing how the IBRD might best fulfill its purpose of inspiring investment for the reconstruction and development of member nations.<sup>51</sup> Immunity would only be granted for bank operations that would assist in the realization of these aims.<sup>52</sup> A waiver of immunity for employee suits was deemed to be "not necessary" for the Bank to "perform its functions."<sup>53</sup> Since the waiver of immunity could "severely hamper its worldwide operations"<sup>54</sup> the court concluded that immunity was preserved by the "members' failure expressly to waive it."<sup>55</sup> Thus, the court made no attempt to achieve a proper balance

50. *Id.* at 615; *see also infra* note 51.

51. The primary functions of the IBRD are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participation in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

Articles of Agreement, *supra*, note 5, at art. I, 60 Stat. at 1440, 2 U.N.T.S. at 134.

52. *Id.*

53. *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492, 494 (D.D.C. 1990) (quoting *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983)).

54. *Mendaro*, 717 F.2d at 615-17. *See also infra* notes 113-22 and accompanying text for explanation on how the IBRD's worldwide operations would be hampered.

55. Articles of Agreement, *supra* note 5, art. I., 60 Stat. at 1440, 2 U.N.T.S. at 134.

between economics and the human rights issues of discrimination and sexual harassment; its scales tilted entirely in favor of the IBRD'S financial interests. The district court in *Morgan* followed the *Mendaro* court's narrow interpretation of the waiver, and proceeded to consider other exceptions to the Bank's immunity.

*B. Commercial Activity Exception Under the FSIA*

The "commercial activity" exception is applicable if the IBRD or any other international institution has restrictive as opposed to absolute immunity.<sup>56</sup> The applicable United States law governing this exception is the Foreign Sovereign Immunities Act.<sup>57</sup> Section 1602 of the Act provides that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."<sup>58</sup> Section 1605(a) of the FSIA included "commercial activity" in its list of general exceptions to the jurisdictional immunity of a foreign state:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

.....

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>59</sup>

The Act defines "commercial activity" as:

a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.<sup>60</sup>

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56. *Morgan*, 752 F. Supp. at 494.

57. 28 U.S.C. § 1602 (1988).

58. *Id.*

59. 28 U.S.C. § 1605(a) (1988 & Supp. II 1990).

60. 28 U.S.C. § 1603(d) (1988).

The United States District Court for the District of Columbia applied a very narrow construction of this exception in *Gibbons v. Republic of Ireland*,<sup>61</sup> holding that under the FSIA "immunity remains the rule rather than the exception."<sup>62</sup> Consistent with this broad conception of immunity and narrow construction of the exception, the Court of Appeals for the District of Columbia Circuit court has consistently rejected "commercial activity" arguments.<sup>63</sup>

In *Broadbent v. Organization of American States*,<sup>64</sup> the Court of Appeals for the District of Columbia Circuit justified such a construction by declaring that it is the "essentially commercial nature of an activity that is critical."<sup>65</sup> Indeed, the court found that the "nature" of employment in international civil service is not "commercial," but is "public or governmental."<sup>66</sup> The court rationalized this conclusion by interpreting the OAS' function as not to accrue profits, but to pursue diplomatic ends.<sup>67</sup> To achieve this aim "[i]nternational officials should be free as possible . . . to perform their duties free from the peculiarities of national politics."<sup>68</sup>

Moreover, the court argued that "[d]enial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of international bodies."<sup>69</sup> According to the court, this "undercutting of uniformity" has the negative effect of "undermin[ing] the ability of the organization to function effectively."<sup>70</sup> Thus, the court decided that the nature of the relationship between an international organization and its internal administrative staff is noncommercial.<sup>71</sup> Relying on the *Broadbent* rationale, the *Morgan* court rejected the commercial activity argument, and proceeded to analyze the application of immunity under the

61. 532 F. Supp. 668, 671 (D.D.C. 1982).

62. *Id.*

63. See *Broadbent v. Organization of Am. States*, 628 F.2d 27, 33-36 (D.C. Cir. 1980); *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 550 (D.C. Cir. 1981).

64. 628 F.2d 27, 34 (D.C. Cir. 1980).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 35.

70. *Id.*

71. *Id.* at 35. The court further ruled that "absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization—regardless of whether international organizations enjoy absolute or restrictive immunity." *Id.*

FSIA.<sup>72</sup>

C. *Tort Exception under the FSIA*

Generally, there is no immunity for foreign states who are responsible for causing tortious injury to a citizen of the jurisdiction they are visiting.<sup>73</sup> However, when such harm results from the conduct of an official exercising discretionary authority, immunity is preserved.<sup>74</sup> Therefore, immunity for tortious activity under the FSIA depends on whether conduct of the international officials can be deemed "discretionary."<sup>75</sup> Section 1605(a)(5)(A) of the FSIA states that the exception to immunity for "any official or employee of that foreign state while acting within the scope of his office or employment" does not attach to "any claim based upon the exercise or performance or failure to exercise or perform a discretionary function regardless of whether the discretion be abused."<sup>76</sup>

The *Morgan* court looked to District of Columbia Circuit precedent for guidance in interpreting this discretionary function exception of the FSIA. In *MacArthur Area Citizens Association v. Republic of Peru*,<sup>77</sup> it was held that the exception should be "narrowly construed" so as not to encompass the farthest reaches of common law.<sup>78</sup> In order to give the exception a narrow construction, *MacArthur* broadly defined "discretionary" as encompassing all fundamentally governmental activities.<sup>79</sup> For these reasons, it has been decided that acts of a governmental nature constitute discretionary activity for the purpose of subsection (A).<sup>80</sup>

The *Morgan* court further looked to interpretations of an analogous discretionary function provision in the Federal Torts Claims Act (FTCA) as a model for construction of the FSIA provisions.<sup>81</sup> Section 2680(a) of the FTCA provides that liability shall not attach to "[a]ny

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72. See *Morgan v. International Bank for Reconstruction & Dev.*, 752 F. Supp. 492, 494 (D.D.C. 1990).

73. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987) (citing *Gibbons v. Republic of Ir.*, 532 F. Supp. 668, 671 (D.C. Cir. 1982)).

74. *Id.* at 921-23.

75. 28 U.S.C. § 1605(a)(5)(A) (1988).

76. *Id.*

77. 809 F.2d 918 (D.C. Cir. 1987).

78. *Id.* at 921.

79. *Id.* (citing *Olsen v. Government of Mex.*, 729 F.2d 641, 645 (9th Cir. 1983), *cert. denied*, 469 U.S. 17 (1984)).

80. *Olsen*, 729 F.2d at 645.

81. *Morgan*, 752 F. Supp. at 495 (citing *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987)).

claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>82</sup> The Supreme Court has interpreted section 2680(a) of the FTCA as preserving immunity for "decisions grounded in social, economic and political policy."<sup>83</sup> This exception was created to prevent "judicial intervention in policymaking" under the guise of adjudication of tort disputes.<sup>84</sup> In addition, the Court has concluded that conduct, rather than the actor's status, governs whether the discretionary function exception applies.<sup>85</sup> Therefore, whether conduct of a foreign official can render his or her government or organization liable depends not "upon whether the actor functioned at an operational or planning level, but instead on whether the decisions he made were 'grounded in social, economic, and political policy.'"<sup>86</sup>

Additionally, the Court of Appeals for the District of Columbia Circuit has expressed that the discretionary function exception shields not only the acts initiating discretionary activities but also the decisions made as to the implementation of those activities.<sup>87</sup> Thus, implementing acts by definition involves the exercise of policy judgment.<sup>88</sup>

Applying these principles of the FTCA set out by the Supreme Court and the court of appeals, the Court of Appeals for the District of Columbia Circuit interpreted the analogous provision of the FSIA in a recent case.<sup>89</sup> As a result, the court ruled that the discretionary function exception has the capability of further immunizing the conduct of lower level employees who are merely carrying out a policy directive.<sup>90</sup>

The *Morgan* court utilized these interpretations to determine that the "alleged false imprisonment and intentional infliction of emotional distress clearly involved the exercise of a policy judgment."<sup>91</sup> The court concluded that Morgan's supervisor "knew in advance" that Morgan would be questioned, and that his treatment was "monitored" and

82. Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1988).

83. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

84. *Id.* at 820.

85. *Id.* at 813.

86. *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187 (D.C. Cir. 1986) (quoting *Varig*, 467 U.S. at 814 (1984)).

87. *Id.*

88. *Id.*

89. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 922-23 (D.C. Cir. 1987).

90. *Id.*

91. *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492, 495 (D.D.C. 1990).

“guided” by World Bank “higher-ups.”<sup>92</sup> These activities were considered discretionary because they were deemed decisions to implement policy directives.<sup>93</sup> Consequently, the court held that the FSIA’s tort exception “provides no basis for proceeding.”<sup>94</sup>

#### IV. THE REASONING OF *MORGAN*: ALLOWING DIPLOMACY AND ADMINISTERABILITY CONCERNS TO OUTWEIGH INDIVIDUAL RIGHTS

##### A. Diplomacy

Underlying the district court’s reading of immunity lies the issue of diplomacy. In *Schooner Exchange v. McFaddon*,<sup>95</sup> the Supreme Court engrafted the concept of sovereign immunity upon American law. American owners of the sea vessel *Schooner Exchange*, seized by Napoleon’s armies and converted to a warship for the French, sought to recover the ship as it rested in the Philadelphia harbor.<sup>96</sup> In determining whether the American owners could sue the French in American courts to recover their property, the Court decided to exempt foreign sovereigns from suit in the United States.<sup>97</sup> The Court reasoned that a contrary finding would “degrade the dignity” of the foreign sovereign.<sup>98</sup> As a result, the Court extended the traditional immunity over the foreign sovereign person to the sovereign’s public armed vessels.<sup>99</sup>

Opportunities to apply the doctrine of sovereign immunity have continually increased in the twentieth century due to the expanded participation of governments in private pursuits of investment and the explosion of international trade through improved technology and resources.<sup>100</sup> However, the growth of unions and civil rights activism in this century has been contemporaneous with the expansion of the global market. In the interests of diplomacy, the courts have left the conflict of these two increasing forces to the foreign policy decisions of politicians.<sup>101</sup> An early example of this hands-off policy is the Supreme Court’s decision in *Mexico v. Hoffman*.<sup>102</sup>

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92. *Id.*

93. *Id.*

94. *Id.* at 494.

95. 11 U.S. (7 Cranch) 116, 116 (1812).

96. *Id.*

97. *Id.* at 146.

98. *Schooner Exchange*, 11 U.S. at 141-44.

99. *Id.*

100. See *Jurisdictional Immunity*, *supra* note 25, at 1148, 1149.

101. *Id.*

102. 324 U.S. 30 (1945).

In *Hoffman*, the Court resisted judicial interpretations of immunity by contending, “[i]t is therefore not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize.”<sup>103</sup> Such an allowance would “embarrass the political department in its efforts to secure the national interest, just as would denying immunity contrary to executive policy.”<sup>104</sup> Thus, a primary rationale for the continued prominence of sovereign immunity is the extreme reluctance of tribunals to meddle in foreign affairs. Until the courts are willing to adopt a more forceful stance, the courts’ concerns for foreign affairs will continue to predominate over individual rights.

### B. Administration

To deny a means of redress for a plaintiff who has been forcibly detained against his will,<sup>105</sup> denied access to an attorney,<sup>106</sup> and continually threatened and harassed<sup>107</sup> indeed would be a “most serious infringement” of individual rights.<sup>108</sup> The *Morgan* court defends this “infringement” by reasoning that without immunity, the IBRD would have its employment relations subjected to the laws of each host country in which it conducted activity.<sup>109</sup> Therefore, a denial of immunity could “severely hamper” the IBRD’s “worldwide operations.”<sup>110</sup>

This rationale is based on the discussions in two related cases: *Mendaro v. World Bank*<sup>111</sup> and *Broadbent v. Organization of American States*.<sup>112</sup> In *Mendaro*, the court of appeals instructed that there is a “strong foundation” in international law for the immunity of international organizations.<sup>113</sup> The goal of this immunity is to realize “coordinated international action” through multinational organizations with specific purposes.<sup>114</sup> Immunity in employment suits functions to shield these organizations from unilateral control by a host member nation.<sup>115</sup>

103. *Id.* at 35.

104. See *Jurisdictional Immunity*, *supra* note 25, at 1157 (citing *Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945)).

105. *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492, 493 (D.D.C. 1990).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 494.

110. *Id.* (quoting *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983)).

111. 717 F.2d 610 (D.C. Cir. 1983).

112. 628 F.2d 27 (D.C. Cir. 1980).

113. *Mendaro*, 717 F.2d at 615.

114. *Id.*

115. *Id.*

The administrative concerns of monitoring numerous employment practices in each area would severely burden the goals of an organization if it were subject to liability in every jurisdiction.<sup>116</sup>

In *Broadbent*, the court of appeals further instructed that the United States has accepted that an international organization must be at liberty to pursue its functions and that no member state may act to harm the organization's objectives.<sup>117</sup> In addition, an organization should be as "free as possible" to execute its responsibilities "free from the peculiarities" of the local sovereign's laws.<sup>118</sup> The attempt of one sovereign to hear the claims of international civil employees would ensnare the courts of that sovereign in the internal administration of those organizations with whom the employees are employed.<sup>119</sup> An exemption from immunity would result in the courts of member states inconsistently "passing judgment on the rules, regulations, and decisions of the international bodies."<sup>120</sup> A further result would be a serious "undercutting" of the application of staff regulations.<sup>121</sup> Thus, the ability of an international institution to "function effectively" would be seriously undermined.<sup>122</sup>

The Supreme Court has recognized that international corporations are often compelled to conform their employment practices to the codes of each nation in which they have employees.<sup>123</sup> However, the *Mendaro* court distinguished between private corporations and international or-

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116. *Id.*; see also *supra* note 51 for the primary purposes of the IBRD.

117. *Broadbent*, 628 F.2d at 34 (citing XIII Documents of the United Nations Conference on International Organizations 704-05 (1945), reprinted in 13 WHITMAN DIGEST OF INTERNATIONAL LAW 36 (1968)).

118. *Id.*

119. *Id.* at 35.

120. *Id.*

121. *Id.*

122. *Id.*

At first sight, disputes of this sort could be referred to municipal tribunals. The organization normally possesses immunity, but immunity can be waived. However, the special nature of the law governing employment in international organizations, closely linked as it is with delicate questions of administrative policy, makes municipal tribunals totally unsuited to deal with it . . . Courts in all countries usually refuse to handle questions of foreign *public* law, and, in the same way, a number of municipal courts have held themselves incompetent to judge claims brought by international civil servants against the organizations which employ them, not on the grounds of immunity, but on the grounds of the special law applicable.

*Id.* (citing M.B. AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS 12 (1967)).

123. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).



ganizations:<sup>124</sup> private corporations are created under the laws of one or more countries while international organizations are founded by the "joint action of several states."<sup>125</sup> The court noted that international organizations are designed to alleviate problems across national borders, with each member realizing benefits.<sup>126</sup> Consequently, international organizations owe their ultimate loyalty to the guidelines of their own documents and not to the laws of any particular member state.<sup>127</sup>

The court of appeals turned to the IBRD's Articles of Agreement to illustrate how judicial scrutiny of IBRD internal administrative affairs would obstruct the organization's goals.<sup>128</sup> In article III, section 5(b) the IBRD is directed to "ensure that the proceeds of any loan are used only for the purposes for which the loan was granted . . . without regard to political or other non-economic influences . . . ."<sup>129</sup> Further, in article V, section 5(c) it is mandated that the IBRD, its officers, and staff "owe their duty entirely to the [IBRD] and to no other authority."<sup>130</sup> The officers of the IBRD are prohibited from disrupting the political activities of its members,<sup>131</sup> and its members are not allowed to influence the political activities of the officers.<sup>132</sup>

The court of appeals interpreted these sections as limiting exceptions to immunity to the IBRD's external commercial activities.<sup>133</sup> It stated that the only permissible exceptions are those that serve primarily to "enhance the marketability" of IBRD securities and the "credibility of its activities" in the lending market.<sup>134</sup> According to its Articles of Agreement, the IBRD is empowered "[t]o guarantee securities in which it has invested for the purpose of facilitating their sale."<sup>135</sup> The court of appeals explained that this "guarantee" would have minimal impact if beneficiaries of the guarantee were bereft of the ability to

124. *Mendaro*, 717 F.2d at 619.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 620.

129. See Articles of Agreement, *supra* note 5, art. III, § 5(b), 60 Stat. at 1444, 2 U.N.T.S. at 146.

130. *Id.*, art. V, § 5(c), 60 Stat. at 1452, 2 U.N.T.S. at 152.

131. *Id.*, art. IV, § 10, 60 Stat. at 1449, 2 U.N.T.S. at 150.

132. *Id.*, art. V, § 5(c), 60 Stat. at 1452, 2 U.N.T.S. at 152.

133. *Mendaro v. World Bank*, 717 F.2d 610, 618-19 (D.C. Cir. 1983).

134. *Id.* at 618 (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 84, Reporters' Note at 275 (1965)).

135. Articles of Agreement, *supra* note 5, art. IV, § 8(ii), 60 Stat. at 1449, 2 U.N.T.S. at 134.

sue to enforce the IBRD's obligations.<sup>136</sup>

Therefore an external, as opposed to an internal, restriction of immunity would hamper the IBRD's ability to conduct the ordinary activities of a financial institution in the commercial marketplace.<sup>137</sup> Furthermore, if immunity for commercial transactions were not waived, the IBRD could purchase office supplies only on a cash basis.<sup>138</sup> The every day employment of utilities and telephones would be "placed on other than usual commercial terms."<sup>139</sup>

In addition to administrative problems, the *Mendaro* court indicated that liability for internal activities could pose a detriment to the IBRD's infrastructure.<sup>140</sup> This structure requires the IBRD to remain "independent from the intranational policies of its individual members."<sup>141</sup> As a result, many charters of international organizations like the IBRD guarantee neutral operation.<sup>142</sup> To address injustice that might occur to an individual employee of one of these international organizations, most of these institutions have established internal administrative tribunals.<sup>143</sup> These tribunals have exclusive authority to deal with employee grievances.<sup>144</sup> However, as discussed in the following section, the tribunals are often ill-equipped to handle such cases, leaving the individual employee with no effective means of redress.

#### V. A BETTER SOLUTION: STRIKING THE APPROPRIATE BALANCE BETWEEN THE NEEDS OF THE INDIVIDUAL AND SOCIETY

As one commentator has argued in regard to sovereign immunity: "the plaintiff deserves a day in court."<sup>145</sup> In the past decade the District of Columbia Circuit has heard an increasing number of cases in

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136. *Mendaro*, 717 F.2d at 618. The court of appeals further explained: Potential investors would be much less likely to acquire the Bank's own securities if they could not sue the Bank to enforce its liabilities. Similarly, the commercial reliability of the Bank's direct loans and private loan guarantees would be significantly vitiated if its debtors and beneficiaries were required to accept the Bank's obligations without recourse to judicial process.

*Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 616.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Michael Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 613 (1954).

which there were serious allegations of infringement of individual rights on the part of international organizations. From false imprisonment<sup>146</sup> to improper discharge<sup>147</sup> and sexual discrimination,<sup>148</sup> these institutions have exceeded the limits of diplomacy. On each occasion the District of Columbia Circuit has been presented with an opportunity to vindicate the rights of these injured individuals, but has instead exaggerated administrative and foreign policy concerns to avoid reaching a conclusion that could lead to international friction.<sup>149</sup>

This hands-off policy is no longer acceptable. The time has come for these organizations to assume responsibility for their tortious actions, particularly in the employment context.

#### A. *Actual Effect on Diplomacy*

No country wants to be subject to another nation's laws; the anticipation of having the tables turned upon itself is what discourages a sovereign from requiring others to conform to its laws. In reality, however, under principles of international law, a host sovereign is free to subject another sovereign to its jurisdiction so long as the host sovereign gives notice of its desire to pursue such a policy.<sup>150</sup> Clearly, to some extent the District of Columbia Circuit is reluctant to correct the abuses effected by many international organizations out of a fear of offending foreign sovereigns. When dealing with an international organization, however, this concern is mitigated. International organizations are comprised of officials from many nations. Thus, the major risk of international friction is avoided, as there is no possibility for one nation to affect the power or degrade the dignity of another nation.

Further, it has been argued that "judicial remedies against foreign states may enhance, rather than impede, international friendship."<sup>151</sup> People able to satisfy their claims might perhaps gain a more favorable impression of other nations. This improvement to diplomacy is thwarted when citizens become frustrated by the absence of a forum in which to bring their claims.<sup>152</sup>

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146. See *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492 (D.D.C. 1990).

147. See *Broadbent v. Organization of Am. States*, 628 F.2d 27 (D.C. Cir. 1980).

148. See *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

149. *Id.*

150. See *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 146 (1812).

151. *Jurisdictional Immunity*, *supra* note 25, at 1170.

152. *Id.*

B. *Fostering the Administration of International Suits*

Barring immunity in cases arising from employee complaints has the potential to "relieve diplomacy of the burden of attempting to settle many cases which the judiciary can handle more economically and more justly."<sup>153</sup> The courts are arguably more competent to resolve disputes than are administrative tribunals established by the international organizations. The IBRD created such a tribunal to hear employment contract disputes.<sup>154</sup> This tribunal, however, is vested with only limited retroactive jurisdiction.<sup>155</sup> Many classifications of individual rights are beyond the parameters of tribunal jurisdiction. In *Mendaro*, for example, the administrative tribunal was not explicitly authorized to hear Susana Mendaro's claims of sexual harassment and discrimination.<sup>156</sup> The *Mendaro* court gives no explanation for why these actions are excluded. The court merely contends that the tribunal has limited authority and jurisdiction to hear employee claims, and that "employee dissatisfaction with the efficacy of the administrative remedy is insufficient to dissolve the immunity of the international organization."<sup>157</sup>

The disallowance of recovery in the tort cases that arise from the policies of many international organizations is particularly unfair when contrasted with the remedies available to an individual who has contracted with one of these organizations. The contracting individual does so at his or her own will and can protect against breach by obtaining security. But the circumstance is altogether different when an individual is tortiously harmed by an international entity. This individual has not incurred the risk voluntarily, and can not protect himself or herself adequately.<sup>158</sup> Without an independent tribunal in which to vindicate rights, the rights of people like Charles Morgan will continue to be abused.<sup>159</sup> In response to this problem, the doctrine of human rights has

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153. *Id.* It is desirable for judicial controversies with foreign governments that the opposing party should be subjected to the ruling of the nation who has jurisdiction. It is undesirable that such claims be settled through diplomatic channels. *Id.* at 1170-71 n.129 (citing Jasper Y. Brinton, *Suits Against Foreign States*, 25 AM. J. INT'L L. 50, 62 (1931)).

154. *See Mendaro v. World Bank*, 717 F.2d 610, 616 n.41 (D.C. Cir. 1983).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Jurisdictional Immunity*, *supra* note 25, at 1164.

159. The increasing dilemma is that without the administrative tribunals the plaintiff's opportunity for any recovery is remote: "The injured party's alternative prospects for recovery against an unwilling sovereign defendant are indeed dim. Diplomatic adjustment of his claim is slow and uncertain. And suit against the foreign government in its own courts, if permitted, 'would probably necessitate expenses incommensurate

increased in importance.

### C. *The Significance of the Human Rights Doctrine*

Worldwide attention to human rights has begun to alter the legal community's perceptions of international law. Traditionally, international law was concerned only with the "relation between the states."<sup>160</sup> The rights of individuals did not adhere to the individuals themselves, but to the nations of their citizenship.<sup>161</sup> The average person was viewed as an object, rather than a citizen entitled to the rights and protection of the laws.<sup>162</sup> Gradually, states have begun to acknowledge that people are the subjects of international law—to recognize that individuals are no longer mere objects of the state.<sup>163</sup> As a result, states are beginning to protect individual fundamental freedoms against abuses by international organizations.<sup>164</sup>

Examples of this trend can be found in the developments in treaty and customary international law.<sup>165</sup> Treaty law expressly protects human rights in the individual rights sections of the United Nations

with the prospective recovery.'" *Id.* (citing Bernard Fensterwald, Jr., *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 622-23 (1950)).

160. John P. Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31, 33 (1978).

161. *Id.*

162. As one commentator explains:

In international law, subjects is the term used to describe those elements bearing, without the need for municipal intervention, rights and responsibilities. Under the rules of international law there is no evidence that individuals are permitted to be the bearers of duties and responsibilities. They must, therefore, be objects; they are like "boundaries" or "rivers" or "territory" or any other chapter headings found in traditional textbooks.

Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11, 13 (1978).

163. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

164. It has been instructed that:

Human rights law is said to have developed in the aftermath of the Second World War. It embodies the notions that individuals have some rights in their societies, which the state should respect, and that a state's treatment of its own nationals is not only a matter of its own concern, but is a proper subject of international concern. The United Nations Charter is a reflection and source of this concern. It contains, as a goal, the promotion of respect for and observance of human rights.

Daniel T. Murphy, *The Restatement (Third)'s Human Rights Provisions: Nothing New, But Very Welcome*, 24 INT'L LAW. 917, 920-21 (1990).

165. See Humphrey, *supra* note 160, at 31-32.

Charter,<sup>166</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>167</sup> and the two United Nations Covenants on Human Rights.<sup>168</sup> These treaties can become customary law, and thus bind non-parties whose adherence to the agreements constitutes a "general and consistent practice" followed out of sense of legal obligation (*opinio juris*).<sup>169</sup> Customary law is generally binding on all states.<sup>170</sup> The law governing aliens is one area in which human rights law has become customary.<sup>171</sup> In this area, a conventional minimum objective standard has been supplanted by a modern standard in which foreigners and nationals are entitled to equal treatment.<sup>172</sup>

Encouraged by the human rights development in alienage doctrine, there has been a call in the international field for a move away from international law to a more encompassing "world law."<sup>173</sup> World law formalizes codes of proper conduct and obtains its identity from the international community or indirectly through treaties.<sup>174</sup> It is concerned mainly with member states, but has the added ability of confer-

166. U.N. CHARTER art. 1, ¶ 3; art. 13, ¶ 1(b); art. 55(c); art. 62, ¶ 2; art. 68; art. 76(c).

167. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

168. International Covenant on Civil and Political Rights, G.A. Res. 2200A, GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

169. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) & cmts. b, c (1986) [hereinafter RESTATEMENT (THIRD)].

170. See Humphrey, *supra* note 160, at 32.

171. *Id.* For a complete analysis on the rise of the alienage doctrine, see McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900 (1974).

172. Humphrey, *supra* note 160, at 32. Humphrey explains that under the traditional minimum objective standard, only an alien's state of citizenship had a right of redress for treatment the alien sustained in violation of international law. *Id.* at 33 (citing I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 467-82 (2d ed. 1973)).

173. *Id.*

174. *Id.* Humphrey also suggests:

[I]t is a moot question hotly debated . . . whether world law is of the same kind of essence as municipal or national law and in particular whether the rules of world law must provide penalties or sanctions in the event of contrary result. It is obvious, however, that law which is not enforced or implemented or for which there are no provisions for enforcement or implementation can have little if any practical meaning; such law whatever its source would be for all practical intents and purposes little more than international morality, important as that might be.

*Id.* (citation omitted).

ring benefits upon individuals.<sup>175</sup> Recently, the "world law" concept has been recognized officially by way of inclusion in the human rights sections of the *Restatement (Third) of the Foreign Relations Law of the United States*.<sup>176</sup>

*D. The Impact of the Restatement (Third) of the Foreign Relations Law of the United States*

The *Restatement (Third)* has three principal sections that advance the valuation of human rights.<sup>177</sup> Section 701 deals specifically with an international institution's obligation to respect human rights. It maintains that a state must respect the rights of individuals subject to its jurisdiction, including those: (a) that the state has undertaken to respect by international agreement; (b) that states generally are bound to respect as a matter of customary international law; and (c) that the state is required to respect under general principles of law common to the major legal systems of the world.<sup>178</sup>

The obligations imposed by section 701 are supported further by section 702, which establishes the customary international law relating to human rights. Under section 702, a state contravenes international law if,

as a matter of policy, it practices, encourages or condones: (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged or arbitrary detention; (f) systematic racial discrimination; or (g) a consistent pattern of gross violations of internationally recognized human rights.<sup>179</sup>

These provisions have been considered a possible breakthrough for individual liberties. One commentator has declared that "[t]heir inclu-

175. *Id.*

176. RESTATEMENT (THIRD), *supra* note 169, §§ 701-703.

177. Murphy, *supra* note 164, at 917. Murphy further suggests:

[I]t is important to appreciate that the human rights provisions of the Restatement (Third) are statements of principles of international law as they would be applied by the United States and other nation states and international organizations. They are not restatements of the domestic laws of the United States in the narrower sense.

*Id.* at 919 (citation omitted).

178. RESTATEMENT (THIRD), *supra* note 169, § 701.

179. *Id.* § 702.

sion is a testament . . . to the heightened consciousness regarding fundamental human rights and the necessity for their protection."<sup>180</sup>

Applying the provisions of sections 701 and 702 to the *Morgan* case, one can easily envision their potential impact. Provisions (d) and (e) of section 702 are particularly applicable. According to section 702(d), an international organization is prohibited from practicing, encouraging or condoning "torture or other cruel, inhuman, or degrading treatment or punishment."<sup>181</sup> In *Morgan*, the IBRD was alleged to have "threatened" and "harassed" the employee.<sup>182</sup> Furthermore, Morgan's arbitrary detention would be a clear violation of section 702(e).<sup>183</sup> The IBRD was also accused of forcibly detaining Morgan against his will and denying him access to an attorney.<sup>184</sup> Clearly, if the *Restatement (Third)* section 702(e) gains force the IBRD will have difficulty avoiding similar claims by pleading immunity.

A possible escape hatch for international organizations is the explicit language of section 702. Under this section, there is a violation of international law only if the institution, *as a matter of policy*, encourages or practices the tortious behavior.<sup>185</sup> The opening segment of section 702 requires a high level of state action before the conduct can be deemed an infringement upon human rights.<sup>186</sup> The state must practice and condone the abuse.<sup>187</sup> Thus, it may well prove difficult for a plaintiff to establish that an organization such as the IBRD has a "policy" of forcible detention and harassment.<sup>188</sup>

180. Murphy, *supra* note 164, at 918. In addition to the two principal human rights provisions, there is a remedy provision which maintains that:

(1) A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.

(2) Any state may pursue international remedies against any other state for a violation of the customary international law of human rights.

(3) An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by another applicable international agreement.

RESTATEMENT (THIRD), *supra* note 169, § 703.

181. RESTATEMENT (THIRD), *supra* note 169, § 702(d).

182. *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492, 493 (D.D.C. 1990).

183. RESTATEMENT (THIRD), *supra* note 169, § 702(e).

184. *Morgan*, 752 F. Supp. at 493.

185. RESTATEMENT (THIRD), *supra* note 169, § 702.

186. *See* Murphy, *supra* note 164, at 921.

187. *Id.*

188. *Id.*



In *Morgan*, however, the court not only deemed the IBRD to be an entity equivalent to that of a state, but it also found that the IBRD officials' actions were a matter of policy.<sup>189</sup> It can be forcefully contended that the policy that gained the IBRD officials' immunity in *Morgan* is the same type of policy that triggers liability under the Restatement (Third). A state must "practice" and "condone" the abuse for it to be "policy" under the Restatement.<sup>190</sup> Though the *Morgan* court found that IBRD officials had indeed engaged in conduct that practiced and condoned abuses against Mr. Morgan, the court supported the conduct of the officials because such conduct was in accordance with IBRD policy for such employee disputes. If the IBRD is found immune from liability for its tortious conduct under the FSIA, it must also be found liable under the provisions of the Restatement (Third). Thus, the Restatement has the potential to subordinate administrative and economic arguments to the ideals of fairness, justice, and the acceptance of universal human rights.

## VI. CONCLUSION

In *Morgan*, the District Court followed a string of District of Columbia Circuit cases that clung to the traditional notion of immunity for international organizations. The rationale behind these rulings was the belief that institutions, such as the IBRD, are incapable of handling the burden of liability in the employment setting. The court's position is that such cases "could severely hamper [the organization's] worldwide operations."<sup>191</sup> As a result, the current stance of the District of Columbia Circuit is that "employee relations of any kind cannot be the subject of litigation against the bank."<sup>192</sup>

This policy contrasts with the increasing desire to respect human rights, exemplified by the formulation of the new *Restatement (Third)*. This enhanced recognition of human rights militates against a perspective that denies compensation for tortious harm to individuals. As nations move closer to forming a global economy, the time has come to view the individual as a subject, rather than an object, of the international laws. Only then can we have a global society that is not merely

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189. *Morgan*, 752 F. Supp. at 495.

190. RESTATEMENT (THIRD), *supra* note 169, § 702.

191. *Morgan*, 752 F. Supp. at 492.

192. *Id.*

financially successful, but committed to recognizing and protecting the fundamental rights common to all citizens of the world community.

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