To what immunities are international organizations entitled under general international law? Thoughts on *Jam v IFC* and the ‘default rules’ of IO immunity

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1. **Introduction**

   Section 2(b) of the US International Organizations Immunities Act 1945 (IOIA) prescribes that designated international organizations ‘shall enjoy the same immunity from foreign suit and every form of judicial process as is enjoyed by foreign governments’. This outwardly straightforward provision seems to bring States and international organizations (IOs) under a common immunity regime under United States law. It has, however, given rise to two conflicting lines of judicial precedent. The first, exemplified by *Atkinson v IADB*, construes section 2(b) as granting absolute immunity to IOs, in keeping with the rules of State immunity as they existed at the time when the IOIA was enacted. The second, exemplified by *Nokalva v ESA*, extends to IOs the provisions of the Foreign Sovereign Immunities Act 1976 (FSIA), which reflects the now dominating doctrine of the relative immunity of States.

   The jurisprudential split was finally settled by the US Supreme Court in *Jam v International Finance Corporation*. At issue was a decision by the Court of Appeals for the DC Circuit that the International Finance Corporation (IFC), an organisation pertaining to the World Bank Group, enjoyed absolute immunity in proceedings relating to pollution resulting from a project that it had financed in India. The Supreme Court reversed the Court of Appeals’ decision, with Chief Justice Roberts delivering the Court’s opinion. Chief Justice Roberts relied on the ‘reference canon’, a technique of statutory interpretation according to which ‘when a statute

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refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. Finding that the IOIA makes reference to ‘an external body of potentially evolving law’, he concluded that it ‘should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other’. As a matter of US law, the implication is that ‘the Foreign Sovereign Immunities Act [also] governs the immunity of international organizations’.

The Supreme Court’s interpretation of the IOIA has methodological implications that are arguably conducive to a clearer alignment between US domestic law and the international obligations of the US. Chief Justice Roberts observed that ‘the privileges and immunities accorded by the IOIA are only default rules’, and that ‘[i]f the work of a given international organization would be impaired by restrictive immunity, the organization’s charter can always specify a different level of immunity’. Thus, instead of starting from a rule that IOs enjoy absolute immunity, and then searching for potential ‘waivers’ in constituent instruments and other agreements, the Supreme Court rightly directs courts to proceed the other way around: first, to have regard to IO-specific treaty provisions; secondly, and only if and as necessary, to resort to the default rules found in the IOIA and the FSIA.

But the question that arises in connection with that potential second step is: are the default rules of US law in accordance with the default rules of international law? From the perspective of international law, is the IOIA justified in extending to IOs the default rules that apply to States? This is a question that the Supreme Court avoids, as the judgment barely touches upon questions of international law, but which remains of interest for those seeking a harmonious relationship between international law.

4 ibid 10.
5 ibid 5.
6 ibid 14 (emphasis added).
7 Chief Justice Roberts acknowledged that the IOIA instructs courts to ‘look up the applicable rules of foreign sovereign immunity, wherever those rules may be found’, singling out ‘the law of nations’ alongside statutes and the common law (ibid 11). But he made no effort to assess whether the interpretation he proposed was compatible with the international obligations of the US, or whether international law could or should have any bearing upon the interpretation of the IOIA in the first place.
and domestic systems – even more so if the Supreme Court’s judgment were to lead to greater engagement by US courts with claims against IOs, or if other jurisdictions were to turn to Jam for inspiration when constructing their own domestic rules. That is why I propose, in the present contribution, to tackle that question by looking into the foundations and scope of the immunities of IOs under general international law. My argument is that, mirroring the Supreme Court’s reading of the IOIA, the default international law rules of State immunity can be extended to IOs by analogy. In expounding it, I endeavour to dispel misconceptions that have led some courts and scholars to espouse one of two dubious positions: either that IOs can claim no immunities in the absence of a treaty provision (section 2), or that under general international law IOs enjoy a ‘functional immunity’ that makes them exempt from the recognised exceptions to State immunity (section 3).

It should be conceded from the outset that the vast majority of cases involving IO immunity in domestic courts do not invite the application of general international law, but rather of the lex specialis stemming from myriad constituent instruments, headquarters agreements and other relevant treaties. Given the widespread practice of conferring immunity to IOs by treaty, there may be little occasion to invoke and apply the ‘default rules’ in practice. Yet, reflecting on such default rules is justified for at least three reasons. First, from time to time there may emerge situations for which no treaty rule is available, as when a claim against an IO is brought in the courts of a third State which is not bound by the IO’s constituent instrument and other internal rules. Second, and as explored in section 4 below, the default rules may be relevant for the interpretation of treaty provisions that are either lacking or unclear, and for the interpretation of domestic statutes and case law in municipal systems where a presumption that the legislature intends to act in accordance with

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8 I use of the phrase ‘general international law’, regularly employed by the ICJ, the ILC and in academic commentary, to refer to default rules of general application to be distinguished from special rules agreed between specific parties (lex specialis). I favour it over the related phrase ‘customary international law’, which is defined narrowly as ‘general practice accepted as law’, for its inclusivity: it encapsulates norms of general application without taking a position as to how they are formed or identified. Thus, ‘general international law’ as used in this article includes customary rules in that narrow sense but, as it will become clear below, is not limited to them.
international law is accepted. Third, enquiring into the foundations and scope of the default rules that apply to IOs on the international plane may lead to more balanced evaluations of instruments of international and domestic law that establish special regimes of IO immunity; such an exercise may help us rethink and better contextualise assumptions as to the character, status and functioning of IOs that influence our understanding of the rules found in those instruments.

2. The foundations of the immunity of IOs under general international law

It has long been accepted that, as a general rule, States enjoy immunity from exercises of jurisdiction by other States. The rules governing State immunity, found in customary international law, have been largely restated in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. But can IOs rely on similar customary rules? This has been a controversial issue, eliciting contrasting answers in academic commentary and in the judgments of domestic courts. Even textbooks on international organizations law disagree: while Schermers & Blokkers and Amerisanghe maintain that IOs may

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9 In the US, the ‘Charming Betsy canon’ of statutory interpretation prescribes that ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’: Murray v The Schooner Charming Betsy, 6 US 64 (1804). See also Restatement (Third) of Foreign Relations Law (1987) para 114.
10 This section expands upon the analysis sketched in FL Bordin, The Analogy between States and International Organizations (CUP 2019) 214-221, and relies on insights developed at length throughout the book.
11 Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) (Judgment) [2012] ICJ Rep 99, para 56.
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claim immunity under customary international law, Sands & Klein contend that, with the exception of the United Nations, they may not.  
Customary international law is typically identified through the application of the ‘two-element approach’ articulated by the International Court of Justice, which directs one to ascertain whether the rule being invoked is supported by ‘general’ or ‘settled’ practice and _opinio juris sive necessitatis_, that is, the conviction that conformity with the practice is required by the law. The obvious first step for tackling the question of whether IOs enjoy immunities under general international law is thus to look at whether States have been abstaining from exercising jurisdiction over the acts of IOs with the belief that such abstention is legally required. In a recent study, Sir Michael Wood, who served as Special Rapporteur on the identification of customary international law at the International Law Commission, embarked on that exercise. He examined existing treaties, decisions of domestic courts, domestic legislation, positions taken by States and IOs in various fora, and academic commentary. His analysis shows that at the time when the activities of IOs took a central spot in international cooperation after World War II, States did not seem to believe that they were obliged to grant immunities to IOs in the absence of treaty obligations; that there is much inconsistency in the views taken by domestic courts and commentators on this issue; and that treaties conferring immunities on IOs do not plausibly evidence a general practice in the field, let alone _opinio juris_. For those reasons, he concludes that ‘it cannot be said that there is a “general practice accepted as law” establishing a customary rule of immunity’ for IOs.


15 Under certain circumstances, IOs may contribute to the formation of those rules through their own practice. See eg Draft conclusions on identification of customary international law, ILC Report, UN Doc A/73/10 (2018) Conclusion 4(2) and paras 4-7 of the commentaries. See also J Odermatt, ‘The Development of Customary International Law by International Organizations’ (2017) 66 ICLQ 491.


17 ibid 312-316.

18 ibid 317.
It is hard to find fault with the particulars of Wood’s analysis. If the question posed is whether a specific rule of immunity for IOs has emerged through the accumulation of State practice and *opinio juris*, the most convincing answer seems indeed to be in the negative. If that were the case, the interpretation of the IOIA adopted in *Jam* would not put the US in breach of general international law: the decision by the US to grant immunity to designated IOs would be strictly *ex gratia*, and the US would be free to condition that immunity as it sees fit. But is this really the end of the matter? Are we to infer that, because ‘it cannot be said that there is a “general practice accepted as law” establishing a customary rule of immunity’, domestic courts in the US and elsewhere are at liberty to exercise jurisdiction over the acts of IOs in the absence of a treaty commitment to refrain from doing so?  

Differences of opinion notwithstanding, it is clear that States have been reluctant to exercise jurisdiction over IOs in the absence of a justification. Moreover, scepticism towards IO immunity under general international law in judicial precedent has been typically expressed in *obiter dicta* or in cases where the immunity of the IO being sued could be affirmed on other grounds. Thus, it is unconvincing to regard the inconclusive practice and precedent that Wood identifies as a clear case in which no prohibitive rule exists, with the inference that States may act as they please. Rather, disagreement over whether IOs enjoy immunity under general international law gives rise to a situation of uncertainty in the law – or, in the phrase popularised by legal philosophers, a ‘hard case’ – that needs to be tackled by recourse to legal reasoning.

The task for those who face a hard case is to provide a solution to the situation of uncertainty that remains faithful to the rule of law ideal to which legal systems are committed. That entails finding the answer that

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19 Wood stresses, it must be noted, that ‘[t]here may be reasons other than immunity why national courts should not inquire into the acts of international organizations’ (ibid 317) but the suggestion seems to be that those would lie outside the realm of international law.

20 That is, as an instance of application of the ‘Lotus principle’ whereby what is not prohibited is permitted: *The Case of the S.S. ‘Lotus’ (France/Turkey)* [1927] PCIJ Ser A No 10, 18-19.


fits best with existing rules and principles, ensuring that the system remain coherent. To do that, lawyers resort to systemic arguments, such as reasoning by principle and reasoning by analogy, with a view to ascertaining whether an existing rule can be extended to the situation of uncertainty in a convincing way. Analogical reasoning is based on the requirement to treat like cases alike that lies at the heart of legal systems.23 It seeks, in the words of Jeremy Waldron, to project ‘the existing logic of the law into an area of uncertainty or controversy’.24 Analogies are based on a ‘relevant similarity’ that connect the situations being compared and leads to the inference that they are ‘alike’.25 Given the attributes of States and IOs as subjects of international law, can the customary rules of State immunity be extended by analogy to IOs?

The principle underlying the customary position on State immunity is sovereign equality: the domestic courts of a State must not adjudicate upon the rights and obligations of another State because par in parem non habet imperium, equals do not have authority over one another.26 Interestingly, in cases in which domestic courts have rejected immunities for IOs under general international law, the focus of the analysis was not so much on the particulars of State practice or opinio juris but rather on perceived differences of status between ‘sovereign States’ and ‘non-sovereign IOs’. For example, in the CERN I case, the Swiss Federal Supreme Court held that the immunity of IOs derives from instruments of international law instead of from their international legal personality because, unlike States, IOs are not ‘full subjects’ of international law.27 Likewise, in Manderlier v ONU et Etat Belge, the Brussels Civil Tribunal remarked that, because the United Nations is not sovereign and has no territory or population, ‘it cannot invoke rights of sovereignty different from the similar, but partial, rights which the Conventions have expressly and with

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24 Jurisdictional Immunities of the State (n 11).
limited effect given to it’. 28 Even more openly, in *Pistelli v EUI*, the Italian Supreme Court of Cassation noted that it was ‘not clear that the principle *par in parem non habet iurisdictionem* […] [had] been extended by customary law to all international organisations’ and concluded that, because it was ‘impossible to place States and international organisations on the same level’, ‘the privileges and immunities the latter enjoy can only arise from specific agreements’. 29 The same position is sometimes found in academic commentary. 30

While sovereignty, understood as a specific status conferred by international law, is indeed confined to the category of States, this does not mean that States and IOs are not comparable for certain purposes. A ‘relevant similarity’ between States and IOs that can justify treating them as ‘alike’ for the purposes of applying the customary law of immunities is the *legal autonomy* that they share when operating on the international plane. In the eyes of public international law, IOs are viewed as autonomous in that they are not subjected to the domestic jurisdiction of any of their members. 31 That is the main implication of saying that an IO has an international legal personality separate from that of its members, or that it expresses a *volonté distincte* through its organs. 32 No doubt an IO is controlled by its members, but that is achieved through their participation in (political) organs where such procedures are followed as may be provided by the constituent instrument that establishes the organization and other internal rules that regulate its functioning. The participation of members in political organs does not amount to an exercise by them of

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32 Eg I Seidl-Hoheverden, *Corporations in and under International Law* (Grotius 1987) 72.
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jurisdiction *qua* subjects of international law. This insight was captured by the Belgian *Conseil d’Etat* in the case of *Dalfino v Governing Council of European Schools and European School of Brussels*. The claimant sued the European School of Brussels I, a school established as an organ of an IO to operate in Belgium. In the *Conseil d’Etat’s* view, ‘neither the European School of Brussels I, nor the Governing Council of the European School, are organized or controlled by the Belgian public authorities’, as the school ‘applies not Belgian laws and regulations relating to education but rather regulations adopted by international agreement’.33 Addressing an argument based on Article 6 of the European Court of Human Rights, which enshrines the right of access to justice, the *Conseil d’Etat* noted that ‘[s]uch a possible absence of any remedy cannot have the effect of giving the *Conseil d’Etat* jurisdiction to review the legality of the acts of an international organization even where that organization has its headquarters in Belgium’.34

The line of reasoning adopted in *Dalfino* is more persuasive than perfunctory arguments that customary immunities only accrue for sovereigns and therefore cannot benefit IOs. It fits best with the existing rules of the system while ensuring its overall coherence for two reasons. First and foremost, any exercise of jurisdiction over an IO ultimately entails an indirect exercise of jurisdiction over its member States. Even though the organization and its members constitute separate legal persons, it cannot be seriously argued that the (sovereign) rights of member States that set up an organization to act in their stead are not affected when a domestic court rules on a dispute involving that organization. To say that the default position under general international law is that States are free to exercise jurisdiction over IOs is to say that, in practice, an exception to the rules of State immunity has emerged for when States act collectively through IOs. As Wilfred Jenks put it:

‘Where no agreement concerning immunities has been negotiated with a third State the organisation will not be able to rely in relation to that State on any general provision of its own Constitution providing for appropriate immunities as an international obligation of that State. It does not follow that the organisation has no legal rights in such a situation.


34 ibid 642.
The rights which it is entitled to claim may be less extensive than those which it is entitled to claim in relation to its own members, but the organisation cannot reasonably be regarded in relation to third States as a group of private persons with no legal status of any kind; at the lowest it is a group of States acting collectively […] A third State has, of course, no obligation to allow such an entity to operate on its territory, but if it allows it to do so it must, it is suggested, respect the immunities appropriate to such an entity.35

That is why denying a default rule on immunity for IOs for lack of sufficient general practice backed up by *opinio juris* is so unsatisfactory. It would be incoherent for international law to enable States to create IOs for collective action but then expose that action to the jurisdiction of third parties in a way that would be impermissible when States act individually. Domestic courts and commentators suggesting that IOs have no form of default immunity seem to ignore the havoc that would be caused to the current system of State immunity if IOs were perceived, as Jenks says, as ‘a group of private persons with no legal status of any kind’. As guarded though States may be when it comes to committing to any particular view about the status of IOs as international legal subjects, is that a solution they could ever accept?

Second and relatedly, approaches to the law of immunities that place too much emphasis on sovereign status – including anachronistic notions of ‘State dignity’ – fail to capture an important rationale for the international rules of immunity: achieving an orderly system for the bringing of international claims by favouring international forums over domestic courts so as to preserve the basic capacity of States to self-govern. If States were to exercise jurisdiction over one another through claims brought before domestic courts, that would result in an unwieldy decentralised mechanism for the enforcement of international obligations that might hinder their coexistence as formally independent entities. While IOs are not ‘sovereign’, they are self-governing institutions created by States to operate outside the jurisdiction of their members. Hence, treating States and IOs similarly under general international law presents itself as the most coherent solution for the situation of uncertainty.

That all said, a caveat must be considered. Private parties injured by an IO, and for whom that IO does not provide access to a procedure

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under which claims can be made and remedies sought, are at a disadvantage in relation to private parties injured by a foreign State in at least one respect: the latter are in principle allowed to bring a claim before the courts of the State that injured them, where no international law immunity can be invoked, whereas the former may be left without a forum. The unfairness stemming from such situations could militate in favour of articulating further IO-specific exceptions to immunity as practice and precedent evolves, including in the guise of doctrines geared towards limiting the extent to which IOs can take advantage of their position of relative unaccountability.\textsuperscript{36} The solution, however, can hardly be a wholesale denial of IO immunity, with a free-for-all recourse to domestic forums. State immunity, after all, prevents the State of the forum from exercising jurisdiction even when the foreign State has failed to provide a remedy to the injured party, with international law instead enabling the State of nationality of the injured party to espouse the claim on the international plane under the rules of diplomatic protection. Because there is no ‘last resort’ exception to State immunity in cases of denial of justice\textsuperscript{37}, existing rules can scarcely provide the basis for postulating a general exception of that kind in the field of IO immunity. Be that as it may, the takeaway for the present analysis is that while treating States and IOs similarly as regards the default rules of immunity may present itself as the most coherent solution within the international legal system as it stands at present, it is not a perfectly coherent solution to which no qualifications can or ought to be made. It should be understood that any solution adopted on the authority of a systemic argument should be a starting point rather than the finishing line.\textsuperscript{38}

\textsuperscript{36} An analogue being the rules articulated in arts 17 and 61 of the 2011 Articles on the Responsibility of International Organizations, which mitigate the rule whereby member States are not in principle liable for the acts of their IOs and vice-versa by envisaging joint responsibility when one is using the other to circumvent international obligations. Another potentially relevant idea is the ‘doctrine of equivalent protection’ articulated by the European Court of Human Rights: see eg the discussion in A Viterbo, A Spagnolo, ‘Of Immunity and Accountability of International Organizations: A Contextual Reading of Jam v. IFC’ (2019) 13 Diritto umani e diritto internazionale 319, 328-329.

\textsuperscript{37} Jurisdictional Immunities of the State (n 11) para 101.

\textsuperscript{38} The point being that immunities can and should be questioned. The development of exceptions to State immunity has shown that it is possible to maintain an orderly system but also make it responsive to fairness concerns. The current debate on the impact of immunities on the human right to access justice, in particular in situations where States
3. The scope of the immunities of IOs under general international law

The interpretation of the IOIA adopted in Jam has the effect of extending to IOs not only the default rule on the immunity to which foreign States is entitled under US law but also the exceptions to that immunity as articulated in the FSIA. As President Gerald Ford stated upon signing the act into law, the FSIA was conceived to ‘[carry] forward a modern and enlightened trend in international law’ and make ‘this development in the law available to all American citizens’. The trend was that of substituting a doctrine of relative immunity for the doctrine of absolute immunity that had been accepted as customary international law until the first half of the 20th century. And, indeed, the regime of relative immunity articulated in the FSIA is largely compatible with the current customary law of State immunity. But is applying to IOs the exceptions in the FSIA similarly in accordance with general international law?

3.1. The allure of functionalism

Given that the theory of functionalism has long pervaded legal thinking about IOs, it provides a good place to start the inquiry. ‘The basic idea behind functionalism’, Jan Klabbers explains, ‘is that states delegate functions to entities they create’. Functionalism invites international lawyers to think of legal problems arising from the activities of IOs in terms of the functions that have been assigned to them. On the one hand, legal doctrine is to put IOs in their place by demanding that they adhere to the script that their principals have written. Hence the insistence that IOs have limited competences, that they do not possess the ‘totality of international rights and obligations’, that they are governed by the ‘principle of speciality’. On the other hand, the law is to be construed as

and IOs have committed serious violations of international law, suggests that there is still much room for improvement.

geared towards the protection of the functions of IOs. So long as organizations purport to be following their script, they must be allowed the necessary room to fulfil their tasks.\textsuperscript{43} It is the latter proposition that has influenced contemporary thinking on IO immunity. In Klabbers’ words:

‘In theory, after all, the organization should not be interfered with and, in order to prevent such interference, should enjoy privileges and immunities. The UN could not work properly if its Secretary-General or other officials would have to stand trial in member states, and it could not do its job if it were forced to pay compensation for damages or even merely faced the threat of lawsuits.’\textsuperscript{44}

Functionalism offers a justification for treaty regimes that are far more protective than the customary rules that applies to States.\textsuperscript{45} Several constituent instruments enact functionalism into law by providing that IOs shall enjoy the immunities necessary for the fulfilment of their purposes.\textsuperscript{46} Such ‘functional immunities’ are sometimes bolstered by supplementary treaties and headquarters agreements envisaging ‘immunity from every form of legal process’,\textsuperscript{47} the upshot being that among the parties to those treaties the immunities to which the organization is entitled are not merely functional but downright absolute. And that is all done in the name of functionalism: ‘[t]he difference in the treatment of foreign States and international organizations under domestic law’, the Supreme Court of Justice of Austria has observed, ‘can be explained through the

\textsuperscript{42} J Klabbers (n 40) 28. In a judicial context, see Stichting Mothers of Srebrenica and Others against The Netherlands, App no 65542/12 (ECtHR, 11 June 2013) para 154, where the Court reasons that ‘[t]o bring [operations taken under Chapter VII of the UN Charter] within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations’.
\textsuperscript{43} See the discussion in K Boon, ‘Immunities of the United Nations and Specialised Agencies’ in T Ruys et al (eds), The Cambridge Handbook of Immunities and International Law (CUP 2019) 202-205. Yet, functionalism has been persuasively criticised for ‘[insulating] not only the UN but also all international organizations from any external legal discipline or judicial accountability’. Benvenisti (n 43) 18.
\textsuperscript{44} Eg art 105 UN Charter.
fact that, “due to the functional nature of the legal personality of any international organisation, all its acts have to be closely linked to their intended organisational purpose”.

But functionalist thinking has informed not only the creation and application of treaty regimes but also arguments relating to the default rules of IO immunity. A position commonly adopted by those courts and commentators that accept that IOs are entitled to immunity under general international law is that ‘the international privileges and immunities recognized by customary law are those that each individual organization requires in order to discharge its responsibilities independently and without interference’. In the seminal case of *Spaans v Iran-US Claims Tribunal*, for example, the Dutch Supreme Court held that ‘[a]ccording to unwritten international law as it currently stood, an international organization was in principle not subject to the jurisdiction of the courts of the host state in respect of disputes which were immediately connected to the fulfilment of the tasks assigned to that organization’. The case revolved around an employment dispute between the Iran-US Claims Tribunal and a former employee. The Dutch lower courts had found that the dispute could be entertained because it fell within a well-accepted exception to State immunity (the exception for employment contracts), but their decision was reversed by the Dutch Supreme Court. Commending the Dutch Supreme Court’s judgment, Catherine Brölmann said the following:

> ‘The dismissal by the Supreme Court of [the distinction between *acta jure imperii* and *acta jure gestionis*] in relation to international organizations underscored the special character and independence of international organizations as legal actors. The Court’s stance was in line with customary international law, both at the time of the judgment and today. As yet, no ‘doctrine of relative immunity’ has emerged in regard to

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49 *Amerasinghe* (n 14) 346.

50 *Spaans v Iran-United States Claims Tribunal*, Final appeal judgment, Case No 12627, Decision No LJN: AC9158, NJ 1986, 438, (1987) 18 Netherlands YB Int'l L 357, ILDC 1759 (NL 1985) (20 December 1985), Supreme Court [HR] (as reported by Catherine Brölmann in her case note for ILDC, which comprises the original untranslated text of the judgment).
international organizations, and no distinction is made between their ‘public’ and ‘commercial’ acts. One explanation may be that the immunity of international organizations is not derived from sovereignty (to which ‘governmental acts’ in contrast to private law acts can be readily linked). Immunity of international organizations is instead founded upon the objective of unhampered operation of the organization. 51

Justice Breyer, the sole dissenter in Jam v IFC, followed a comparable line of argument. He contended that the intention of Congress in enacting the IOIA had been to fulfil the international commitments of the US and to facilitate the ability of IOs to pursue their missions in the US. 52 In explaining why he thought an interpretation of the IOIA that denies absolute immunity frustrated that intention, he noted that ‘[u]nlike foreign governments, international organizations are not sovereign entities engaged in a host of activities’ but are rather given ‘specific missions that often require them to engage in what U.S. law may well consider to be commercial activities’. 53 Discussing the consequences of the majority’s approach, Justice Breyer argued that they are ‘likely to produce rules of law that interfere with an international organization’s public interest tasks’. 54 His dissent makes a plausible case of why exceptions to immunity can be more problematic for IOs than for States. An IO does not have the option, as States do, of contracting with private parties operating under its own legal system. It is, as a result, always exposed to the application of ‘foreign’ law.

3.2. Questioning the significance of functionalism in general international law

On the functionalist view, then, the scope of the immunities enjoyed by IOs under general international law may be wider than that of immunities enjoyed by States, as exceptions to State immunity for commercial transactions, torts, employment contracts and the such will not be extended to IOs if doing so would undermine the IOs’ functions. But does

51 See Brölmann’s analysis in ILDC 1759 (NL 1985).
52 Jam v International Finance Corporation (n 3) Breyer J dissenting opinion 6.
53 Ibid 7.
54 Ibid 13.
that view really have a place when one examines the immunities of IOs under general international law?

That can be doubted for three reasons. First, if Michael Wood’s study referred to above is accurate, a customary principle of functional immunity cannot be discerned in the practice of States and their opinio juris.

Secondly, a principle of functional immunity is not supported by systemic reasoning either. If the rules that apply to States can be extended to IOs by analogy because, like States, IOs are autonomous entities operating on the international plane, it does not follow that general international law should be more protective of the functions of IOs than it is of the functions of States. This sentiment was captured in the judgment by the US Court of Appeals for the Third Circuit in the OSS Nokalva v European Space Agency case. Nokalva, a provider of software services to the ESA, instituted proceedings to complain about the Agency’s distribution of software to third parties without due compensation. Anticipating the Supreme Court’s conclusion in Jam, the court construed the IOIA as conferring immunities coterminous with those envisaged in the FSIA. But it went further than the Supreme Court in exploring the rationale for extending the exceptions to State immunity to the ESA:

‘If a foreign government, such as Germany, had contracted with [Nokalva], it would not be immune from suit because the FSIA provides that a foreign government involved in a commercial arrangement such as that in this case may be sued... We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.’

While the Court of Appeals for the Third Circuit was applying the IOIA instead of general international law, the point that it makes is persuasive more generally. If denying to IOs immunity under general international law is unacceptable because it would imply an exception to State

56 OSS Nokalva, Inc. v European Space Agency, 617 F.3d 756 (3d Cir. 2010). For a discussion of other cases applying to IOs exceptions to State immunity, Reinisch (n 13) 196-197.
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immunity when States act collectively through intergovernmental institutions, it is also unacceptable to fill the gap with a rule that has the effect of conferring to them even more exemptions from domestic jurisdiction. In other words, if one resorts to systemic reasoning to fill the gap in a situation of uncertainty, the exceptions must be extended together with the rules.

Another way of looking at this issue is by pondering the factual scenarios where the default rules of IO immunity become most relevant: when an IO invokes an immunity against third parties. If we take the Spaans case as an example, why should the Netherlands, which is not a party to the constituent instrument of the Iran-US Claims Tribunal, be bound by ‘the objective of unhampered operation’ of that organization? Likewise, why should the US be under a special obligation to protect the functions of the ESA? For the Netherlands and for the US, the constituent instruments of the respective organizations being sued are *res inter alios acta*. The point that is missed by those advocating for a default rule of functional immunity for IOs is that functionalism can only make sense of the relations between IOs and their members, which are governed by constituent instruments and other internal rules that articulate and protect the exercise of functions as necessary or appropriate.

On the international plane, where organizations maintain external relations with the outside world, their internal rules find no application. That is why, even if functional immunity were to become recognised in the practice and opinio juris of States, that customary rule would be likely confined to the relations between IOs and members (where it is, one must note, least needed).

Thirdly, there is some exaggeration in the discussion of ‘technical challenges’ involved in extending to IOs the exceptions to State immunity. For one, the distinction between *acta jure imperii* and *acta jure gestionis* is equally challenging in the case of States, requiring further refinement as disputes regarding borderline situations arise. Be that as it may,

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57 It is true, however, that the Netherlands had a clear interest in according immunity to the Iran-US Claims Tribunal because it served as the host State for the Tribunal. The judgment was given before a headquarters agreement could be concluded.


59 A point emphasized by J Klabbers (n 40) 23.
it is difficult to understand why the basic idea underlying the commercial transactions exception – that one can distinguish between acts constituting an exercise of public authority by the self-governing entity, and acts that are commensurate with those that private parties perform in the marketplace – cannot be readily applied to the activities of IOs. The task of distinguishing only becomes unsurmountable when one gets bogged down with non-starters, such as the notion that *acta jure imperii* are co-terminous with ‘sovereign’ acts that can only be performed by States because only States are ‘sovereign’. Likewise, the fact that an IO may be disproportionately exposed to the territorial jurisdiction of its member States may be a good reason for adopting a protective treaty regime of functional (or even absolute) immunity, but it does not make characterising an act as *de jure imperii* or *de jure gestionis* any more difficult.

One can turn to the case of the International Finance Corporation itself to illustrate the point. To perform its functions, the IFC makes use of several commercial law instruments: it makes investments, offers loans and issues bonds. According to the definition found in Article 2(1)(c) of the 2004 UN Convention, ‘commercial transactions’ include ‘any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction’. Article 2(2) clarifies that ‘[i]n determining whether a contract or transaction is a “commercial transaction” [...] reference should be made primarily to the nature of the contract or transaction’. That means that various activities carried out by the IFC and similar organizations prima facie fall within the definition of ‘commercial transaction’, in the same way as State loans and bonds do. The definition is not all-encompassing, though: as the Supreme Court in *Jam* observes, in line with the US Government’s submission, ‘the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as “commercial” under the FSIA’. That is in keeping with the rule in Article 10(2)(a) of the UN Convention,

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60 Contra: A Viterbo, A Spagnolo (n 36) 320-321.
61 Art III, IFC Articles of Agreement.
62 On the applicability of the commercial transactions exception to State bonds and loans, see S Wittich, ‘Article 2(1)(c) and (2) and (3)’ in R O’Keefe, C Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 65.
63 *Jam v International Finance Corporation* (n 3) 14.
which excludes any ‘commercial transaction between States’ from the purview of the commercial transactions exception. Of course, some scenarios will be harder to individuate than others. The claim in Jam, for example, was based on the IFC’s subsequent failure to supervise and monitor construction and operation of the Tata Mundra Power Plant project and ensure its compliance with numerous environmental and social sustainability requirements in the loan agreement. Could this be described as conduct ‘arising out of [a] commercial transaction’ in which a State or IO ‘engages […] with a foreign natural or juridical person’, in the words of Article 10 of the UN Convention? To the present writer, a complaint which does not relate to the loan agreement as such, but rather to tortious liability towards third parties affected by a project that the loan financed, comes closer to the scenarios covered by the territorial torts exception (if only, on the facts, personal injury or property damage could be deemed as caused by an IFC agent in Indian territory) than to the scenarios covered by the commercial transactions exception.

When it comes to other exceptions to State immunity – territorial torts, employment, etc – there may likewise be good reasons to adopt special treaty rules to cater to the needs of particular IOs. For example, that many IOs have established robust internal judicial systems to hear employment disputes militates against extending to them, by treaty, the contracts of employment exception to State immunity. But if no such treaty rules were applicable, domestic courts should be capable of applying the basic concepts to IOs in a fairly straightforward way. An IO can conclude an easily identifiable contract of employment with an individual for work to be performed in the territory of the State of the forum just as any foreign State could. Likewise, an agent of an IO can enter the territory of a State and cause, while there, ‘death or injury to the person, or damage to or loss of tangible property’ to an individual just as any foreign

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64 As described in Jam v International Finance Corporation, US District Court for the District of Columbia (14 February 2020) 9.

65 Neither the Supreme Court nor the District Court to which the case was remanded pronounced on this issue. A potential consideration is that the phrase ‘in connection with a commercial activity’ found in the FSIA is broader than the phrase ‘commercial transaction’ employed in the UN Convention. Be that as it may, as discussed in section 4 below, the dispute in Jam did not concern the application of the commercial transactions exception in general international law but rather the application of art VI(3) of the IFC’s Articles of Agreement.

66 See art 11 Convention on Privileges and Immunities of the UN (n 47).
State could. In short, one should be wary of dubious arguments about how ‘difficult’ or ‘problematic’, technically speaking, it would be to align the default immunities of IOs with those of States. Those are assumptions that can lead to a rather uncritical application of the law by domestic courts in cases where it is the rules of general international law – and not generous treaty-based immunities – that apply. As things stand, therefore, the Supreme Court’s interpretation of the IOIA in *Jam*, extending the default rules of State immunity to IOs, seems to be in line with the international obligations of the US under general international law.

4. *General international in the interpretation of treaty-based immunities*

So far, the present contribution has identified the reasons why, in general international law (and, *a fortiori*, in domestic law), it is justifiable to place States and IOs under a common regime. But some further reflection on the role that such default rules may play should be offered, for, as emphasised above, this is a field widely regulated by *lex specialis*, and most disputes involving IO immunity do not invite the (direct) application of general international law. That is the case with the dispute in *Jam v IFC* itself: given that the United States is a member of the IFC, the applicable law is to be found, in the first instance, in Article VI(3) of the IFC’s Articles of Agreement. That much is acknowledged by the Supreme Court itself, when it observes that ‘the privileges and immunities accorded by the IOIA are only default rules’, and that ‘[i]f the work of a given international organization would be impaired by restrictive immunity, the organization’s charter can always specify a different level of immunity’.

Article VI(3) of the IFC’s Articles of Agreement, common to all the organizations of the so-called World Bank Group, provides that

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67 See art 12 Convention on Privileges and Immunities of the UN (n 47).
68 Provided that the immunity-related provisions are regarded as self-executing under US law (on which see eg E Okeke, ‘Unpacking the *Jam v. IFC* Decision’ (2019) 13 Diritti umani e diritto internazionale 297, 302).
69 *Jam v International Finance Corporation* (n 3) 14. As Edward Okeke has remarked, given that in issue was the application of treaty-based immunity, ‘[t]he discussion of the commercial activity exception in the opinion is a bit of a red-herring’: Okeke (n 68) 302.
‘[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities’. The drafting of this so-called ‘in charter waiver’ is far from optimal, and doubts remain as to its precise scope.\(^{70}\) Both the 1969 and the 1986 Vienna Conventions on the Law of Treaties provide that ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account in the interpretation of a treaty.\(^{71}\) In the words of the International Law Commission, this ‘gives expression to the objective of “systemic integration”’, according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact’.\(^{72}\) That points to a potential residual role for the default rules of general international law: can they inform the interpretation of Article VI(3), and, indeed, other immunity-related treaty provisions?

Needless to say, this is an area in which the default rules of IO immunity are far from being the only relevant factor. Of even greater importance are arguably the functionalist tenets discussed above. Functionalism provides a justification for special regimes of treaty-based immunity tailored to the needs of specific IOs, the goal being to allow those IOs to perform their functions with no undue interference by member States. The protection of the IO’s function can thus serve as a guiding principle for the interpretation of treaty-based immunities.\(^{73}\)

But the question then arises of what the appropriate test to identify immunities needed for the functioning of an IO might be.\(^{74}\) In the case


\(^{71}\) See art 31(3)(c) common to the two Vienna Conventions.


\(^{74}\) For a helpful discussion of competing approaches, see P Rossi, ‘The International Law Significance of *Jam v. IFC*: Some Implications for the Immunity of International Organizations’ (2019) 13 Diritti umani e diritto internazionale 305, 311-313.
of the IFC Articles of Agreement, while it is said that ‘the status, immunities and privileges’ there provided are conferred ‘[t]o enable the Corporation to fulfill the functions with which it is entrusted’, member States have refrained from granting to the IFC any broad form of ‘functional immunity’, let alone absolute immunity. Indeed, a textual reading of Article VI(3) could lead to the conclusion that the IFC enjoys no immunity from prescriptive jurisdiction at all, as long as the claim is brought in the right forum(s). Yet, US courts have developed what has been described as a ‘very distinctive use of the concept of functional immunity’ to construe the provisions of the constituent instruments of the organizations in the World Bank Group. In the Mendaro case, a ‘corresponding benefit standard’ was devised on the ground that ‘[s]ince the purpose of [IO immunity] is to enable the organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goal’. Be that as it may, for all the doubts that the drafting of Article VI(3) gives rise to, it is widely accepted that it allows for claims related to the IFC’s ‘external’ borrowing activities and the issuing of securities. Because the IFC (and other World Bank institutions) need to work closely with private parties, with which they must be capable of establishing relationships of trust, their constituent instruments are read as allowing for a category of claims that broadly overlap with those covered by the commercial transactions exception under general international law. In the case of the IFC, thus, it seems that relative immunity (at least as regards commercial transactions) and the performance of functions walk hand in hand.

The example of the IFC Articles of Agreement suggests that exceptions to IO immunity as articulated in the default rules of general international law could play a role in the interpretation of treaty-based immunity, either as a complement to functional approaches or as a heuristic device to determine what immunities are required to protect the functions of an IO in any given case. In particular, the notion that IOs cannot,

75 ibid 313.
76 Mendaro v World Bank, 717 F.2d 610 (DC Cir. 1983).
77 Okeke (n 70) 160-162. For a helpful discussion of the case law pertaining to the IFC Articles of Agreement specifically, see M Feldman, C Franzetti, MM Chiquier, ‘Annex XIII– International Finance Corporation (IFC)’ in A Reinisch (ed) (n 70) 806-811.
without more, claim more immunities than States may serve as a counter-weight to functional arguments that turn out to be unjustifiably protective. Indeed, one of the traps of functional arguments is that they often lapse into full-blown defences of absolute immunity. Instead, one could postulate, as a tentative presumption, that claims falling squarely under the narrow existing exceptions to State immunity, which have crystallized over time for reasons of fairness, would not stand in the way of the fulfilment of the functions of an IO. That presumption would be naturally rebutted in cases where the IO provides an adequate procedure for injured individuals to claim (as in the field of employment disputes) or where a strong and specific argument that a function of the organization needs additional protection can be made (vague standards such as that of ‘corresponding benefit’ might not quite reach that threshold). But it would otherwise militate in favour of letting private parties left without a forum plead in cases where that would be permissible had they been injured by a foreign State instead. For those exceptional cases where it is felt that protecting an IO’s function requires full exemption from the jurisdiction of domestic courts, the option to adopt treaty provisions providing for absolute immunity would remain.

At the same time, one must be cautious not to overplay the role that the default rules of IO immunity should play in the application of treaty-based immunities. The Jam case itself points to the risk that courts may get muddled by the methodology as they are asked to juggle treaty rules and default rules. When the Supreme Court remanded the case to the District Court for the District of Columbia, the court proceeded to apply to the facts the commercial transactions exception envisaged in §1605(2) FSIA. It ultimately decided against the plaintiffs on the ground that their lawsuit, relating to damage caused and suffered in India, was not ‘on its core, based upon activity – commercial or otherwise – carried on or performed in the United States’ as required by §1605(2). Surprisingly, the question of whether the lawsuit was allowed under Article VI(3) of the IFC’s Articles of Agreement was dealt with only very briefly in a footnote, where the District Court confirmed findings made in previous phases of the case that the IFC had not ‘waived’ its immunity. While the conclusion that the District Court reached is defensible (as a matter of both

78 P Rossi (n 74) 312.
79 Jam v International Finance Corporation (n 64) 23.
international and domestic law), its opinion seemingly placed the default rules ahead of the applicable lex specialis. It should have been sufficient for the court to apply Article VI(3), and, upon coming to the conclusion that the claim was not allowed under the treaty rule, to refrain from considering the default rules found in the IOIA and the FSIA. The danger here is that liberally applying the default rules in combination with, or in addition to, the special rules may lead to anomalous results in individual cases. The better view is thus that the default rules should only be resorted to in the absence of relevant special rules, unless recourse to the default rules serves the purpose of construing the special rules (in which case appropriate reasons must be given).

5. **Concluding remarks**

In this contribution, I argued that, from the perspective of general international law, the US Supreme Court reached the correct outcome in *Jam v IFC* because the rules of State immunity can be extended to IOs by analogy. While functionalism can militate in favour of offering greater protection to IOs in certain cases, thus justifying the adoption of appropriate treaty-based immunities, there is little basis for advocating for a regime of ‘functional immunities’ as the default position under general international law. Given the current state of practice and precedent, and in the light of systemic considerations, the starting point should be that an IO enjoys the same level of immunity as the individual States on behalf of which it acts.

In a day and age where the law of immunities has been the subject of increasing criticism, not least because it gets in the way of the enforcement of the rights of individuals, it is important not to be close-minded as to what exceptions to IO immunity general international law may or may not accommodate. Rather, we should strive towards a mindset in which the granting of additional protections to IOs by treaty has to be carefully negotiated and convincingly justified.