

Delama Georges Et Al. V. United Nations Et Al.:
Memorandum Of Law Of Amici Curiae
International Law Scholars And Practitioners In
Support Of Plaintiffs' Opposition To The
Government's Statement Of Interest

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Reckless sanitation practices at a United Nations troop base in rural Haiti triggered a massive April, 2010 cholera outbreak. Ultimately, over 8,000 Haitians died and 700,000 more were sickened. Despite overwhelming evidence of the U.N.'s responsibility, including analysis provided by the U.N.'s own experts, the victims still have not received so much as an apology for their grievous losses, much less a remedy.

After all other avenues were exhausted, thousands of Haitians filed a class action suit against the U.N. in the U.S. District Court for the Southern District of New York. After the U.S. intervened to request the suit be dismissed on the basis of U.N. immunity, the Health and Human Rights Clinic of IU McKinney helped draft an amici curiae brief in support of the plaintiffs. Amici are professors and scholars of international law who have researched, published and taught on the law of international organizations. As of this writing, the court has not ruled on the U.S. request to dismiss the Complaint.

As we stated in the Brief, our concern is not just with seeing that the Haitian people are provided their human right to a remedy for the grievous harm done to them. We are also concerned about the U.N.'s legitimacy as a promoter of human rights and the rule of law, and see the organization accepting responsibility and providing a remedy to the Haitian people as inextricably connected to its future credibility in this vital cause.

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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 INTERNATIONAL LAW SCHOLARS
AND PRACTITIONERS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE
GOVERNMENT'S STATEMENT OF INTEREST**

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ARGUMENT

I. The United Nations Has an Obligation to Respond to Claims of a Private Law Nature.

Section 2 of the United Nation’s Convention on the Privileges and Immunities of the United Nations (“General Convention”) states that “[T]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” Convention on the Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16. But this Section cannot be read in isolation. A more comprehensive review of the immunity question, one that includes the United Nations (“UN”) Charter itself, along with other binding documents and decades of organizational statements and institutional practice, reveals that this immunity is a privilege with limitations.

In fact, the same General Convention imposes a clear and substantial duty on the UN to accept responsibility and provide remedy for harm caused by its actions or the actions of its agents. Article VIII, Section 29 of the General Convention reads, under the heading ‘Settlement of Disputes,’ as follows: “The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.” General Convention, art. VII, § 29. This explicit acknowledgement of organizational responsibility fulfilled the more generalized call for limited immunity issued in the UN Charter, which states that the UN should enjoy only those privileges and immunities that “are necessary for the fulfillment of its purposes.” Charter of the United Nations, art. 105, 59

Stat. 1031, TS 993 (1945).

The General Convention’s Section 29 limitation of organizational responsibility to disputes of “private law character” is revealing. Since its inception, as is evidenced by the preamble to the General Convention itself, the UN’s motivations in creating and defending some measure of immunity have been focused on the concern that its member states would use litigation as a tool to interfere with UN operations and compromise the organization’s independence. (“Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.” General Convention, Preamble.) The Rapporteur for the Committee drafting the Convention stated, in explaining the meaning of “privileges and immunities” in the document, that “(n)o member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other.” *Documents of the United Nations Conference on International Organization, San Francisco 1945*, vol .XIII, p. 780.

As the adoption of the Section 29 private law language demonstrates, that concern for protecting what is sometimes referred to as the UN’s “functional immunity” from state interference does not arise when individuals are pursuing claims against the UN under well-settled doctrines such as negligence or wrongful death. *See Frédéric Mégret, La Responsabilité Des Nations Unies Aux Temps Du Choléra (United Nations Responsibility in the Time of Cholera*, (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242902.¹ In fact, when

¹ The obligation to provide a remedy for harm, as assigned to the UN by Section 29 of the General Convention, provides specific context for the position that the UN possesses a legal personality that carries with it both rights and duties. (“The United Nations shall possess juridical personality.” Art 1, §1.) The legal personality of the UN, and the duties that accompany that status, is a concept that has been reaffirmed many times since, including by the International Court of Justice (*Reparations for Injuries Suffered in the Service of the United Nations*, Advisory

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necessary to preserve the broad mandates of justice, the Secretary-General has an obligation to waive an individual officials' immunity. The General Convention states, "[t]he Secretary-General shall have the right *and duty* to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." General Convention, art. V, § 20 (emphasis added).

This general duty imposed on the Secretary-General, and the more explicit duties imposed by Article VII, Section 29, together constitute an acknowledgement of the right of an injured or aggrieved person to access a process by which she can seek remedy. *See* August Reinisch, *Convention on Privileges and Immunities of the United Nations, Convention on Privileges and Immunities of the Specialized Agencies*, United Nations Audiovisual Library of International Law (2009), <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html>. The UN has acted in accordance with its obligations under Section 29 through a well-settled practice of negotiation or arbitration with parties presenting private law claims against the organization. *See* Bruce Rashkow, *Remedies for Harms Caused by UN Peacekeepers*, American Society of International Law (2014), <http://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers>

Since the adoption of the General Convention, that right to a remedy has been affirmed multiple times in foundational human rights instruments. The Universal Declaration of Human Rights, for example, states that "(e)veryone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law." Universal Declaration of Human Rights, art. 25, G.A. Res. 217, U.N., GAOR 3d Sess.,

Opinion, 1949 I.C.J. 174, 179 (April 11) and the UN Secretary-General (U.N. Secretary-General, *Report of the Secretary-General, Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, ¶ 6, U.N. Doc. A/51/389 (Sept. 20, 1996)).

U.N. Doc. A/810 (Dec. 12, 1948). *See also* 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); Convention on the Rights of the Child, G.A. Res. 44/25, art. 39, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); 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 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).

The UN General Assembly in 2006 adopted specific recommendations on protecting the right to a remedy for human rights violations, and in so doing stated that it “reaffirms the international principles of accountability, justice and the rule of law.” Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess. U.N. Doc. A/RES/60/147 ¶15 (Mar. 21, 2006). Consistent with this articulation of access to remedy as a fundamental right, the lack of an alternative and effective remedy for private law claims has been cited as grounds for courts to decline to recognize international organizations’ immunity from suit. *See, Beer and Regan v. Germany*, App. No. 28934/95, Eur. Ct. H.R. (1999); *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (1999); and *SA Energies Nouvelles et Environnement v. Agence Spatiale Européenne*, December 1, 2005, *Journal des Tribunaux* (2006), No. 6216, 171. For example, the European Court of Human Rights in *Waite and Kennedy* stated, “[a] material factor in determining whether granting [...] immunity from [...] jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention (European Convention for the Protection of Human Rights and Fundamental Freedoms.)” *Waite and Kennedy* at ¶68.

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These decisions on the surrender of immunity did not directly address the question of the UN's protections and obligations. However, they may be helpful to this Court's review because they invoke a key distinction between the Plaintiffs' claims here and the preceding Second Circuit claim against the UN cited by the United States in its Statement of Interest. The plaintiffs in *Brzak v. United Nations*, 597 F.3d 107 (2d. Cir. 2010) were provided with an alternative process for asserting their claims against the UN before they pursued litigation in U.S. courts. *See, also Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir, 1983) (Immunity from suit of international governmental organization World Bank affirmed, with court noting that alternative process was provided by the World Bank.) As is noted in the Plaintiffs' Complaint, and not disputed by the United States in its Statement of Interest, no such alternative process was provided for Plaintiffs in this case. Compl. at ¶12.

II. The UN Has Voluntarily Assumed Treaty Obligations to Respond to Private Law Claims for Harm Caused by Defendants in Haiti.

The UN's obligation to respond to private law claims are persuasively reinforced by the UN's own agreements, statements, and actions, in Haiti and beyond. In Haiti, the Status of Forces Agreement with the Government of Haiti is the manifestation of the UN's General Convention-imposed obligation to provide a remedy for private law claims. *See*, Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, art. 1(f), July 9, 2004, 2271 U.N.T.S.235 ("UN-Haiti SOFA"). The Haiti agreement and other agreements entered into by the UN and host countries derive from a model agreement established pursuant to a 1989 request from the UN General Assembly. The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status-of-Forces Agreement for Peacekeeping Operations*, U.N. Doc.

A/45/594 (Oct. 9, 1990). That model agreement echoes the language of the General Convention’s Article 29 mandate to the UN to provide a remedy for claims of a private law nature. *Id.* at ¶51.

The same mandate takes shape in the UN-Haiti SOFA through agreed-upon terms both general in nature (the UN and its representatives “shall respect all local laws and regulations” of Haiti, per Article IV, ¶5) and quite specific. At Article VIII, ¶¶54-55 of the UN-Haiti SOFA, the agreement calls for third-party claims for matters including personal injury or illness to be submitted to and resolved by a standing claims commission. In agreeing to this process, the UN evidenced a clear intent to avoid establishing or claiming full immunity for itself for claims based on personal injury, illness, or death arising out of negligence. Instead, it only chose its preferred venue for receiving and responding to such claims. The UN Secretary-General has candidly acknowledged that the standing claims commission SOFA provisions are necessary for compliance with the organization’s overall mandates: “Based on the principle that justice should not only be done but also seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.” The Secretary-General, *Report of the Secretary General: Administrative and Budgetary Aspects of Peacekeeping, supra* at ¶10. The Plaintiffs allege here, and the United States in its Statement of Interest does not dispute, that they tried without success to submit their claims to this *lex specialis* regime that the Defendants both conceived of and agreed to. But the Defendants never established the standing claims commission described in Article VIII, ¶¶54-55 of the UN-Haiti SOFA.²

² The absence of a standing claims commission in Haiti, despite the clear language of the UN-Haiti SOFA calling for its establishment, is apparently not an anomaly. There is no evidence the UN has ever established such a commission in any of the 32 countries where it has agreed to do so. Yale Law School, Yale School of Public Health, and Association Hatienne De Droit De

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The UN's agreement to receive and remedy private law claims in Haiti is consistent with the organization's long-standing institutional practice, as evidenced by its official resolutions, statements, and settlements of private law claims arising out of peacekeeper actions. In 1998, the UN General Assembly, in the process of placing temporal and financial limits on such claims, affirmed the organization's general liability for remedying harms. Third-Party Liability: Temporal and Financial Limitations, G.A. Res. 52/247, U.N. Doc. A/RES/52/247 (Jul. 17, 1998). That resolution accompanies multiple official reports and statements by UN leadership acknowledging the organization's liability for third-party claims for damages caused by peacekeeper operations. The most comprehensive of those reports was the Secretary-General's 1996 *Report of the Secretary-General, Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations, supra*. In that report, the Secretary-General refers to the standing claims commission pledges and acknowledges that "(t)he 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." *Id.* at ¶7. The Secretary-General made it clear that this responsibility derives from the UN's international legal personality and its capacity to bear international responsibilities, including liability in compensation. *Id.* at ¶6.

As the Secretary-General's 1996 statement suggests, this assumption of liability is not a new concept for the UN. In 1965, the Secretary-General, in a letter regarding the payment of indemnities by the UN, stated: "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which

L'Environnement. *Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* 31-32 (2013) at 27 and Matthew Russell Lee, "UN Admits No Mission Has a Claims Commission-Like in Haiti Cholera, No Remedy," *Inner City Press* (November 26, 2013), <http://www.innercitypress.com/dpko1noremedy112613.html> (quoting a UN spokesperson acknowledging that no UN mission has a claims commission in place.)

the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on the Privileges and Immunities of the United Nations.”

Letter dated August 6, 1965 from the Secretary-General addressed to the Permanent Representative of the Union of Soviet Socialist Republics, 1965 United Nations Juridical Yearbook 41, UN Doc. S/6597. This position has been since reaffirmed by the UN’s top legal officer, who stated in 2001, “[a]s a matter of international law, it is clear that the Organization (UN) can incur liabilities of a private law nature *and is obligated to pay* in regard to such liabilities.” Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims, *supra* at ¶17 (emphasis added).

The UN’s acceptance of its liability for harm caused by peacekeeping operations has moved far beyond abstract statements of obligation. The 1965 Secretary-General statement quoted above was made in the context of the UN paying compensation related to deaths and injuries connected to UN peacekeeping operations in the Congo. *See, e.g., Moshe Hirsch, The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* 69-70 (1995). Paying such compensation is a common practice for the Defendants. *See, Kirsten Schmalenbach, Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations* 10 Yearbook of International Peace Operations 33-51 (2006). In the Secretary-General’s 1996 report on the financing of UN peacekeeper operations, he acknowledged that \$15.5 million would be necessary to settle pending third-party liability claims. *Report of the Secretary-General, Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, *supra* at ¶ 53. Even in Haiti, there is evidence that the UN has paid out funds to civilians harmed by peacekeeper actions. *See, Interoffice memorandum to the Controller, Assistant Secretary-*

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General, Office of Programme Planning, Budgets and Accounts, 2009 United Nations Juridical Yearbook 428-30 (describing payment to Haitian civilian shot during a military action.)

III. The Plaintiffs' Claims are Private Law in Nature and Do Not Invoke "Operational Necessity"

As explained above, the UN's mandate to meaningfully respond to claims against it is limited to claims of a private law nature. General Convention, art. VII, § 29. That limitation was repeated in art. VIII, ¶55 of the UN-Haiti SOFA. The Plaintiffs' claims here allege sickness and death attributable to the UN's actions and include requests for relief based on the Defendants' alleged negligence, gross negligence/recklessness, wrongful death, negligent and intentional infliction of emotional distress, and public and private nuisance. Compl., ¶¶243-299. These claims are brought on behalf of private individuals, not a governmental organization, and the Plaintiffs are represented by non-governmental organizations and a private law firm. They seek monetary compensation as a remedy.

These types of classic tort claims brought by these non-governmental parties fit squarely within the definition of private law claims. *See, e.g.,* Randy E. Barnett, *Four Senses of the Public-Private Law Distinction*, 9 *Harvard Journal of Law and Public Policy* 267, 269-70 (1986) ("Private law subjects would include contracts, torts, property . . . subjects defining the enforceable duties that all individuals owe to each other.") *See also* Ernest Weinrib, *The Idea Of Private Law* 8 (2012). By contrast, a public law claim would likely involve a government complainant against the UN, *see, Documents of the United Nations Conference on International Organization, supra*, or private individuals' claims that the UN wrongly exercised its strategic or policy-making discretion in a manner that led to the individuals suffering harm. *See, e.g., Mothers of Srebrenica Association v. Netherlands and the United Nations*, Case 10/04437, Supreme Court of the Netherlands (2012). Not surprisingly, international law scholars who have

reviewed Plaintiffs' claims have concluded unequivocally that they are private law in nature. *See, Mégret, La Responsabilité Des Nations Unies Aux Temps Du Cholera (United Nations Responsibility in the Time of Cholera), supra*, and Yale Law School, Yale School of Public Health, and Association Haïtienne De Droit De L'Environnement. *Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* 31-32 (2013).

The UN has itself repeatedly acknowledged that claims like the Plaintiffs' fall into the private law category. For example, the UN's Legal Counsel in 2001 cited the General Convention in explicitly affirming that personal injury claims are private law in nature, stating, "The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused by the Organization (the UN) to property or persons, is reflected in Article 29 of the Convention on Privileges and Immunities and the long-standing practice of the Organization in addressing such claims . . . (o)ther claims of a private law nature, for example, personal injury claims, were settled amicably." Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims, 2001 U.N. Jurid. Y.B. 381. Such claims were also referenced in a 1995 UN Secretary-General report stating 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." 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).

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These acknowledgements by the UN support the proposition that the actions complained of by the Plaintiffs here do not fall under the category of “operational necessity.” The UN has articulated a narrow operational necessity exception to its responsibility to address harms of a private law nature, an exception defined as encompassing claims based on “necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuit of its mandates.” U. N. Secretary-General, *Report of the Secretary-General, Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, ¶ 13, U.N. Doc. A/51/389 (Sept. 20, 1996). At the time of the complained-of actions here, the mandate for the UN peacekeeping operations in Haiti was to reduce community violence, support a democratic political process, and generally protect human rights and promote socio-economic development. UN Security Council Res. 1892 ¶¶ 8, 10, 18, 21, U.N. Doc S/RES/1892 (Oct. 13, 2009).

Plaintiffs allege that the UN failed to adequately screen troops headed for peacekeeping operations in Haiti, engage in sanitary practices of waste disposal, and respond adequately to the resulting outbreak of cholera. Compl., ¶¶ 4-9. The UN has not asserted, nor could it credibly assert, that these actions rise to the level of operational necessity as that exception has been self-defined by the organization.

CONCLUSION

Amici curiae urge this Court to reject any notion of the UN enjoying absolute immunity from claims of a private law nature. We urge this Court to consider the agreements that bind the UN both globally and in the specific context of its peacekeeping operations in Haiti, along with its long history of institutional practice and unequivocal statements by the organization and its leaders. We believe that a thorough review of these documents and this precedent demonstrates that the UN’s immunity is and always has been limited. Accordingly, the Plaintiffs are entitled

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under law to a forum and a hearing to determine if the UN has responsibility for the harms they have suffered, and to determine the nature and scope of an appropriate remedy.

Respectfully submitted,

May, 15th 2014

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