UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-455-cv

Caption [use short title]

GEORGES
-v.-
UNITED NATIONS

Motion for: Leave to File a Brief as Amici Curiae in Support of Plaintiffs-Appellants

Set forth below precise, complete statement of relief sought:

Pursuant to this Court's order dated January 22, 2016, certain European law scholars and practitioners respectfully move this Court for leave to re-file the accompanying BRIEF OF EUROPEAN LAW SCHOLARS AND PRACTITIONERS in accordance with Rule 29(b) of the Federal Rules of Appellate Procedure.

MOVING PARTY: Amici Curiae European Law Scholars
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: See Attached Addendum

MOVING ATTORNEY: Jennifer Doucleff

OPPOSING ATTORNEY: See Attached Addendum

[name of attorney, with firm, address, phone number and e-mail]

Strandboulevarden 35, 2100 Copenhagen,Denmark
+4550186778
mlleduke@yahoo.com

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York, Hon. J. Paul Oetken

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☐ Yes ☑ No (explain): The opposing party has not entered an appearance in this matter.

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/Jennifer Doucleff **Date:** February 23, 2016

Service by: ☑ CM/ECF ☑ Other [Attach proof of service]

ADDENDUM

United Nations – Pro Se
United Nations Headquarters
Office of Legal Affairs, Office of the Under-Secretary-General
S-3675
44th street and 1st avenue
New York, NY 10017

United Nations Stabilization Mission in Haiti – Pro Se
United Nations Headquarters
Office of Legal Affairs, Office of the Under-Secretary-General
S-3675
44th street and 1st avenue
New York, NY 10017

Edmond Mulet – Pro Se
United Nations Headquarters
Office of Legal Affairs, Office of the Under-Secretary-General
S-3675
44th street and 1st avenue
New York, NY 10017

Ban Ki-moon – Pro Se
United Nations Headquarters
Office of Legal Affairs, Office of the Under-Secretary-General
S-3675
44th street and 1st avenue
New York, NY 10017

15-455

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DELAMA GEORGES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DESILUS GEORGES AND ALL OTHERS SIMILARLY SITUATED, ALIUS JOSEPH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIE-CLAUDE LEFEUVE AND ALL OTHERS SIMILARLY SITUATED, LISETTE PAUL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FRITZNEL PAUL AND ALL OTHERS SIMILARLY SITUATED, FELICIA PAULE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JEAN RONY SILFORT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED NATIONS, UNITED NATIONS STABILIZATION MISSION IN HAITI, EDMOND MULET, FORMER UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI, BAN KI-MOON, SECRETARY-GENERAL OF THE UNITED NATIONS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

MOTION OF EUROPEAN LAW SCHOLARS AND PRACTITIONERS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Jennifer Doucleff
Strandboulevarden 35
2100 Copenhagen, Denmark
+4550186778
Counsel for Amici Curiae

Pursuant to this Court's order dated January 22, 2016, certain European law scholars and practitioners respectfully move this Court for leave to re-file the accompanying BRIEF OF EUROPEAN LAW SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS ("Brief") in the above-captioned matter in accordance with Rule 29(b) of the Federal Rules of Appellate Procedure. A full list of amici is set forth in the addendum to the Brief, pp. 21-23. In support of this motion, *amici* state as follows:

INTERESTS OF *AMICI CURIAE*

Prospective *amici curiae* are legal scholars and practitioners of human rights law and international law in Europe. Together, *amici* have substantial experience researching, publishing and litigating on the approach of European courts to international organization immunity. In particular, *amici* possess expertise in how courts confronted with international organization immunity in jurisdictions outside the United States have applied such immunity in a manner that comports with international law and respects individuals' human right to access effective remedies. *Amici* have a strong interest in ensuring that immunity is not interpreted in a way that violates this right. They submit their brief in support of Plaintiffs-Appellants' position that immunity should not be accorded in this case, where

doing so would deny Plaintiffs-Appellants' access to any means to obtain redress for the harms they have suffered.

THE PROPOSED *AMICI CURIAE* BRIEF IS DESIRABLE AND THE MATTERS ASSERTED THEREIN ARE RELEVANT TO THE DISPOSITION OF THE CASE

The pending case raises the question of how to balance the immunity of an international organization against the fundamental individual human right of access to an effective remedy. As scholars and practitioners of European law, *amici* have meaningful knowledge of how courts in jurisdictions outside the United States have approached this issue. *Amici* seek to provide the Court with a discussion and analysis of how European courts have evaluated the immunity necessary for international organizations to achieve their purposes when such immunity conflicts with individual human rights. Specifically, *amici* wish to explain the balancing approach that most European courts have applied when confronted with this issue.

Counsel for the Plaintiffs-Appellants consent to the filing of the Brief. Because Defendants-Appellees have not entered an appearance in this case, their consent to the filing of the Brief has not been obtained. Accordingly, this motion is necessary. No party will be prejudiced if *amici* are permitted to file their Brief. Should Defendants-Appellees desire to respond to anything in the Brief, they have the opportunity to do so.

CONCLUSION

Amici curiae are well-positioned to offer advice to this Court on how European courts have assessed international organization immunity by weighing it

against the individual human right of access to an effective remedy, and believe that their expertise will be of assistance to this Court in resolving the issues raised by this case. In view of the foregoing, *amici* respectfully request that the Court grant this motion for leave to file the accompanying *amici curiae* brief in the above-captioned matter.

DATED: February 23, 2016

Respectfully submitted,

/s/: Jennifer Doucleff
Jennifer Doucleff
Strandboulevarden 35
2100 Copenhagen
Denmark
+4550186778

Counsel for European Law Scholars and Practitioners as Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2016, a true and correct copy of the foregoing document was served via mail, on the following:

United Nations
1 United Nations Plaza
New York, NY 10017

MINUSTAH headquarters
Log Base
Boulevard Toussaint Louverture and Clercine 18
Port-au-Prince, Haiti

Ban Ki-Moon
3 Sutton Place
New York, NY 10022

Edmond Mulet
429 East 52nd Street
Apartment 36A-E
New York, NY 10022

Copies of the same have also been sent via electronic mail to the following:

Ellen Blain, Esq.
Assistant United States Attorney
ellen.blain@usdoj.gov

Nicholas Cartier, Esq.
United States Department of Justice
nicolas.cartier@usdoj.gov

Respectfully submitted,

/s/: Jennifer Doucleff

15-455

UNITED STATES OF APPEALS
FOR THE SECOND CIRCUIT

DELAMA GEORGES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DESILUS GEORGES AND ALL OTHERS SIMILARLY SITUATED, ALIUS JOSEPH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIE-CLAUDE LEFEUVE AND ALL OTHERS SIMILARLY SITUATED, LISETTE PAUL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FRITZNEL PAUL AND ALL OTHERS SIMILARLY SITUATED, FELICIA PAULE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JEAN RONY SILFORT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

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v.

UNITED NATIONS, UNITED NATIONS STABILIZATION MISSION IN HAITI, EDMOND MULET, FORMER UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI, BAN KI-MOON, SECRETARY-GENERAL OF THE UNITED NATIONS,

Defendants-Appellees.

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

BRIEF OF EUROPEAN LAW SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

Jennifer Doucleff, Esq.
Strandboulevarden 35
2100 Copenhagen, Denmark
+4550186778
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae[1] are professors and scholars of European and human rights law who have substantial experience researching, publishing and litigating on international organization immunity in European courts.[2] In particular, *amici* possess expertise in how courts confronted with international organization immunity in jurisdictions outside the United States have applied such immunity in a manner that comports with international law and respects individuals' human right to access effective remedies. *Amici* have a strong interest in ensuring that immunity is not interpreted in a way that violates this right. They submit their brief in support of Plaintiffs-Appellants' position that immunity should not be accorded in this case, where doing so would deny Plaintiffs-Appellants' access to any means to obtain redress for the harms they have suffered.

Therefore, *amici* respectfully seek to leave to file an *amicus curiae* brief pursuant to Fed. R. App. P. 29 and Local Rule 29.1, in support of Plaintiffs-Appellants' Principal Appellate Brief and in support of reversal of the District Court's decision to dismiss their case. The proposed brief is submitted herewith.

[1] The Plaintiffs-Appellants have consented to the participation of *Amici* in this case. Because the Defendants-Appellees have not appeared in this case, their consent could not be requested pursuant to Fed. R. App. P. 29 and Local Rule 29.1. *Amici Curiae* represent that no party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

[2] A complete list of *amici* appears in the appendix hereto.

ARGUMENT

1. INTRODUCTION

The present case involves an issue of increasing importance as international organizations ("IO") have come to play a greater role globally: how to weigh the immunity necessary for these organizations to conduct their work without interference against the need to protect individuals' fundamental right to access justice. The central question presented in this case – whether the court should grant the United Nations ("UN") immunity under the Convention on the Privileges and Immunities of the United Nations ("CPIUN") when it has failed to provide access to alternative means to seek redress – has not previously been addressed by US courts. But European courts in countries where IOs are headquartered have long grappled with this question. To address these competing interests, European courts have adopted a balancing approach whereby their recognition of IO immunity requires a showing that adversely affected individuals have access to reasonable alternative means to seek remedies.

Importantly, European courts consider the availability of alternative means a material factor even where the immunity in question is "absolute" in nature, and have declined to grant IOs that immunity where the IO has denied access to an alternative remedy. European courts have often dealt with immunity agreements that are similar or even identical in their terminology CPIUN — as in the numerous

cases concerning UN Specialized Agencies. *Compare* CPIUN, § 2, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, *with* Convention on the Privileges and Immunities of the Specialized Agencies, § 4, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter CPISA] ("The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process…."); *Compare also* CPIUN, *supra*, § 29 *with* CPISA, *supra*, § 31 ("Each specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party."). Not all of the cases considered by European courts have directly involved the UN, in part because cases against an IO are most likely to be brought where that IO is headquartered, which in the case of the UN is New York. But the important principles underpinning the European jurisprudence in this area, and particularly the fundamental importance of the access to justice, are equally relevant even where the cases deal with other types of IOs.

Given the UN's complete denial of access to reasonable alternative means to seek remedies in the present case, this Court should act consistently with the approach of foreign courts to deny Defendants immunity for their responsibility in Haiti's cholera epidemic and afford the Plaintiffs access to the Court.

2. THE UN MUST PROVIDE PLAINTIFFS WITH A REASONABLE ALTERNATIVE MEANS OF ACHIEVING JUSTICE IN ORDER TO ENJOY ITS IMMUNITY

2.1. The UN's Immunity Must Be Balanced Against Plaintiffs' Fundamental Due Process Rights

The case at hand, like most cases that involve IO immunity, essentially concerns a conflict between two opposing principles: on the one hand, the immunity that allows an IO to execute the functions it was established to conduct, and on the other hand the obligation of states to uphold the due process rights of effective remedy and access to court vis-à-vis individual plaintiffs.[3] The fundamental importance of these latter rights is not in dispute, and indeed affirmed by the UN itself in Article 8 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), and again more recently in the 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 (Dec. 16, 2005).

However, as the Plaintiffs in this case have been denied access to any alternative form of process for the harms they have experienced, a grant of immunity to the UN would be an effective denial of their right to a remedy.

[3] The right of access to courts is a crucial component of the human right to an effective remedy, a key due process rights. The UN defines the right to a remedy to include: "(*a*) Equal and effective access to justice; (*b*) Adequate, effective and prompt reparation for harm suffered; and (*c*) Access to relevant information concerning violations and reparation mechanisms." 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, ¶ 11, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

European courts recognize that IO immunity can directly interfere with individuals' ability to enjoy the right to a remedy if IOs do not provide a reasonable alternative means of resolving disputes. Hence European courts broadly have accepted that granting such immunities is only lawful if balanced with adversely affected individuals' due process rights. *See, e.g.*, *Waite and Kennedy v. Germany*, 1999-I Eur. Ct. H.R. 393.

2.2. The European Court of Human Rights has Established that Access to Reasonable Alternative Means of Redress is a Material Factor in According IO Immunity

In *Waite and Kennedy*, the European Court of Human Rights ("ECtHR") issued a clearly articulated ruling on how the balance of immunity and the right of access to a court should be drawn. 1999-I Eur. Ct. H.R. 393. The Court recognized the importance of IOs in fostering international cooperation and the need for these organizations to operate without undue interference by individual governments. *Id.* ¶ 63. The ECtHR further acknowledged that the right of access to court contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], is not absolute. *Waite and Kennedy*, 1999-I Eur. Ct. H.R., ¶ 59. However, the Court cautioned that a state's ECHR responsibilities to protect individuals' fundamental fair trial rights remain intact when extending immunity to IOs. *Waite and Kennedy*, 1999-I Eur. Ct. H.R., ¶ 67. The Court thus resolved that a material factor in

assessing the lawfulness of a state's grant of immunity is whether the organization in question has a system in place that provides a "reasonable alternative means" for individuals to obtain effective protection of their rights under the ECHR. *Id*., ¶ 68; *see also* Riccardo Pavoni, *Human Rights and the Immunities of Foreign States,* in *Hierarchy in International Law: The Place of Human Rights,* 104-05 (Erika de Wet & Jure Vidmar eds., 2012) (emphasizing the crucial importance of the availability of a "reasonable alternative means" in European jurisprudence before and after *Waite and Kennedy*).

The ECtHR has continued to underscore the importance of the availability of a "reasonable alternative means" in its last two opportunities to confront questions of IO immunity. In *Klausecker v. Germany*, the plaintiff sought to challenge the German courts' refusal to hear his employment dispute with the European Patent Office. App. No. 415/07, Eur. Ct. H.R. (2015) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001- 151029, ¶¶ 6-16. In upholding the German court's decision, the Court relied on the availability of an internal arbitration process, emphasizing:

> Having regard to the importance in a democratic society of the right to a fair trial, of which the right of access to court is an essential aspect, the Court therefore considers it ***decisive*** whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention.

Id., ¶ 69 (emphasis added). In *Perez v. Germany*, the court elaborated on this principle, ruling that national courts could decline to enforce immunity if the alternative means for redress were inadequate. App. No. 15521/08, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-151049., ¶¶ 47-50. The plaintiff brought suit directly before the ECtHR, arguing that she had implicitly exhausted the requirement of exhausting domestic remedies because the German courts would grant immunity to the UN Development Program ("UNDP"), and dismiss her case. The Court disagreed, holding that the German courts could deny immunity and have jurisdiction to review the plaintiff's claims, finding in important part that UNDP's internal dispute resolution mechanism was structurally deficient and would likely fail to meet the human rights protections required by the German constitution and the ECHR. *Id*., ¶¶ 82-90. Both of these cases thus confirmed the centrality of the availability of a "reasonable alternative means" to a grant of IO immunity by the ECtHR.

2.3. National Courts in Europe Require a Reasonable Alternative Means in Order to Grant Immunity to IOs

The *Waite and Kennedy* "reasonable alternative means" test is representative of the balancing approach widely adopted among European domestic courts. *See* August Reinisch, *The Personality, Privileges, and Immunities of International Organizations before National Courts—Room for Dialogue,* in *The Privileges and Immunities of International Organizations in Domestic Courts*, 332 (August

Reinisch ed., 2013). These courts assess the availability of reasonable alternative means as a key factor in deciding whether to grant immunity to an IO. Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 Int'l Org. L. Rev. 121, 136 (2010). The jurisprudence of Italy, France, Belgium, and the Netherlands is particularly relevant to this case, and is discussed in detail below.

In Italy, courts have linked immunities to the right of access to justice since 1955, when the Italian Supreme Court denied the immunity of the UN International Refugee Organization, a specialized agency governed by the CPISA, due to a lack of procedural rules regarding its arbitral process. *Maida v. Admin. for Int'l Assistance*, Cass., sez. un., 27 maggio 1955, 39 Rivista di diritto internazionale 546 (1956) (It.), *English summary in* 23 I.L.R. 510 (1955); *see* CPISA, *supra*, Annex X (applying clauses without modification to the IRO); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166. The Italian courts consider the legality of immunity to be conditional on individual claimants' access to alternative remedies.[4] These alternative means may consist of internal procedures, as long as these are independent and impartial.

[4] This linkage is true both for questions of IO immunity and for those of state immunity, as illustrated by a recent case in which the Italian Constitutional court declined to grant Germany immunity from allegations of humanitarian law violations during World War II given the lack of alternative fora for victims to seek redress. *Simoncioni and Others v. Germany and President of the Council of Ministers*, Corte cost., 29 ottobre 2014, No. 238/2014, Gazz. Uff. 45, ILDC 2237 (It.).

Pistelli v. Eur. Univ. Inst., Cass., sez. un., 28 ottobre 2005, No. 20995, ILDC 297 ¶¶ 14.1-14.3 (It.); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166. Italian courts regard upholding an IO's immunity as unlawful in cases where the procedures for an alternative remedy are inadequate. *See Drago v. Int'l Plant Genetic Res. Inst.*, Cass., sez. un., 19 febbraio 2007, No. 3718, ILDC 827 ¶ 6.6 (It.); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166.

French courts have regularly refused to allow immunity where reasonable alternative means are not available. The French Court of Appeal withheld immunity from UNESCO, a UN agency, deciding that immunity from jurisdiction should not be a means to escape from the principle of *pacta sunt servanda*, which in that case required the UN agency to appoint an arbitrator as per the arbitration clause in the contract it had entered with the claimant. *UNESCO v. Boulois*, Cour d'Appel [CA] [regional court of appeal] Paris, 14e Ch. A, June 19, 1998, Revue de l'Arbitrage 1999, II, 343 (Fr.), *translated in* 1999 Y.B. Com. Arb. XXIV 294. The Court of Appeal required this arbitration even though UNESCO's presence in France is governed by the France-UNESCO agreement and CPISA, which confer absolute immunity in language virtually identical to that of CPIUN. *Compare* CPIUN, *supra*, § 2 *with* France-UNESCO Headquarters Agreement, Fr.-U.N., art.

12, July 2, 1954 ("The Organization, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process…") *and* CPISA, *supra*, § 4.

In another case, the French Court of Cassation decided to give no effect to the near-absolute immunity conferred by the Agreement Establishing the African Development Bank because there was no internal tribunal that could decide a dispute between the Bank and a former employee. *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] [supreme court for judicial matters], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (Fr.); *see also* Agreement Establishing the African Development Bank, ¶ 52, Aug. 4, 1963, 510 U.N.T.S. 3. Moreover, in the case of the Arab League, the Court of Cassation ruled that IOs cannot invoke immunity with regard to acts that are by their nature and purpose excluded from the 'sovereignty' of the organization and that granting immunity in that case would result in a violation of Article 6 of the ECHR. *Ligue des Etats Arabes*, Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., Oct. 14, 2009, Bull Civ. I, No. 206 ¶ 3 (Fr.).

Belgium's highest court, the Court of Cassation, rejected the immunity of the Western European Union because the IO's internal dispute settlement procedure did not meet the required guarantees, and could not be regarded as a fair and equitable legal process. *W. European Union v. Siedler*, Cour de Cassation

[Cass.] [supreme court for judicial matters], Dec. 21, 2009, AJIL Vol. 105, No. 3, pp 561 (July 2011), No. S.04.0129.F (Belg.)

In the Netherlands, the District Court of The Hague found that upholding the immunity of the Permanent Court of Arbitration would violate the right to access to court where the dispute resolution mechanism established in the Headquarters Agreement never became operational. *Pichon-Duverger* v. *PCA*, District Court of The Hague (sub-district section), judgment in the incidental proceedings, June 27, 2002, cause list no. 262987/02-3417 (not published) (*as discussed* in Rosanne Van Alebeek & Andre Nollkaemper, *The Netherlands,* in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166).

3. IMMUNITY IS NOT REQUIRED HERE WHERE THE UN CARRIED OUT ACTS OF A PRIVATE NATURE THAT WERE NOT NECESSARY TO ITS CORE FUNCTIONS

3.1. IO Immunity Follows from Functional Necessity, and Should Not Be Upheld Where No Necessity Exists

Many courts have held that IO immunity follows from the idea of functional necessity, and, thus, not all IO acts must be shielded from national court jurisdiction. Jan Klabbers, *An Introduction to International Organizations Law* 132 (3d ed. 2015). IOs possess immunity to the extent that it enables them to effectively carry out the tasks entrusted to them by Member States without undue interference. Henry Schermers & Niels Blokker, *International Institutional Law: Unity Within Diversity* 258-259 (5th ed. 2011). Thus, the immunities granted to IOs

constitute "a more limited breed of international immunities" compared to those of states. Charles H. Brower, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1, 18 (2000). Functional necessity is a ground for immunity, but at the same time also a limitation thereof, since an IO's immunity is intended to cover only conduct that is necessary for it to carry out its functions. Schermers & Blokker, *supra* at 258.

Certain acts and omissions are more closely related to the core of an IO's functions than others, and this should affect the balancing test that determines whether IOs are entitled to immunity. In *African Development Bank*, the French Court required that immunity be necessary to an IO's function even where there was a written agreement that facially conferred near absolute immunity. In denying the Bank's immunity, the Court held that: "the fact that ADB is forced to defend itself before a French Court on the merits of the dispute over the dismissal of Mr. Degboe is not such as to impair ADB's efficient functioning." *Banque africaine de developpement*, Bull. civ. V, No. 04-41.012 (Fr.).

3.2. IO Immunity Should Not Be Upheld in Instances Where IOs Commit Acts of a Private Nature That Do Not Fall Within Their Core Functions

Generally, IOs are established by States to carry out certain functions, Klabbers, *supra*, at 7, and exercise elements of public authority delegated to them. Armin von Bogdandy et al., *Developing the Publicness of Public International*

Law: Towards a Legal Framework for Global Governance Activities, 9 Ger. L. J. 1375, 1381 (2008); Klabbers, *supra*, at 50. This does not mean, however, that all IO conduct can be qualified as an exercise of public authority. Certain conduct IOs engage in is simply incidental to their main purpose, and can be characterized as being of a private nature.

Under the doctrine of state immunity, *acte jure imperii* (acts of a sovereign nature) are distinguished from *acte jure gestionis* (acts of a private nature). Hazel Fox and Philippa Webb, *The Law of State Immunity* 23 (3d ed. 2013). Today, States only enjoy immunity before the courts of other States in relation to acts that can be qualified as *iure imperii*: acts that involve the exercise of an element of State sovereignty. *Id*. In contrast, when a State operates in a manner similar to a private party, such as entering into a contract or committing a tort of a private nature, it cannot rely on its immunity before the courts of another State. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). ("Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts *(jure imperii)*, but not as to those that are private or commercial in character *(jure gestionis)*"); *see also Typaldos Console di Grecia v Manicomio di Aversa*, cass., sez. un., 16 marzo 1886, Giur. It. I, 228 (It.).

With regard to IO conduct, a number of European courts have drawn a similar distinction between conduct that is closely related to the core of an IO's functions or entails an exercise of public authority and conduct that touches upon the functions of the IO in a more peripheral manner or cannot be distinguished from conduct of a private entity. *See Ligue des Etats Arabes* at ¶ 3; *Pichon-Duverger*, cause list no. 262987/02-3417; *Food & Agric. Org. v. INPDAI*, Cass., sez. un., 18 ottobre 1982, No. 5399, 87 ILR 1 (It.) ("whenever [IOs] acted in the private law domain, they placed themselves on the same footing as private persons …, and thus forwent the right to act as sovereign bodies that were not subject to the sovereignty of others."). Where an IO's conduct entails no element of public authority, and does not touch upon the core of the exercise of its functions, there is no reason to shield it from judicial scrutiny. In the present case, the personal injury results from tortious conduct in waste disposal that is ancillary to the UN's mandate of supporting political stability in Haiti. Thus the conduct complained of does not entail an exercise of public authority and there is no basis to exempt the UN from the jurisdiction of the courts in the absence of a reasonable alternative means of vindicating plaintiffs' rights.

4. IMMUNITY IS NOT REQUIRED HERE WHERE THE UN'S MISCONDUCT DOES NOT CONCERN PEACE AND SECURITY

European courts have been more protective of UN immunity in cases where the underlying conduct concerned the discharge of the UN's core function to

protect international peace and security, but that is not a relevant concern in the present case. In *Mothers of Srebrenica*, a case considered by the Dutch courts and the ECtHR, surviving relatives sought to hold the UN accountable for the abandonment of the peacekeeping force's duty to protect a group of Bosnian Muslims in the former Yugoslavia. The ECtHR confirmed that ECHR Article 6 was not abrogated by the Dutch Supreme Court's decision to preserve the UN's absolute immunity under these circumstances. *Stichting Mothers of Srebrenica and Others v. Netherlands*, App. No. 65542/12, Eur. Ct. H.R. (2013); *Stichting Mothers of Srebrenica v. Netherlands*, LJN: BW1999, ILDC 1760 ¶ 4.3.6 (Neth).

The ECtHR distinguished *Mothers of Srebrenica* from earlier cases addressing the immunity of a variety of IOs, finding that the UN Security Council ("UNSC") use of its Chapter VII powers to preserve international peace and security could not be subjected to the jurisdiction of domestic courts, since doing so would "interfere with the fulfilment of the key mission of the United Nations in this field." *Id*., ¶¶ 149-151, 154. The Court thus determined the absence of an alternative remedy did not sufficiently outweigh the UN's interest of maintaining immunity for UNSC operational decisions made pursuant to its Chapter VII powers. *Id*., ¶¶ 163-165, 169.

Thus, because it dealt with the discretion of the UNSC when operating within its core Chapter VII functions to direct peacekeeping efforts in active armed

combat, *Mothers of Srebrenica* can be strictly distinguished from this case involving the issue of whether the UN observed proper waste management procedures in the context of a cholera outbreak in Haiti. A review of the merits of this case would in no way interfere with the exercise by the UNSC of the special powers it was granted under the UN Charter.

Moreover, notwithstanding the ruling in *Mothers of Srebenica*, European courts that have been confronted with similar conflicts between the UN's core functions and protection of individual rights have increasingly emphasized the importance of safeguarding due process rights. In a number cases involving a targeted sanctions regime imposed upon UN member states by the UNSC acting pursuant to its Chapter VII powers, European courts observed the obligation to provide access to justice and safeguard individuals' human rights, requiring national courts to provide individual claimants with a remedy where the UN had not provided one. *See Kadi & Al Barakaat Int'l Found v. Council & Commission*, 2008 E.C.R. I-06351, ¶¶ 321-22 (finding that because individuals adversely affected by the UNSC imposed sanction regimes would not have access to an effective remedy at the UN level, European Union Constitutional principles required the courts of UN member states to provide for such protection); *Nada v. Switzerland*, 2012 Eur. Ct. H.R. 1691, ¶¶ 209, 213 (holding that the State involved in implementing these measures should provide the individuals concerned with an

effective remedy, particularly since these individuals would find no adequate remedy at the UN level). Among these cases, *Al-Dulimi & Mont. Mgmt. Inc. v. Switzerland* is particularly significant because for the first time the ECtHR explicitly submitted the UN to its "equivalent protection" doctrine which presumes that so long as IOs offer human rights protections equivalent to those established under the ECHR, the implementing measures states adopt pursuant to their IO obligations also conform with ECHR standards. 2013 Eur. Ct. H.R. 1173, ¶¶ 115-21. However, this presumption was rebutted by the court's finding that "as long as there is no effective and independent judicial review, at the level of the [UN]…it is essential that such individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime." *Id.* ¶ 134.

European courts have also concluded that obligations created by the UNSC must be interpreted in accordance with fundamental human rights principles. *See, e.g.*, *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305, ¶ 102; *Nada*, 2012 Eur. Ct. H.R. 1691, ¶¶ 170-71; *Ahmed & Others v. HM Treasury* [2010] 4 All ER 745 (U.K. Sup. Ct.); *Ahmed & Others v. HM Treasury (No. 2)*, Note, [2010] 4 All ER 829 (U.K. Sup. Ct.); *Netherlands v. A & Others*, [2012] LJN:BX8351, ILDC 1959 ¶ 3.6.2 (Neth.). Recognizing that the UN Charter requires the UNSC to "discharge its duties in accordance with the Purposes and Principles of the United

Nations", courts have presumed that the UNSC does not intend states to take measures that would result in a breach of their duties to respect human rights and fundamental freedoms. *Al-Jedda*, 2011-IV Eur. Ct. H.R. 305, ¶ 102 (quoting UN Charter Art. 24, para. 2); *Nada*, 2012 Eur. Ct. H.R. 1691, ¶ 171; *see also Stichting Mothers of Srebrenica v. Netherlands*, [2010] LJN: BL8979, ILDC 1760 ¶ 5.5 (Court of Appeal) (Neth.). Accordingly, this court must interpret its immunity obligations towards the UN in light of the UN Charter's broader human rights principles. It should be presumed that the UN would not expect the courts of a Member State to exempt the organization from answering claims of accountability for tortious conduct if doing so would entirely foreclose plaintiffs from enjoying their human right of access to justice.

CONCLUSION

Granting immunity in this case is not in accordance with the UN's own purposes and principles of encouraging and promoting respect for human rights. Moreover, European courts have consistently held that where the immunity of international organizations is in question, courts should draw a careful balance between the interests at stake, giving great weight to the availability of a reasonable alternative means of seeking a remedy, and also considering whether a grant of immunity is necessary for the conduct of an IO's core functions. Here, the UN has not provided the victims any reasonable alternative means for protecting their

rights, and was not acting within the core of its mandate under Chapter VII of the UN Charter. For those reasons, the District Court's decision to grant immunity is inconsistent with the careful balancing approach applied in European jurisprudence on this issue.

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Respectfully submitted,

/s/: Jennifer Doucleff
Jennifer Doucleff, Esq.
Strandboulevarden 35
2100 Copenhagen, Denmark
+4550186778

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,876 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/: Jennifer Doucleff

February 23, 2016

LIST OF AMICI*

* Institutional affiliations are provided for identification purposes only. *Amici* submit this brief in their personal capacities and not as a representative of any institution, including the universities listed below.

Dr. Rosanne van Alebeek
Assistant Professor of International Law, University of Amsterdam Department of International and European Law
Research Fellow, Amsterdam Center of International Law (ACIL)
Netherlands

Prof. Beatrice I. Bonafè
Associate Professor of International Law, Sapienza University of Rome
Italy

Prof. Theo Van Boven
Emeritus Professor of International Law, Maastricht University
Netherlands

Dr. Catherine Brölmann
Associate Professor of International Law, University of Amsterdam Department of International and European Law
Research Fellow, Amsterdam Center of International Law (ACIL)
Netherlands

Prof. Eric David
Professor Emeritus of International Law and President of the Centre for International Law, Universite Libre de Bruxelles,
Belgium

Dr. Elvira Domínguez-Redondo
Senior Lecturer in Law, Middlesex University
United Kingdom

Carla Ferstman (LL.M.)
Director, REDRESS

United Kingdom

Dr. Rosa Freedman
Lecturer, Birmingham Law School, University of Birmingham
United Kingdom

Dr. Stephan Hollenberg
Assistant Professor of Public International Law, Utrecht University and the Netherlands Institute for Human Rights (SIM)
Netherlands

Prof. Manfred Nowak
Professor of International Law and Human Rights, University of Vienna
Scientific Director, Ludwig Boltzmann Institute of Human Rights
Austrian Chair Visiting Professor, Stanford Law School
Austria

Prof. Riccardo Pavoni
Associate Professor of International and European Law, Department of Law, University of Siena
Italy

Prof. Cedric Ryngaert
Professor of Public International Law at Utrecht University
Netherlands

Dr. Otto Spijkers
Assistant Professor of Public International Law, Utrecht University
Netherlands

Judge Krister Thelin (LL.M.)
Former Committee Member, UN Human Rights Committee
Former Judge, International Tribunal for the former Yugoslavia (ICTY)
Sweden

Prof. Liesbeth Zegveld
Professor of War Reparations, University of Amsterdam
Lawyer, Prakken d'Oliveira
Netherlands

European Center for Constitutional and Human Rights (ECCHR), Berlin, Germany
ECCHR is an independent, non-profit legal organization that enforces human rights by holding state and non-state actors responsible for egregious abuses through innovative strategic litigation. ECCHR focuses on cases that have the greatest likelihood of creating legal precedents in order to advance human rights around the world.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2016, a true and correct copy of the foregoing document was served via mail, on the following:

United Nations
United Nations Headquarters
Office of Legal Affairs
S-3675
44th Street and 1st Avenue
New York, NY 10017

United Nations Stabilization Mission in Haiti
United Nations Headquarters
Office of Legal Affairs
S-3675
44th Street and 1st Avenue
New York, NY 10017

Edmond Mulet
United Nations Headquarters
Office of Legal Affairs
S-3675
44th Street and 1st Avenue
New York, NY 10017

Ban Ki-moon
United Nations Headquarters
Office of Legal Affairs
S-3675
44th Street and 1st Avenue
New York, NY 10017

Respectfully submitted,

/s/: Jennifer Doucleff