

15-455-cv

IN THE
United States Court Of Appeals
FOR THE SECOND CIRCUIT

DELAMA GEORGES, ET AL.,

Plaintiffs-Appellees,

- against -

UNITED NATIONS, ET AL.,

Defendants-Appellants.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

**MEMORANDUM OF LAW OF *AMICI CURIAE* FORMER UNITED
NATIONS OFFICIALS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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PRELIMINARY STATEMENT

Amici respectfully submit this brief in support of Plaintiffs-Appellants' appeal of the District Court's dismissal of this action on the grounds that the United Nations ("UN") is immune from suit in U.S. courts, notwithstanding its failure to offer any redress or process in response to the Haitian cholera victims' tort claims.

INTERESTS OF AMICI CURIAE¹

Amici are a group of six former senior UN officials with extensive experience in a diverse set of roles at the highest levels of the UN, including a former Under-Secretary General, Permanent Representative, Deputy Executive Director of a UN agency, Director of a UN bureau, and Special Rapporteurs on the human rights to physical health, safe drinking water, and sanitation.² Given their experience and insight, *Amici* write to provide their perspective on critical policy issues raised by this appeal that are relevant to the Court's decision, as well as the impact that the Court's decision will have on the UN's ability to fulfill its mandate.

Notwithstanding the historical and practical importance of the UN's immunity to fulfill its mission, *Amici* respectfully submit that affirming the District Court will allow the UN to act with impunity for both the injuries its actions have

¹ *Amici* confirm that no party's counsel authored this brief (in whole or in part) or contributed money that was intended to fund preparing or submitting this brief, and no person – other than *Amici* and their counsel – contributed money that was intended to fund preparing or submitting this brief.

² The attached Appendix sets forth *Amici*'s names and relevant roles during their respective tenures at the UN.

caused and its refusal to provide any redress or process to the victims of the Haitian cholera disaster. The UN's actions in this case unquestionably violate its express obligations to provide adequate remedies for victims of private law claims. They also are contrary to the values the UN professes, including the importance of the rule of law and access to remedies as a fundamental human right. Endorsing the UN's position is not only contrary to the very foundation for its immunity, it will threaten the UN's legitimacy and its ability to fulfill its vital mission.

ARGUMENT

Based on their broad, first-hand experience at the UN, *Amici* believe that three policy considerations are vitally important for purposes of this appeal. First, the policy justifying the UN's immunity has always been to protect the UN from political interference that could threaten its core functions, not to shield the organization from responsibility for acts of gross negligence where it fails to provide any means of redress or process for the injured. Second, as an organization committed to the rule of law and the right of redress, the UN's misguided actions in this case run counter to its professed values, thereby threatening its legitimacy and its mission. And third, the Government's argument before the District Court – that allowing Plaintiffs-Appellants' claims to go forward would compromise the UN's mission by opening the proverbial floodgates for further claims against the UN in national courts – is incorrect, given the narrow

circumstances of this case and the fact that the UN alone has the ability to provide the redress and process for private law claims that it has guaranteed.

Although allowing this case to go forward would not result in a torrent of new claims against the UN in national courts, if the Court is concerned about the prospect of the District Court adjudicating damages against the UN, *Amici* respectfully suggest an alternative solution: Reverse the District Court on the grounds that the UN has failed to meet its obligations under Section 29 of the Convention on the Privileges and Immunities of the United Nations ("CPIUN"), but direct the District Court to consider injunctive relief that would require the UN – not the court – to follow its procedures and establish an independent process to provide adequate means of redress and process for Plaintiffs-Appellants' claims. Without at least that remedy, *Amici* are deeply concerned that the UN's failure to address Plaintiffs-Appellants' claims will irrevocably damage its reputation and undermine its mission. By deciding that this case should be adjudicated – either by the District Court or an independent process established under the UN's procedures – the Court will support the principles the UN espouses, and enhance the UN's ability to continue performing valuable and necessary functions around the world.

I. Immunity was never meant to provide a mechanism for the UN to act with impunity.

The purpose behind the CPIUN's grant of immunity to the UN in Section 2 was not to protect the UN from liability for private law tort claims, but

rather to ensure that the UN can carry out its mission without political interference. Affirming dismissal of this case on immunity grounds – without also ordering the UN to implement its required process for redress – would undermine the fundamental justification for the UN's immunity, would be inconsistent with immunity's purpose, and will allow the UN to act with impunity in denying Plaintiffs-Appellants any possibility of redress for their injuries.

When the UN was founded, immunity was considered critical to protect a nascent, vulnerable organization from vexatious litigation and political interference.³ The basis of its immunity was made clear in Article 105(2) of the UN Charter, which states that the UN shall be provided privileges and immunities "as are necessary for the fulfillment of its purposes".⁴ But while the UN's immunity was intended to protect it from interference with actions necessary for its mission, that immunity was never intended to eliminate the UN's responsibility for private torts. As Plaintiffs-Appellants have explained, while the CPIUN – which implemented the UN Charter – provided the UN with its immunity in Section 2, it also required in Section 29 that the UN provide appropriate modes of settlement for private law claims, imposing a clear obligation to ensure that the UN's

³ Rep. by the Exec. Comm. to the Prep. Comm. of the U.N., 69-71, U.N. Doc. PC/EX/113/Rev.1 (Nov. 12, 1945).

⁴ U.N. Charter art. 105, para. 1.

immunity would not eviscerate its responsibility for legitimate personal injury claims.⁵

The functions at the core of the UN's role in the international community have expanded dramatically since its founding and, as *Amici* can attest, immunity is still critical to ensure that UN officials are able to have open and frank discussions with representatives of member states without fear of sanction. Similarly, with diverse responsibilities that now include tasks such as the protection of vulnerable populations in armed conflict and monitoring polling stations in elections under unstable governments, UN immunity remains an important protection against potential interference with its peacekeeping mission.

However, while it is vital that the UN retains the independence and immunity necessary to carry out those missions, *Amici* believe the policy reasons that justify immunity are not present here. There is no justification for immunity for acts of gross negligence and recklessness when those acts are not related to the UN's core functions and when the UN has not provided any process for redress to the injured, in direct contravention of the CPIUN. Unlike other situations where the UN has been accused of failing to provide appropriate remedies, the actions at

⁵ Consistent with its obligation to provide redress for private law claims, the CPIUN also imposes a “right and duty” on the Secretary-General to waive immunity of staff where immunity would “impede the course of justice and can be waived without prejudice to the interests of the United Nations.” *See* Convention on the Privileges and Immunities of the United Nations, art. 5, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16.

issue did not occur under circumstances where the UN's immunity was arguably vital, such as when it has functioned as an interim government at the time of the alleged tort, exercised its military powers, or invoked the doctrine of "operational necessity."⁶ Instead, this is a classic private tort case concerning the grossly negligent disposal of wastewater, even if the injuries are catastrophic in scope.

A ruling by this Court in favor of the Plaintiffs-Appellants thus would not be "antithetical to the critical mission of the UN to be able to carry out its mission around the world and as contemplated by the countries to the [CPIUN]," as the Government argued before the District Court.⁷ Rather, the UN's refusal to honor its obligations under Section 29 of the CPIUN to shield itself from accountability altogether are what will threaten its mission and undermine the very bargain upon which the UN's immunity is based. Indeed, the United Nations has previously argued to this Court that "eliminat[ing] the prospect of impunity" is a "fundamental goal" that is achieved when the UN "provides the appropriate mechanisms to resolve all complaints of a private law nature."⁸ Where the policy

⁶ See, e.g., Bruce C. Rashkow, *Immunity of the United Nations*, 10 Int'l Org. L. Rev. 332, 340 (2013).

⁷ See Transcript of Oral Argument at 53:1-5, *Georges v. United Nations*, 13-CV-7146 (JPO) (2015).

⁸ See Memorandum of Law in Support of the Motion of the United Nations to Dismiss and to Intervene at 3-5, *Brzak v. United Nations*, 06-CV-03432 (RWS), (S.D.N.Y. Oct. 2, 2007) ("In civil matters, the uniform practice is to maintain immunity, while offering, in accord with Section 29 of the [CPIUN], alternative means of dispute settlement. . . . This practice achieves two fundamental goals: it

concerns that justify immunity are not present, and where the UN has abandoned its avowed responsibility to provide redress and process for private tort claims, the UN should not be above the law.

II. Allowing the claims to go forward will enhance the UN's legitimacy and its ability to fulfill its mission.

The UN's refusal to provide any form of remedy to the Plaintiffs-Appellants does not just breach its obligations under the CPIUN. It also breaches the UN's commitment to the rule of law and access to remedies as a fundamental human right. The UN's misguided actions in this matter already have damaged its reputation and legitimacy. *Amici* are gravely concerned that upholding the UN's claim of immunity under these circumstances will deepen that damage by reinforcing that the UN can act with impunity, regardless of the injuries it inflicts or its egregious disregard of its own procedures. Reversing the District Court under these circumstances will enhance the UN's legitimacy and the values it espouses, improving its ability to carry out its mission.

There can be no doubt that the UN has long been a champion of the rule of law and fundamental human rights, especially of the right to seek a remedy. As early as 1948, the UN declared access to an effective remedy to be a universal human right, proclaiming that "(e)veryone has a right to an effective remedy by the

ensures the independence of the [UN] and its officials from national court systems, but at the same time it eliminates the prospect of impunity, as the [UN] provides the appropriate mechanisms to resolve all complaints of a private law nature.").

competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."⁹ The UN has acknowledged, "[t]he rule of law is strengthened when all individuals are empowered to claim their rights, to request effective remedies and to express legitimate demands on public institutions for accountability in the fair and just delivery of public services."¹⁰ Indeed, the UN General Assembly even adopted basic principles and guidelines on the right to a remedy in 2005.¹¹

The UN's foundational promise to provide "appropriate modes of settlement" in Section 29 of the CPIUN is echoed throughout the UN's contracts and literature. The Status of Forces Agreement with the Haitian government provides for the establishment of a standing claims commission for "claims for

⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁰ U.N. Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, ¶ 22, U.N. Doc. A/66/749 (Mar. 16, 2012); *see also* Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, G.A. Res. 67/1, ¶ 12, U.N. Doc. A/RES/67/1 (Nov. 30, 2012) ("We affirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.").

¹¹ *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); *see also* Marten Zwanenburg, *UN Peace Operations between Independence and Accountability*, 5 Int'l Org. L. Rev. 23, 45 (2008).

personal injury, illness, and death arising from or directly attributed to MINUSTAH," the UN Stabilization Mission in Haiti.¹² Articles in the UN's own library confirm that the UN's "obligation to provide for alternative dispute settlement in case of the Organization's immunity from legal process can be regarded as an acknowledgement of the right of access to court."¹³ And, as the Secretary-General of the UN himself has said, compensation for damages caused by the UN is a norm supported "by considerations of equity and humanity which the [UN] cannot ignore."¹⁴ The UN could not have been more explicit: notwithstanding immunity, it has an affirmative obligation to be accountable for wrongs it commits.

Given the UN's long history of advocating for the rule of law and access to remedies, it is unsurprising that the UN's failure to live up to its

¹² Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, U.N.-Haiti, ¶¶ 54-55, July 9, 2004, 2271 U.N.T.S. 235.

¹³ See August Reinisch, *Introductory Note on Convention on the Privileges and Immunities of the United Nations and Convention on the Privileges and Immunities of the Specialized Agencies*, United Nations Audiovisual Library of International Law, at 2 (2009), available at http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf (emphasis added).

¹⁴ Letter dated August 6, 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, 1965 U.N. Jurid. Y.B. 41, UN Doc. S/6597. Similarly, the UN's top legal officer stated in 2001 that "it is clear that the [UN] can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities." Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims, 2001 U.N. Jurid. Y.B. 381, ¶ 17.

obligations with respect to its role in the Haitian cholera epidemic has caused an accountability crisis that threatens the legitimacy and credibility of the organization. As leading news organizations have reported, the UN's actions have "strained the peacekeepers' relationship with the Haitians they are protecting"¹⁵ and made Haitians "increasingly doubtful of the benefits [MINUSTAH] provides."¹⁶ Especially worrisome is the sense that the UN's failures in Haiti will have "serious implications for the overall legitimacy of the UN's peacekeeping authority."¹⁷ Perhaps most telling is the pervading sense that this case has revealed a double standard, where the UN will urge one standard for member states and another for its own work. As one journalist aptly noted: "[t]his is hypocrisy of a high order"¹⁸

That hypocrisy is particularly outrageous because it is unnecessary.

The present-day UN is a massive organization, with an enormous budget and

¹⁵ Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic*, N.Y. Times, March 31, 2012, available at <http://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html>.

¹⁶ *First, Do No Harm*, The Economist, Apr. 28, 2012, available at <http://www.economist.com/node/21553450>.

¹⁷ See Transnational Development Clinic, Yale Law School et al., *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic*, 42 (2013), available at http://www.law.yale.edu/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf.

¹⁸ Patrick Cockburn, *Shame on the UN for Creating the Deadly Cholera Epidemic That's Killed 7,500 in Haiti*, The Independent, Dec. 2, 2012, available at <http://www.independent.co.uk/voices/comment/shame-on-the-un-for-creating-the-deadly-cholera-epidemic-thats-killed-7500-in-haiti-8373765.html>.

significant influence on the economies of developing countries. Under the General Assembly's 1998 Resolution on "Third-party liability: temporal and financial limitations," which details and limits the UN's liability for claims like those alleged here,¹⁹ the UN's liability for damages even in the event of grave injuries and wrongful death is capped at a reasonable amount that would not threaten the UN's budget.²⁰ Had the UN simply lived up to its own obligations, it could have already provided a settlement process for Plaintiffs-Appellants' claims and remedies in line with its own established procedures. Its choice to instead do nothing has jeopardized the legitimacy and trust among local populations upon which the UN's mission depends.²¹

¹⁹ The Resolution expressly applies to "third-party claims against the Organization for personal injury, illness or death, and for property loss or damage . . . resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties" *See* G.A. Res. 52/247, ¶¶ 5, 9, U.N. Doc. A/RES/52/247 (July 17 1998).

²⁰ *See id.*, *supra* note 19, ¶ 9(d).

²¹ Rodolphe Adada, UN-AU Joint Special Representative for Darfur, has identified "local trust" as "the most important capital for any peacekeeper." *See Security Council delegation to meet Sudanese President*, UN News Centre, June 5, 2008, *available at* <http://www.un.org/apps/news/story.asp?NewsID=26920#.VVZOptJ0x9A>. That local trust feeds into the legitimacy of the UN, and the "[l]egitimacy and effectiveness of [international organizations] are tightly linked." *See* Kristina Daugirdas, *Reputation and Responsibility of International Organizations*, 25 *Eur. J. Int'l L.* 991, 1007 (2014). "The stronger the argument that an [international organization] is violating a particular norm, the greater the reputational threat." *Id.* at 1014.

If the Court affirms the District Court's dismissal, allowing the UN's decision to remain immune from scrutiny, it will allow the UN to achieve impunity for its actions, no matter the consequences. That outcome would overshadow the UN's long history of championing human rights and demanding accountability of others, and may forever undermine the UN's legitimacy and credibility around the world. Allowing the claims to go forward, conversely, will repudiate the UN's refusal of accountability and show the world – and the UN itself – that when the UN fails to live up to its own obligations, it is not above the law.

III. Allowing the claims to go forward will not "open the floodgates" for future cases against the UN in national courts.

Based on its unique circumstances, allowing this case to proceed will not "create and open up a huge set of claims [against] the United Nations,"²² contrary to the Government's arguments before the District Court. Instead, a finding that the UN must fulfill its Section 29 obligations to provide some form of redress or process for private law claims will send a clear signal that the UN will be held to its promise of accountability. Such a ruling would not result in any additional court cases against the UN, as long as the UN complies with Section 29 of the CPIUN when such private law claims arise in the future. Whether the UN chooses to do so or not would remain entirely under its own control.

²² See Transcript of Oral Argument, *supra* note 7, at 52:10-19.

To the best of *Amici's* knowledge, this situation is unprecedented. The UN has never before refused to provide any form of redress or process for similar, private claims for damages for personal injury, illness, or death allegedly resulting from peacekeeping operations.²³ To the contrary, the UN has repeatedly settled tort claims of that nature in the past and has established procedures for doing so. For example, the UN paid compensation for deaths and injuries connected to its peacekeeping operations in the Congo,²⁴ paid over \$15 million to settle third-party liability claims in connection with peacekeeping operations in 1996,²⁵ and has even paid out funds to Haitians harmed by peacekeeping actions in the past.²⁶

Commentators including the former head of the UN's Legal Office have remarked

²³ The former head of the UN Legal Office has agreed, writing: "[A]s the head of the United Nations legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation [that claims 'are not receivable'] was utilized in regard to such claims." Mr. Rashkow also states that it is "difficult to understand the decision of the United Nations declining to review the claims of the Haitian cholera victims in light of the longstanding practice of the Organization to address claims of a private law character in connection with peacekeeping missions and the terms of the Organization's new peacekeeping liability regime," established in the 1998 General Assembly Resolution. See Rashkow, *supra* note 6, at 344, n.27.

²⁴ See Kirsten Schmalenbach, *Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations*, 10 Yearbook of International Peace Operations, 48 (2006).

²⁵ See U.N. Secretary-General, *Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, ¶ 53, U.N. Doc. A/51/389, (Sept. 20, 1996).

²⁶ See *Interoffice Memorandum to the Controller, Assistant Secretary-General, Office of Programme Planning, Budgets and Accounts*, 2009 U.N. Jurid. U.B. 428-30.

on the commonality of the practice and the functioning of UN claims review boards over the years.²⁷ The UN could, and should, take the same approach here.

A ruling that this action can go forward, appropriately tailored to the circumstances of this case – the UN's refusal to provide any redress or process for classic private law tort claims – will not result in any widespread litigation in national courts. Since the UN has historically complied with Section 29, and has the exclusive ability to decide to do so in the future, there would not be a flood of private law claims based on the UN's failure to comply with Section 29 unless the UN decided to create one. To the extent that the Government or UN claim that an appropriately tailored ruling would impact future UN operations, *Amici* respectfully submit that such a decision would help ensure adequate settlement procedures are always instituted, and should even encourage greater oversight and diligence by the UN in preventing any private law harms in the first instance.

Consistent with the UN's Section 29 obligations and other guarantees, the UN must provide a process for settlement of private law claims like those of Plaintiffs-Appellants, not summarily reject them on nebulous grounds that they are "not receivable." *Amici* are not advocating for national courts to adjudicate disputes of this nature as a general matter, but rather for the UN to honor the commitments it has made in pursuit of its mission. The UN's misguided refusal to

²⁷ See Rashkow, *supra* note 6, at 337, 339-40; see also, e.g., Schmalenbach, *supra* note 24, at 33.

provide any redress or process to the Haitian cholera victims has made this lawsuit – and this Court's intervention – necessary. To the extent that the Court is concerned that a reversal would result in further possible suits in national courts, it could alleviate those concerns by ordering that no U.S. court will adjudicate the merits of Plaintiffs-Appellants' tort claims. The case would then move forward with an order that the UN fulfill its Section 29 obligations, without impacting the UN's immunity in situations where it provides the forms of process and redress it has promised.

CONCLUSION

Because allowing Plaintiffs-Appellants' case to go forward will promote accountability under the CPIUN, will advance the principles the UN espouses, and will not pose a significant threat of future litigation against the UN in national courts, *Amici* respectfully submit that the Court should not affirm the dismissal of this case, but should instead hold the UN to its own treaty-based and self-declared remedial obligations by providing a forum for Plaintiffs-Appellants' claims, either in federal court or under the UN's own procedures.

Dated: New York, New York
June 3, 2015

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Former Ambassador and Permanent Representative of Canada to the United Nations

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Fourteen point, Times New Roman.