



May 7, 2013

Dear Under-Secretary-General O'Brien:

I refer to your letter of 21 February 2013 (the "Response"), dismissing claims for relief and reparations that were submitted to the United Nations (UN) on 3 November 2011 by 5,000 victims of cholera in Haiti (Petitioners).

The Response's two sentences addressing Petitioners' claims contend that they are "not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations [CPIUN]," because "consideration of these claims would necessarily include a review of political and policy matters." The Response does not explain how the claims necessarily entail such review, nor does it refer to any international or domestic law authority supporting the contention that such a review renders the claims "not receivable." In the absence of more information, the Response's invocation of Section 29 appears arbitrary, self-serving and contrary to international principles of due process.

In fact, under relevant international law, and consistent with long-standing UN practice and UN General Assembly resolutions, Petitioners' claims are "claims of a private law nature" for which Section 29 requires the UN to "make appropriate modes of settlement." This letter summarizes that law, and also constitutes a formal request for either:

- A) a meeting with UN officials to discuss Petitioners' claims, including the issues raised by the UN's Response; or
- B) an agreement to enter into mediation to assist in resolving the claims.

The continued toll that the UN-caused cholera epidemic is taking on the people of Haiti demands the fair and prompt resolution of Petitioners' claims and requires that they be treated with utmost urgency. Since January 2013, an additional 184 people have died and 18,162 have been sickened from cholera. An evaluation of public health facilities released by Médecins Sans Frontières (Doctors Without Borders) in March found that "[a] lack of funds and supplies has crippled cholera treatment programs in Haiti, leading to unnecessary deaths and increasing the risk of greater outbreaks during the upcoming rainy season."<sup>1</sup> Accordingly, this letter shall also constitute official notice by Petitioners' counsel that they will file a suit in a national court on behalf of Petitioners and other victims of cholera in Haiti if an appropriate response is not received within 60 days of the date of this letter.

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<sup>1</sup> Press Release, Médecins Sans Frontières, Haiti: Deplorable Conditions for Cholera Patients (Mar. 12, 2013), <http://www.doctorswithoutborders.org/press/release.cfm?id=6681&cat=press-release>.

<sup>2</sup> Convention on the Privileges and Immunities of the United Nations, § 29, Feb. 13, 1946, 1 U.N.T.S. 15

## **I. INTERNATIONAL LAW REQUIRES THE UN TO ACCEPT PETITIONER'S CLAIMS AND PROVIDE RELIEF.**

### ***A. The UN is legally obligated to consider and settle claims filed by third parties for injury, illness and death attributable to the UN or its peacekeeping forces.***

Petitioners, who are 5,000 victims of UN-caused cholera in Haiti, filed private law claims in accordance with Section 29 of the CPIUN<sup>2</sup> and Articles 54 and 55 of the Status of Forces Agreement (SOFA) signed between the UN and the Government of Haiti.<sup>3</sup> Section 29 requires that the “United Nations shall make provisions for appropriate modes of settlement of ... [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.” In Section 29, the UN promises to balance immunity from legal action in national courts with a commitment to provide settlements of private law claims through the UN internal claims process. Notably, Section 29 does not prescribe any type of claim as not receivable.

In the context of peacekeeping operations, the UN has further committed to establish “Standing Claims Commissions” to hear private law claims submitted by third parties.<sup>4</sup> Article 55 of the SOFA expressly mandates that the UN establish such a commission in Haiti to receive claims by individuals who are victims of harms attributable to the UN Stabilization Mission in Haiti (MINUSTAH).<sup>5</sup>

These treaty obligations under the CPIUN and SOFA help to ensure that the UN's immunity regime will not amount to a complete denial of justice for victims of harms caused by the UN. The obligations accord with the fundamental right to an effective remedy, which has been recognized in major human rights instruments, including those adopted by the UN itself.<sup>6</sup> Moreover, they are consistent with the UN's express aim to promote human rights and justice.<sup>7</sup> Yet over two-and-a-half years after the outbreak of

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<sup>2</sup> Convention on the Privileges and Immunities of the United Nations, § 29, Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter CPIUN].

<sup>3</sup> Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, ¶¶ 54-55, U.N.-Haiti, Jul. 9, 2004 [hereinafter SOFA].

<sup>4</sup> U. N. Secretary-General, *Report of the Secretary-General, Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, ¶ 7, U.N. Doc. A/51/389 (Sept. 20, 1996) (“In conformity with section 29 of the [CPIUN], it has undertaken ... to settle by means of a standing claims commission claims resulting from damage caused by members of the force....”).

<sup>5</sup> SOFA ¶¶ 54, 55 (“Third-party claims for ... personal injury, illness or death arising from or directly attributed to MINUSTAH, ... which cannot be settled through the internal procedures of the United Nations shall be settled ... by a standing claims commission to be established for that purpose.”).

<sup>6</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI) A, art. 2, U.N. Doc. A/RES/2200 (XXI) A (Dec. 16, 1966); International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 6, U.N. Doc. A/RES/2106 (XX) (Dec. 21, 1965); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 14, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); and Convention on the Rights of the Child, G.A. Res. 44/25, art. 39, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

<sup>7</sup> See Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Reports 47, at 57 (Jul. 13) (finding that a failure by the UN to provide an alternative remedy to would thwart the expressed aim of the UN Charter to promote freedom and justice).

cholera in Haiti, the UN Secretariat has refused to receive Petitioners' claims, and the UN in Haiti has not established a standing claims commission, thus resulting in a complete denial of justice to those who have been injured or killed by the UN cholera epidemic.

The UN's obligation to accept and respond to claims of liability for third-party personal injury and death attributable to the organization extends beyond the CPIUN and SOFA. Your predecessor as UN Legal Counsel stressed that “[a]s a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and *is obligated to pay* in regard to such liabilities.”<sup>8</sup> The UN Secretary-General, in studying the financial limitations on UN liability, reiterated the general principle that compensation should be paid with a view to redressing the damage caused by the UN, and restoring the situation to what it had been prior to the occurrence of the damage.<sup>9</sup> When tortious liability arises, “the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations.”<sup>10</sup> The International Court of Justice has also ruled in two advisory opinions that, “although the General Assembly has the authority under the Charter of the United Nations to approve the budget of the Organization, it has no alternative but to honour obligations incurred by the Organization.”<sup>11</sup> Thus, principles of international law firmly establish the UN's obligation to hear and settle claims such as Petitioners'.

This obligation is particularly well-established with respect to UN peacekeeping operations such as MINUSTAH. For example:

- In 1996, the Secretary-General observed that “the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties.”<sup>12</sup>
- The Secretary-General has also accepted that “[i]t has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the [CPIUN].”<sup>13</sup>
- The UN General Assembly has decided specific temporal and financial measures to govern third-party liability resulting or arising from peacekeeping operations

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<sup>8</sup> Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims, 2001 U.N. Jurid. Y.B. 381 (emphasis added) [hereinafter Memorandum to the Controller].

<sup>9</sup> *Report of the Secretary-General on the Financing of the UN Peacekeeping Operations*, *supra* note 4, ¶ 39.

<sup>10</sup> *Id.*

<sup>11</sup> Effect of Awards of Compensation, *supra* note 7; Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Reports 151 (Jul. 20).

<sup>12</sup> *Report of the Secretary-General on the Financing of the UN Peacekeeping Operations*, *supra* note 4, ¶ 7.

<sup>13</sup> The Secretariat, *Study Prepared by the Secretariat on the Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning their Status, Privileges and Immunities*, ¶ 56, p. 220, U.N. Doc. A/CN.4/L.118 and Add.1 and 2 (Mar. 8, May 5 & 23, 1967), available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_1118.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_1118.pdf).

conducted by the Organization, reaffirming the general principle of liability for peacekeeping.<sup>14</sup>

The Secretary-General's evasion of these principles and practice in the Haiti cholera context violates international law and the UN's legal commitments, and departs from the organization's long-honored practice.

***B. Petitioners' cholera claims are of a private law character within the meaning of Section 29 of the CPIUN and Articles 54 and 55 of the SOFA.***

Petitioners' cholera-related claims are precisely the type of claim envisioned in Section 29 of the CPIUN and Articles 54 and 55 of the SOFA, which the UN has an obligation to hear and settle. A tort, *i.e.*, a claim for injury suffered by individuals, is an archetype of the kind of "private law" claim such as that covered in the provisions of the CPIUN and SOFA.<sup>15</sup> The UN Legal Counsel has confirmed this citing personal injury claims as a common example of claims that are of a "private law nature".<sup>16</sup> UN practice also confirms it: in a report on UN procedures implementing Section 29, the Secretary-General identified four common types of private law claims that the UN must settle:

- a) Disputes arising out of commercial contracts;
- b) *Third-party claims for personal injuries, including tort claims, arising outside of the peacekeeping context;*
- c) *Third-party claims related to UN peacekeeping operations, including claims for compensation for personal injury or death;*
- d) Claims related to the conduct of operational activities for development.<sup>17</sup>

Furthermore, the Secretary-General has specifically affirmed that "claims for compensation submitted by third parties for personal injury or death ... incurred as a result of acts committed by members of a United Nations peace-keeping operation within the 'mission area' concerned" are "of a 'private law' character."<sup>18</sup> The UN followed this principle when it established the Human Rights Advisory Panel to review human rights violations committed by the UN Mission in Kosovo (UNMIK). In assessing the types of claims that fell under its original jurisdiction, the Panel determined that complaints of human rights violations involving personal injury, illness or death constituted private law claims, and, therefore, fell within the purview of the UN's Section 29 internal claims

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<sup>14</sup> Third-Party Liability: Temporal and Financial Limitations, G.A. Res. 52/247, U.N. Doc. A/RES/52/247 (Jul. 17, 1998).

<sup>15</sup> See, e.g., Randy E. Barnett, *Foreward: Four Senses of the Public Law—Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 268-69 (1986); see also the Secretary General, *Written Comments Concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ¶ 14 (Oct. 30, 1998) ("It is clear that a claim of libel and/or slander constitutes a dispute of a private law character" and falls under the jurisdiction of Section 29 of the CPIUN), available at <http://www.icj-cij.org/docket/files/100/8658.pdf>.

<sup>16</sup> Memorandum to the Controller, *supra* note 10.

<sup>17</sup> U.N. Secretary-General, *Report of the Secretary General on the Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations*, ¶ 15, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995) (emphasis added).

<sup>18</sup> *Id.*

process.<sup>19</sup>

Accordingly, under generally recognized definitions of private law and by the UN's own standards, all of the characteristics of a private law claim are present in this case. Petitioners are third-party complainants seeking compensation for personal injury, illness or death incurred as a result of acts committed by the UN and its peacekeeping operation MINUSTAH, as well as for the consequent human rights violations they have suffered. Since their claims (which are brought by private individuals represented by non-governmental organizations and private law firms) sound in private law tort,<sup>20</sup> the UN has an obligation to settle those claims pursuant to Section 29 of the CPIUN and Article 54 and 55 of the SOFA.

***C. The Response's asserted "policy or political matters" exception has no basis in law.***

Notwithstanding the UN's well-established obligations discussed above, the Response asserts that Petitioners' claims are "not receivable" because considering them "would necessarily include a review of political or policy matters." The Response cites no legal authority for any "political" or "policy" related exception to the UN's obligation to hear claims, nor in fact does any such exception exist. Moreover, assuming *arguendo* that such an exception existed, it would not excuse the UN from hearing Petitioners' claims.

Nowhere does the CPIUN or SOFA excuse the UN's obligation to settle private law claims that entail a review of political or policy matters. Similarly, none of the documents generally establishing the scope of the UN's legal obligations toward third parties (such as relevant General Assembly resolutions,<sup>21</sup> Secretary-General reports, or publicly-available opinions of the UN's own legal office<sup>22</sup>) creates such a carve-out. Rather, those documents exempt the UN from its obligation to settle third-party private law claims *only* for claims of harms resulting out of operational necessity — an exception which is not at issue and the UN has not invoked in this case.

The only UN document to mention "political or policy-related" claims characterizes such claims as those "denouncing the policies of the Organization and alleging that specific actions of the General Assembly or the Security Council have caused the claimant to sustain financial losses."<sup>23</sup> This characterization seems to refer to petitions that, for example, seek compensation for business losses incurred as a result of sanctions imposed on a government by a Security Council resolution. Petitioners' have not asserted any such "political or policy-related" claims. Nothing in Petitioners' claims relates to

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<sup>19</sup> N.M. and Others v. UNMIK, Case No. 26-08, Decision of Mar. 31, 2010 (Hum. Rts. Advisory Panel).

<sup>20</sup> See Petitioners, Petition for Relief, ¶¶ 1, 2, & 18-20 (Nov. 3, 2011) (stating that the basis for the claim is the UN's negligence, gross negligence, recklessness and depraved indifference to human life).

<sup>21</sup> See, e.g., G.A. Res. 52/247, *supra* note 14 (delineating compensable types of injuries and endorsing operational necessity as an exemption from liability, but making no mention policy or politics as an exception).

<sup>22</sup> See 1967-2011 U.N. Jurid. Y.B.; International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, U.N. Doc. A/CN.4/637/Add.1 (Feb. 17, 2011).

<sup>23</sup> Report of the Secretary General on the Procedures of Article VIII, Section 29, *supra* note 137.

actions of the General Assembly or the Security Council (unless the UN is suggesting that the malfeasance it committed in Haiti rises to the level of a deliberate General Assembly or Security Council policy). Nor are Petitioners seeking compensation for policy-induced financial losses.<sup>24</sup>

Even if such an exception were more broadly construed, Petitioners' claims do not seek a review of any UN policy or politics at any level. They seek reparations for injuries resulting from the UN's negligent omission to adequately screen troops for cholera prior to deployment, and its reckless acts that caused untreated, contaminated human waste to leak into and poison Haiti's central river, in accordance with the UN's agreement to pay for its tortious liability.<sup>25</sup> Such claims for personal injury are universally actionable around the world.<sup>26</sup> If the UN separately chooses to review its policies so as to prevent similar harms and liability in the future, that is a decision the UN is free to make, but it is neither a remedy sought by Petitioners nor a necessary precursor to providing Petitioners with just compensation for the injury they have suffered.

Even if Petitioners' claims implicated matters of UN policy, that would not change their nature so as to render them unreceivable.<sup>27</sup> As the International Court of Justice has noted, matters involving the UN often have political significance and may be intertwined with political questions, but that does not provide a valid reason for refusing to review those matters.<sup>28</sup>

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<sup>24</sup> As explained above, Petitioners only seek compensation for financial losses that have resulted from personal injury or death — precisely the type of loss the UN has explicitly agreed to compensate. *See* G.A. Res. 52/247, *supra* note 17 (identifying economic loss resulting from personal injury or death as compensable).

<sup>25</sup> Memorandum to the Controller, *supra* note 8.

<sup>26</sup> The International Commission of Jurists surveyed comparative law globally and concluded that “[i]n every jurisdiction, despite differences in terminology and approach, an actor can be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else.” REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ), REPORT OF THE ICJ EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, VOL. III CIVIL REMEDIES, 10 (2008).

<sup>27</sup> *See, e.g.*, Interpretation of the Agreement Signed of 25 March 1951 Between the World Health Organization and the Government of Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 33 (Dec. 20) (finding a claim to be reviewable, despite its “allegedly political character”); *id.*, opinion of J. Gros (“the question put to the Court is intertwined with political questions,” but that is not a reason for refusing to examine the question [at issue]...”). Domestic legal systems that limit certain purely political questions from being adjudicated in courts still maintain that claims for compensation for tortious harms are reviewable in court, even if they touch on political matters. In the United States, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”); *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005) (holding that “[s]imply because a foreign bank is involved and the case arises out of a ‘politically charged’ context does not transform [claims for conversion, unjust enrichment, restitution, and an accounting] into political questions,” and finding those claims to be justiciable); in France, *see e.g.*, *Compagnie générale d’énergie radio-électrique*, Conseil d’Etat, 30 March 1966 (while certain political acts concerning foreign affairs are non-judicial, tort actions of individuals against the French government for individualized harms are, even when they arise from international agreements).

<sup>28</sup> Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 155 (July 20).

The UN's refusal to address Petitioners' claims on the grounds that they implicate political or policy matters is untenable and has two dangerous consequences for the UN and its commitment to promoting human rights. *First*, it implies that the UN's tortious dumping of raw sewage into rivers of vulnerable countries where it operates is a matter of UN policy. *Second*, it would carve out an exception to Section 29 that is so broad as to swallow the UN's obligation to compensate. If Petitioners' claims involve a review of policy or political matters so as to render it non-receivable, it is difficult to imagine what type of claim would not involve such a review. Nearly all UN acts and omissions that result in injury to third parties could be construed to touch on matters of "policy" at some level. For example, the UN has routinely compensated for third party injury resulting from car accidents caused by UN peacekeepers, but even such relatively minor accidents could be said to involve a review of the "policies" that led to the UN vehicle taking that route; the training, supervision and regulation of UN drivers; and the maintenance of vehicles. Such a situation may spur the UN to review the process and policies that led to the injury-causing error, but this does not, and should not, affect the UN's obligation to compensate the injured third party. If it were so, very few situations would remain where the UN retained an obligation to compensate third parties injured by its actions, essentially rendering the critical promise in Section 29 meaningless.

## **II. THE UN CONTINUES TO HAVE OUTSTANDING OBLIGATIONS TO VICTIMS OF UN CHOLERA IN HAITI.**

Cholera is an ongoing emergency in Haiti, and unless adequate measures are taken to control the epidemic, hundreds of thousands of Haitians will continue to fall sick and die over the coming years. In its letter of February 21st, the UN acknowledged that the outbreak of cholera in Haiti has been "catastrophic." Between January and March 2013, twice as many people died from cholera as compared to the same period the year prior.<sup>29</sup> The UN Secretary-General himself has stressed that the situation is "particularly worrying since non-governmental organizations that responded at the beginning of the epidemic are phasing out their support for lack of funding."<sup>30</sup>

In their Petition for Relief, Petitioners requested that the UN work with the Government of Haiti to establish and fund a countrywide program for clean water, adequate sanitation, and appropriate medical treatment to prevent the further spread of cholera. Petitioners stressed that the funds for this program should be furnished by the UN and allocated for measures that will end the cholera epidemic, including measures that improve (i) water quality and access; (ii) sanitation conditions; and (iii) access to medical services.

In your letter of February 21st, you stated that the UN has "expended considerable efforts and resources in combating cholera and improving Haiti's water and sanitation facilities, training, logistics and early warning systems." The fact that over 680,000 people have been sickened by cholera and over 8,000 have died since the start of the outbreak in

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<sup>29</sup> Official Daily Mortality Reports, Ministère de la Santé Publique et de la Population (Jan-Mar).

<sup>30</sup> The Secretary-General, *Report of the Secretary-General on the UN Stabilization Mission in Haiti*, ¶ 45, U.N. Doc. S/2012/678 (Aug. 31, 2012), available at [www.un.org/Docs/journal/asp/ws.asp?m=S/2012/678](http://www.un.org/Docs/journal/asp/ws.asp?m=S/2012/678).

2010 (including 1,000 new recorded deaths in the last year) demonstrates that the UN's efforts have been highly inadequate to stop the suffering from the UN-caused harm, and that a more urgent response is needed to properly address this crisis.

The Haitian Government, in partnership with the Pan-American Health Organization, UNICEF, and U.S. Centers for Disease Control, has determined that it will take ten years and cost \$2.2 billion to eliminate the cholera that the UN brought to Haiti. On 27 February 2013, the Haitian Government launched a full plan for the elimination of cholera, and appealed to the international community for support. In your letter, you noted that the Secretary-General has committed \$23.5 million in support of the Haitian Government's initiative. While this represents a positive step, the amount represents a mere 1% of the total needed, and cannot be considered an adequate response to the crisis in Haiti. Given that it triggered the epidemic in Haiti, the UN has a legal and moral obligation to ensure that this cholera initiative is fully and immediately funded.

Moreover, in addition to reparations in the form of a comprehensive water and sanitation program and just compensation for the victims, Petitioners seek a public acknowledgment and apology from the UN for the thousands of deaths and innumerable amount of suffering it has caused. The UN made no mention of this request in its response. Petitioners also requested that the UN take prompt action to establish a standing claims commission in accordance with its commitments under the SOFA to hear the claims in an independent, transparent matter. Petitioners interpret the UN's silence on the matter as an indication that the UN has no intent of fulfilling this obligation, and requests that the UN inform petitioners immediately if this is not the case.

### **III. PRAYER FOR A PROMPT RESPONSE.**

In light of the fact that the UN's letter of February 21 leaves many outstanding questions regarding Petitioners' claims, and in consideration of the UN's commitment to transparency and the rule of law, Petitioners request a meeting with the UN's Office of Legal Affairs to discuss this matter. Petitioners seek to understand what reasonable legal explanation exists for why their claims may not be "receivable" under Section 29. They also seek to work towards resolving this matter amicably, in furtherance of both parties' expressed dedication to combatting the ill-effects of cholera in Haiti and to containing and eradicating the current epidemic.

Alternatively, Petitioners request that the UN consent to mediation regarding the reviewability and merits of their claims by an independent mediator (mutually agreed upon by both parties). Petitioners believe that mediation may facilitate an expeditious resolution of this matter, help avoid litigation, and provide a just resolution to Petitioners' claims.

If Petitioners do not receive a timely response to this letter within 60 days, they will be left with no other option than to file suit against the UN so as to pursue a fair resolution of their claims in a court of law.



Respectfully submitted on May 7, 2013



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