

# Closing the ‘Remedy Gap’ - The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti

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*‘[T]he Haitian people are all too familiar with courts expressing sympathy for their plight but ultimately closing the courtroom doors to them. In Sale v. Haitian Centers Council, the Supreme Court concluded its opinion denying relief by quoting the approval from Judge Edwards: ‘Although the human crisis is compelling, there is no solution to be found in a judicial remedy.’ That need not be the case here.’*

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## Abstract

In October 2010, United Nations (UN) peacekeepers from Nepal arrived in Haiti. The peacekeepers had been exposed to cholera in their country and, as a result of a poor water and sanitation system at their base, contaminated the Artibonite River with the cholera bacterium. A cholera outbreak ensued, killing almost 9,500 Haitians and infecting another 806,000. After failed efforts at dialogue with the UN, Haitian and Haitian-American victims sued the organization in United States (US) federal courts. However, the federal court in the Southern District of New York dismissed the case for lack of subject matter jurisdiction under the Convention on the Privileges and Immunities of the UN. The Court of Appeal for the Second Circuit affirmed this decision. These judgments were based on a finding that the UN has absolute immunity from suit.

This paper considers the role of international law in ensuring justice for the victims of the cholera epidemic. Although the US court decisions highlight a ‘remedy gap’, the paper suggests that the time-honored practice of diplomatic protection may offer a solution that allows for UN accountability even within international law. Although traditional diplomatic protection would likely only offer a remedy to Haitian-Americans, if at all, the paper argues

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<sup>1</sup> Transcript of Oral Argument at 44, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. Oct. 23, 2014), at <[ijdh.org/2014/10/topics/health/transcript-of-cholera-litigation-oral-arguments/](http://ijdh.org/2014/10/topics/health/transcript-of-cholera-litigation-oral-arguments/)> (accessed on 20 June 2017).

that the cholera epidemic and the UN's refusal to accept the victims' claims demonstrate both the limits and the potential of diplomatic protection.

## I. Introduction

As the world worries about the Zika virus and other outbreaks, Haiti, a Caribbean country with a population of approximately 11 million has been battling a cholera epidemic,<sup>2</sup> which scientific evidence confirms was brought to the island by United Nations (UN) peacekeepers. Though celebrated as the world's first black republic, the country is perhaps more recognized globally for the 2010 earthquake, the subsequent influx of international aid and ongoing efforts to rebuild. Indeed, the mention of 'Haiti' is often accompanied with the tag line 'the poorest country in the Western Hemisphere'; only the rare speaker attempts to situate this poverty in a broader historical and geopolitical context. The cholera epidemic is, arguably and unfortunately, just the latest in a string of externally-imposed challenges that the Haitian government and its people have faced since independence.<sup>3</sup>

Over the last six years, hundreds of thousands of Haitians and Haitian-Americans have been affected by what is now recognized as the worst cholera epidemic in recent history.<sup>4</sup> Data from the UN indicates that at least 9,496 people have died and another 806,000 have been infected<sup>5</sup> since UN peacekeepers from Nepal recklessly dumped fecal waste contaminated with the *Vibrio cholerae* bacteria into a tributary of Haiti's most important river, the Artibonite, in October 2010.<sup>6</sup>

Despite the international dimensions of this catastrophe, the decentralized system of international law with its 'paradox of objectives',<sup>7</sup> seems to offer cholera victims<sup>8</sup> no avenue for redress. There is no international court to which they could bring their claims and their efforts to file a claim with the claims unit of the UN Stabilisation Mission in Haiti

<sup>2</sup> *Haiti Population 2017*, World Population Review (Oct. 6, 2016), at <worldpopulationreview.com/countries/haiti-population/> (accessed on 20 June 2017).

<sup>3</sup> See, e.g., Katz, JM, *The Big Truck that Went By: How the World Came to Save Haiti and Left Behind A Disaster*, (2013). See also Dalembert, L-P, *Haiti, la dette originelle*, Liberation (Mar. 25, 2010, 00:00 AM), at <liberation.fr/monde/2010/03/25/haitila-dette-originelle\_617159> (accessed 20 June 2017) (describing the debilitating impact of France's imposition of an 'independence debt' ['dette de l'indépendance'] on Haiti in the early 1800s); Lindstrom, B, *Law in the Time of Cholera: Violations of the Right to Water in Haiti*, Huffington Post, Jan. 24, 2011, at <huffingtonpost.com/beatrice-lindstrom/law-in-the-time-of-choler\_b\_812170.html> (accessed on 20 June 2017) (on the way in which foreign interventions have interfered with Haitian water rights).

<sup>4</sup> Watts, J, "Haiti making good progress in health but challenges remain" 384 *The Lancet* (2014) 1413, 1413.

<sup>5</sup> UN Office for the Coordinator of Humanitarian Affairs, *Haiti: Cholera figures* (28 February 2017), Relief Web, (10 April 2017) at <reliefweb.int/sites/reliefweb.int/files/resources/hti\_cholera\_figures\_feb\_2017\_en\_0.pdf> (accessed on 20 June 2017).

<sup>6</sup> Lantagne, D, et al, "The Cholera Epidemic in Haiti: Where and How Did It Begin?" 379 *Current Topics in Microbiology and Immunology* (2014) 145, para 5.

<sup>7</sup> Koskeniemi, M, "What is International Law For?" in D. Evans, M, ed, *International Law* (Oxford University Press 2014).

<sup>8</sup> I refer to them as 'victims' throughout this paper because this is the language used in Haiti. However, it is important to recognise their agency, particularly as they continue to use various strategies as they seek redress.

(MINUSTAH) and the UN Secretary-General were unsuccessful.<sup>9</sup> Victims have since filed law suits against the UN in the United States (US), but US courts have dismissed the claims for lack of jurisdiction because of the UN's immunity from suit.

Reflecting on this troubling situation, Professor Ian Hurd suggests that it demonstrates 'what Scott Veitch calls the production of "irresponsibility", through law'.<sup>10</sup> Similarly, Katarina Lundahl has written about the conflict between victims' lack of access to dispute resolution mechanisms and the UN's immunity from suit, arguing that this has resulted in a 'remedy gap' which only 'political action' can resolve.<sup>11</sup> Even Bruce C Rashkow, Former Director of the General Legal Division of the UN's Office of Legal Affairs characterises the situation as one that raises significant questions about UN immunity.<sup>12</sup> Although it seems like the hard law principle of immunity trumps the much softer human rights issue, is the victims' quest for justice really futile?

This paper argues that the time-honored practice of diplomatic protection may offer a solution that allows for UN accountability even within international law. Although traditional diplomatic protection would likely only offer a remedy to Haitian-Americans, if at all, this paper argues that the cholera epidemic and the UN's refusal to accept the victims' claims demonstrates both the limits and the potential of diplomatic protection.

## II. Background

Haitians experienced cholera—an acute diarrheal disease caused by food and water contaminated with the *Vibrio cholera* bacterium—for the first time in October 2010.<sup>13</sup> This was just a few months after a devastating 7.0 magnitude earthquake left at least 316,000 people dead, 300,000 injured and 1.3 million displaced, in addition to destroying 97,294 houses and damaging another 188,383 in the capital, Port-au-Prince, and surrounding areas.<sup>14</sup> The first cholera cases were reported in mid-October along the Artibonite River in

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<sup>9</sup> Petition for Relief to MINUSTAH Claims Unit (filed Nov. 3, 2011), at <ijdh.org/?p=22916> (accessed on 20 June 2017).

<sup>10</sup> Abstract, *American Bar Foundation Research Seminar, The Politics of Legal Responsibility: Haiti, Cholera, and International Law* (2014), at <americanbarfoundation.org/events/440> (accessed on 20 June 2017). See generally Hurd, I, "Enchanted and Disenchanted International Law" 7.1 *Global Policy* (2016) 96.

<sup>11</sup> Lundahl, K, "The United Nations and the Remedy Gap: The Haiti Cholera Dispute" 88 *Friedens-Warte: Journal of International Peace and Organization* (2013) 77, 78.

<sup>12</sup> Rashkow, B. "Immunity of the United Nations: Practice and Challenges" 10 *International Organization Law Review* (2013) 332, 345 (suggesting that '[i]f the United Nations continues to refuse to review the claims of the Haitian cholera victims, and does not offer a convincing rationale for doing so, the options open to the claimants are few').

<sup>13</sup> Orata, FD, et al, *The 2010 Cholera Outbreak in Haiti: How Science Solved a Controversy*, 14 *PLOS Pathogens* 1 (2014), at <plospathogens.org/article/fetchObject.action?uri= info%3Adoi%2F10.1371%2Fjournal.ppat.1003967&representation=PDF> (accessed on 20 June 2017) (according to which '[p]rior to 2010, there was no reported history of cholera in Haiti, despite devastating outbreaks in the Caribbean region in the 19<sup>th</sup> century').

<sup>14</sup> US Geological Survey, *Earthquake Information for 2010*, (Dec. 12, 2011 5:52:04 PM), at <earthquake.usgs.gov/earthquakes/eqarchives/year/2010/> (accessed on 20 June 2017).

Mirebalais, a commune in central Haiti where the MINUSTAH base was located.<sup>15</sup> Peacekeeping troops from Nepal had arrived at this base between October 8<sup>th</sup> and 24<sup>th</sup>.<sup>16</sup> Although they were coming from regions of Nepal that were experiencing a cholera outbreak,<sup>17</sup> they were not tested immediately prior to their departure.<sup>18</sup> In addition, the base's water and sanitation system was poorly maintained, leaving waste from the showers and toilets to drain into the Meye, a tributary of the Artibonite River.<sup>19</sup> To make matters worse, MINUSTAH contracted a company which would dump untreated waste containing human feces into an open septic pit nearby, from which it could flow into the tributary when it rained.<sup>20</sup>

Initially, an independent panel of experts appointed by UN Secretary-General Ban Ki-moon in 2011 claimed that the MINUSTAH peacekeepers were not at fault. In their final report, the experts suggested that the outbreak resulted from contamination of the Meye Tributary of the Artibonite River with a South Asian strain of *Vibrio cholerae*.<sup>21</sup> The experts concluded that 'the Haiti cholera outbreak was caused by the confluence of circumstances as described above, and was not the fault of, or deliberate action of, a group or individual'.<sup>22</sup> However, in a more recent report supported by more extensive research, the members of the panel suggest that 'the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti'.<sup>23</sup> The panel references research by other experts to support their findings.<sup>24</sup> Taken together, the

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<sup>15</sup> Cravioto, A, *et al*, Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, at 13-17, at <un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> (accessed on 20 June 2017) [hereinafter Independent Panel Report].

<sup>16</sup> Transnational Development Clinic, Yale Law School, Global Health Justice Partnership of the Yale School of Public Health and Association Haitienne de Droit de L'Environnement, Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic, 14 (2013), at <law.yale.edu/documents/pdf/Clinics/Haiti\_TDC\_Final\_Report.pdf> (accessed on 20 June 2017) [hereinafter Peacekeeping Without Accountability].

<sup>17</sup> *See id.* at 21 (indicating that 1,400 cholera cases had been reported in Nepal between around July 28<sup>th</sup> and mid-August).

<sup>18</sup> *Haiti cholera outbreak: Nepal troops not tested*, BBC News South Asia (Dec. 8, 2010, 3:48 PM), at <bbc.co.uk/news/world-south-asia-11949181> (accessed on 20 June 2017).

<sup>19</sup> Lantagne, *supra* nt 6, para 2.2.

<sup>20</sup> *Ibid.*

<sup>21</sup> Independent Panel Report, *supra* nt 15, 4.

<sup>22</sup> *Ibid.*

<sup>23</sup> Lantagne, *supra*, nt 6, para 5. The experts, nevertheless, attempt to minimise potential blame, writing: 'We would like to highlight here that we do not feel that this was a deliberate introduction of cholera into Haiti; based on the evidence we feel that the introduction of cholera was an accidental and unfortunate confluence of events. Action should be taken in the future to prevent such introduction of cholera into non-endemic countries in the future'.

<sup>24</sup> *Ibid.*, para 4. *See also* Piarroux, R, *et al*, "Understanding the Cholera Epidemic, Haiti" 17 *Emerging Infectious Diseases* (2011) 1161 (the report by a French and Haitian team of researchers who conducted a November 2010 study commissioned by both of their governments).

sources reveal that the Haiti cholera strain was found to be a 'perfect match' to a Nepal strain isolated in 2010.<sup>25</sup>

In November 2011, over 5,000 cholera victims attempted to file a claim with the MINUSTAH claims unit and the UN Secretary-General.<sup>26</sup> They sought relief in the form of: (1) the establishment of a standings claims commission; (2) measures by the UN to improve the water and sanitation system and to provide adequate health services in order to prevent the further spread of cholera; (3) compensation; and (4) a public apology.<sup>27</sup> When it finally responded in February 2013, the UN asserted that the claims were 'not receivable' because they 'would necessarily include a review of political and policy matters'.<sup>28</sup>

Following unsuccessful efforts to dialogue with UN representatives, the Bureau des Avocats Internationaux (BAI) (Bureau of International Lawyers) in Haiti and its US partner organisation, the Institute for Justice & Democracy in Haiti (IJDH), filed a lawsuit in federal court in the Southern District of New York (SDNY) in October 2013 against MINUSTAH, Secretary-General Ban Ki-moon and the former Under-Secretary-General for MINUSTAH, Edmond Mulet.<sup>29</sup> They filed this lawsuit on behalf of Haitian and Haitian-American plaintiffs seeking remedies in the form of installation of an adequate water and sanitation system and compensation.<sup>30</sup> Soon after, other cases were filed in the same jurisdiction and in the Eastern District of New York.<sup>31</sup> Although the IJDH/BAI case is the most advanced, the UN did not appear in the case and instead requested that the US government intervene and seek dismissal, taking the position that the UN has absolute immunity from suit.<sup>32</sup>

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<sup>25</sup> Frerichs, R, *et al*, "Nepalese origin of cholera epidemic in Haiti" 18.6 *Clinical Microbiology and Infection* (2012) E162.

<sup>26</sup> Petition for Relief to MINUSTAH Claims Unit, *supra* nt 9.

<sup>27</sup> *Ibid*, para VII.

<sup>28</sup> Letter from the Under-Secretary for Legal Affairs of United Nations to the Director of the Institute for Justice and Democracy in Haiti (July 5, 2013), at 1, at <ijdh.org/wpcontent/uploads/2013/07/20130705164515.pdf> (accessed on 20 June 2017).

<sup>29</sup> Inst. for Justice and Democracy in Haiti, *Cholera Litigation*, available at <ijdh.org/cholera/cholera-litigation/> (accessed on 20 June 2017).

<sup>30</sup> Class Action Complaint and Demand for Jury Trial at 65, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 9 Oct 2013), at <ijdh.org/wp-content/uploads/2013/10/Georges-v.-United-Nations-Complaint.pdf> (accessed on 20 June 2017) [hereinafter Complaint].

<sup>31</sup> Complaint, *La Venture v United Nations*, No. 1:14-cv-01611 (E.D.N.Y. Mar. 11, 2014); Complaint, *Jean-Robert v United Nations*, No. 1:14-cv-01545 (S.D.N.Y. Mar. 06, 2014).

<sup>32</sup> United States Government Statement of Interest, *Georges v United Nations*, at 6, No. 1:13-cv-07146-JPO (S.D.N.Y. Mar. 7, 2014), at <ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-13-Civ.-7146-SDNY-Statement-of-Interest.pdf> (accessed on 20 June 2017) (informing the court that '[o]n December 20, 2013, Miguel de Serpa Soares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating, 'I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint'.... [and] requesting 'the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials'').

In late September 2014, the judge granted the plaintiff's request for oral arguments to address jurisdictional issues, including this question of immunity.<sup>33</sup> The Court heard the arguments on October 23, 2014,<sup>34</sup> and in January 2015 the court 'conclude[d] that all Defendants are immune. Accordingly, the case [was] dismissed for lack of subject matter jurisdiction, and Plaintiffs' motion [was] denied as moot'.<sup>35</sup> On appeal, the US Court of Appeal for the Second Circuit upheld the lower court's decision.<sup>36</sup> Like the lower court, the appellate court rejected the plaintiffs-appellants' argument that the UN's obligations under Section 29 were a condition precedent to its enjoyment of immunity.<sup>37</sup> As such, the judgments reinforce the notion that unless the Secretary-General waives immunity, the UN enjoys absolute immunity from suit. The period for the plaintiff-appellants to appeal the Second Circuit decision has lapsed.<sup>38</sup>

### III. The Arguments About UN Immunity From Suit

The US Government, which filed a Statement of Interest in the case and appeared in court for the oral arguments in both the lower court and Second Circuit, asserted that the UN has absolute immunity to suit.<sup>39</sup> The Government informed the court that its Statement of Interest was made 'pursuant to 28 U.S.C. § 517, consistent with the United States' obligations as host nation to the UN and as a party to treaties governing the privileges and immunities of the UN'.<sup>40</sup>

#### A. Sources of UN Immunity

In the District Court, the US government based its argument on immunity primarily on two treaties, namely, the UN Charter and the Convention on the Privileges and Immunities of the UN (commonly referred to as 'the General Convention'). It also referenced an agreement signed between the UN and the Haitian government following the Security Council's passage of Resolution 1542 creating MINUSTAH in April 2004.<sup>41</sup> However, the plaintiffs argued that the government selectively read out a provision of the General Convention which conditions this immunity on the provision of avenues for redress.<sup>42</sup>

<sup>33</sup> Press Release, Bureau des Avocats Internationaux & Inst. for Justice & Democracy in Haiti, Hearing Set for UN Cholera Case (Oct. 8, 2014), at <[ijdh.org/2014/10/topics/health/hearing-set-for-un-cholera-case/](http://ijdh.org/2014/10/topics/health/hearing-set-for-un-cholera-case/)> (accessed on 20 June 2017).

<sup>34</sup> Press Release, Bureau des Avocats Internationaux & Inst. for Justice & Democracy in Haiti, Hearing Held in UN Cholera Case (Oct. 23, 2014), at <[ijdh.org/2014/10/topics/health/hearing-held-in-un-cholera-case/](http://ijdh.org/2014/10/topics/health/hearing-held-in-un-cholera-case/)> (accessed on 20 June 2017).

<sup>35</sup> *Georges v UN*, 84 F. Supp.3d 246 (S.D.N.Y. 2015).

<sup>36</sup> *Georges v UN*, 834 F.3d 88, 90 (2016).

<sup>37</sup> *Ibid.*

<sup>38</sup> The plaintiffs-appellants had 90 days from the entry of the Second Circuit judgment on August 18, 2016, to appeal. See 28 U.S.C. para 2101(c).

<sup>39</sup> United States Government Statement of Interest, *supra* nt 32, 3-6; *Georges v UN*, 834 F.3d 88, 90 (2016).

<sup>40</sup> United States Government Statement of Interest, *supra* nt 32, 3.

<sup>41</sup> S.C. Res. 1542 (Apr. 30, 2004).

<sup>42</sup> Plaintiffs' Memorandum of Law in Further Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 6, at <[ijdh.org/wp-content/uploads/2014/09/Surreply-Final.pdf](http://ijdh.org/wp-content/uploads/2014/09/Surreply-Final.pdf)> (accessed on 20 June 2017) [hereinafter Plaintiffs' Sur-reply]

Article 105(1) of the UN Charter, a multilateral treaty that is the most authoritative source of international law,<sup>43</sup> states that '[t]he Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'. This is echoed in Section 2 of the General Convention whereby, '[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'.<sup>44</sup> The July 2004 Status of Forces Agreement (SOFA) signed by the UN and the government of Haiti also stipulates that 'MINUSTAH, its property, funds and assets, and its members, including the Special Representative, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention'.<sup>45</sup>

The plaintiffs argued that the UN's immunity is conditioned on the provision of alternative modes of redress and, in their situation, on the establishment of a standing claims commission as stipulated in the SOFA, which reads as follows:

'Except as provided in paragraph 57,<sup>46</sup> any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose'.<sup>47</sup>

The plaintiffs asserted that rather than granting absolute immunity, Section 2 of the General Convention is conditioned by Section 29 according to which, '[t]he 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'.<sup>48</sup>

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Brief] ('By focusing solely on Section 2 and ignoring Section 29, the Government offers an unreasonably fragmented reading of the CPIUN.')

<sup>43</sup> Charter of the United Nations, 1945, 1 UNTS XVI Art. 103 ('In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail').

<sup>44</sup> Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 1 UNTS 16 [hereinafter General Convention].

<sup>45</sup> Haiti-United Nations, *Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti*, July 9, 2004, para 3, 2271 UNTS 235 [hereinafter SOFA].

<sup>46</sup> This paragraph stipulates that '[d]isputes between MINUSTAH and the Government concerning the interpretation or application of the present Agreement shall, unless otherwise agreed by the parties, be submitted to a tribunal of three arbitrators.' *Ibid.*

<sup>47</sup> *Ibid.*, para 55.

<sup>48</sup> General Convention, *supra* nt 44; Plaintiffs' Sur-reply Brief, *supra* nt 42, 1 ('Section 29's condition that the UN 'shall' provide modes of settlement of private law claims is mandatory and without exception under the plain text of the [General Convention], and constitutes a material term that cannot simply be ignored. It is well established that a party that breaches or fails to satisfy a condition precedent of a contract cannot then enjoy the benefits of its bargain. Here, Defendants may not selectively choose among the [General Convention]'s benefits and obligations to evade accountability for private law torts').

The plaintiffs reiterated these arguments on appeal to the Second Circuit.<sup>49</sup> Although the UN did not appear, the US government asserted the UN's immunity by appearing as *amicus curiae*.<sup>50</sup>

### **B. Significance of Lack of a Remedy for Plaintiffs-appellants**

Thus, the plaintiffs-appellants and the US government had radically different views on the significance of access to a remedy. On the one hand, for the government, whether or not the plaintiffs-appellants had access to a remedy was immaterial because the only exception to UN immunity is an 'express' waiver of immunity by the organisation itself.<sup>51</sup> On the other hand, the plaintiffs-appellants claimed that access to a remedy was crucial to a finding of UN immunity—that is, 'compliance with Section 29 must be interpreted as a condition precedent to UN immunity'.<sup>52</sup>

The plaintiffs-appellants' lawyers' views were shared by a group of European amici who suggested that not only does the UN's immunity solely flow from functional necessity,<sup>53</sup> but that the US court should draw on the practice of the European Court of Human Rights<sup>54</sup> and many European courts which have adopted a 'reasonable alternative means' test in such cases, 'review[ing] the balance between the right to an effective remedy and the immunity of [international organisations]'.<sup>55</sup> Moreover, another group of international law amici highlighted the provisions of Section 20 of the General Convention,<sup>56</sup> suggesting that '[t]his 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'.<sup>57</sup> The subsequent

<sup>49</sup> Reply Brief for Appellants, No. 15-455-cv (2nd Cir. 2015), at 6-7, at <ijdh.org/wp-content/uploads/2011/11/Appellants-Reply-Brief.pdf> (accessed on 20 June 2017).

<sup>50</sup> Brief for the United States of America as *Amicus Curiae* in Support of Affirmance, No. 15-455 (2nd Cir. 2015), at <ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-Amicus-Brief.pdf> (accessed on 20 June 2017).

<sup>51</sup> United States Government Statement of Interest, *supra* nt 32, 6.

<sup>52</sup> Plaintiffs' Sur-reply Brief, *supra* nt 42, 6.

<sup>53</sup> Motion of European Law Scholars and Practitioners for Leave to File a Brief as *Amici Curiae* in Support of Plaintiffs-Appellants, *Georges v United Nations*, No. 14-455 (2nd Cir. 2015), at 11, at <ijdh.org/wp-content/uploads/2015/06/Dkt.-242.pdf> (accessed on 20 June 2017), 'Many courts have held that I[n]ternational O[rganisation] immunity follows from the idea of functional necessity, and, thus not all IO acts must be shielded from national court jurisdiction'.

<sup>54</sup> *Ibid*, at 5-7.

<sup>55</sup> Memorandum of Law of Amici Curiae European Law Scholars and Practitioners of Plaintiffs' Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 3, at <ijdh.org/wp-content/uploads/2014/05/Dkt32-2-Amicus-Brief-European-Scholars.pdf> (accessed on 20 June 2017).

<sup>56</sup> General Convention, *supra* nt 44 ('The Secretary-General shall have the right and the 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. In the case of the Secretary-General, the Security Council shall have the right to waive immunity').

<sup>57</sup> Memorandum of Law of Amici Curiae International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 3, at <ijdh.org/wp-content/uploads/2014/05/Dkt31-1\_Amicus-Brief-Intl-

sections of this paper consider whether diplomatic protection might provide an alternative avenue for such a remedy.

#### **IV. Diplomatic Protection: A 'Precursor'<sup>58</sup> to International Human Rights Law**

In 1924, Greece brought proceedings to the Permanent Court of International Justice (PCIJ), seeking reparations from Great Britain for its alleged failure to recognise the concessions granted to its national, Mr. Mavrommatis, by the Ottoman authorities.<sup>59</sup> In its decision, the PCIJ stated: 'It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels'.<sup>60</sup> Although diplomatic protection dates back to the late 18<sup>th</sup> and early 19<sup>th</sup> century,<sup>61</sup> this significant pronouncement by the PCIJ marks the beginning of the recognition of diplomatic protection in international law.

The practice arose in a colonial context and was largely used by European States seeking to protect their citizens from alleged mistreatment in foreign States. At times, this 'protection' included armed intervention that undoubtedly served additional ends.<sup>62</sup> As a result of the dubious uses of diplomatic protection, many Latin American countries, who were subjected to constant complaints concerning injury to Europeans inhabiting their territories, came to view it as a tool used by stronger countries against weaker ones, leading many Latin American theorists and practitioners, like the Argentinian scholar and diplomat Carlos Calvo, to strongly oppose it.<sup>63</sup> This vehement and reasoned objection led to various Latin American countries inserting what became known as 'Calvo Clauses' in their constitutions and other instruments.<sup>64</sup> Through these clauses, States rejected the imposition of preferential treatment of foreigners, asserting that they should be entitled only to the same treatment as nationals, thereby ensuring that European States related to their Latin American counterparts in the same way that they did with each other.<sup>65</sup> Over time,

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Law-Scholars.pdf> (accessed on 20 June 2017) [hereinafter International Law Scholars Amicus Brief].  
*Accord* Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, INTERNATIONAL LAW 379, 400 (Malcolm D. Evans ed., 2014) ('The Convention makes clear that the immunities of officials and experts are granted not for their personal benefit, but for the benefit of the Organization. The Secretary-General thus has the right *and the duty* to waive immunity of any official where the immunity would in his or her opinion impede the course of justice and can be waived without prejudice to the interests of the Organization (Article V, s 20)').

<sup>58</sup> Vermeer-Künzli, A, "Diplomatic Protection as a Source of Human Rights Law", in Shelton, D, ed, *Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 250.

<sup>59</sup> Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).

<sup>60</sup> *Ibid*, 7.

<sup>61</sup> Amerasinghe, CF, *Diplomatic Protection* (Oxford University Press, 2008), 8.

<sup>62</sup> *Ibid*, 15 (Examples of this 'gunboat diplomacy' include: French intervention in Mexico in 1838 and 1861; intervention by Germany; Great Britain; Italy in Venezuela in 1902-03; interventions by the US in Santo Domingo in 1904 and Haiti in 1915). Another example is the (Second) Anglo-Boer War (1899-1902).

<sup>63</sup> *Ibid*, 14-15.

<sup>64</sup> Shan, W, "Is Calvo Dead?" 55 *American Journal of Comparative Law* (2007) 123, 124-26.

<sup>65</sup> Amerasinghe, *supra* nt 61, 15.

diplomatic protection came to be more commonly used even by countries in the Global South<sup>66</sup> and now it is recognised as forming part of customary international law.

The International Law Commission (ILC) began to codify the doctrine in the 1990s, leading to the current *Draft Articles of Diplomatic Protection*.<sup>67</sup> Article 1 defines diplomatic protection as

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>68</sup>

In addition to the requirement of the commission of an ‘internationally wrongful act’, the draft articles and previous practice establish the fundamental requirements to exercising this ‘diplomatic action’ or related procedures, which includes: (1) the establishment of a legal interest; and (2) the exhaustion of local remedies by the injured national.<sup>69</sup>

### A. Establishing a State Interest

In keeping with the State-centric nature of international law, States can only establish a legal interest in the injury of an individual based on nationality, with the only exception being that they can choose to exercise this protection for a stateless person or refugee residing in the State at the time of the injury.<sup>70</sup> Concerned by the possibility of people changing their nationality for convenience, the International Court of Justice (ICJ) established the requirement of a ‘genuine connection’ between the person and the State.<sup>71</sup> Prior to World War II, Friedrich Nottebohm, a German national, had briefly left Guatemala, his residence of more than 30 years, and had established a business with his brothers.<sup>72</sup> After the war broke out, he wanted to return and, in order to do so, sought a neutral nationality.<sup>73</sup> Despite not having spent much time in the country, Lichtenstein approved his application for

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<sup>66</sup> *Ibid*, *But see* Shan, *supra* nt 64, 163 (‘Calvo has been significantly changed, or substantially “disfigured”, or generally “deactivated”, but [is] not yet completely “dead”. When political and economic climates are “right”, it could be re-activated again and “resurge”, as what seems to be happening’). Shan indicates that several countries, including Bolivia, Mexico, Peru and Venezuela still deny diplomatic protection in their constitutions.

<sup>67</sup> *Draft Articles on Diplomatic Protection, Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 10, U.N. Doc. 1/61/10 (2006).

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*, Arts. 1, 3-9, 14. *See also* Borchard, EM, Harvard Research International Law, “The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners” 23 *American Journal of International Law* 131 (Supp. 1929); Special Rapporteur on the topic of diplomatic protection, *Preliminary Rep. on Diplomatic Protection*, Int’l Law Comm’n, paras 16-18, U.N. Doc. A/CN.4/484 (Feb. 4, 1998) (by Bennouna, M).

<sup>70</sup> *Draft Articles on Diplomatic Protection, supra* nt 67, Art. 8. Chapter III of the *Draft Articles* provides that this is also true of corporations whose nationality is determined based on the State of incorporation.

<sup>71</sup> Nottebohm (Liech. *v* Guat.) (second phase), Judgment, 1955 I.C.J. 4, 23 (Apr. 6).

<sup>72</sup> *Ibid*, 13.

<sup>73</sup> *Ibid*, 26.

naturalisation.<sup>74</sup> However, the State's effort to compel Guatemala to recognise this citizenship was unsuccessful because the ICJ found that the requisite connection between Nottebohm and Liechtenstein was missing.<sup>75</sup>

Thus, the case highlighted the fact that despite diplomatic protection developing as a tool to protect individuals, the State, and not the individual, remained the subject of international law. Only a State with which Nottebohm had a 'genuine connection' could exercise this protection. Emmerich de Vattel, a Swiss jurist among the first scholars to write about this practice, commented in 1758: 'Whoever ill-treats a citizen injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him'.<sup>76</sup> At the heart of diplomatic protection is the fiction that the State has been injured and, as a consequence, is asserting its own rights.<sup>77</sup>

## **B. Exhaustion of Local Remedies**

Article 14 of the *Draft Articles on Diplomatic Protection* elaborates on the requirement that an individual exhaust local remedies before a State exercises diplomatic protection on his or her behalf.<sup>78</sup> According to Article 14(2) local remedies are 'legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing injury'. Although there is some

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<sup>74</sup> *Ibid*, 16.

<sup>75</sup> *Ibid*, 23 ('A State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States').

<sup>76</sup> Amerasinghe, *supra* nt 61, 10.

<sup>77</sup> *E.g.*, Mavrommatis Palestine Concessions, at 12 ('By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law'). See also *Preliminary Rep. on Diplomatic Protection*, *supra* nt 67, paras 21-26; Vermeer-Künzli, A, "As If: The Legal Fiction in Diplomatic Protection" 18(1) *European Journal of International Law* (2007) 37. This is markedly different from the view held by renowned jurist, Hersch Lauterpacht, who suggested that: 'The position of the individual as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument, of rights to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of stating the legal position is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere'. INTERNATIONAL LAW 27 (1950).

<sup>78</sup> See also Borchard, *supra* nt 69, 149 ('The question must always be answered, therefore, whether the claimant State has been injured and ordinarily, though not necessarily always, it is a condition precedent to establishing such injury that it should be shown that the national of the claimant State has exhausted the local remedies which were made available to him by the law of the State from which he is alleged to have suffered injury').

disagreement as to whether this constitutes a procedural or substantive requirement<sup>79</sup> and about when exhaustion is required,<sup>80</sup> Article 15 is clear about the exceptions to the requirement, namely:

- (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) the injured person is manifestly precluded from pursuing local remedies; or
- (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

This requirement of the exhaustion of local remedies is an effort to protect State sovereignty.<sup>81</sup> As suggested in the *Interhandel* case, the defendant State must be given a chance to attempt to remedy the situation before another State invokes its responsibility for violating international law.<sup>82</sup> However, as US Secretary of State Hamilton Fish is reported to have said, '[a] claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust'.<sup>83</sup>

### C. The Diplomatic Protection and Human Rights Nexus

Many scholars agree that diplomatic protection and international human rights law pursue similar ends. Diplomatic protection was developed largely as a means of ensuring that States adhered to international minimum standards, but it has now evolved to include a broader scope of rights guaranteed in international human rights law.<sup>84</sup> According to Vermeer-Künzli,

<sup>79</sup> See, e.g., Special Rapporteur on Diplomatic Protection, *Second Rep. on Diplomatic Protection*, Int'l Law Comm'n, paras 53-66, U.N. Doc. A/CN.4/514 (Feb. 28, 2001) (by Dugard, JR) (on the debate between the proceduralists, substantivists, and what Professor Dugard calls the 'third school').

<sup>80</sup> Amerasinghe, *supra* nt 61, 38-41.

<sup>81</sup> Borchard, *supra* nt 69, 176.

<sup>82</sup> *Interhandel* (Switz. v U.S.), Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21) (The rule that local remedies must be exhausted before international proceedings may be instituted is a well established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system')

<sup>83</sup> Borchard, *supra* nt 69, 154.

<sup>84</sup> Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, 599 (May 24) ('Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'); Amerasinghe, *supra* nt 61, 73-74.

[it] was an instrument for the protection of human rights *avant la lettre*, because the rights that diplomatic protection protected were not always classified as *human* rights, and because individuals were not considered holders of rights. Nevertheless, diplomatic protection proved an effective means to protect individuals against abuses at the hands of States.<sup>85</sup>

In fact, in contexts where human rights protections for foreigners are ineffective, diplomatic protection may offer the only means of protection. Professor John Dugard has suggested that '[m]ost States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body'.<sup>86</sup>

The potential effectiveness of this procedure coupled with the growing recognition of international human rights law raises the question of whether States in fact have a duty to protect their nationals in this way. The exercise of diplomatic protection by States has largely been left to the discretion of individual States.<sup>87</sup> Rather than creating an obligation, the *Draft Articles on Diplomatic Protection* recommend that States 'give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.<sup>88</sup> Although both the Supreme Court of Canada and the Constitutional Court of South Africa have also grappled with this question, both courts ultimately decided to leave decisions regarding diplomatic protection to the discretion of the Executive.<sup>89</sup> The majority in the Constitutional Court rejected the argument that diplomatic protection is a human right.<sup>90</sup> Nevertheless, it is worth noting that in his concurring opinion, Justice Sandile Ngcobo wrote the following:

there is in my view, a compelling argument for the proposition that States have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights. Those States that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard.<sup>91</sup>

In a dissenting opinion, Justice Catherine O'Regan, joined by Justice Yvonne Mokgoro, emphasised that there was, in fact, a duty, based on the South African Constitution, for the State to provide diplomatic protection to its citizens.<sup>92</sup> However, this view does not seem to be shared not only in individual States, but in the broader international community.

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<sup>85</sup> Vermeer-Künzli, *Supra* nt 58, 252.

<sup>86</sup> Special Rapporteur on diplomatic protection, *First Rep. on Diplomatic Protection*, Int'l Law Comm'n, U.N. Doc. A/CN.4/506 and Add. 1 (Mar. 7, 2000 & Apr. 20, 2000) (by Dugard, JR).

<sup>87</sup> *Preliminary Rep. on Diplomatic Protection*, *supra* nt 67, para 19.

<sup>88</sup> Art. 19(a).

<sup>89</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para 39 (Can.); *Kaunda v President of the RSA* 2004 (1) BCLR 1009 (CC) at 1019 (S. Afr.).

<sup>90</sup> *Kaunda*, at 1019.

<sup>91</sup> *Ibid*, 1053.

<sup>92</sup> *Ibid*, 1071.

## V. The Exercise of Diplomatic Protection for Cholera Victims

Clearly, the introduction of cholera into Haiti is a wrongful act that violates international human rights law. It constitutes a violation of several rights guaranteed in the International Bill of Human Rights and other instruments, including the rights to water, health, life and, thus far, the right to an effective remedy.<sup>93</sup> Furthermore, scientific data suggests that it is an act that can be attributed to Nepalese peacekeepers who were, arguably, under the 'effective control' of the UN. The peacekeepers' conduct also violated international humanitarian relief standards, including the core 'do no harm' principle.<sup>94</sup> All of these factors suggest that the UN's action<sup>95</sup> meet the requirements for 'an internationally wrongful act of an international organization', as described in Articles 4 and 7 of the *Draft Articles on the Responsibility of International Organizations*.<sup>96</sup> Yet, why is the UN not being held accountable?

While the *Draft Articles on Diplomatic Protection* lay out a clear framework for the exercise of diplomatic protection by one State against another, they are silent about its assertion by a State against an international organisation. Judge Krylor feared that this possibility would arise, inversely, after the ICJ found that the UN could make claims on behalf of its agents.<sup>97</sup> The judge was right, but so far the instances have been few and far between.<sup>98</sup> Zwanenberg suggests that while many of the requirements and modalities may be the same in both cases of diplomatic protection, some, like the requirement of the exhaustion of local remedies, cannot be easily applied when the responsibility of international organisations is being invoked.<sup>99</sup> Here, perhaps such exhaustion should entail the exhaustion of the organisations' own claims settlement procedures.<sup>100</sup>

Despite these gaps, the cholera epidemic in Haiti seems to exemplify a grave injury to Haitian and Haitian-Americans for which States should, as the *Draft Articles* suggest, 'give due consideration to the possibility of exercising diplomatic protection'.<sup>101</sup> Thus, it is not surprising that, in an article about UN responsibility for cholera in Haiti, Professor Frédéric Mégret briefly alludes to the possibility that Haiti could exercise diplomatic protection on

<sup>93</sup> United Nations, *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR 3d Sess., U.N. Doc. A/810 (1948); United Nations, *International Covenant on Economic, Social, and Cultural Rights, opened for signature* Dec. 19, 1966, 993 UNTS 3 (1978); United Nations, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171 (1978); Committee on Economic, Social and Cultural Rights, *International Covenant on Economic, Social and Cultural Rights: The Right to Water*, 29th sess., gen. cmt. 15, para 12, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

<sup>94</sup> See generally *Peacekeeping Without Accountability*, *supra* nt 16.

<sup>95</sup> The plaintiffs-appellants also emphasized the responsibility of the UN as a whole, rather than Nepal for the following reasons: (1) the UN had primary responsibility to the Haitian people; (2) MINSUTAH had responsibility to ensure that its water and sanitation system were functioning properly; (3) Nepal had no real interest in Haiti; (4) Nepal experienced cholera because it is a victim of the same structural injustices as Haiti; and (5) Nepal lacked the money to remedy the harm.

<sup>96</sup> United Nations, *Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. 10, U.N. Doc. A/66/10 (2011).

<sup>97</sup> International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 I.C.J. 174, 219 (Apr. 11) (dissenting opinion of Judge Krylor).

<sup>98</sup> Zwanenberg, M, *Accountability of Peace Support Operations* 252, 2005.

<sup>99</sup> *Ibid*, 253.

<sup>100</sup> *Ibid*, 254.

<sup>101</sup> *Draft Articles on Diplomatic Protection*, *supra* nt 67, Art. 19(1).

behalf of its nationals.<sup>102</sup> The allusion is likely brief given the low probability of such an event.

The SOFA provides various avenues for Haiti. For example, it could submit any disputes arising from the agreement or its performance to an arbitration tribunal<sup>103</sup> or, as stipulated in Section 30 of the General Convention, to the ICJ. However, Section 30 only provides that a party that has a disagreement regarding the interpretation of the General Convention may request an advisory opinion from the ICJ, rather than bring a contentious case.<sup>104</sup> There is currently no evidence that the government has taken either of these measures.

Alternatively, according to the SOFA, Haiti would also be responsible for appointing one commissioner separately and a second jointly with the UN Secretary-General<sup>105</sup> to preside over a standing claims commission established to hear 'any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement'.<sup>106</sup> Although the cholera claims fit this description, there is no suggestion that the government will take such action. The country's dependence on aid which, ironically, has often bypassed the State,<sup>107</sup> precludes such a possibility. You cannot bite the hand that feeds you. Moreover, although the provision regarding the establishment of a standing claims commission is in every SOFA, it has never been invoked.<sup>108</sup> Countries hosting peacekeepers are generally too weak to enforce the provision.

Yet this leaves the cholera victims unable to seek the settlement of their claims through the 'internal procedures of the United Nations'<sup>109</sup> or the non-existent standing claims commission, but equally unable to file suit in local courts in Haiti which lack jurisdiction because of the SOFA's provisions regarding UN immunity. Even if Haitian courts somehow agreed to hear the cases, concerns about the independence of the

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<sup>102</sup> Mégret, F, *La Responsabilité des Nations Unies aux temps du cholera*, Social Science Research Network, para 19 (Apr. 1, 2013), at <ssrn.com/abstract=224290> (accessed on 20 June 2017).

<sup>103</sup> SOFA, *supra* nt 45, para 57.

<sup>104</sup> General Convention, *supra* nt 44, para 30 ('If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties').

<sup>105</sup> The agreement stipulates that the UN Secretary-General would appoint the third commissioner. SOFA, *supra* nt 45, para 55.

<sup>106</sup> *Ibid*, para 55.

<sup>107</sup> Ramachandran, V and Walz, J, Center for Global Development, "*Haiti: Where Has All The Money Gone?*" at <cgdev.org/content/publications/detail/1426185> (accessed on 20 June 2017), The report indicates, for example, that between 2010 and 2012, less than 1% of the \$5.63 billion in humanitarian and recovery aid disbursed in Haiti went to the Haitian government.

<sup>108</sup> Rashkow, B, *Remedies for Harm Caused by UN Peacekeepers*, AJIL Unbound, (Apr. 2, 2014, 3:55 PM), at <asil.org/blogs/remedies-harm-caused-un-peacekeepers> (accessed on 20 June 2017).

<sup>109</sup> SOFA, *supra* nt 45, para 54 ('Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement').

judiciary<sup>110</sup> suggest that attempts at legal redress would be futile. Does this not exemplify a denial of justice that should hasten diplomatic protection? Returning to Secretary Fish, there seems to be ‘no justice to exhaust’.<sup>111</sup>

The US could also potentially exercise protection of its citizens who have been affected by the cholera epidemic, some of whom have already filed suit in the US. But, as considered above, does the US have any duty to do so? The Commentary to Article 2 of the *Draft Articles on Diplomatic Protection* suggests that ‘[a] State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation’.<sup>112</sup> US jurisprudence and the US Constitution imply such an obligation. In *Marbury v. Madison*, the Court suggested that

[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.<sup>113</sup>

Some years later, the Court emphasised that this right was not simply reserved for citizens, stating:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.<sup>114</sup>

This right of access to courts can be located in the Due Process Clauses (Fifth and Fourteenth Amendments), the Privileges and Immunities Clause (Article Four) and the Petition Clause (First Amendment).<sup>115</sup> It is also recognised in at least 40 State constitutions.<sup>116</sup> This suggests that the US has a responsibility to protect at least its citizens,

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<sup>110</sup> U.N. Human Rights Committee, *Observations finales concernant le rapport initial d’Haïti*, U.N. Doc. CCPR/C/HTI/CO/1 (2014), at <[tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHTI%2fCO%2f1&Lang=en](http://internet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHTI%2fCO%2f1&Lang=en)> (accessed on 20 June 2017).

<sup>111</sup> Borchard, *supra* nt 69, 154.

<sup>112</sup> *Draft Articles on Diplomatic Protection*, *supra* nt 67, 28.

<sup>113</sup> 5 U.S. 137, 163 (1803).

<sup>114</sup> *Chambers v Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

<sup>115</sup> Kim, UA, Note, “Government Corruption and the Right of Access to Courts” 103 *Michigan Law Review* (2004) 554, 559-560.

<sup>116</sup> Phillips, TR, Chief Justice, Supreme Court of Texas, *Speech at the Annual Justice William J. Brennan Lecture on State Courts and Social Justice*, *The Constitutional Right to a Remedy*, 78 *New York University Law Review* (1977) 1309, 1310.

but also possibly its neighbours' fundamental right of access by, at a minimum, ceasing to intervene on the UN's behalf.

## VI. Overcoming UN Immunity

As a world power with significant political and economic resources at its disposal, the US could likely effectively exercise diplomatic protection in one or more of the ways suggested by 'diplomatic action or other means of peaceful settlement' in Article 1 of the *Draft Articles*.<sup>117</sup> It could probably bring the UN to the negotiating table in a way that Haiti would be unable to. However, if the US opted to use judicial dispute settlement, it would still be confronted with the challenge posed by UN immunity.

In *Jurisdictional Immunities of the State*, the ICJ grappled with the issues raised by Italian courts allowing Italian citizens to bring civil claims against Germany for the German Reich's violations of international humanitarian law during World War II.<sup>118</sup> Italy alleged that the war crimes and crimes against humanity committed by the German government violated *jus cogens* and that the claimants lacked any other avenue for redress. Therefore, it argued, Germany was no longer entitled to State immunity.<sup>119</sup> The court rejected Italy's argument, stating:

This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.<sup>120</sup>

The court distinguished this procedural aspect from the determination of the merits.<sup>121</sup> Ultimately, it rejected the notion that State immunity might be conditioned on the provision of alternate remedies.<sup>122</sup> The court's finding that even *jus cogens* violations could not trump State immunity does not bode well for the cholera plaintiffs.

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<sup>117</sup> See Amerasinghe, *supra* nt 61, 27 ("Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry, or for negotiations aimed at the settlement of disputes. 'Other means of peaceful settlement' embraces all forms of lawful dispute settlement, from negotiation, mediation, and conciliation, to arbitral and judicial dispute settlement').

<sup>118</sup> *Jurisdictional Immunities of the State* (Ger. v It.; Greece), 2012 I.C.J. 99 (Feb. 3).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, para 93.

<sup>121</sup> *Ibid.*, para 106.

<sup>122</sup> *Ibid.*, para 101 ("The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in

However, in an interesting twist on October 22, 2014, the Italian Constitutional Court<sup>123</sup> rendered a decision deeming that effect cannot be given to the ICJ decision because it violates the country's fundamental constitutional principles, including the right of access to justice.<sup>124</sup> This means that Italian national courts can proceed to hear the merits of the dispute. Thus, ironically, although it facilitates access to the courts, the Italian Constitutional Court decision violates international law in light of the ICJ ruling.

As the plaintiffs-appellants and amici in *Georges v. United Nations* argue, the US's assertions about absolute immunity seem to counter the organisation's own principles and the values that it is promoting around the world. A 1954 ICJ advisory opinion provides an apt example. The General Assembly had requested an opinion regarding whether the General Assembly had the right to decline to effectuate a compensation award from the UN Administrative Tribunal to an employee terminated without his assent and, if so, it sought clarification on the main legal basis for this right.<sup>125</sup> In response, the ICJ opined that

'[t]he Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them'.<sup>126</sup>

It would not be too much of a stretch to argue that this obligation to ensure a remedy for staff members, which reflects the ideals expressed in the UN Charter,<sup>127</sup> equally applies to

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the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition'). *Contra* Reinisch A and Weber UA, "In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement" 1 *International Organization Law Review* (2004) 59, 72 (outlining the 'clearly discernible trend in recent immunity decisions, both concerning foreign States and international organizations, to consider the availability of alternative fora when deciding whether to grant or deny immunity').

<sup>123</sup> Corte Costituzionale, 22 October 2014, n. 238/2014, at <[cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238](http://cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238)> (accessed on 20 June 2017).

<sup>124</sup> See Barakatt, M, "Italian Court Rules Certain International Community Laws Inapplicable to Italian Legal Order" (*October 22, 2014*), *American Society of International Law* (Oct. 31, 2014, 4:15 PM), at <[asil.org/blogs/italian-court-rules-certain-international-immunity-laws-inapplicable-italian-legal-order](http://asil.org/blogs/italian-court-rules-certain-international-immunity-laws-inapplicable-italian-legal-order)> (accessed on 20 June 2017) (providing a summary and an unofficial English translation).

<sup>125</sup> G.A. Res. 785 A (VIII) (Dec. 9, 1953).

<sup>126</sup> International Court of Justice, *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13).

<sup>127</sup> UN Charter Art. 1, para 3 (States that one of the purposes of the organization is '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion').

non-staff members. In fact, the UN itself has said as much. In an *amicus* brief submitted in *Broadbent v. Organization of American States*, the organisation indicated that

[i]ntergovernmental organizations may not use their immunity from involuntary suit in national courts to escape liability or to refuse to settle disputes. They are required to and do make appropriate provisions for the impartial settlement of disputes with States, with private individuals and with the members of their own staffs.<sup>128</sup>

Thus, the right to a remedy need not necessarily be secured within a court room. In the *Barcelona Traction* case, the ICJ suggested that 'within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit'.<sup>129</sup> Several European States have successfully invoked UN responsibility for injuries to their citizens without resorting to judicial action. Between 1965 and 1967, the UN responded to claims filed by the governments of Belgium, Greece, Italy, Luxembourg and Switzerland, and compensated their citizens for injuries and deaths resulting from UN peacekeeping operations in the Congo.<sup>130</sup> The UN paid out \$1.5 million to the Belgian government alone<sup>131</sup> for disbursement to 581 Belgian citizens.<sup>132</sup> In a 1965 letter regarding this compensation, the then Secretary-General wrote: 'It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable'.<sup>133</sup> One has to wonder if the policy has been changed, without notice.

## VII. Concluding Reflections on the Limits and Promise of Diplomatic Protection

Despite its troubling origins and early usage, diplomatic protection remains relevant and continues to play an important role in the protection of human rights. The *Diallo* case, among others, suggests that no longer is it simply a tool brandished by powerful States against weaker ones in an effort to promote dubious self-interests. Rather, it is increasingly becoming focused on the rights of individuals, to the extent that various courts are considering whether States have an obligation to provide them with protection, particularly in cases of gross human rights violations.

This is indeed promising, but victims' efforts to ensure UN accountability for the cholera epidemic in Haiti suggest that the doctrine needs further development. While the

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<sup>128</sup> Brief for United Nations as Amicus Curiae, *Broadbent v Organization of American States*, 628 F.2d (1980) (No. 78-1465) reprinted in [1980] 3 Y.B. Int'l L. Comm'n 228, U.N. Doc. A/CN.4/SER.A/1980.

<sup>129</sup> *Barcelona Traction, Light and Power Company, Limited, (Belg. v Spain) (Second Phase)*, Judgment, 1970 I.C.J. 3, 44 (Feb. 5).

<sup>130</sup> *Peacekeeping Without Accountability*, *supra* nt 16, 30.

<sup>131</sup> *Letter dated 2 August 1965 from the Acting Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General*, Document S/6589, reprinted in [1965] 1 Y.B. Int'l L. Comm'n 40, U.N. Doc. ST/LEG/SER.C/3, U.N. Sales No. 67. V. 3.

<sup>132</sup> *Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics*, Documents S/6597, reprinted in [1965] 1 Y.B. Int'l L. Comm'n 41, U.N. Doc. ST/LEG/SER.C/3, U.N. Sales No. 67. V. 3.

<sup>133</sup> *Ibid.*

*Draft Articles on Diplomatic Protection* recognise the legal personality of corporations,<sup>134</sup> they are yet to recognise the invocation of responsibility of international organisations for breaches of international law. Perhaps it is too early, given the continued predominance of the State within the international system, to suggest that the scope of diplomatic protection be expanded beyond nationality. However, at a minimum, in light of the power dynamics at play in Haiti, where the international organisation in question is also involved in state-building, reconstruction and fundraising, diplomatic protection should be re-imagined to not only recognise the different stakes involved in its exercise against international organisations, but to ensure, as Latin American countries sought to do years ago, that there is a level playing field for States desiring to protect their nationals. While political action might, as Lundahl suggests, provide an avenue for redress, the *lex lata* must evolve to enhance the conditions of possibility for justice for individuals and families, like the named plaintiff, Delama Georges, whose lives have been devastated by the cholera epidemic.

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[www.grojil.org](http://www.grojil.org)

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<sup>134</sup> See *Draft Articles on Diplomatic Protection*, *supra* nt 67, Chapter III.