UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Delama GEORGES *et al*., Plaintiffs, v. United Nations *et al.*, Defendants.	**Civil Action No. 1:13-cv-07146-JPO**

MOTION OF EUROPEAN LEGAL SCHOLARS AND PRACTITIONERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE GOVERNMENT'S STATEMENT OF INTEREST

European legal scholars and practitioners, listed in full below, respectfully seek leave of the Court to file a brief *amicus curiae* in support of the Plaintiffs' Opposition to the Government's Statement of Interest. They file this motion pursuant to this Court's order of April 22, 2014, instructing how the Court will entertain motions from potential *amici curiae* (Dkt. No. 30). The proposed brief is submitted herewith.

INTERESTS OF *AMICI CURIAE*

Amici curiae are legal scholars and practitioners of human rights law and international law in Europe. *Amici* have substantial experience researching, publishing and litigating on the approach of European courts to international organization immunity. *Amici* respectfully offer this brief to furnish the Court with a wider view of how courts confronted with international organization immunity in other jurisdictions 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' position that immunity should not be accorded in this case, where doing so would deny Plaintiffs access to any means to obtain redress for the harms they have suffered.

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ECCHR is an independent, non-profit legal organization based in Berlin, Germany 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.

Amici respectfully request that the Court grant leave to file the attached *amicus* brief in support of Plaintiffs' Opposition to the Government's Statement of Interest.

May 15, 2014

Respectfully submitted,

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I hereby certify that on the 15th day of May, 2014, that a true and correct copy of the foregoing document was served via mail, on the following:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Delama GEORGES *et al*., Plaintiffs, v. United Nations *et al.*, Defendants.

Civil Action No. 1:13-cv-07146-JPO

MEMORANDUM OF LAW OF *AMICI CURIAE* EUROPEAN LAW SCHOLARS AND PRACTITIONERS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE GOVERNMENT'S STATEMENT OF INTEREST

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1. INTRODUCTION

The present case involves a question of increasing importance as international organizations ("IO") have come to play a greater role globally: how to balance the immunity necessary for these organizations to conduct their work without interference, on the one hand, with the fundamental need to protect individuals' rights against abuse, on the other. More than half a century of jurisprudence on this topic in European courts demonstrates that most courts apply a balancing approach to IO immunity. In return for granting immunity, they require IOs to provide reasonable alternative means for the adversely affected individuals to protect their rights. Considering the fundamental importance of access to justice for safeguarding human rights protection in individual cases, a tailored approach is called for. Given the UN's complete denial of access to reasonable alternative means in the present case, this Court should deny Defendants immunity for their cholera-related torts and afford the Plaintiffs access to the Court.

2. THE RIGHT TO A REMEDY IS CENTRAL IN PROTECTING INDIVIDUALS' HUMAN RIGHTS

The due process rights of effective remedy and access to court are not only human rights in and of themselves, but they also operate as a mechanism for ensuring the observance of other human rights. The lack of a remedy is, in effect, similar to the lack of a right. *See* Dinah Shelton, *Remedies in International Human Rights Law* 29 & 100 (2d ed. 2006). Courts have acknowledged this fundamental importance, and there is an increasing tendency in case law towards safeguarding individuals' due process rights, even in cases where they are balanced against other weighty public interests. *See e.g.*, Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n (Kadi I)*, 2008 E.C.R. I-06351, ¶¶ 342-44, 363, 368-70; *A & Others v. United Kingdom*, 2009 Eur. Ct. H.R. 301 ¶ 220; *Sec'y of State for Home*

Dep't v. AF (FC) & Another, 2009 UKHL 28 ¶¶ 59, 71, 116, 119 (appeal taken from Eng. & Wales). While courts in Europe, like those in the U.S., regularly acknowledge that there are legitimate grounds to grant immunity to IOs before domestic courts, such immunity can directly interfere with individuals' ability to enjoy the right to a remedy. Hence European courts have broadly 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*, 1999-1 Eur. Ct. H.R. 393.

3. A REASONABLE ALTERNATIVE MEANS OF ACHIEVING JUSTICE IS AN MATERIAL FACTOR IN DETERMINING WHETHER AN ORGANIZATION CAN ENJOY IMMUNITY

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 conduct the functions it was established to conduct, and on the other hand the obligation of states to uphold an individual's right of access to court. A seminal case resolving such a conflict is the European Court of Human Rights' ("ECtHR") decision in *Waite and Kennedy v. Germany*, in which that court gave a clear ruling on how the balance should be drawn. 1999-1 Eur. Ct. H.R. 393. The Court recognized the importance of international cooperation, and acknowledged that the right of access to court as interpreted in Article 6 of the European Convention on Human Rights ("ECHR") is not absolute. *Id.*, ¶¶ 59, 63. However, the Court also emphasized that States continue to be responsible for guaranteeing the rights laid down in the ECHR to all people within their jurisdiction. *Id.*, ¶ 67. Therefore, it concluded 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).

Several domestic courts in Europe engaged in a 'reasonable alternative means' test before the ECtHR's decision in the *Waite and Kennedy* case, and subsequent to that decision, European courts have widely adopted this test. *See The Privileges and Immunities of International Organizations in Domestic Courts* 332 (August Reinisch ed., 2013). These courts review the balance between the right to an effective remedy and the immunity of IOs both in the light of Article 6 of the ECHR, and domestic constitutional law. Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT'L ORG. L. REV. 121, 136 (2010). In Italy, courts have linked the immunities of IOs to the right of access to justice since 1955, when the Italian Supreme Court denied the immunity of the UN International Refugee Organization due to a lack of procedural rules regarding its arbitral process. *Maida v. Admin. for Int'l Assistance*, Cass., sez. un., 27 maggio 1955, 23 ILR 510 (It.); *see* Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166. The Italian courts consider the legality of IO immunity to be conditional on individual claimants' access to alternative remedies. These alternative means may consist of internal procedures, as long as these are independent and impartial. *Pistelli v. Eur. Univ. Inst.*, Cass., sez. un., 28 ottobre 2005, No. 20995, ILDC 297 ¶¶ 14.1-14.3 (It.); Pavoni, *Italy*, *supra*, at 161. 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 2007); Pavoni, *Italy*, *supra*, at 161.

Belgian, French, and Dutch courts are also among those that apply this substantive review. 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.). 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, 19 June 1998, XXIVa Yearbook Commercial Arbitration 294 (Fr.). In another case, the Court decided to give no effect to the immunity of the African Development Bank because there was no internal tribunal that could decide the case at hand. *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* Genevieve Bastid Burdeau, *France*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 118. 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.). In the Netherlands, the District Court of The Hague held that it was not enough for the dispute settlement procedure of the Permanent Court of Arbitration to exist on paper. *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), *cited in* Rosanne Van Alebeek & Andre Nollkaemper, *The Netherlands,* in *The Privileges and Immunities of International Organizations in Domestic Courts, supra,* at 196. While the procedure was included in the Headquarters Agreement, it was never really created. The court rejected the IO's immunity, based in part on the argument that immunity would violate the right to access to court. *Id*.

4. THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS IS INHERENTLY LIMITED TO INSTANCES OF FUNCTIONAL NECESSITY AND SHOULD NOT APPLY TO ACTS OF A PRIVATE NATURE

European courts have found that IO immunity is justified in certain circumstances, but not all IO acts are of a similar type nor require the same shield from national court jurisdiction.

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

According to long-standing international law principles, States enjoy immunity before the courts of other States due to their sovereign equality, since it is not for equals to decide upon each other – *par in parem non habet imperium*. Hazel Fox, *The Law of State Immunity* 30-31 (2002). Immunity of IOs, however, is generally held to follow from the idea of functional necessity. Jan Klabbers, *An Introduction to International Institutional Law* 132 (2d ed. 2009). 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* 252-253 (4th ed. 2003). This 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. *Id*. at 253. Certain acts and omissions are more closely related to the core of an IO's functions than others, and this should have consequences for the scope of IO immunity.

4.2. IO Immunity Should Not Be Upheld in Instances Where IOs Commit Acts of a Private Nature

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 185. 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 more of a private nature.

Under the doctrine of State immunity, *iure imperii* (acts of a sovereign nature) are distinguished from *iure gestionis* (acts of a private nature). Fox, *supra*, at 272. 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, for example entering into a simple contract or committing a tort of a private nature, it cannot rely on its immunity before the courts of another State.

With regard to IO conduct, a number of European courts have drawn a similar distinction between, on the one hand, conduct that is closely related to the core of an IO's functions and entailing an exercise of public authority, and on the other hand, conduct that touches upon the functions of the IO in a more peripheral manner, and which cannot be distinguished from conduct of a private entity. *See Ligue des Etats Arabes* at ¶ 3; *Pichon-Duverger*; *Food & Agric. Org. v. INPDAI*, Cass., 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 accountability. In the present case, where the personal injury results from tortious conduct in waste disposal ancillary to the UN's mandate of supporting political stability in Haiti, it is clear that the conduct complained of does not entail an exercise of public authority. There is no reason that the UN should be shielded from accountability, where if the same conduct were carried out by a private entity or even a foreign State no immunity would prevent the victims from having recourse to justice.

5. ALTHOUGH THE UN HAS ENJOYED IMMUNITY FOR CONDUCT RELATED TO CORE FUNCTIONS UNDER CHAPTER VII OF THE UN CHARTER, SUCH RULINGS ARE NOT RELEVANT TO THIS CASE

Where cases challenge the discharge of the UN's core functions of protecting international peace and security, courts have found more compelling reasons to uphold immunity, but such facts do not exist in the case at bar. Decisions by the UN Security Council ("UNSC") in fulfillment of its core functions were at issue in the *Mothers of Srebrenica* case, considered by the Dutch courts and the ECtHR. The particular circumstances in the *Mothers of Srebrenica* case were different from those in the cases discussed above. The case concerned the conduct of a Dutch military force operating within the peacekeeping mission established in the former Yugoslavia by the UNSC. Surviving relatives sought to hold the UN accountable for the abandonment of the peacekeeping force's duty to protect a group of Bosnian Muslims through Dutch courts. The Dutch Supreme Court found that under these circumstances the UN enjoyed absolute immunity. *Mothers of Srebrenica v. Netherlands*, [2012] LJN: BW1999, ILDC 1760 ¶ 4.3.6 (Neth). This was eventually confirmed by the ECtHR. *Mothers of Srebrenica v. Netherlands*, App. No. 65542/12, Eur. Ct. H.R. Jan. 11, 2013.

The ECtHR was careful to distinguish the *Mothers of Srebrenica* case from earlier cases in which it decided upon the immunity of a variety of IOs. *Id*. at ¶¶. 149-151. It held that at the root of the case was "a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under Chapter VII of the [UN Charter]." *Id*. at ¶ 152. The court found that the UNSC's use of its powers for the maintenance of international peace and security could not be subjected to the jurisdiction of domestic courts, since doing so would "interfere with the fulfillment of the key mission of the United Nations in this field." *Id*. at ¶154. Accordingly, the Court considered the absence of an alternative remedy not to carry sufficient weight to outweigh the interest of the UN to retain immunity for the UN peacekeeping force's failure to prevent the Srebrenica massacre. *Id*. at ¶¶ 163-165, 169. This ruling may be justified by the understanding that any review of such conduct would immediately turn at the very heart of the operational decisions taken by the UNSC and would entail judicial scrutiny of the UNSC's use of its special powers under Chapter VII.

However, the *Mothers of Srebrenica* case can be strictly distinguished from the issue presently under consideration. While both cases concern a situation in which a peacekeeping mission was sent by the UN, the circumstances in the *Mothers of Srebrenica* case, and the type of acts complained of, differ entirely from the case of the cholera outbreak in Haiti. While the conduct complained of in regard to the inaction of the UN peacekeeping force in Srebrenica touches upon the core of the UNSC's mandate carried out during active armed conflict, the present case rather concerns conduct that was at a mere mission support level, as a part of the UN's routine, non-battle time decisions outside of its core public functions. A review of the merits of this case would therefore in no way interfere with the exercise by the UNSC of the special powers it was granted under the UN Charter; it would merely ensure that the victims are

able to access the remedies for their injuries that they are due under the law. The UN's tortious misconduct in Haiti was part of a task that any private entity could have carried out. It did not involve the use of public authority or any of the UNSC's special powers. Rather it was peripheral to the discharge of its function.

It is important to consider the particular circumstances of a case when striking a balance between an IO's immunity and the individual right to a remedy. Assessing the UN's immunity calls for a tailored approach, instead of a one size fits all absolute immunity. In the present instance there is no reason why requiring the UN to have a reasonable alternative means available to the individuals concerned, as a condition for obtaining immunity before domestic courts, would lead to a disproportionate result in drawing the balance between the interests concerned.

6. EVEN IN CASES INVOLVING UNSC DECISIONS UNDER CHAPTER VII OF THE UN CHARTER, EUROPEAN CASE LAW INCREASINGLY EMPHASIZES ACCESS TO JUSTICE, AND THIS PRINCIPLE MUST BE UPHELD IN THIS CASE

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. One example of this is a number of cases involving targeted sanctions: measures taken by the UNSC under Chapter VII directly targeted at particularly designated individuals. Upon designation by a UNSC Sanctions Committee, all UN Member States are obliged to take measures against these individuals, such as freezing of their assets. *See*, *e.g.*, S.C. Res. 1267, U.N. Doc. S/RES/1267 ¶ 4(b) (Oct. 15, 1999); S.C. Res. 1390, U.N. Doc. S/RES/1390 ¶ 2(a) (Jan. 16, 2002). The relevant UNSC resolutions leave no room for States to guarantee targeted individuals any of their due process rights.

While this issue does not directly concern the UN's immunity, the applicable norms and underlying interests are remarkably similar. Both situations concern obligations grounded in the UN Charter and ensuring the effective operation of the UNSC, on the one hand, and observing an obligation to provide access to justice and safeguarding individuals human rights, on the other. *See* Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-03649 ¶¶ 287-88 (understanding the review of the implementation of targeted sanctions in the context of the concept of immunity); *Kadi I*, 2008 E.C.R. I-06351, *supra*, ¶¶ 321-22 (same).

The seminal decision in this line of cases is that of the European Court of Justice in *Kadi I.* 2008 E.C.R. I-06351, *supra*. That court found it in conflict with European constitutional principles that individuals adversely affected by these measures would have no avenue for independent review. *Id.*, ¶¶ 285 & 326. It held that since no effective remedy was available for the targeted individuals at the UN level, the court must itself provide for such protection. *Id*. ¶¶ 321-26. This is a reflection of an idea very similar to the one underlying the 'reasonable alternative means doctrine' discussed above.

The same requirement that due process rights be safeguarded can be witnessed in the ECtHR's decisions in the cases of *Nada* and *Al-Dulimi*, both concerning the implementation of targeted sanctions as well. In the *Nada* case the Court ruled that the State involved in implementing these measures should provide the individuals concerned with an effective remedy. *Nada v. Switzerland*, 2012 Eur. Ct. H.R. 1691 ¶ 209. It found this especially to be the case since these individuals would find no adequate remedy at the UN level. *Id*. ¶ 213. Similarly, the Court held in the *Al-Dulimi* case that domestic implementation of UNSC sanctions could only be exempt from the court's review if the UN system would protect targeted individuals' human rights in a manner that is equivalent to the protection under the ECHR. *Al-Dulimi &*

Mont. Mgmt. Inc. v. Switzerland, 2013 Eur. Ct. H.R. 1173 ¶¶ 114-20. Since, it found that not to be the case, it engaged in a full review. *Id*. ¶¶ 121-22.

In addition, the ECtHR has held in several instances, including the *Nada* case, that obligations created by the UNSC need to be interpreted in harmony with obligations under human rights law. *Al-Jedda v. United Kingdom*, 147 IRL 107, 53 Eur. H.R. Rep. 23 (2011) ¶ 102; *Nada*, 2012 Eur. Ct. H.R. 1691, *supra* at ¶¶ 170-71. It read from the UN Charter that the UNSC 'shall discharge its duties in accordance with the Purposes and Principles of the United Nations.' UN Charter Art. 24, para. 2. The purposes of the UN include encouraging respect for human rights and fundamental freedoms. Accordingly, the Court concluded that it must be presumed that the UNSC does not intend states to take measures that would result in a breach of their obligations under the ECHR. *Al-Jedda*, *supra*, ¶ 102; *Nada*, 2012 Eur. Ct. H.R. 1691, *supra*, ¶ 171; *See also Mothers of Srebrenica v. Netherlands*, [2010] LJN: BL8979, ILDC 1760 ¶ 5.5 (Neth.).

Since encouraging respect for human rights is one of the purposes of the UN, obligations following from the UN's immunity should be interpreted from the perspective that it is not the intention of the UN to deny individuals' right to access to justice, or to shield itself from responsibility in instances not concerning the exercise of the core of the UNSC's special powers under Chapter VII. Allowing immunity in such cases, including for the UN's tortious conduct in the case at bar, would be tantamount to ignoring the UN's own purposes and principles as laid down in its constituent document, the UN Charter.

In this line of decisions, which has been followed by other courts in Europe, *see*, *e.g.*, *HM Treasury v. Ahmed & Others*, [2010] UKSC 2 & UKSC 5, [2010] A.C. 534, (appeal taken from Eng.); *Netherlands v. A & Others*, [2012] LJN:BX8351, ILDC 1959 ¶ 3.6.2 (Neth.), these courts

clearly indicate what they consider an appropriate balance between observing an obligation under Chapter VII of the UN Charter and upholding individuals' due process rights. In the targeted sanctions cases, European courts have clearly held that the important interest of facilitating international cooperation and maintaining international peace and security has to give way to guaranteeing individuals' access to justice. This is also particularly true in instances such as the one at hand, which do not at all touch upon the core of the UNSC's exercise of its Chapter VII powers.

7. CONCLUSION

In conclusion, European courts have consistently held that where the immunity of international organizations is in question, a careful balance should be drawn between the interests at stake. In making such rulings, these courts have sometimes drawn an analogy to the restriction on State immunity, which applies only in relation to sovereign acts. Interpreting the concept of functional immunity in this way, it would be unreasonable to grant immunity to the UN for conduct unrelated to the core of its authority. European Courts have also consistently ruled that a reasonable alternative means of achieving justice is a precondition of immunity. In this case, where the UN has not provided the victims any reasonable alternative means for protecting their rights, and was not acting within the core of its functions, granting immunity would be inconsistent with the carefully and thoughtfully developed European jurisprudence on these issues. Moreover, it would not be in accordance with the UN's own purposes and principles of encouraging and promoting respect for human rights.

Dated: May 15th, 2014

Respectfully submitted,

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APPENDIX

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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.