The Alien Tort Statute, Customary International Law, And The Limits Of Un Immunity.

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Abstract. *This paper critically examines the absolute immunity granted to the United Nations (UN) and other international organizations, particularly about human rights violations and tort claims under the Alien Tort Statute (ATS). Using the 2010 cholera outbreak in Haiti—traced to Nepalese UN peacekeepers—as a case study, the paper argues that the International Organization's claim to absolute immunity is incompatible with both U.S. domestic law and customary international law. This paper (Part I) contends that the right to an effective remedy is a deeply embedded principle of American legal tradition and that granting the UN absolute immunity violates the Fifth Amendment's due process protections. Part I concludes that the UN's invocation of immunity, particularly in cases like the Haitian cholera outbreak, conflicts with its foundational principles and violates both international law and American constitutional traditions, setting a dangerous precedent that undermines the rule of law and denies victims their right to justice. Part II will extend this argument by asserting that the right to an effective remedy is a well-established norm of customary international law.*

Keywords*: United Nations immunity, Alien Tort Statute (ATS), customary international law, human rights violations, proper to an effective remedy, constitutional law, Fifth Amendment, Georges v. United Nations, Haitian cholera outbreak, sovereign immunity, international accountability, judicial oversight*

INTRODUCTION AND BACKGROUND INFORMATION

"Evil, when we are in its power, is not felt as evil, but as a necessity or even a duty."

Simone Weil[1]

The United Nations ("UN") was created "to save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights." "to establish conditions under which justice and respect for the obligations arising from … sources of international law can be maintained," and "to promote social progress and better standards of life in

[1] SIMONE WEIL, GRAVITY AND GRACE 119 (Emma Crawford & Mario von der Ruhr trans., Routledge Classics 2002) (1947).

larger freedom".[2] Mr. Dag Hammarskjöld, a former Secretary-General of the UN[3] ("Secretary-General"), described the organization as "created not to lead mankind to heaven but to save humanity from hell."[4] As a central institution in international peace and security, the UN has facilitated significant progress in areas such as human rights and global cooperation. However, the complexities of its vast bureaucracy and reliance on member states with diverse political interests have sometimes posed challenges in fully achieving its founding vision. These operational realities raise essential questions about how the UN might balance the need for immunity with mechanisms reinforcing accountability and transparency, particularly in cases involving affected populations.[5]

According to an independent investigation by the Associated Press ("AP"), between 2004 and 2016, the United Nations received around 2,000 allegations of sexual exploitation and abuse against its peacekeepers.[6,7] Among the reported incidents, one involved a 14-year-old girl assaulted in the presence of her siblings,[8] and another involved a girl who had two children by the age of 14 as a result of sexual exploitation

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[2] U.N. Charter Preamble (http://www.un.org/en/sections/un-charter/preamble/index.html); *see also* History of the UN, https://www.un.org/un70/en/content/history.

[3] Nobel Peace Prize winner and second Secretary-General of the United Nations. *See* United Nations, Dag Hammarskjöld, Second Secretary-General of the United Nations, http://www.un.org/en/sections/nobel-peace-prize/dag-hammarskjold-second-secretary-general-united-nations/index.html.

[4] Chris McGreal, *70 years and half a trillion dollars later: what has the UN achieved?*, THE GUARDIAN, Sept. 7, 2015. https://www.theguardian.com/world/2015/sep/07/what-has-the-un-achieved-united-nations

[5] *Id*.

[6] United Nations Peacekeepers are military troops and civilians called upon to help unstable, or war torn, countries to "maintain peace and security, facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law." According to the UN, the peacekeeping operations are guided by three principles: (1) consent of the parties, (2) impartiality, and (3) "[n]on-use of force except in self-defence and defence of the mandate." United Nations Peacekeeping, What is Peacekeeping, https://peacekeeping.un.org/en/what-is-peacekeeping; *also see* Séverine Autesserre, *The Crisis of Peacekeeping: Why the UN Can't End Wars*, FOREIGN AFFAIRS, Jan./Feb. 2019. Despite this explanation, the UN was reluctant to define this term in more detail. *See* Shashi Tharoor, *The Changing Face of Peace-Keeping and Peace-Enforcement*, 19 FORDHAM INT'L L.J. 408, 414 (1995).

[7] Krista Larson & Paisley Dodds, *United Nations Peacekeepers as Predators Sexual abuse UN peacekeepers in Congo hold record for rape, sex abuse*, ASSOCIATED PRESS, Sept. 23, 2017, https://apnews.com/69e56ab46cab400f9f4b3753bd79c930; *see also* Azad Essa, *Why do some peacekeepers rape? The full report*, AL JAZEERA, Aug. 10, 2017, https://www.aljazeera.com/indepth/features/2017/08/peacekeepers-rape-full-report-170804134221292.html.

[8] Larson & Dodds, *supra* note 8.

by peacekeepers.[9] This year alone, the UN has received 72 allegations of sexual abuse and exploitation against peacekeeping and special political missions personnel[10] and 107 allegations against other United Nations personnel.[11] From the allegations, 88 victims were identified this year alone, 18 of which were children.[12,13] These reports underscore the challenges faced by the UN in ensuring accountability within complex operational contexts, even as it continues its commitment to human rights and the protection of vulnerable populations.

On the other side of the world, in Kosovo, there was a 1.5-year-old girl named Nikolina Mehmeti, who, after having a high fever, falling into a seizure, turning blue and shaking, slipped into unconsciousness.[14] This was all after she, her family, and 570 other Roma people were placed in UN camps near the Trepča mines, where toxic lead emissions remained a severe environmental hazard and were still operational.[15] Nikolina survived, but her sister passed away three months earlier after exhibiting similar symptoms.[16] World Health Organization ("WHO") examination "indicated that all children under the age of six had life-threatening levels of lead in their

[9] *Id*.
[10] United Nations Sexual Exploitation and Abuse, U.N. MISSIONS, https://conduct.unmissions.org/sea-data-introduction.
[11] United Nations, *Annual Field Report* (Sept. 2024), available at https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-and-abuse/files/afp_sep-2024.pdf.
[12] *Id*.
[13] On the topic, *see* Sonja Grover, *Children's Participation in Holding International Peacekeepers Accountable for Sex Crimes*, 38 CHILD. LEGAL RTS. J. 1 (2018); Lauren Gabrielle Blau, *Victimizing Those They Were Sent to Protect: Enhancing Accountability for Children Born of Sexual Abuse and Exploitation by UN Peacekeepers*, 44 SYRACUSE J. INT'L L. & COM. 121 (2016).
[14] Nicholas Wood, Displaced Gypsies at Risk From Lead in Kosovo Camps, N.Y. TIMES, Feb. 5, 2006, https://www.nytimes.com/2006/02/05/world/europe/displaced-gypsies-at-risk-from-lead-in-kosovo-camps.html.
[15] ALEKSANDAR MOMIROV, ACCOUNTABILITY OF THE INTERNATIONAL TERRITORIAL ADMINISTRATIONS: A PUBLIC LAW APPROACH 3 (2011); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 357 (2016); Austin Ramzy, *U.N. Offers Regret but No Compensation for Kosovo Poisoning Victims*, N.Y. TIMES, Mar. 26, 2017, https://www.nytimes.com/2017/05/26/world/europe/un-united-nations-kosovo-roma-lead-poisoning.html.
[16] Wood, *supra* note 13; On her sister, Djenita Mehmeti, *see* HUMAN RIGHTS WATCH, KOSOVO: POISONED BY LEAD. A HEALTH AND HUMAN RIGHTS CRISIS IN MITROVICA'S ROMA CAMPS 50, n.187 (2009); EUROPEAN ROMA RIGHTS CENTRE, ERRC CRIMINAL COMPLAINT IN KOSOVO POISONING CASE (2005), http://www.errc.org/press-releases/errc-criminal-complaint-in-kosovo-poisoning-case.

blood."[17] Tragically, the death toll reached 31 people, which was approximately 5 percent of the Roma community at the site.[18] Such incidents highlight the critical need to assess how accountability measures within UN operations can be refined better to safeguard the welfare of vulnerable populations in complex environments.

These incidents underscore the inherent tension between the UN's operational immunity and the need for accountability when harm occurs within its mission areas. This paper explores how absolute immunity granted to the UN intersects with the right to an effective remedy and access to justice for affected individuals. By examining legal and customary principles within U.S. and international frameworks, this study aims to contribute to a balanced discussion on reinforcing the UN's accountability structures to enhance its legitimacy and support its mission as a trusted international security institution.

At dawn on October 16, 2010, Mr. Jean Salgadeau Pelette (a 38-year-old man from Haiti) went to the Latem River. Like many others in the area, the river was regularly used by men, women, and children.[19] Some people also brought their animals to bathe and drink from the river.[20] A few hours later, Mr. Pelette was found lying by the riverbank, weak from a sudden stomach illness, and brought home. Several hours later, Mr. Pelette passed away.[21]

Mr. Pelette died of cholera. Cholera is a bacterial infection spread by contaminated food or water, which leads to severe diarrhea, potentially causing severe dehydration, shock, and

[17] Boon, *supra* note 14, at 357; Momirov, *supra* note 14; Bernard Rorke, *Kosovo Lead Poisoning: a Tragic Timeline of Poisoned Neglect*, EUROPEAN ROMA RIGHTS CENTER. *Also see* Katharina Rall, *Dispatches: A glimmer of hope for Kosovo's lead poisoning victims*, HUMAN RIGHTS WATCH, April 13, 2016.
[18] Wood, *supra* note 13.
[19] Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic*, N.Y. TIMES, Mar. 31, 2012, https://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html; Rafael Llanes et al., *Did the Cholera epidemic in Haiti really start in the Artibonite Department?*, 7 J INFECT DEV CTRIES 753 (2013), https://pdfs.semanticscholar.org/e740/5d3bd8c87ccc8480150836010ccdf8f4a13d.pdf; Brian Concannon Jr. & Beatrice Lindstrom, *Cheaper, Better, Longer-Lasting: A Rights-Based Approach to Disaster Response in Haiti*, 25 EMORY INT'L L. REV. 1145, 1168 (2011); *see also* James Ferguson, *Massacre River of blood*, CARRIBEANBEAT, https://www.caribbean-beat.com/issue-117/massacre-river-blood.
[20] Carolyn Presutti, *Haiti's Cholera Epidemic Not Waning; Vaccination to Begin*, VOICE OF AMERICA (VOA), Nov. 16, 2011, https://www.voanews.com/a/haitis-cholera-epidemic-not-waningvaccination-to-begin-134083213/164624.html.
[21] Sontag, *supra* note 18.

death.[22] Mr. Pelette's relatives did not immediately take him to the hospital as cholera had not been documented for more than a century in Haiti before October 2010, and it was not widely recognized at the time.[23, 24] From 2010 to October 2018, WHO and the Pan-American Health Organization ("PAHO") reported that there were 812,586 documented cases of cholera in Haiti, out of which 9,606 resulted in death.[25] In May 2012, the New York Times they have described it as "the world's largest cholera epidemic".[26] Multiple independent investigations, including one by the UN's Independent Panel of Experts on the Cholera Outbreak in Haiti, using epidemiologic and microbiologic evidence, traced the source of the outbreak to Nepalese UN peacekeepers, thereby refuting the UN's hypothesis of a natural environmental source.[27]

In November 2011, victims filed claims with the UN Stabilization Mission in Haiti (MINUSTAH), seeking accountability and establishing adequate mechanisms to address the crisis. [28] The UN dismissed the claims without further legal justification, stating they were "not receivable" because they would involve reviewing "political and policy

[22] Center for Disease Control and Prevention, CHOLERA: ILLNESS AND SYMPTOMS, https://www.cdc.gov/cholera/illness.html (last visited Nov. 26, 2018); *also see* National Organization for Rare Disorders, CHOLERA, https://rarediseases.org/rare-diseases/cholera/ (last visited Apr. 2, 2019).
[23] Rosalyn Chan et al., *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic*, YALE LAW SCHOOL AND ASSOCIATION HAITÏENNE DE DROIT DE L'ENVIRONNMENT (2013), https://law.yale.edu/system/files/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf; Lee S. Katz et al., *Evolutionary Dynamics of Vibrio cholerae O1 following a Single Source Introduction to Haiti*, 4 MBIO 1 (2013), https://mbio.asm.org/content/mbio/4/4/e00398-13.full.pdf; Center for Disease Control and Prevention, CHOLERA IN HAITI: ONE YEAR LATER, https://www.cdc.gov/cholera/haiti/haiti-one-year-later.html; Sontag, *supra* note 16.
[24] Sontag, *supra* note 16.
[25] PAN AMERICAN HEALTH ORGANIZATION & WORLD HEALTH ORGANIZATION, EPIDEMIOLOGICAL UPDATE: CHOLERA (2018), https://reliefweb.int/sites/reliefweb.int/files/resources/2018-oct-11-phe-epi-update-cholera.pdf
[26] Sontag, *supra* note 16.
[27] *See, e.g.,* Alejandro Cravioto et al., FINAL REPORT OF THE INDEPENDENT PANEL OF EXPERTS ON THE CHOLERA OUTBREAK IN HAITI 29 ("The evidence does not support the hypotheses suggesting that the current outbreak is of a natural environmental source."); Renaud Piarroux et al., *Understanding the Cholera Epidemic, Haiti*, CENTER FOR DISEASE CONTROL AND PREVENTION (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3381400/pdf/11-0059_finalS.pdf.
[28] Farhana Choudhury, *The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability*, 104 GEO. L.J. 725, 727 (2016); *MINUSTAH by the Numbers*, CENTER FOR ECONOMIC AND POLICY RESEARCH, Dec. 8, 2011, http://cepr.net/blogs/haiti-relief-and-reconstruction-watch/minustah-by-the-numbers.

matters." [29] With no alternative remedy, lawsuits were filed against the United Nations in the U.S. District Court for the Southern District of New York ("SDNY") in October 2013.[30]

Relying on *Brzak v. United Nations* (2d Cir. 2010), UN Charter Article 105, paragraph 1, and Convention on the Privileges and Immunities of the United Nations ("CPIUN") article II, §2, the District Court dismissed the case due to lack of subject-matter jurisdiction.[31] Without extensive explanation, the court cited the UN Charter and CPIUN provisions. As the United States is a party to the CPIUN, and the treaty is self- executing, the court determined it was required to enforce it.[32] Furthermore, this conclusion was consistent with *Brzak*, where the Second Circuit held that the United Nations has absolute immunity from suit unless "it has expressly waived its immunity."[33] Although the UN did not provide a dispute resolution mechanism in this case, unlike in *Brzak*, the Court ruled that the provisions' language and its drafting history did not indicate that the UN's immunity was dependent on fulfilling its obligation to provide a dispute resolution mechanism, per CPIUN Article VIII, §29(a), nor that this obligation overrides the grant of absolute immunity.[34] Lastly, the court gave significant consideration to the interpretation of the treaty by the Executive Branch of the United States, which supported the position absolute immunity applies unless expressly waived.[35]

On appeal, the Second Circuit affirmed the lower court's decision. Relying on the principles of private contract and applying a semantic canon of construction, the principle of expressio unius est exclusio alterius, and the principle that condition precedent must be stated unambiguously, the Court agreed that the UN's fulfillment of obligations under §29 is not

[29] Letter from Patricia O'Brien, U.N. Under-Secretary-General for Legal Affairs, to Dianne Post (Jul. 25, 2011); Choudhury, *supra* note 25; *also see* Statement, Ban Ki-moon, U.N. Secretary-General, Haiti Cholera Victims' Compensation Claims 'Not Receivable' under Immunities and Privileges Convention, United Nations Tells Their Representatives, U.N. Press Release SG/SM/14828 (Feb. 21, 2013), https://www.un.org/press/en/2013/sgsm14828.doc.htm.
[30] Choudhury, *supra* note 25, at 728.
[31] Pursuant to FED. R. CIV. P. 12(h)(3); Georges v. UN, 84 F. Supp. 3d 246, 248 (S.D.N.Y. 2015); *also see* Brzak v. UN, 597 F.3d 107, 111 (2d Cir. 2010).
[32] *Georges*, *supra* note 30.
[33] *Id.* at 249 (quoting *Brzak*, *supra* note 30 (quoting CPIUN art. II, § 2)).
[34] *Id.* at 249-250.
[35] *Id.* at 250.

condition precedent to §2 immunity under the CPIUN.[36] The court refused to address the merits of the plaintiff's argument on material breach of §29, reasoning that they lacked standing.[37] Regarding the claim that such a decision would violate the constitutional right to access federal courts, the court reasoned that immunities are "firmly embedded in American law" and accepting the plaintiff's argument would "defeat not only the UN's immunity, but also 'judicial immunity, prosecutorial immunity, and legislative immunity.'"[38]

This series of papers challenges the presumption of absolute immunity granted to international organizations, arguing that such immunity violates fundamental constitutional rights. Specifically, Part I contends that the right to an effective remedy is deeply rooted in American legal tradition and has been continuously affirmed by the United States Supreme Court. Consequently, the courts' grant of absolute immunity to international organizations has limited petitioners' constitutional rights to seek redress through domestic courts.

Part II will explore how such immunity intersects with the right to an effective remedy under customary international law, drawing on international jurisprudence, treaty interpretation, and the Alien Tort Statute ("ATS").

DISCUSSION

The Right to an Effective Remedy is Deeply Rooted in American Tradition

A. Constitutional Foundations

The right to an effective remedy is a fundamental constitutional right deeply rooted in American legal tradition. The Fifth Amendment to the United States Constitution states that "[n]o person shall … be deprived of life, liberty, or property, without due process of law…."[39] In its most basic terms, due process could be understood as a procedural right,[40] which encompasses a set of rights within it, including "(1) right to

[36] Georges v. UN, 834 F.3d 88, 94 (2d Cir. 2016).
[37] *Id.* at 97.
[38] *Id.* at 98 (quoting *Brzak*, *supra* note 28, at 114).
[39] U.S. CONST. amend. V.
[40] *See, e.g.,* Newton v. City of N.Y., 779 F.3d 140, 158-59 (2d Cir. 2015) ("the District Court's decision…appears to have rested almost entirely on its rejection of…underlying Fourteenth Amendment claim that the City violated his procedural right to due process.").

notice, (2) right [of access to courts], (3) right to reasons, (4) right of appeal to an independent tribunal, (5) right of public access to information, and (6) right to a judicial remedy."[41] These rights ensure that individuals have the means to enforce substantive rights and seek redress when those rights are violated.

The concept of human rights, "rights of mankind," or "rights of man,"[42] has been present in and throughout American history, philosophy, and jurisprudence since the founding of the Republic. The Declaration of Independence asserts that everyone is endowed with "certain unalienable Rights," including "Life, Liberty and the pursuit of Happiness."[43] Implicit in these unalienable rights is the necessity of an effective means of enforcement; without a mechanism to redress violations, these rights would be rendered meaningless.

William Blackstone[44], who "constituted the preeminent authority on English law for the founding generation"[45] and "the oracle of the common law in the mind of the American Framers,"[46] declared that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."[47] Blackstone's *Commentaries on the Laws of England* were pivotal, systematically organizing English common law and profoundly influencing American legal thought. They are considered a foundational source of customary law, embodying

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[41] Devika Hovell, *Due Process in the United Nations*, 110 A.J.I.L. 1, 3 (2016).
[42] Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICHIGAN J. INT'L L. 543, 546 (1989) [hereinafter Paust, *On Human Rights*]; Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence. Testing the Limits of Permissibility*, 32 EMORY L. J. 545 (1983); Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 245-47, 254-55 (1975).
[43] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Paust, *On Human Rights*, *supra* note 43, at 552.
[44] Blackstone's Commentaries are pivotal to U.S. law as they systematized English common law, framing customary law—the unwritten principles developed from consistent judicial decisions and societal norms—and establishing a legal foundation that parallels customary international law, where widespread state practices evolve into binding norms, both of which continue to guide legal interpretations of rights and precedents today. *See, e.g.,* John V. Orth, *How Many Judges Does it Take to Make a Supreme Court? A Historical Puzzle,* 2020 ILL. L. REV. 1247, available at https://illinoislawreview.org/wp-content/uploads/2020/07/Orth.pdf.
[45] District of Columbia *v.* Heller, 554 US 570, at 593-94 (2008)
[46] Gertz v. Robert Welch, Inc., 418 U.S. 323, 381 n.14 (1974).
[47] 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

enduring legal principles integral to British and American legal traditions.

This understanding was subsequently transferred and firmly embedded in American jurisprudence by Chief Justice John Marshall. In *Marbury v. Madison*, he articulated the essential nature of the right to a remedy: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection."[48] He confirmed the maxim that judicial tribunals were created "to decide on human rights" seven years later in *Fletcher v. Peck*.[49]

Although the Universal Declaration of Human Rights ("UDHR") is not legally binding, its articulation of fundamental rights reflects universally recognized principles consistent with customary international law and, as it will be shown herewith, American legal tradition. As seen and noted, according to Chief Justice Marshall and the UDHR, the right to an effective remedy has at least two components – (1) the right to access the courts when one receives an injury and (2) the right to receive an appropriate remedy for this wrong.

B. The Right to Access Courts

The right of access to courts is fundamental to due process. In *Terrell v. Allisson*, the Supreme Court held that "[i]t is a rule old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court; that is, without being duly cited to answer respecting them, and being heard or having opportunity of being heard thereon."[50] In *Morgan's L. & T. R.R. & S.S. v. Texas Cent. Ry.*, Chief Justice Fuller, writing for the Court, would affirm an "inherent right of resort to the courts."[51] Eleven years later, Justice Brown, also writing for the Court, in *Downes v. Bidwell* would claim that right of free access to the courts is a natural

[48] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
[49] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810); *see also* Paust, *On Human Rights*, *supra* note 43.
[50] Terrell v. Allison, 88 U.S. 289, 292 (1874). For State recognition of this principle, *see* Gillett v. Romig, 1906 17 Okla. 324, 87 P. 325, 329.
[51] Morgan's L. & T. R. & S.S. Co. v. Tex. C. R. Co., 137 U.S. 171, 192 (1890); *see also* Low v. Blackford, 87 F. 392, 399 (4th Cir. 1898).

right guaranteed by the Constitution.[52] In 1977, the Court would affirm a "fundamental constitutional right of access to the courts" in *Bounds v. Smith*.[53] These cases collectively affirm that access to the courts is a fundamental right, essential for the protection and enforcement of all other rights.

However, a valid counterargument to this position would be Supreme Court decision in *Lewis v. Casey*,[54] in which, it may be argued, the Court clarified that right of access to the courts ends when the petitioner "gained the attention of the court to which the action is submitted." [55] Applying such reasoning to this case, the petitioners' right of access to courts, in *Georges v. United Nations*[56], was satisfied as soon as the Southern District of New York received their claims, considered them and dismissed the case for the lack of subject matter jurisdiction.

Yet, this argument fails upon closer examination. The mere formality of submitting a claim and having it dismissed without substantive consideration does not fulfill the fundamental right of access to courts. The essence of this right is not just about physical access but about meaningful access—the ability to have one's claims heard and adjudicated on the merits. As the Court recognized in *Boddie v. Connecticut*, due process requires that individuals have a "meaningful opportunity to be heard."[57] Denying this opportunity by invoking absolute immunity effectively bars plaintiffs from seeking redress, thus violating their constitutional rights.

The Right to an Effective Remedy

Access to courts is meaningless without the possibility of obtaining an adequate remedy. The maxim *ubi jus ibi remedium*—"where there is a right, there is a remedy"—is a cornerstone of Anglo-American jurisprudence. Blackstone asserted that "[it] is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[58]

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[52] Downes v. Bidwell, 182 U.S. 244, 282 (1901).
[53] Bounds v. Smith, 430 U.S. 817, 828 (1977).
[54] Lewis v. Casey, 518 U.S. 343 (1996).
[55] Does the right of access extend beyond filing a claim?, 3 Rights of Prisoners § 12:7 (5th ed.).
[56] *Georges*, *supra* note 36.
[57] Boddie v. Connecticut, 401 U.S. 371, 379–80 (1971).
[58] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23, *109 (1765-69).

This further has subsequently translated into American legal tradition and the very essence of the fabric of the American Republic. In Federalist 43, James Madison proclaimed that "a right implies a remedy."[59] Besides *Marbury v. Madison*[60], in *Poindexter v. Greenhow*, the Supreme Court announced that "[t]o take away all remedy for the enforcement of a right is to take away the right itself."[61] In *Bell v. Hood*, writing for the Supreme Court, Justice Black announced that it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[62] The Supreme Court in Bivens v. Six Unknown Fed subsequently quoted this line. *Narcotics Agents*,[63] which was also a landmark case establishing that damage remedies for a constitutional right violation may be implied directly from the Constitution[64] and that the Fourth Amendment had an implied cause of action.[65]

Before discussing the implied cause of action, it is necessary to present and respond to the counterargument of the most significant value. Critics might argue that the principle of sovereign immunity, extended to international organizations, is an accepted exception to the rule that every right must have a remedy. They may assert that immunity is essential for the UN to perform its functions effectively and that exceptions to remedies exist in the law. To rule otherwise would open the floodgates against actions of both justified and meritless international organizations, effectively stifling the work they were created to perform. However, while sovereign immunity exists, it is not absolute and has exceptions, significantly when fundamental rights are infringed. The Foreign Sovereign Immunities Act (FSIA) limits immunity in cases involving commercial activities or tortious acts causing personal injury or death.[66] Similarly, the International Organizations Immunities

[59] THE FEDERALIST NO. 23 (James Madison).
[60] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[61] Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).
[62] Bell v. Hood, 327 U.S. 678, 684 (1946). *Also see*, Dooley v. United States, 182 U.S. 222 (1901); Bd. of Cty. Comm'rs v. United States, 308 U.S. 343 (1939).
[63] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).
[64] *See Id.*, at 405 n.6; *also see* Davis v. Passman, 442 U.S. 228, 252 (1979).
[65] *See Bivens*, *supra* note 60, at 389.
[66] Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611.

Act (IOIA) does not grant absolute immunity. Therefore, denying an effective remedy under the guise of immunity when no alternative means of redress are provided contradicts statutory law, fundamental constitutional principles and principles of customary law. The right to an effective remedy remains inviolable, and immunity doctrines should not be misapplied to nullify this essential right without providing alternative avenues for justice.

D. Implied Causes of Action and Constitutional Remedies

"[A] private cause of action is necessary to provide an adequate remedy…."[67] The implied cause of action was extended to the Fifth Amendment in *Davis v. Passman,*[68] where the Supreme Court established a three-prong test for applying the *Bivens* doctrine to other constitutional claims:[69]

(1) plaintiff asserted a constitutionally protected right;

(2) the plaintiff stated "a cause of action which asserts this right"[70];

(3) "relief in damages constitutes an appropriate remedy."[71]

The crux question here remains on determining whether the plaintiff stated a cause of action if such cause of action did not exist in a statute. The Supreme Court was not silent on this issue:

> "At least in the absence of a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their constitutional rights have been violated and who, at the same time, have no effective means other than the judiciary to enforce these rights must be able to invoke the existing

[67] Rodgers v. St. Mary's Hosp., 149 Ill. 2d 302, 309 (1992).
[68] Davis v. Passman, 442 U.S. 228, 242, 244 (1979).
[69] *See Davis*, *supra* note 64, at 234; To see the application of the test, *see e.g.* Bishop v. Tice, 622 F.2d 349, 353 (8th Cir. 1980)
[70] *Id.*
[71] *Id.*

> jurisdiction of the courts for the protection of their justiciable constitutional rights."[72]

Confirming this argument for the right to an effective remedy, Justice Scalia's opinion in *Lewis v. Casey*, which might be used to counter the argument for violation of the right of access to courts, supports that "[i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer actual harm."[73] Therefore, the right to an effective remedy is deeply rooted in American tradition, enshrined in the Constitution, and continuously affirmed by the Supreme Court. From the reasoning above, it must also inevitably follow that issues arising on these topics are constitutionally delegated to the judiciary.

One might contend that extending the *Bivens* doctrine to cases involving international organizations interferes with foreign relations and the separation of powers, representing a "special factor counseling hesitation."[74] However, the judiciary must enforce constitutional rights, mainly when no alternative remedies exist. In *Bivens*, the Court recognized that the absence of statutory remedies necessitates judicially created causes of action to prevent rights from becoming meaningless, especially in cases like this, where foreign sovereign immunity essentially creates two classes of people – those under the law and those above it, essentially allowing the latter to do anything they want (including the most heinous crimes) without any prosecution.

Moreover, concerns about foreign relations do not outweigh the imperative to remedy constitutional violations, notably when the UN has failed to fulfill its obligations to offer dispute-resolution mechanisms. After all, as the Supreme Court most recently declared in *Loper Bright Enterprises v. Raimondo*,[75] the law should be construed with clear heads and honest hearts, not with an eye to policy preferences that had not made it into the statute. Therefore, implying a cause of action is appropriate and

[72] *See Davis*, *supra* note 64, at 242; *also see* Baker v. Carr*,* 369 U.S. 186 (1962); Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1035 (9th Cir. 2007); Rhode Island Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 41 (1st Cir. 2002); Konah v. D.C., 915 F. Supp. 2d 7, 31 (D.D.C. 2013).
[73] *Lewis*, *supra* note 52, at 349.
[74] *Bivens*, 403 U. S., at 396.
[75] Loper Bright Enterprises v. Raimondo, 603 U.S. ____(2024).

necessary to uphold constitutional rights and concerns about international relations does not justify denying a remedy.

E. Application to *Georges v. United Nations*

Applying the facts to this case, it may be argued that the class members were denied their right of access to courts and the right to an effective remedy by dismissing the action for the reasons of absolute immunity of the United Nations and its officers. A fundamental similarity between the two mentioned cases (*Bivens* and *Davis*) and *George v. United Nations* must not be ignored either – both plaintiffs had no other available remedy. Such a lack of alternative remedy was confirmed to be a requirement for a *Bivens* action in *Corr. Servs. Corp. v. Malesko*.[76] One could reject this argument by stating that immunity precludes any of the above arguments. Alternatively, it could be dismissed by conceding that the right to an effective remedy is deeply rooted in American tradition but arguing that no case law talks about international organizations and the necessity of such organizations to be free from judicial oversight of any one government.[77] Indeed, this could be claimed to be a "special factor[] counseling hesitation," thereby precluding a *Bivens* action in this case. The spirit may discard this argument, or even better - a quote provided above where the court, among others, said that the class of litigants who have their constitutional right violated and have no other remedy available "*must* be able to invoke the existing jurisdiction of the courts for the protection" of their rights (emphasis added).[78] Another argument against this particular factor would be *Geoffroy v. Riggs*[79] and *Reid v. Covert* [80].

In *Geoffroy,* the Court ruled that "[i]t would not be contended that [treaty power of the United States] extends so far as to

[76] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).
[77] *Bivens* decision, as explained by *Butz v. Economou*, 438 U.S. 478, 503 (1978), also *required* "special factors counselling hesitation in the absence of affirmative action by Congress." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 429 (1971). As it will be explained later, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1330, §1391(f), §1441(d), §1602–11, actually provides an affirmative action by Congress and it will be argued that FSIA instructs courts to recognize the immunities of international organizations to be of the same power and nature as immunities of foreign sovereigns. Nonetheless, the SDNY saw the CPIUN as a self-executing treaty, so the act did not play a role in the decision. Therefore, taking the argument as such, "absence of affirmative action by Congress" could be presumed.
[78] *See Malesko*, *supra* note 69, at 63.
[79] Geofroy v. Riggs, 133 U.S. 258 (1890).
[80] Reid v. Covert, 354 U.S. 1 (1957).

authorize what the Constitution forbids…."[81] Therefore, the United States could not enter into a treaty that would deny its citizens the due process of laws guaranteed by the Fifth Amendment to the Constitution. After all, the courts found absolute immunity, which meant that had cholera happened within the United States, the United Nations would have the same immunity intact. The logic of *Geoffroy* is affirmed by the Supreme Court in *Reid* when the Court explained that,

> "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act by all the limitations imposed by the Constitution."[82]

Therefore, there is, and should be, a presumption of constitutionality. Thus, the Court must presume that the United States recognized its obligations under the Constitution when it signed and ratified the Charter and the CPIUN. This point is further supported by the fact that Congress amended 28 U.S.C. §1343 on September 9, 1957, to give federal district courts jurisdiction "authorized by law to be commenced by any person: … (4) To recover damages or to secure equitable or other relief under *any* Act of Congress providing for the protection of civil rights…"[83] (emphasis added) and created a bipartisan executive Commission on Civil Rights.

Furthermore, the Supreme Court explained that "the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[84] This is particularly compelling when we consider a case decided by the Supreme Court on February 27, 2019, Budha Ismail Jam v. International Finance Corporation, where the Court ruled that international organizations have the same immunities and privileges as foreign sovereigns.

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[81] *Geofroy*, *supra* note 73, at 267; *see also Reid*, *supra* note 73, at 17; Seneca Nation of Indians v. New York, 382 F.3d 245, 259 n.16 (2d Cir. 2004); Edwards v. Carter, 580 F.2d 1055, 1068 (D.C. Cir. 1978) (MacKinnon, J., dissenting).
[82] *Reid*, *supra* note 74, at 5-6.
[83] 28 U.S.C. §1343 (1979); *also see* Civil Rights Act of 1957, Pub. L. No. 85-315, §121, 71 Stat. 634, 637 (1957).
[84] Boddie v. Connecticut, 401 U.S. 371, 379–80 (1971); *see also* Covey v. Town of Somers, 351 U.S. 141, (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Hence, an argument of absolute immunity, without, at least, the presence of any alternative means of dispute resolution, cannot and does not stand under scrutiny for if the United States clearly intends or ever intended to "treaty around" the express requirements under the Constitution, they would be violating it, per *Geoffroy* and *Reid*. "Our basic charter cannot be contracted away like this."[85] If they could, "the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched."[86] So, the United States federal courts have jurisdiction, and Congress was aware they would when they signed and ratified the UN Charter and the CPIUN over cases alleging violation of a fundamental constitutional right, even if this case involved an international organization, such as the UN.[87]

But even if Congress did not anticipate this, it affirmed this right with 1979 Amendments to 28 U.S.C. §1343 and 42 U.S.C. §1983.[88] Or even bypassing the Foreign Sovereign Immunities Act ("FSIA") and International Organizations Immunities Act ("IOIA") in 1977 and 1945, respectively. In fact, on the latter point, the United States, when joining the United Nations and before even (assumedly) voting on the CPIUN in the UN, passed the IOIA expressly providing that international organizations would not have absolute immunity.

Therefore, on its face, the U.S. District Court for the SDNY and the Second Circuit erred in dismissing the case for the lack of subject-matter jurisdiction. Customs, Constitutions, precedents, and legislation support procedural rights of access to courts and provide an adequate remedy. The Courts erred in applying *Brzak's reasoning as in Brzak,* the dispute resolution mechanism was provided by the United Nations, in contrast to this case, and, therefore, *Brzak* could not claim *Bivens* action. The courts should have recognized that the class members in *George* did not have alternative remedies other than the United States court to claim violation of their Fifth Amendment Due Process Rights – deprivation of life without due process. From

[85] Boumediene v. Bush, 553 U.S. 723 (2008)
[86] Bond v. United States, 572 U.S. 844, 878 (2014) (Scalia, J., concurring in judgment).
[87] *Cf.* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) ("It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.")
[88] 28 U.S.C. §1343 (1997); 42 U.S.C. §1983 (2015).

there, the courts should have moved to inquire whether the plaintiffs satisfied the three-prong *Bivens* test – (1) violation of a constitutional right; (2) implied cause of action; (3) relief in damages would satisfy an appropriate remedy. They would have found the three-prong test satisfied. [89] Therefore, the UN should have been stripped of its immunity in this case, as it denied an alternative remedy to the petitioners. It should be noted that the argument is strictly limited to procedural rights of access to courts and an adequate remedy.

"[I]t has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[90] Therefore, if CPIUN is the basis for the grant of absolute immunity and if we accept and assume that the CPIUN is, in fact, a self-executing treaty, then there could not be any statement to say that the procedural rules of the United States will not be governing the adjudication of treaty disputes. And it so, fortunately, happens that the presumption against extraterritoriality does not apply to the Fifth Amendment to the Constitution.[91]

A significant challenge to this position is the assertion that U.S. constitutional rights, including the Fifth Amendment's Due Process Clause, do not extend to foreign nationals who are non-residents and whose injuries occurred outside U.S. territory; critics argue that extending these rights extraterritorially oversteps constitutional boundaries, infringes upon principles of national sovereignty and international comity, and could inappropriately subject international organizations to U.S. jurisdiction, thereby interfering with their global operations. However, this argument fails to acknowledge that the Fifth Amendment protects "persons," not just "citizens," Supreme Court jurisprudence has extended certain constitutional protections to non-citizens, especially when there is a substantial connection to the United States.[92] Or that when

[89] For the implied cause of action under the Fifth Amendment, *see Davis*, *supra* note 60.
[90] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006) (quoting Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam)).
[91] *See e.g.,* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).
[92] *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (ruling that the Fifth and Sixth Amendments extend to foreign nationals as well as American citizens); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (holding that the Fourteenth Amendment's Equal Protection Clause applies to all persons within U.S. territory, including non-citizens);

foreign plaintiffs bring a lawsuit in U.S. courts, they subject themselves to the jurisdiction of the U.S. legal system, obligating the courts to uphold constitutional protections in their proceedings, regardless of the plaintiffs' nationality.[93] Last but not least, the Alien Tort Statute ("ATS"), which will be thoroughly discussed in Part II of the series, was introduced by the First Congress of the United States in 1789 and is one of the oldest federal laws still in effect in the United States, was enacted to punish infractions of the laws of nations. And this case (as Part II shall illustrate) falls squarely within ATS' scope.

Therefore, the argument that U.S. constitutional rights do not apply to the foreign plaintiffs in *Georges v. United Nations* is unpersuasive. The combination of constitutional text, Supreme Court precedent, statutory provisions like the ATS, and international legal principles supports the extension of specific constitutional protections to foreign nationals in this context. The plaintiffs, having sought justice through the U.S. legal system against an entity operating under U.S. jurisdiction and protection, are entitled to the fundamental right to an effective remedy. Denying them this right contradicts the Constitution and undermines the integrity of the U.S. legal system and its commitment to the rule of law.

CONCLUSION

The United Nations, established to "save succeeding generations from the scourge of war" and to "reaffirm faith in fundamental human rights,"[94] has been central to international peace and security. However, in cases such as the Haitian cholera outbreak, the invocation of absolute immunity has raised questions about how accountability aligns with these foundational principles. This study explores how such immunity intersects with international customary law and American constitutional traditions, particularly regarding the right to an effective remedy for all individuals. The Fifth Amendment's protection of "life, liberty, or property" without due process of

Plyler v. Doe, 457 U.S. 202 (1982) (ruling that undocumented immigrant children are protected under the Equal Protection Clause).

[93] *See, e.g.,* Bridges v. Wixon, 326 U.S. 135 (1945) (holding that non-citizens are entitled to due process protections during legal proceedings).

[94] *Supra* note 3.

law is not a hollow promise confined within U.S. borders but a fundamental tenet underpinning the essence of justice.

The judiciary's decision in *Georges v. United Nations*, which upheld an international organization's immunity above the constitutional rights of individuals, sets a precedent that has sparked important debate about the rule of law. This ruling brings to light the longstanding principle affirmed by the Supreme Court: that where there is a right, there must be a remedy and that justice must remain accessible in cases of fundamental rights. Courts hold both the authority and responsibility to reassess immunity in situations that may hinder justice, mainly when the UN's charter envisions avenues for redress.

Allowing the UN to operate with absolute immunity risks creating a system where rights are illusory and unattainable remedies—a profound contradiction to American constitutional principles and international legal standards. Such immunity, if unchecked, could compromise the integrity of the U.S. Constitution, diminish the credibility of international law, and leave victims of serious harm without recourse. Courts have a critical role in reaffirming that even international organizations must be accountable when fundamental rights are at stake. Ensuring that no institution stands entirely above the law, however noble its mission, is essential to honoring the global promise of justice and upholding the fundamental rights that form the bedrock of American jurisprudence and the international community.

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67. *See Bivens*, *supra* note 60, at 389.
68. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611.
69. Rodgers v. St. Mary's Hosp., 149 Ill. 2d 302, 309 (1992).
70. Davis v. Passman, 442 U.S. 228, 242, 244 (1979).
71. *See Davis*, *supra* note 64, at 234; To see the application of the test, *see e.g.* Bishop v. Tice, 622 F.2d 349, 353 (8th Cir. 1980)
72. *Id.*
73. *Id.*
74. *See Davis*, *supra* note 64, at 242; *also see* Baker v. Carr, 369 U.S. 186 (1962); Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1035 (9th Cir. 2007); Rhode Island Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 41 (1st Cir. 2002); Konah v. D.C., 915 F. Supp. 2d 7, 31 (D.D.C. 2013).
75. *Lewis*, *supra* note 52, at 349.
76. *Bivens*, 403 U. S., at 396.
77. Loper Bright Enterprises v. Raimondo, 603 U.S. ____(2024).
78. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).
79. *Bivens* decision, as explained by *Butz v. Economou*, 438 U.S. 478, 503 (1978), also *required* "special factors counselling hesitation in the absence of affirmative action by Congress." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 429 (1971). As it will be explained later, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1330, §1391(f), §1441(d), §1602–11, actually provides an affirmative action by Congress and it will be argued that FSIA instructs courts to recognize the immunities of international organizations to be of the same power and nature as immunities of foreign sovereigns. Nonetheless, the SDNY saw the CPIUN as a self-executing treaty, so the act did not play a role in the decision. Therefore, taking the argument as such, "absence of affirmative action by Congress" could be presumed.
80. *See Malesko*, *supra* note 69, at 63.
81. Geofroy v. Riggs, 133 U.S. 258 (1890).
82. Reid v. Covert, 354 U.S. 1 (1957).
83. *Geofroy*, *supra* note 73, at 267; *see also Reid*, *supra* note 73, at 17; Seneca Nation of Indians v. New York, 382 F.3d 245, 259 n.16 (2d Cir. 2004); Edwards v. Carter, 580 F.2d 1055, 1068 (D.C. Cir. 1978) (MacKinnon, J., dissenting).

84. *Reid*, *supra* note 74, at 5-6.
85. 28 U.S.C. §1343 (1979); *also see* Civil Rights Act of 1957, Pub. L. No. 85-315, §121, 71 Stat. 634, 637 (1957).
86. Boddie v. Connecticut, 401 U.S. 371, 379–80 (1971); *see also* Covey v. Town of Somers, 351 U.S. 141, (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
87. Boumediene v. Bush, 553 U.S. 723 (2008)
88. Bond v. United States, 572 U.S. 844, 878 (2014) (Scalia, J., concurring in judgment).
89. *Cf.* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) ("It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.")
90. 28 U.S.C. §1343 (1997); 42 U.S.C. §1983 (2015).
91. For the implied cause of action under the Fifth Amendment, *see Davis*, *supra* note 60.
92. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006) (quoting Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam)).
93. *See e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397 (1930).
94. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228 (1896) (ruling that the Fifth and Sixth Amendments extend to foreign nationals as well as American citizens); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment's Equal Protection Clause applies to all persons within U.S. territory, including non-citizens); *Plyler v. Doe*, 457 U.S. 202 (1982) (ruling that undocumented immigrant children are protected under the Equal Protection Clause).
95. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135 (1945) (holding that non-citizens are entitled to due process protections during legal proceedings).
96. *Supra* note 3.