

No. 17-2908

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARIE LAVENTURE, each individually and on behalf of the Estate of
CHERYLUSSE LAVENTURE, and the Estate of MARIE THERESE
FLEURICIANE DELINAIS, and the additional persons and their representatives
listed on Exhibit 1, and on behalf of all others similarly situated;

(Caption continued on Inside Cover)

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Of Counsel:

MARY CATHERINE MALIN
*Assistant Legal Advisor for Diplomatic Law
and Litigation
Department of State*

HENRY AZAR, JR.
*Attorney Adviser
Department of State*

CHAD A. READLER
Acting Assistant Attorney General

SHARON SWINGLE
JENNIFER UTRECHT
*Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039*

MAGGIE LAVENTURE, each individually and on behalf of the Estate of CHERYLUSSE LAVENTURE, and the Estate of MARIE THERESE FLEURICIANE DELINAIS, and the additional persons and their representatives listed on Exhibit 1, and on behalf of all others similarly situated; SANE LAVENTURE, each individually and on behalf of the Estate of CHERYLUSSE LAVENTURE, and the Estate of MARIE THERESE FLEURICIANE DELINIAS, and the additional persons and their representatives listed on Exhibit 1, and on behalf of all others similarly situated; CARMEN LAVENTURE, each individually and on behalf of the Estate of CHERYLUSSE LAVENTURE, and the Estate of MARIE THERESE FLEURICIANE DELINAIS, and the additional persons and their representatives listed on Exhibit 1, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED NATIONS; UNITED NATIONS STABILIZATION MISSION IN HAITI; BAN KI-MOON, former Secretary-General of the United Nations; EDMOND MULET, former Under-Secretary-General for the United Nations Stabilization Mission in Haiti, CHANDRA SRIVASTAVA, former Chief Engineer for the United Nations Mission to Haiti; PAUL AGHADJANIAN, Chief of Mission Support for the United Nations Mission to Haiti; PEDRO MEDRANO ROJAS, Assistant Secretary-General of the United Nations; MIGUEL DE SERPA SOARES, Under Secretary-General for Legal Affairs,

Defendants-Appellees.

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE UNITED STATES	1
STATEMENT OF THE CASE	2
A. International Treaty Background	2
B. The UN's Role in Haiti.....	3
C. Prior Proceedings	4
ARGUMENT	7
I. The District Court Correctly Dismissed this Case for Lack of Subject Matter Jurisdiction	7
A. The UN and MINUSTAH Enjoy Absolute Immunity from Suit.....	8
B. The Individual Defendants Also Enjoy Immunity	16
II. Jurisdictional Discovery is not Appropriate in this Case	19
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Arch Trading Corp. v. Republic of Ecuador</i> , 839 F.3d 193 (2d Cir. 2016)	19
<i>Brzak v. United Nations</i> , 597 F.3d 107 (2d Cir. 2010)	7, 14, 15, 18
<i>De Luca v. United Nations</i> , 841 F. Supp. 531 (S.D.N.Y.), <i>aff'd</i> , 41 F.3d 1502 (2d Cir. 1994)	17
<i>Emmanuel v. United States</i> , 253 F.3d 755 (1st Cir. 2001)	8, 9, 15
<i>Georges v. United Nations</i> , 834 F.3d 88 (2d Cir. 2016)	5, 7, 8, 14, 15, 18
<i>Medellin v. Texas</i> , 552 U.S. 491 (2008)	8
<i>Tachiona v. United States</i> , 386 F.3d 205 (2d Cir. 2004)	18
<i>Van Aggelen v. United Nations</i> , 311 F. App'x 407 (2d Cir. 2009)	16

Treaties and International Agreements:

Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (SOFA Agreement) (July 9, 2004)	3, 4, 9, 13
Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Nov. 21, 1947)	16

Convention on the Privileges and Immunities of the United Nations, (CPIUN), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, <i>entered into force with respect to the United States</i> Apr. 29, 1970, 21 U.S.T. 1418	3, 7, 14, 16, 17, 18, 20
G.A. Res. 52/247 (July 17, 1998)	11, 13
G.A. Res. 76 (I), U.N. Doc. A/RES/76(I) (Dec. 7, 1946)	17
Report of the Preparatory Commission of the United Nations, U.N. Doc. PC/20 (1945)	2
S.C. Res. 1542 (Apr. 30, 2004)	3
S.C. Res. 1908 (Jan. 19, 2010)	4
S.C. Res. 2350 (Apr. 13, 2017)	1, 4
U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153	2, 8, 16
U.N. Doc. A/51/389 (Sept. 20, 1996)	9, 10, 11, 12, 13
U.N. Doc. A/51/903 (May 21, 1997)	11, 12, 13
Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95, <i>entered into force with respect to the United States</i> Dec. 13, 1972	17, 18

Statutes:

International Organizations Immunities Act, 22 U.S.C. § 288d(b)	17, 18
28 U.S.C. § 517	1, 6
28 U.S.C. § 2674	14

Rule:

Fed. R. App. P. 29(a)	1
-----------------------------	---

INTEREST OF THE UNITED STATES

The United States makes this submission pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, consistent with the United States' obligations as a party to treaties governing the immunities of the United Nations ("UN"). The member states of the UN conferred absolute immunity on the UN in order to allow it to perform its vital missions without facing the threat of lawsuits in multiple countries; contradictory court orders issued by tribunals around the world; judicial intervention in sensitive policy and operational matters; and the diversion of resources (provided by the member states) to the burdens and expenses of litigation.

The United States has regularly asserted the absolute immunity of the UN with respect to lawsuits filed against that organization in domestic courts, and courts, including this Court, have consistently upheld the immunity of the UN and its integral component, defendant-appellee the United Nations Stabilization Mission in Haiti ("MINUSTAH").¹ The same is true when individual officials and employees of the UN are sued for activities performed in their official capacity, as is the case here for defendants-appellees Ban Ki-Moon, the former Secretary-General of the UN; Edmond Mulet, former Under-Secretary-General for the United Nations Stabilization Mission in Haiti; Chandra Srivastava, former Chief Engineer for the United Nations

¹ MINUSTAH ceased operations on October 15, 2017. It was replaced by a follow-on peacekeeping operation, the United Nations Mission for Justice Support in Haiti ("MINUJUSTH"). S.C. Res. 2350 (Apr. 13, 2017), para. 5.

Stabilization Mission to Haiti; Pedro Medrano Rojas, United Nations Assistant Secretary-General; and Miguel De Serpa, Under Secretary for Legal Affairs. Because the UN and its officials are immune from suit, this Court should affirm the district court's judgment dismissing this action for lack of subject matter jurisdiction.

STATEMENT OF THE CASE

A. International Treaty Background

On June 26, 1945, representatives from fifty nations, including the United States, signed the Charter of the United Nations ("UN Charter"). *See* U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153. As described in Article 1 of that charter, the UN was created for the purpose of, *inter alia*, "maintain[ing] international peace and security," as well as "achiev[ing] international cooperation in solving international problems[.]" *Id.* The UN Charter further specifies that the UN "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions" and "such privileges and immunities as are necessary for the fulfillment of its purposes." *Id.* arts. 104, 105.

The day after the UN Charter was signed, the UN's Preparatory Committee, consisting of one representative from each of the UN Charter signatories, began meeting to propose recommendations as to the UN's organization and the type of "legal capacity" and "immunities" that the UN Charter conferred upon the UN. *See* Report of the Preparatory Commission of the United Nations, U.N. Doc. PC/20, at 5, Chapter VII (1945). Based on those recommendations, on February 13, 1946, the

UN General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (cited herein as “CPIUN” though it is sometimes referred to as the “General Convention”), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1418.

Article II of the CPIUN addresses the UN’s property, funds, and assets.

Article II, Section 2 specifically provides 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.” CPIUN, art. II, § 2.

Article VIII of the CPIUN addresses dispute resolution procedures. Article VIII, Section 29 provides: “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.” CPIUN, art. VIII, § 29.

B. The UN’s Role in Haiti

MINUSTAH was a UN peacekeeping mission established by the UN Security Council. The UN Security Council established MINUSTAH on April 30, 2004, with a mission to, *inter alia*, “ensure a secure and stable environment within which the constitutional and political process in Haiti can take place.” S.C. Res. 1542, para. 7(I)(a) (Apr. 30, 2004). On July 9, 2004, the UN and the Government of Haiti entered into the Agreement Between the United Nations and the Government of

Haiti Concerning the Status of the United Nations Operation in Haiti. A86–98 (“Status of Forces Agreement” or “SOFA”).² The Status of Forces Agreement explicitly provides that MINUSTAH “shall enjoy the privileges and immunities . . . provided for in the [General] Convention.” SOFA para. 3 (A87). In the aftermath of the devastating earthquake in Haiti in January 2010, the UN Security Council increased MINUSTAH’s authorized force levels to 8,940 troops and 3,711 police to support the country’s recovery, reconstruction, and stability. S.C. Res. 1908 (Jan. 19, 2010). MINUSTAH’s mandate was terminated by the UN Security Council effective October 15, 2017. S.C. Res. 2350 (Apr. 13, 2017), para. 1.

C. Prior Proceedings

The Laventures (Marie, Maggie, Sane, and Carmen) are Haitian or United States citizens who allege that their parents died in the cholera epidemic that broke out in Haiti in 2010, killing approximately 9,000 Haitians and injuring approximately 700,000 more. The Laventures and 2,641 other named plaintiffs brought this putative class action against the UN, MINUSTAH, and six current or former UN officials.

Plaintiffs allege that the UN, MINUSTAH, and UN officials negligently caused the cholera outbreak in Haiti by failing to screen Nepalese peacekeeping forces who were deployed to Haiti in October 2010, despite a known outbreak of cholera in Nepal, and by failing to use adequate sanitation for the peacekeepers, which allegedly

² Citations rendered herein as “A__” are to Appellants’ Appendix.

led to the contamination of a major Haitian water supply. A158. Plaintiffs also allege that the UN failed to establish a claims commission to address third-party claims of individuals injured by the cholera epidemic, purportedly in violation of the Status of Forces Agreement and the CPIUN. A162.

The district court initially stayed this case to await this Court's decision in *Georges v. United Nations*, No. 15-455. That case involved a similar suit brought against the UN, Secretary-General Ban, and former Under Secretary-General Mulet by victims of the Haitian cholera outbreak. *See Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016). There, as here, the plaintiffs claimed that the UN had an obligation under Section 29 of the CPIUN to create a settlement mechanism to address claims by victims of the cholera outbreak, and that the UN's failure to do so subjected it to suit in courts of the United States. This Court rejected that challenge and affirmed the district court's decision to dismiss the case for lack of subject matter jurisdiction. *Id.* at 98 & n.64. Nothing in the CPIUN, this Court explained, suggested that the creation of an alternative dispute resolution mechanism was a "condition precedent" to the UN's immunity. *Id.* at 97.

Plaintiffs in this case attempted to distinguish *Georges* after the district court lifted the stay. They explained that although the plaintiffs in *Georges* had claimed that the failure to establish a settlement mechanism prevented the UN from asserting immunity, the *Georges* plaintiffs had not argued that the UN had expressly waived its

immunity. A48–49. Here, by contrast, the plaintiffs argued, it was alleged that the UN had repeatedly and expressly waived its immunity.

At the invitation of the district court, the United States filed a Statement of Interest pursuant to 28 U.S.C. § 517, which explained that the UN expressly asserted its immunity in this case. A137–143. That statement included as an exhibit a letter from the UN Office of Legal Affairs to United States Ambassador to the UN Nikki Haley, in which the UN stated that it has not waived, and expressly maintains, its immunity and the immunity of its officials with respect to this case. A146–149. The United States’ Statement of Interest further explained that plaintiffs had failed to point to any statement of the UN or any constituent part that waived immunity with respect to claims arising from peacekeeping operations in Haiti. A141. To the contrary, the only support for plaintiffs’ claim of waiver came from reports by the UN Secretary-General in the 1990s that described the best manner to set up dispute resolution mechanisms for claims arising out of peacekeeping efforts. Neither those reports, nor the General Assembly resolution adopting the recommendations in those reports, ever expressly stated that the UN had waived its immunity outside the establishment of such claims commissions or that it could be subject to the legal processes of any member state. *Id.*

The district court dismissed this suit for lack of subject matter jurisdiction, and held that each of the defendants was entitled to immunity from this suit. As that court explained, the CPIUN by its very terms requires courts “to respect the UN’s

‘immunity from every form of legal process’ unless ‘in any particular case’ the UN ‘expressly’ waived its immunity.” SPA7.³ Plaintiffs, the court explained, had not made any allegations that revealed that the UN expressly waived its immunity from suit in courts of the United States for harm caused by the Haitian cholera outbreak. On the contrary, plaintiffs relied on reports issued by the Secretary-General in the 1990s that expressly contemplate that claims against the UN “would be resolved by non-judicial means,” not in domestic courts, and that such statements, which predated Haiti’s cholera outbreak by more than a decade, could not be considered an express waiver of immunity in this “particular case.” SPA8.

ARGUMENT

I. The District Court Correctly Dismissed This Case for Lack of Subject Matter Jurisdiction

It is well established that the UN and its subsidiary organ MINUSTAH are absolutely immune from suit in domestic courts. *See, e.g. Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016); *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010). As the district court here appropriately determined, the Convention on the Privileges and Immunities of the United Nations grants the United Nations “immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, sec. 2. Appellants here have failed to allege any plausible

³ Citations herein rendered as “SPA__” are to Appellants’ Special Appendix, located in the back of their opening brief.

evidence that the UN has expressly waived immunity from suit for itself or its component MINUSTAH in this case.

A. The UN and MINUSTAH Enjoy Absolute Immunity from Suit

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.” U.N. Charter, art. 105, para. 1. The CPIUN defines these privileges and immunities by providing that “[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” *Id.* art. II, sec. 2.

The United States understands the CPIUN to mean what it unambiguously says: the UN enjoys absolute immunity from “every form of legal process,” including suit and service of process, unless the UN has “expressly waived” its immunity in a “particular case.” *See Georges*, 834 F.3d at 94; *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (“[T]he United States’ interpretation of a treaty is entitled to great weight.”). This immunity extends to MINUSTAH, which was a UN peacekeeping mission that reported directly to the Secretary-General and the Security Council, and was therefore an integral part of the UN. *See Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001). In addition, the Status of Forces Agreement between the UN and Haiti explicitly provides that MINUSTAH “shall enjoy the privileges and immunities . . .

provided for in the [UN General] Convention.” SOFA, para. 3 (A87). Accordingly, MINUSTAH is entitled to the same immunities established by the CPIUN. *See Emmanuel*, 253 F.3d at 756.

Appellants do not dispute that only an express waiver by the UN of its immunity can be effective. They have further disclaimed any argument that the UN cannot assert its immunity until it has established a binding claims-resolution process, as such an argument is squarely foreclosed by *Georges*. Instead, Appellants argue that the UN issued a general waiver of immunity for all torts arising out of peacekeeping operations. In doing so, however, the Appellants do not point to any statement by the UN or any of its constituent parts that expressly states that the organization will be subject to the legal processes of its member states, nor any statement that the UN will be liable to plaintiffs bringing claims in domestic courts arising out of peacekeeping operations in Haiti. Appellants rely chiefly on two reports of the Secretary-General from the 1990s that discuss the organization’s procedures for settling third-party claims that arise from the UN’s peacekeeping operations, and a General Assembly resolution adopting the recommendations made in those reports. These documents do not constitute an express waiver of the UN’s immunity from legal processes in courts of the United States.

The first report relied upon by Appellants, Report 51/389, dated September 20, 1996, was submitted “in response to a recommendation of the Advisory Committee on Administrative and Budgetary Questions” that the Secretary-General issue a report

analyzing the UN's "current procedures on settling third-party claims" after the issue was studied by the organization's Legal Counsel. U.N. Doc. A/51/389, at 3 (A99–100). As that report explained, a proper evaluation of the UN's procedures for handling third party claims required a description of "the scope of United Nations liability . . . in relation to the types of damage most commonly encountered in the practice of United Nations operations." *Id.*

In that vein, Report 51/389 began with a description of when the United Nations would be liable—though non-judicial settlement procedures—for damages occurring from its peacekeeping operations. Consistent with the fact that the report was written for the purpose of analyzing the UN's settlement procedures, the report goes on to describe the organization's current procedures and the problems encountered by it. And the report concludes with several proposals to change those procedures that the General Assembly might wish to consider, including creating a type of statute of limitations on claims, as well as placing a cap on payment awards for economic and non-economic losses.

Though Report 51/389 states that the UN "has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties," U.N. Doc. A/51/389, at 4 (A101), nothing in the report states that the UN intends for such claims to be resolved in domestic courts. On the contrary, the report makes clear that UN-created standing claims commissions must address claims "resulting from damage caused by members of the

[UN] force in the performance of their . . . official duties” because such claims “could not have been submitted to local courts” “for reasons of immunity of the Organization and its Members.” *Id.*

The second report, Report 51/903, dated May 21, 1997, was issued as a supplement to Report 51/389 in response to a request by the Advisory Committee on Administrative and Budgetary Questions for the Secretary-General to make specific recommendations for implementing the proposals recommended in Report 389. U.N. Doc. A/51/903 (A113–131). Like Report 51/389, this later report expressly recognized that the UN is immune from suit in domestic courts. *Id.* at 4 (A116). Again, this immunity was cited as the rationale for proposing the establishment of standing claims commissions to adjudicate disputes and serve “as a mechanism for the settlement of disputes of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and over which the local courts *have no jurisdiction because of the immunity* of the Organization or its members.” *Id.* (emphasis added).

Accordingly, both reports, and the 1998 General Assembly resolution that adopted them, G.A. Res. 52/247 (July 17, 1998) (A132–35), are consistent with the basic principle that the UN is *not* subject to legal processes in domestic courts, and that it could only be liable through non-judicial modes of dispute resolution. The plain text of these documents simply does not subject the UN to the legal processes

of courts in the United States in *any* case, and surely not to cases arising from peacekeeping operations that began decades after the documents were signed.

Appellants' arguments to the contrary focus too narrowly on the fact that these documents use the word "liability." According to Appellants (Br. 20–31), the mere use of this word in the Secretary-General's reports *requires* the UN to be held accountable in any forum for damages caused by its peacekeeping operations. In making such an argument, however, Appellants entirely ignore the context of the word "liability" within those documents. As explained, the stated purpose of these reports was to "evaluate the current procedures for handling third-party claims and propose new or modified procedures that will simplify and streamline *the settlement* of claims." U.N. Doc. A/51/389 (A101) (emphasis added). When the excerpts of the documents on which Appellants rely are read in this context, it is abundantly clear that any use of the word "liability" refers to when the UN will pay for third-party claims through internal settlement procedures or standing claims commissions, but not through domestic courts. Section II of Report 51/389, for example, details the situations in which the UN will *not* be liable to third parties through its internal settlement procedures. As that section explains, "[c]laims resulting from the operational necessity of a peacekeeping operation would thus be excluded from the scope of competence of the standing claims commission." *Id.* (A103–104). Similarly, Report 51/903, which supplements Report 51/389, sets forth temporal and financial limitations on claims that the UN's procedures may consider. A117–121.

Indeed, the UN has long taken the position that it can be “liable” for tort claims without waiving its immunity from the jurisdiction of local courts. In 1965, for example, the Secretary-General described the UN’s “liability” for tort claims brought by Belgian citizens (A468) that were resolved by a payment to Belgium that was to be made “without prejudice to the privileges and immunities enjoyed by the United Nations.” A469. Despite Appellants’ claims to the contrary, nothing in either Report 51/389, Report 51/903, or General Assembly Resolution 52/247 suggests that the UN would be liable for tort claims under a judicial process. On the contrary, the documents themselves explain that the reason such procedures are necessary is because the UN and its members are immune from suit in local courts.

Appellants also suggest (Br. 38–39) that these documents’ reference to the UN’s immunity is meaningless, purportedly because they refer to this immunity in the past tense. But the UN has continued to assert its immunity long since these documents were issued, and indeed, the 2004 Status of Forces Agreement with Haiti, which was entered into well after the documents that allegedly waived the UN’s immunity, continues to assert the UN’s immunity, A96–97, and states that “[t]hird-party claims for property loss or damage and for personal injury . . . which cannot be settled through the internal procedures of the United Nations,” shall be settled by a standing claims commission.

To be sure, the UN has not established a standing claims commission to resolve claims resulting from the UN’s peacekeeping operations in Haiti. This Court,

however, has expressly concluded that the failure to create an adequate dispute-resolution mechanism does not constitute an express waiver of immunity. *See Brzak*, 597 F.3d at 112 (“Although the 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 CPIUN.”). And this Court in *Georges* made clear that the UN’s failure to establish a standing claims commission is not a condition precedent to asserting immunity. *Georges*, 834 F.3d at 90, 97. These precedents squarely foreclose Appellants’ attempts to claim that the UN’s use of the word “liability” in the Secretary-General reports opens the organization up to the judicial processes of “any other court of competent jurisdiction” (Br. 20) simply because they have not established any “binding” settlement mechanisms.⁴

Appellants’ arguments also ignore the requirement that waiver of immunity be made in reference to a “particular case.” CPIUN art. II, § 2. The documents on which they rely, of course, were made in the 1990s and make no reference to Appellants’ case or to the Haitian cholera outbreak generally. Appellants claim that

⁴ Appellants’ attempts to analogize the UN’s use of the word “liability” to the waivers of sovereign immunity in the United States are similarly unpersuasive. The Federal Torts Claims Act, for example, provides that the United States “shall be liable . . . *in the same manner and to the same extent* as a private individual under like circumstances,” which includes suit in domestic courts. 28 U.S.C. § 2674 (emphasis added). In contrast, the Secretary-General reports reference liability *only* in the context of discussing the UN’s standing claims commission, and make no reference to the ability to make claims against the organization in any other manner.

this is irrelevant because the reports by the Secretary-General constitute an *a priori* waiver covering the circumstances of this suit, simply because the documents refer to “liability” for damages resulting from UN peacekeeping operations in a general and aspirational sense. The plain import of this argument is that the UN should therefore have been subject to suit in *every* case since the publications of these reports about standing claims commissions, with no geographic limitation. But Appellants point to no case in which any court has found that the UN has submitted itself to the court’s jurisdiction in a tort suit under *any* circumstances, let alone via an advance waiver of immunity. On the contrary, courts have consistently found the UN to have retained its immunity from tort claims, including tort claims arising out of the events in Haiti. *E.g.*, *Georges*, 834 F.3d at 98; *Brzak*, 597 F.3d at 112; *Emmanuel*, 253 F.3d at 757.

In short, there is no plausible reading of these documents that suggests that they were intended to waive the immunity of the UN and its subsidiary organ MINUSTAH and subject them to the conflicting jurisdiction of domestic courts, regardless whether, as Appellants argue, the documents use the word “liability.” As the district court correctly recognized, those documents plainly contemplate that any “liability” against the UN would be resolved through non-judicial means. SPA8.

Such a statement cannot constitute an express waiver of immunity from “any legal process” in the courts of the United States. CPIUN art. II, sec. 2.⁵

B. The Individual Defendants Also Enjoy Immunity

The district court also appropriately concluded that the individual defendants in this case are immune from suit. The UN Charter provides that “officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.” U.N. Charter, art. 105, para. 2. Article V, Section 18(a) of the CPIUN provides that UN officials are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity”

Under Section 18(a), both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App’x 407, 409 (2d Cir. 2009) (applying such immunity to a UN employee who did not enjoy diplomatic immunity). Likewise, former as well as current UN officials enjoy immunity for their official acts under the

⁵ This immunity from “every form of legal process” also includes service of process in a civil suit. Moreover, the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 3422, 11 U.N.T.S. 11, 20 (entered into force Nov. 21, 1947), art. III, sec. 9(a), makes clear that the Secretary-General must consent to the conditions under which any service of process might be permitted in the headquarters district. No such conditions have been established, and therefore plaintiffs’ attempts to serve the UN and MINUSTAH by personal service and facsimile within the headquarters district (Br. 11) were ineffectual.

International Organizations Immunities Act, 22 U.S.C. § 288d(b). *De Luca v. United Nations*, 841 F. Supp. 531, 534 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994).

Consequently, all of the individual defendants enjoy immunity for their official acts under Section 18(a) of the CPIUN and the IOIA.⁶ The UN has not waived this immunity, and indeed, has expressly asserted these officials' immunity in reference to this suit. *See, e.g.*, A146–49.

In addition to immunity for their official acts, Under Secretary-General Soares also enjoys diplomatic agent-level immunity. Article V, Section 19 of the CPIUN provides that, in addition to the immunities specified in Section 18, “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States on December 13, 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents “enjoy immunity from [the] civil and administrative jurisdiction” of

⁶ Section 17 of the CPIUN provides that the Secretary-General will specify the categories of officials to whom the provisions of Article V of the CPIUN apply. In 1946, the General Assembly approved the Secretary-General's proposal to apply the privileges and immunities of Article V of the CPIUN to “all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates.” G.A. Res. 76 (I), U.N. Doc. A/RES/76(I) (Dec. 7, 1946).

the receiving State—here, the United States—except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities other than official functions. None of these exceptions are at issue here. 23 U.S.T. at 3240.

Accordingly, Under-Secretary Soares enjoys immunity from this suit. *See Georges*, 834 F.3d at 92, 98 n.64 (affirming dismissal of Secretary-General Ban and Assistant Secretary-General Mulet on the grounds of diplomatic immunity).⁷

Appellants' only argument against this immunity is that it is derivative of the UN's immunity, which, according to Appellants, has been waived. As already explained *supra* Part I, however, the UN has not waived its immunity, or the immunity of its officials, with respect to this case.⁸

⁷ In this case, Secretary-General Ban no longer enjoys diplomatic immunity because his term as Secretary-General has ended, but he continues to enjoy immunity for his official acts under Section 18(a) of the CPIUN and under the IOIA, as well as due to his status as a former Secretary-General. *See Brzak*, 597 F.3d at 113 (individuals who formerly held the rank of UN Assistant Secretary-General or higher continue to enjoy immunity for their official acts as a matter of residual diplomatic immunity). Mulet stepped down from an Assistant Secretary-General position in December 2017, while this case was on appeal, but in any event, he also continues to enjoy immunity for his official acts.

⁸ Appellants have also failed to serve the individual defendants. The docket indicates that plaintiffs attempted to serve all of the defendants by personal service on former Secretary-General Ban in June 2014. Secretary-General Ban, however, enjoyed diplomatic immunity as of 2014, and therefore enjoyed personal inviolability, which rendered service on him ineffective. *See Tachiona v. United States*, 386 F.3d 205, 223 (2d Cir. 2004) (unless one of the three exceptions to immunity from civil suit apply, service of process on an individual enjoying diplomatic immunity is improper). Furthermore, an individual who enjoys inviolability cannot be served as a means of serving parties who do not enjoy immunity. *See id.* at 224.

II. Jurisdictional Discovery Is Not Appropriate in This Case

The district court in this case appropriately denied Appellants' request for limited jurisdictional discovery in this case, and there is no need for this Court to request additional discovery. As this court recently explained in *Arch Trading Corp. v. Republic of Ecuador*, "a district court may deny jurisdictional discovery demands made on a foreign sovereign if the party seeking discovery cannot articulate a 'reasonable basis' for the court first to assume jurisdiction." 839 F.3d 193, 206–07 (2d Cir. 2016). And when "sovereign immunity is at issue, discovery is warranted 'only to verify allegations of specific facts crucial to an immunity determination.'" *Id.*

Here, as explained *supra* Part I, Appellants have failed entirely to allege any facts that suggest the UN has expressly waived its immunity from suit in this particular case. On the contrary, Appellant have relied on documents that expressly invoke the UN's immunity from suit in domestic courts. And though Appellants assert that there may have been various internal conversations at the UN about its responsibility for the Haitian cholera outbreak, Appellants have not made a single factual allegation suggesting that the UN did, in fact, state that it would be subject to suit in courts of the United States for claims arising out of these circumstances. Requiring the UN to subject itself to the Appellants' discovery requests in these circumstances would be highly inappropriate. Not only would it require diversion of key resources in a suit in which it is clear that the UN is immune, but it would directly interfere with the United States' treaty obligations to ensure that the UN is free from "any form of legal

process,” CPIUN, art. II, sec. 2, and to ensure the inviolability of “archives of the United Nations, and in general all documents belonging to it or held by it.” *Id.* sec. 4. Appellants’ request for jurisdictional discovery should therefore be denied.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Of Counsel:

MARY CATHERINE MALIN
*Assistant Legal Advisor for Diplomatic Law and
Litigation
Department of State*

HENRY AZAR
*Attorney Advisor
Department of State*

CHAD A. READLER
Acting Assistant Attorney General

SHARON SWINGLE

s/ Jennifer Utrecht

JENNIFER UTRECHT
*Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039
Jennifer.l.utrecht@usdoj.gov*

February 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,088 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jennifer Utrecht

Jennifer Utrecht

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Utrecht
Jennifer Utrecht