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By ECF

July 18, 2017

The Honorable Roanne L. Mann
Chief United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Laventure et al. v. United Nations et al., CV-14-1611 (Townes, J.) (Mann, C.M.J.)

Dear Judge Mann:

The United States submits this letter pursuant to 28 U.S.C. § 517 in further support of its Statement of Interest, dated May 24, 2017, concerning Plaintiffs' motion for leave to file a sur-reply as well as their request for discovery. *See* Pls. Mot. for Leave, ECF No. 24. The United States' prior submissions have made clear that the United Nations is immune under the General Convention from all legal process in the above-referenced litigation, and as set forth below that immunity would extend to any discovery now sought from the UN.

Plaintiffs have failed to establish any grounds for filing a sur-reply. While they contend that "the Government has put forth new issues of fact and law in its reply," the Government was simply responding to arguments about the legal significance of certain UN documents put at issue by Plaintiffs. *Id.* at 1. The parties have now had two rounds of briefing addressing the very issue Plaintiffs assert requires a sur-reply. After this Court's order to show cause why the case should not be dismissed, Plaintiffs argued that two Secretary-General reports from the 1990s, and a General Assembly resolution adopting the reports, constituted an express waiver of the UN's immunity in U.S. courts with respect to all future claims arising out of the UN's peacekeeping operations. ECF No. 14 at 9 (March 30, 2017); *see* Exhibits E-G (attaching reports and General Assembly resolution). In response, the United States explained in its Statement of Interest that the reports "do not constitute an express waiver by the UN of its immunity from legal process in United States courts in this case." Statement of Interest ("SOI") (May 24, 2017), ECF No. 17 at 5.

Plaintiffs then devoted the majority of their opposition to a discussion of the reports, in which they raised the same argument that the materials constituted an express waiver of the UN's immunity. Pl. Opp., ECF No. 21. Again in *response* to Plaintiffs' arguments, the United States noted that the UN materials merely show that the UN discussed accepting liability for its

peacekeeping operations before standing claims commission and stated that the UN would be immune from such claims in domestic courts.¹ Supp. SOI (July 7, 2017), ECF No. 22 at 2-3. Therefore, contrary to Plaintiffs' arguments, these documents demonstrate a recognition on the part of the UN that it preserved its immunity from suit in domestic courts. *Id.* As a result, they clearly do not constitute an express waiver of the UN's immunity in this particular case, which is what the General Convention would require for this suit to proceed. *See* Supp. SOI at 2-3; General Convention, art. II, sec. 2 (providing that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity").

In support of their proposed sur-reply, Plaintiffs erroneously contend that the United States does not contest that (i) the UN's acceptance of liability constitutes an agreement "to be bound under law or justice," and (ii) such an agreement could constitute an express waiver of immunity. Pls. Mot for Leave at 1. Based on this incorrect premise, Plaintiffs argue the Government has introduced a new factual dispute in its reply about "the United Nations' intent and understanding of what it means to 'accept liability.'" *Id.* These contentions are plainly groundless. First, the United States *does* contest Plaintiffs' legal theory and has repeatedly explained that it rejects their claim that the UN's potential acceptance of liability before a standing claims commission could ever amount to an *express* waiver by the UN of its immunity in a U.S. court. SOI at 5; Supp. SOI at 2-3. Such an argument would read the word "express" out of the General Convention and require embracing an implied theory of waiver that is at odds with the language of the General Convention and that has been rejected by binding Second Circuit precedent. SOI at 5 (citing *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) (explaining that although Plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]")). Second, it was not the Government but Plaintiffs who raised the issue of the UN's "intent" in their opposition, when they argued (incorrectly) that the UN materials constituted "a clear, unambiguous manifestation of the intent to waive" immunity. *See* Pl. Opp. at 5; *id.* at 13 (quoting *United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007)). Plaintiffs have now had two briefs to set forth their arguments about the significance of the UN materials discussed above and there are no grounds for a third.

There are no also grounds for ordering discovery in this case, including Plaintiffs' request for sensitive internal deliberations from the UN leading up to public statements issued by the UN this past year about the Haiti cholera outbreak, including Secretary-General Ban's apology. Pls. Mot for Leave at 2-3 & n.7. Such internal materials are irrelevant to the question of whether the UN expressly waived its immunity. As Plaintiffs themselves assert, for the UN to expressly waive its immunity, there must be "a clear and unambiguous manifestation of the intent to waive" on the part of the U.N. Pl. Opp. at 13 (quoting *Chalmers*, 2007 WL 624063, at *2). No discovery is required to determine whether the UN has *unambiguously* and *expressly* waived its immunity from suit in this case. The materials before this Court make plain on their face that the

¹ While the United States attached a 1965 U.N. report to its Supplemental Statement of Interest, this was because the document was discussed in Plaintiffs' opposition. *See* Exhibit A to Supp. SOI; Pl. Opp. at 10 n.18.

UN has not unambiguously and expressly waived its immunity in this particular case. On the contrary, as demonstrated by the UN's May 2, 2017 letter, the UN has unambiguously and expressly *asserted* its immunity. *See* SOI (Exhibit A). As was true in *Georges*, dismissal of Plaintiffs' complaint on immunity grounds is therefore warranted. *See Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016). Plaintiffs' discovery demands are without merit and if allowed would in themselves infringe upon the UN's immunity.

In particular, any order from this Court compelling the UN to provide discovery would constitute "legal process" and thus run counter to the General Convention's grant of immunity to the UN. General Convention, art. II, § 2 (stating that UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); *see also Chalmers*, 2007 WL 624063 at *1-3 (in a case involving a subpoena *duces tecum* to the UN, denying a motion to compel the production of documents from the UN, citing the UN's immunity under the General Convention as well as the International Organizations Immunities Act ("IOIA," 22 U.S.C. §§ 288a(b))). Such an order would also infringe upon the United Nations' archival immunity. *See* General Convention Section 4 (stating that the "archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located").

Likewise an order compelling the testimony of any of the individual defendants, or other UN officials, would run counter to the United States' treaty obligations. The Government has explained that these defendants enjoy immunity, *see* SOI 5-7, and Plaintiffs have not contested this point. Under the General Convention, UN officials with the rank of Assistant Secretary-General or higher enjoy the privileges and immunities accorded to diplomatic envoys in accordance with international law. UN General Convention Section 19. These immunities include immunity from compulsory testimony. *See* Vienna Convention on Diplomatic Relations ("VCDR") art. 31(2) ("A diplomatic agent is not obliged to give evidence as a witness."). Further, former high-level UN officials, including former Secretary-General Ban, enjoy residual testimonial immunity with respect to matters within their former official capacity. *See* VCDR art. 39(2) (even after a diplomatic agent's functions have come to an end, "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist"). Indeed, all officials of the UN are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity" General Convention Section 18(a). *Accord* IOIA, 22 U.S.C. § 288d(b).

The United States appreciates the Court's consideration of these additional views as it resolves Plaintiffs' request for leave to file a sur-reply and for discovery.

Respectfully submitted,

/s/

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