

## ZOOM IN

### *The question:*

#### **UN immunity and the *Haiti Cholera Case***

*Introduced by Emanuele Cimiotta and Maria Irene Papa*

In October 2013, Haiti cholera victims filed a class action complaint against the United Nations (UN) in the Southern District Court of New York, claiming UN responsibility for ‘the negligent, reckless, and tortious conduct’ that had caused the outbreak of the epidemic, and seeking compensation (*Georges et al v United Nations et al*). Evidence provided by various scientific investigations, including a study carried out by a UN panel of independent experts, shows that the disease was brought to Haiti after the 2010 earthquake by a battalion of Nepalese peacekeepers, acting within the United Nations Stabilization Mission in Haiti (MINUSTAH). The epidemic caused approximately 8.000 deaths.

The class action followed the UN’s explicit refusal to provide redress to cholera victims and to provide for an appropriate mode of settlement for the private law disputes, as required by Article VIII, Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention), as well as by the Status of Forces Agreement between Haiti and the UN. According to the UN, the dispute at hand involves ‘a review of political and policy matters’. It does not have a private law character. Therefore, those rules do not apply.

The *Haiti Cholera Case* has to be assessed in the context of the broader ongoing debate about the UN’s accountability. The jurisdictional immunity of international organizations in domestic courts is increasingly being brought into question. There is a growing plea to update it, with a view to reducing its scope and balancing it with the individual right of access to justice. Such demands have gained some suc-

cess over time: recent judicial practice has shown a trend to restrict that immunity.

Nevertheless, the UN has remained unaffected by this trend, notwithstanding the enlargement of its activities in the field of international peace and security. Domestic courts continue to uphold its immunity, as in the *Mothers of Srebrenica* case where the European Court of Human Rights found that the Dutch courts' grant of immunity to the UN did not violate Article 6 of the European Convention on Human Rights.

A similar approach was adopted in the *Opinion on United Nations Immunity*, rendered on 9 January 2015 by District Court Judge Oetken in *Georges et al v United Nations et al*, which dismissed the case for lack of subject-matter jurisdiction. According to Judge Oetken, the UN enjoys absolute immunity from suit, unless it expressly waives it. He refused to consider this privilege contingent on the fulfilment of the duty to provide a mechanism to solve third-party claims. The applicants appealed this ruling and two other similar class actions are still pending in US courts. Consequently, the issues raised by this case are far from being definitively settled.

The problem concerning the extent of UN immunities goes far beyond the case at hand, even if the fate of the Haiti cholera victims is indicative of the aberrations to which absolute immunity can lead. It is hard to accept that the UN could decline its responsibility, by asserting blanket immunity for peacekeeping operations which manifestly fail to meet diligence standards and run against their objectives. This is all the more so given the UN's continued failure to establish alternative mechanisms for adjudicating victims' claims resulting from such operations.

Three main legal questions hence arise. First, what is the relationship between the UN's absolute immunity, prescribed by Article II, Section 2 of the General Convention, and the UN's obligation to provide for alternative modalities to settle individual third-party claims under Article VIII, Section 29 of the same Convention? Second, are disputes stemming from UN forces' activities 'of a private law character'? Finally, can the availability of alternative dispute settlement mechanisms, as a necessary condition to the immunity grant, be constructed on other legal grounds that Judge Oetken did not take into account (such as, relevant UN legal instruments or international human rights law)? In particular, how can the UN's absolute immunity be rec-



onciled with the UN's role in promoting and ensuring respect for human rights, including the individual right of access to justice?

Rosa Freedman and Nicolas Lemay-Hebert, on the one hand, and Riccardo Pavoni, on the other hand, address these issues from different point of views and following different approaches. However, they both put the *Haiti Cholera Case* into a wider context and assess recent judicial developments concerning the immunity of international organizations. As a result, they rely on the 'alternative remedy' test to find a more balanced solution to the conflict between UN immunity and the individual right of access to a court.

