

# RESOLVING UN TORTS IN US COURTS: *GEORGES v UNITED NATIONS*

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*This article concerns the recent case of Georges v United Nations, which constitutes, to date, the most elaborate public law challenge to the principle of UN immunity from suit and private law attempt at procuring compensation from the UN for alleged malfeasance. Despite the fact that it relates to people and events in Haiti, the case was brought by United States lawyers on behalf of US plaintiffs, was decided by US courts, used the US-style class action method, called for reparations of US proportions and was intervened in by the US government. The article addresses how the US legal culture of expansionism, litigiousness and charity have influenced the case. It asks whether, in drawing on this culture, the US legal system has overextended its extraterritorial engagement in international and foreign affairs.*

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## I INTRODUCTION

While the United Nations has long been able to hold states to account for wrongs done to it, by virtue of the famous International Court of Justice (‘ICJ’) *Reparations* case of 1949 (‘*Reparations*’),<sup>1</sup> the same cannot exactly be said of the accountability of the UN to others. The UN enjoys functional immunity from suit due to a variety of instruments — including the *Charter of the United Nations*, the *Convention on the Privileges and Immunities of the United Nations* (‘*CPIUN*’)<sup>2</sup> concluded as early as 1946 and agreements on specific forms of UN work such as Status of Forces Agreements (‘SOFA’) on UN peacekeeping — and possibly custom and domestic law,<sup>3</sup> generally meaning that it cannot be sued

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<sup>1</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

<sup>2</sup> *Charter of the United Nations* art 105; *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) (‘*UN Privileges and Immunities Convention*’).

<sup>3</sup> August Reinisch, ‘Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organization — An Introduction’ in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013) 1, 6–7.

for malfeasance committed in the performance of its functions. Victims of UN torts have traditionally, therefore, sought redress through the UN's own dispute resolution mechanisms that exist outside this immunity, including ombudsmen, mediation services, dispute tribunals and local claims review boards. Moreover, claimants can appeal to the UN Secretary-General to resolve disputes.

However, these options are limited in scope,<sup>4</sup> and in any case, they carry the perception of a potential absence of independence that attends with the UN examining its own misconduct. The UN might not exercise its discretion to engage its dispute resolution mechanisms, or the mechanisms might render decisions that are restricted by policy considerations of the organisation or are not open to appeal. Consequently, aggrieved individuals have, at times, looked outside the province of international law for resolution of their grievances.<sup>5</sup> From UN staff who have been harmed in the workplace to civilians who have suffered from the actions or inaction of UN peacekeepers, they have sued the UN in various states across the world in an attempt to pierce UN immunity and be more adequately recompensed.

These cases have almost never been met with success. In the greater scheme of things, their failure has generally meant that from the time UN immunity cases first arose in national courts in the middle of the last century, the occasional UN employee with a workplace complaint who has braved a domestic jurisdiction has had his/her complaint dismissed or remitted to a UN administrative body. Of course, behind these immunity cases lie many more employment disputes, including the hundreds that tribunals of the UN and its specialised agencies handle every year.<sup>6</sup> Yet, in recent times, there has become more at stake with the rise of mass, as opposed to individual, tort claims against the UN, involving many thousands of claimants per case. Notably, such cases have been brought not in the country in which the alleged tort was committed or where the claimants were living, unlike in standard immunity cases, but in jurisdictions of developed countries equipped with considerable legal resources and legal enterprise.

One such case before US courts from 2013 to 2016, which has been described as 'one of the most organized legal challenges' to UN immunity yet,<sup>7</sup> is *Georges v United Nations* ('*Georges*').<sup>8</sup> This case arose in response to a cholera epidemic triggered in Haiti in October 2010 that was for a long time the largest cholera

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<sup>4</sup> Jan Wouters and Pierre Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials' in August Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (Oxford University Press, 2010) 77, 78.

<sup>5</sup> For a review of the case law, see *ibid.* See also Cedric Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends' (2010) 7 *International Organizations Law Review* 121.

<sup>6</sup> See Yaraslau Kryvoi, 'Procedural Fairness as a Precondition for Immunity of International Organizations' (2016) 13 *International Organizations Law Review* 255, 256.

<sup>7</sup> Rick Gladstone, 'Peacekeeping by UN Faces New Scrutiny on 2 Fronts', *The New York Times* (online), 9 October 2013 <<https://www.nytimes.com/2013/10/10/world/peacekeeping-by-un-faces-new-scrutiny-on-2-fronts.html>> archived at <<https://perma.cc/73FK-JXK9>>.

<sup>8</sup> *Georges v United Nations*, 84 F Supp 3d 246 (SD NY, 2015); *Georges v United Nations*, 84 F 3d 88 (2<sup>nd</sup> Cir, 2016).

epidemic in the world and that continues today.<sup>9</sup> At least 10 000 people have died of the disease and 800 000 people have taken ill in the country of 10 million.<sup>10</sup> Scientists traced the strain of cholera to a battalion of UN peacekeeping troops that inadvertently carried the disease from their home country of Nepal and failed to exercise proper methods of sanitation.<sup>11</sup> The UN responded with more than US\$100 million in services, reducing the epidemic by around 90 per cent since it peaked in 2011.<sup>12</sup> However, the UN did not assess claims for compensation. Hence, *Georges* commenced, in which a class of thousands of people affected by the epidemic brought a suit in the US judicial system against the UN, the UN Stabilization Mission in Haiti, the former Under-Secretary-General of the UN Stabilization Mission in Haiti and the former UN Secretary-General.

Some jurists and scholars have queried the potential unfairness of national courts, rather than an international body, holding the UN to account, given that these courts could make decisions inconsistent with one another and in making these decisions assert ‘unilateral control’ over the UN and undermine the principle of ‘sovereign equality’.<sup>13</sup> The present article takes this argument one step further in considering the potential bias involved in the US jurisdiction, in particular, holding the UN to account in the cholera case. Certainly, with regard to the facts presented in the case, the US jurisdiction bears little material connection to the events, with cholera having ravaged the sovereign nation of Haiti, with the strain brought by Nepalese nationals and with failure to prevent the outbreak attributed to the UN.

The article discusses the relevance of US legal culture in bringing *Georges* to fruition, namely, the culture of expansionism, litigiousness and charity. It questions whether the advanced state of this culture might justify the legal innovation of the case or whether its influence could, in fact, amount to legal intervention. Though, *prima facie*, it might seem that the legal action could not have made matters worse for the Haitian people, the article addresses whether, in trying to resolve a dispute between a foreign people and the UN, where international dispute resolution mechanisms have failed to do so adequately, the legal action has implications more far-reaching than intended with regard to the US legal system’s extraterritorial engagement. The article discusses these implications and whether they can be reconciled with a public interest case for US involvement.

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<sup>9</sup> R R Frerichs et al, ‘Nepalese Origin of Cholera Epidemic in Haiti’ (2012) 18 *Clinical Microbiology and Infection* 158, 158.

<sup>10</sup> Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Cholera Litigation: Frequently Asked Questions* (2018) <<http://www.ijdh.org/cholera-litigation-frequently-asked-questions/>> archived at <<https://perma.cc/KFA9-JF4W>>.

<sup>11</sup> Frerichs et al, above n 9, 158–9.

<sup>12</sup> Letter from Patricia O’Brien, UN Under-Secretary-General for Legal Affairs to Brian Concannon, Mario Joseph and Ira Kurzban, 21 February 2013; *A New Approach to Cholera in Haiti: Report by the Secretary-General*, GA Res 71/620, UN GAOR, 71<sup>st</sup> sess, Agenda Item 69(c), UN Doc A/71/620 (25 November 2016) [1] (‘*A New Approach to Cholera in Haiti*’).

<sup>13</sup> See, eg, Wouters and Schmitt, above n 4, 101, 109; Daniël M Grütters, ‘NATO, International Organizations and Functional Immunity’ (2016) 13 *International Organizations Law Review* 211, 238, 251.

## II LITIGATION WITH US CHARACTERISTICS

The discussion of legal culture is prefaced with an illustration of the US features of the case and an overview of its procedural history. Of particular note, the legal minds behind *Georges* appear to hail, in most part, from the US. They are two groups of public interest advocates and human rights lawyers: the Institute for Justice and Democracy in Haiti ('IJDH'), based in Boston, Massachusetts and the Bureau des Avocats Internationaux ('BAI'), based in Port-au-Prince, Haiti. While the IJDH is the more distinctly American of the two groups — with a network of board members, advisors, team members and partner organisations from the US —<sup>14</sup> the BAI nevertheless has a considerable US influence. It was co-managed by the current Executive Director of the IJDH, US lawyer Brian Concannon, for eight years until the IJDH was founded in 2004,<sup>15</sup> at which time the IJDH succeeded the Haitian government as the BAI's main source of support. The ensuing BAI–IJDH partnership has had the well-resourced US-based IJDH group at its financial and seemingly operational centre. The interest groups have been assisted in *Georges* by the private US law firm Kurzban Kurzban Tetzeli and Pratt ('KKTP'), located in Miami, Florida.

In 2011, just over a year after cholera spread through Haiti, the lawyers filed a petition with the UN on behalf of more than 5000 people killed or injured by the disease.<sup>16</sup> Their first request was compensation. They claimed damages of a minimum of \$100 000 per deceased person and a minimum of \$50 000 per injured person, in addition to legal costs — in US currency, not the Haitian gourde. Secondly, they petitioned for improved water, sanitation and medical services. Thirdly, they sought a public apology.

Fifteen months later, in 2013, the then UN Under-Secretary-General for Legal Affairs, Patricia O'Brien, responded to Concannon of the IJDH. She referred to advice provided to the UN by a panel of independent experts that the epidemic resulted from 'a confluence of circumstances'.<sup>17</sup> She also said the petition effectively called for 'a review of political and policy matters' and as such was

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<sup>14</sup> See Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Board of Directors* (2018) <<http://www.ijdh.org/about/board-of-directors/>> archived at <<https://perma.cc/37F3-MBWK>>; Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Advisory Council* (2018) <<http://www.ijdh.org/about/advisory-council/>> archived at <<https://perma.cc/N65Z-55NF>>; Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Team* (2018) <<http://www.ijdh.org/about/team/>> archived at <<https://perma.cc/A3U7-465K>>; Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Our Partners* (2018) <<http://www.ijdh.org/about/partner-organizations/>> archived at <<https://perma.cc/LC74-S5HW>>.

<sup>15</sup> Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Board of Directors*, above n 14.

<sup>16</sup> Petition for Relief from Mario Joseph, Brian Concannon and Ira Kurzban, to Chief, Claims Unit, MINUSTAH Log Base, Office of the United Nations Secretary-General, 3 November 2011 <<http://www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>> archived at <<https://perma.cc/9G5A-WAZS>>.

<sup>17</sup> Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Mario Joseph and Ira Kurzban, 21 February 2013, 2. See also Alejandro Cravioto et al, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (Report, 4 May 2011) <<http://reliefweb.int/report/haiti/final-report-independent-panel-experts-cholera-outbreak-haiti/>> archived at <<https://perma.cc/92T9-RC8L>> ('*Expert Report on Cholera Outbreak in Haiti*').

‘not receivable’ under the *CPIUN*.<sup>18</sup> Further, she characterised the matter as having a public law rather than private law nature and came to the conclusion that the UN could, therefore, be exempt from tortious liability.<sup>19</sup> The lawyers then gave the UN Secretariat 60 days to agree to meet and engage in mediation and/or establish a standing claims commission, but O’Brien declined the invitation.<sup>20</sup>

Having reached an impasse at the international level, the lawyers henceforth shifted their attention to the judiciary of the domestic jurisdiction in which the UN headquarters are located. They filed the claims with the US District Court for the Southern District of New York in late 2013 and thereby initiated the class action of *Georges*. The class in the lawsuit comprised ‘at least 679,000 individuals’, including representatives of more than 8300 deceased persons and people who had not died or become ill but could potentially die or become ill.<sup>21</sup> The court heard the case around one year later, dismissing the claims in early 2015 for lack of subject-matter jurisdiction.<sup>22</sup> The US Court of Appeals for the Second Circuit subsequently heard an appeal in early 2016 and by August of that year upheld the lower court’s decision.<sup>23</sup> In one of the last chapters of the case to date, the legal team was granted an extension until January 2017 in which to seek certiorari in the US Supreme Court, but ultimately decided not to pursue the case further in the US jurisdiction. In February 2017, Ira Kurzban announced at an American Bar Association panel discussion that the legal team was considering whether to bring the case before a ‘European court’,<sup>24</sup> despite an uncertain nexus to the jurisdiction.

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<sup>18</sup> Letter from Patricia O’Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Mario Joseph and Ira Kurzban, 21 February 2013, 2.

<sup>19</sup> Jake Johnston, *Ban Ki-moon Explains to Congress Why the UN Won’t Be Held Accountable for Cholera in Haiti* (27 February 2015) Haiti Relief and Reconstruction Watch <<http://cepr.net/blogs/haiti-relief-and-reconstruction-watch/ban-ki-moon-explains-to-congress-why-the-un-wont-be-held-accountable-for-cholera-in-haiti/>> archived at <<https://perma.cc/P828-DD9H>>, quoting Letter from Ban Ki-moon to US Congress, 19 February 2015.

<sup>20</sup> See Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Cholera Chronology* (2018) <<http://www.ijdh.org/wp-content/uploads/2012/03/Cholera-chronology.pdf>> archived at <<https://perma.cc/RD2M-8PAN>>; Rosa Freedman, ‘UN-Accountable?: A Response to Devika Hovell’ (2016) 110 *AJIL Unbound*, 11 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/unaccountable-a-response-to-devika-hovell/E4D49D01C242AFE36DEFF267CD971A3C>> archived at <<https://perma.cc/9FVT-JES2>>; Letter from Patricia O’Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Mario Joseph and Ira Kurzban, 5 July 2013 <<http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>> archived at <<https://perma.cc/TW39-J28E>>.

<sup>21</sup> Georges et al, ‘Class Action Complaint: Jury Trial Demanded’, Complaint in *Georges v United Nations*, 13-cv-07146-JPO, 9 October 2013, 8–9.

<sup>22</sup> *Georges v United Nations*, 84 F Supp 3d 246 (SD NY, 2015).

<sup>23</sup> *Georges v United Nations*, 84 F 3d (2<sup>nd</sup> Cir, 2016).

<sup>24</sup> Ira J Kurzban, *Address at Civil Rights and Justice Section Panel Discussion* (American Bar Association Midyear Meeting: Cholera in Haiti and UN Liability — How Did the Cholera Epidemic Start and What Reparations Does the UN Owe Haitians?, 4 February 2017) 1:01:40–1:02:23 <<https://www.periscope.tv/w/1LyxBwXAMeOKN/>>. See also American Bar Association, *UN Immunity Beats Back Legal Claims by Haitian Cholera Victims, Battle Continues* (5 February 2017) <[http://www.americanbar.org/news/abanews/aba-news-archives/2017/02/un\\_immunity\\_beatsba.html/](http://www.americanbar.org/news/abanews/aba-news-archives/2017/02/un_immunity_beatsba.html/)> archived at <<https://perma.cc/TC3C-QEVM>>.

In the meantime, far from US courtrooms, the UN Secretariat had been working on a ‘new approach’ to the cholera epidemic that was announced one day before the Second Circuit handed down its decision and that was then discussed in a report tabled before the UN General Assembly.<sup>25</sup> This report was supplemented with an apology in Haitian Creole issued in December 2016 by the outgoing UN Secretary-General, Ban Ki-moon, who acknowledged the ‘blemish on the reputation of UN peacekeeping’ and lamented that the UN had not done enough to respond to the epidemic.<sup>26</sup> He called for US\$400 million in voluntary donations from member states and pledged to use, as a matter of priority, one part of these donations to continue the battle against cholera.<sup>27</sup> He vowed to use the other part to support affected communities through ‘projects and initiatives’, possibly including compensation to individual families, while acknowledging that compensation is complicated by limits to funding and to the ability to identify who had died of cholera.<sup>28</sup>

It therefore appeared that, six years after the cholera outbreak, the UN would now be somewhat open to the idea of compensation. However, if provided, compensation would only be a secondary measure to the provision of services and infrastructure. In addition, it would only be delivered through an ad hoc scheme of the UN rather than through the established *CPIUN* and *SOFA* mechanisms or at the behest of external legal systems.<sup>29</sup> Furthermore, the UN only conceived of a limited amount of compensation and could not guarantee this amount. The voluntary contribution scheme had generated a mere two per cent of the desired funds by the March 2017 deadline.<sup>30</sup> This amount was quickly depleted through a small number of UN projects in Haiti.<sup>31</sup> Subsequent to this dismal result, the permanent five states of the UN Security Council blocked the current UN Secretary-General, António Guterres, from redirecting to the cholera fund US\$40.5 million that had been saved from the Haitian peacekeeping budget

<sup>25</sup> See *A New Approach to Cholera in Haiti*, UN Doc A/71/620.

<sup>26</sup> Ban Ki-moon, ‘Secretary-General’s Remarks to the General Assembly on a New Approach to Address Cholera in Haiti’ (Speech delivered at the United Nations General Assembly, 1 December 2016) <<https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>> archived at <<https://perma.cc/825W-RFC4>>.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *UN Privileges and Immunities Convention* art 29; *Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti*, 2271 UNTS 235 (signed and entered into force 9 July 2004) art 55 (‘*United Nations–Haiti Agreement*’).

<sup>30</sup> See Editorial, ‘Haiti is Still Waiting on Promised UN Help for Cholera Epidemic’, *The Boston Globe* (online), 27 March 2017 <<https://www.bostonglobe.com/opinion/editorials/2017/03/26/haiti-still-waiting-promised-help-for-cholera-epidemic/wJg7JIEwnpM6Wra1xfqqGL/story.html>> archived at <<https://perma.cc/7BYD-B7HK>>; Rick Gladstone, ‘After Bringing Cholera to Haiti, UN Can’t Raise Money to Fight It’, *The New York Times* (online), 19 March 2017 <[https://www.nytimes.com/2017/03/19/world/americas/cholera-haiti-united-nations.html?\\_r=0/](https://www.nytimes.com/2017/03/19/world/americas/cholera-haiti-united-nations.html?_r=0/)> archived <<https://perma.cc/8TDR-MQAQ>>.

<sup>31</sup> Amina Mohammed, ‘Sustaining Intensified Response to Haiti Cholera Outbreak Key to Saving Lives, Deputy Secretary-General Tells General Assembly, as Number of Cases Falls’ (Press Release, DSG/SM/1063-GA/11921, 14 June 2017) <<https://www.un.org/press/en/2017/dsgsm1063.doc.htm>> archived at <<https://perma.cc/GB2K-KECZ>>.

in the previous years.<sup>32</sup> It has also been reported that the UN is ‘moving in the direction of saying’ it will provide compensation for communities and organisations in lieu of individuals, frustrating the legal team’s goal of winning individual compensation.<sup>33</sup> Accordingly, Guterres has spoken of individual compensation as potentially engendering ‘negative incentives’, tension and violence and as ‘most unlikely to be supported’ diplomatically.<sup>34</sup>

It is unsurprising, then, that the IJDH and BAI have acted unilaterally — courting US politicians and the US media, putting demands to the UN Secretariat, highlighting the cholera issue in the process for selecting the UN Secretary-General, lodging complaints with UN human rights bodies and suing the UN in the US court system.<sup>35</sup> They have presumably undertaken these activities from the perspective that adversarial forms of lobbying and civil litigation conducted in the seat of a nation such as the US could make up for an unconvincing form of internationalism, with the UN having earned the reputation of exercising *impunity* rather than *immunity*.<sup>36</sup>

The lawyers have also acted independently of the Haitian government. The Haitian government could have requested that the UN settle the third-party claims through a standing claims commission provided for in the agreement on the peacekeeping operation in Haiti.<sup>37</sup> It has instead resisted an application (brought with the assistance of a Canadian non-governmental organisation (‘NGO’)) for an injunction compelling it to activate this commission.<sup>38</sup> Moreover, it could have appealed to the General Assembly or Security Council to solicit an advisory opinion from the ICJ on the establishment of the standing claims commission, given that there is no precedent for this commission in the history of UN peacekeeping, or an advisory opinion on the question of UN immunity, just as UN bodies themselves could have taken initiative.<sup>39</sup> In the

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<sup>32</sup> Karen McVeigh, “‘Shameful’: UK and US under Fire over Blocked Funds for Haiti Cholera Victims”, *The Guardian* (online), 3 November 2017 <<https://www.theguardian.com/global-development/2017/nov/02/shameful-uk-us-blocked-funds-haiti-cholera-victims-un-donors-china-france-russia>> archived at <<https://perma.cc/8VKQ-57LD>>.

<sup>33</sup> Kurzban, above n 24, 54:25–54:42.

<sup>34</sup> *New Approach to Cholera in Haiti: Report of the Secretary-General*, GA Res 71/895, UN GAOR, 71<sup>st</sup> sess, Agenda Item 69(c), UN Doc A/71/895 (3 May 2017) [53]–[54].

<sup>35</sup> See Kurzban, above n 24, 24:55–25:22.

<sup>36</sup> See, eg, Moritz P Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press, 2017) 201; Farhana Choudhury, ‘The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability’ (2016) 104 *Georgetown Journal of International Law* 725, 742.

<sup>37</sup> *United Nations–Haiti Agreement* art 55.

<sup>38</sup> See Patrice Florvilus, ‘*Le dossier des victimes du choléra en attente d’ordonnance du juge des référés*’ (Press Release, Institute for Justice & Democracy in Haiti, 2018) <<https://www.ijdh.org/2018/10/projects/le-dossier-des-victimes-du-cholera-en-attente-dordonnance-du-juge-des-referes/>> archived at <<https://perma.cc/YX8X-5TG6>>; Frédéric Mégret, ‘Remedying UN Abuses by Forcing the Host State’s Hand: Current Case Calls for the Haitian Government to Trigger a Standing Claims Commission’, on *Opinio Juris* (24 October 2018) <<http://opiniojuris.org/2018/10/24/remedying-un-abuses-by-forcing-the-host-states-hand-current-case-calls-for-the-haitian-government-to-trigger-a-standing-claims-commission/>> archived at <<https://perma.cc/K6Z6-7TCC>>.

<sup>39</sup> See Devika Hovell, ‘Due Process in the United Nations’ (2016) 110 *American Journal of International Law* 1, 33; Wouters and Schmitt, above n 4, 107; *UN Privileges and Immunities Convention* art 30.

absence of such initiatives, the lawyers attempted to forge their own path to compensation.

The lawyers embarked on this enterprise in the legal framework of the US. They went to US courts, appeared before US judges and requested that the matter be decided by a US jury. They sought to legitimise this approach by nominating, among the five plaintiffs in *Georges*, some plaintiffs of dual Haitian–American citizenship,<sup>40</sup> notwithstanding the tenuous connection between the US and the Haitian class as a whole in *Georges*. Indeed, the epidemic had barely touched the US, with epidemiologists reporting that in the six months after the cholera outbreak in Haiti, at which time the lawyers were assembling their case, only 23 persons from the US contracted the Haitian strain of cholera and none had died.<sup>41</sup>

While both the trial and appeal courts ultimately dismissed *Georges*, they were clearly open to entertaining the matter, as each granted hearings. This willingness of the US courts to hear the issues amazed some scholars of international law, such as Kristen Boon, who characterised the Second Circuit’s sudden decision to hear the appeal as a ‘surprise’.<sup>42</sup> The judges displayed substantial knowledge of the relevant international law and, in accepting numerous amicus curiae briefs from interested organisations around the world whose submissions helped build the case,<sup>43</sup> they added to the spectacle of US courts deciding the matter.

Notably, the courts permitted the US government to intervene. With the UN defendants failing to acknowledge or contest the proceedings, in their absolute unwillingness to waive immunity, the US Attorney’s Office stepped in and essentially acted in response to the claims, as is relatively standard practice. It argued at the initial hearing that it was logical for it to be involved in the case given that the US hosts the UN, whose headquarters are situated in New York City, and because the US is party to the *CPIUN*.<sup>44</sup> Although the government presented a case in favour of UN immunity, its submissions facilitated the development of *Georges* into a well-formed case with a putatively legitimate presence in the US jurisdiction. At the same time, with the government having appointed itself as de facto respondent, *Georges* would now have a full complement of what could appear to be US parties playing the parts of the respective international parties — international judges, Haitian plaintiffs and UN respondents — as though the US parties were participants in a mock international trial.

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<sup>40</sup> See Institute for Justice and Democracy in Haiti, Bureau des Avocats Internationaux, *Cholera Accountability* (2017) <<http://www.ijdh.org/choleraaccountability/>> archived at <<https://perma.cc/4BLP-HXJW>>: ‘The named plaintiffs in the suit are five Haitians and Haitian-Americans’.

<sup>41</sup> Anna E Newton et al, ‘Cholera in United States Associated with Epidemic in Hispaniola’ (2011) 17(1) *Emerging Infectious Diseases* 2166, 2166–7.

<sup>42</sup> Kristen Boon, ‘Surprise Hearing in Haiti Cholera Case Appeal’ on *Opinio Juris* (29 February 2016) <<http://opiniojuris.org/2016/02/29/haiti-cholera-hearing/>> archived at <<https://perma.cc/DD7Y-YEMH>>.

<sup>43</sup> Transcript of Proceedings, *Georges v United Nations* (SD NY, 13-cv-07146-JPO, 24 October 2014) 2. Appearances include Monica Visalam Iyer, Attorney for Amici Curiae European Law Scholars; Kertch J Conze, Attorney for Amici Curiae Haitian Lawyers Association and the Haitian Women of Miami; Muneer I Ahmad, Attorney for Amici Curiae International Law Scholars and Practitioners.

<sup>44</sup> *Ibid* 15–16.

A final and distinctly American feature of *Georges* is its use of the class action method of litigation, which has its modern roots in the US and remains a largely US phenomenon.<sup>45</sup> This legal technique enabled the lawyers to demand vast amounts of money, including US\$2.2 billion to eradicate cholera from Haiti.<sup>46</sup> While the lawyers left open the amount of compensation payable to individuals, it has been estimated that, given the size of the class, the total compensation package in the event of a win ‘would be between US\$15 billion and US\$36.5 billion’, which is in the vicinity of the UN biennial budget.<sup>47</sup> These figures are significantly larger than the US\$400 million in assistance proposed by the former UN Secretary-General. They also amount to substantially more than the ‘small cash transfers’ that, as English field researchers observed, Haitians have expressed interest in to assist in returning to the *status quo ante*.<sup>48</sup>

In summary, the IJDH, BAI and KKTP brought the issue of the Haitian epidemic into the context of US law as a means of compelling the UN to take responsibility for the actions of its personnel. These architects of *Georges* provided a blueprint for how US lawyers can bring US-style actions in US courts, before US judges, in relation to mass UN torts. They attempted to carve out a place for mass UN torts in the realm of US law even where the location and parties involved in the alleged tort were only remotely related to the US jurisdiction.

### III ON THE CREST OF A NEW WAVE

The case of *Georges* is almost unprecedented. There exists only one other example of national, Western-sponsored, mass tort litigation against the UN: the *Mothers of Srebrenica* case, considered by Dutch courts from 2008 to 2012.<sup>49</sup> This case consists of a class action against the Netherlands and the UN brought by some individuals from the town of Srebrenica in Bosnia and Herzegovina and a Dutch ‘Mothers of Srebrenica’ association representing 6000 people. The plaintiffs alleged that in 1995 a Dutch battalion of UN peacekeepers breached its duty of care and acted negligently when it failed to safeguard an enclave overrun by Bosnian Serb forces which then killed some 8000 people in an act of genocide.

Familiarly, it would appear that there was some degree to which Dutch elements of the litigation were contrived or enhanced through legal devices in order to enable the case to be heard in the Netherlands. As with the strategy in

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<sup>45</sup> See Stephen C Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, 1987) 220.

<sup>46</sup> *Georges et al*, ‘Class Action Complaint: Jury Trial Demanded’, Complaint in *Georges v United Nations*, 13-cv-07146-JPO, 9 October 2013, 65.

<sup>47</sup> Hovell, above n 39, 42.

<sup>48</sup> Nicolas Lemay-Hébert and Rosa Freedman, ‘Haiti’s Cholera Victims Still Can’t Get What They Need from the UN’, *The Conversation* (online), 20 April 2017 <<https://theconversation.com/haitis-cholera-victims-still-cant-get-what-they-need-from-the-un-75788/>> archived at <<https://perma.cc/7YBP-8S8Y>>.

<sup>49</sup> *Mothers of Srebrenica Association v The Netherlands*, No 295247/HA ZA 07-2973 (District Court of The Hague, 10 July 2008); *Mothers of Srebrenica Association v The Netherlands*, No 200.022.151/01 (Court of Appeal of The Hague, 30 March 2010); *Mothers of Srebrenica Association v The Netherlands*, No 10/04437 (Supreme Court of the Netherlands, 13 April 2012). See generally Otto Spijkers, ‘Questions of Legal Responsibility for Srebrenica before the Dutch Courts’ (2016) 14 *Journal of International Criminal Justice* 819.

*Georges* of using some Haitian–American plaintiffs, the class was furnished with a greater connection to the country of the lawsuit, with the Mothers of Srebrenica association registered not in Srebrenica, but in Amsterdam, even though it represented survivors of the Srebrenica massacre.

In some ways, however, the Dutch litigation demonstrated a more genuine connection between the alleged tort and the selected forum than did the US litigation of *Georges*. In particular, the Dutch litigation was filed in the state of the nationality of the peacekeepers — namely, the Netherlands. Also, the plaintiffs listed the Netherlands as the first defendant and the UN only secondly and omitted the UN in a second round of litigation.<sup>50</sup> Furthermore, the plaintiffs claimed damages only from the Netherlands and not from the UN,<sup>51</sup> which was, as in *Georges*, found to be immune from suit. Such a strategy, which was ultimately successful in winning a small amount of damages from the Dutch government due to the recognition that a short window of Dutch command contributed to over three hundred deaths,<sup>52</sup> would be akin to *Georges* being filed in Nepal against the Nepalese government for failing to screen its peacekeepers. Similarly, in relation to the ‘sex-for-food’ scandal that erupted in Haiti in 2007, involving more than one hundred UN peacekeepers from Sri Lanka, the Sri Lankan government itself provided an ex gratia payment to a Haitian woman and to a child born as a consequence of the woman’s ‘sexual exploitation’.<sup>53</sup>

The Dutch litigation also conformed to UN policy on third-party compensation more than the US litigation did. The General Assembly stipulated in 1998 that compensation paid by the UN should be determined in accordance with ‘local compensation standards’, awarded for economic loss only and capped at US\$50 000 per claimant for illness, injury or death.<sup>54</sup> Each of the members of the class in the Dutch litigation accordingly sought only €25 000 in damages, totalling €150 million. In contrast, in seemingly aiming at an uppermost amount of compensation, the lawyers in the US litigation gave the US courts freedom to apply lofty US standards of compensation. Yet, if guided by the General Assembly policy, the citizens of Haiti should have expected to receive even less compensation than the citizens of Bosnia and Herzegovina, given Haiti’s lower economic status.

The Mothers of Srebrenica also took their case to the European Court of Human Rights (‘ECHR’).<sup>55</sup> They argued, unsuccessfully, that by declaring the

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<sup>50</sup> *Mothers of Srebrenica Association v The Netherlands*, No C/09/295247/HA ZA 07-2973 (District Court of The Hague, 16 July 2014); *Mothers of Srebrenica Association v The Netherlands*, No 200.158.313/01 and No 200.160.317/01 (Court of Appeal of The Hague, 27 June 2017).

<sup>51</sup> See Kristen E Boon, ‘The United Nations as Good Samaritan: Immunity and Responsibility’ (2016) 16 *Chicago Journal of International Law* 341, 371.

<sup>52</sup> *Mothers of Srebrenica Association v The Netherlands*, No 200.158.313/01 and No 200.160.317/01 (Court of Appeal of The Hague, 27 June 2017).

<sup>53</sup> ‘“We Have an Agenda before Us” — UN Officials Reiterate Need for Measures Against Sexual Abuse’, *UN News* (online), 13 May 2016 <<https://news.un.org/en/story/2016/05/529272-we-have-agenda-us-un-officials-reiterate-need-measures-against-sexual-abuse>>.

<sup>54</sup> *Third-Party Liability: Temporal and Financial Limitations*, GA Res 52/247, UN GAOR, 52<sup>nd</sup> sess, 88<sup>th</sup> plen mtg, Agenda Item 142(a), UN Doc A/RES/52/247 (17 July 1998, adopted 26 June 1998) [9].

<sup>55</sup> *Stichting Mothers of Srebrenica v The Netherlands* [2013] III Eur Court HR 255.

UN immune from suit, the Dutch courts violated their human right to access a court or tribunal. In disagreeing, the Strasbourg court reversed its suggestion in the *Waite and Kennedy* and *Beer and Regan* twin judgments (concerning a European organisation) that the failure to provide this right weakens immunity.<sup>56</sup> Although the European legal action was technically an extension of the Dutch litigation, the strategy of applying to the ECHR moved the consideration of UN immunity beyond the national sphere. It meant that the court of a large regional organisation — the Council of Europe — could examine this vital issue, even though it would be bound to do so from a strictly human rights perspective, without contemplation of other concepts of justice and public policy. This point aside, the regional approach might seem more equitable than leaving the matter to the courts of one state, such as the Netherlands or the US. Except, the ECHR is not representative of the entire international community. So, with the development of European legal doctrine on the issue of UN immunity, we encounter similar problems that arise in relation to national case law.

Another significant case involving mass UN torts is the Kosovo Lead Poisoning case. While this case has not entered a national jurisdiction, it is notable for the fact that, like *Georges* and the initial *Mothers of Srebrenica* litigation, it is a Western-sponsored class action against the UN that was brought before a Western court by an underprivileged class, with 184 Romani applicants filing in the ECHR in 2006. The case arose in response to the lead poisoning of displaced Romani families housed on highly contaminated land by a UN peacekeeping mission acting as the interim administration in Kosovo. The court dismissed the case the day after it was filed, stating that the UN mission was not a party to the *European Convention on Human Rights*.<sup>57</sup>

A US lawyer from the European Roma Rights Centre, Dianne Post, was not prepared to concede, taking the case for compensation directly to the UN. Although the UN Under-Secretary-General for Legal Affairs deemed the case ‘not receivable’,<sup>58</sup> a UN Human Rights Advisory Panel provided a glimmer of hope by proclaiming in 2016, eight years after receiving the complaint, that the UN was responsible for harm suffered and should, therefore, provide the victims with compensation.<sup>59</sup> However, as the panel is entrusted merely with token powers, the decision was not binding. Moreover, its decisions are based on a human rights framework that is not currently recognised in the UN third-party

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<sup>56</sup> See *ibid* [163]–[164]. See also Riccardo Pavoni, ‘Choleric Notes on the Haiti Cholera Case’ (2015) 19 *Questions of International Law* 19, 32; Maria Irene Papa, ‘The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity Versus Right of Access to a Court’ (2016) 14 *Journal of International Criminal Justice* 893.

<sup>57</sup> See European Roma Rights Centre, *European Court of Human Rights Has No Jurisdiction in Kosovo Lead Poisoning Case* (3 April 2006) <<http://www.errc.org/roma-rights-journal/european-court-of-human-rights-has-no-jurisdiction-in-kosovo-lead-poisoning-case>> archived at <<https://perma.cc/7VVL-FRDJ>>.

<sup>58</sup> Letter from Patricia O’Brien, UN Under-Secretary-General for Legal Affairs, to Dianne Post, 25 July 2011, cited in Boon, above n 51, 357.

<sup>59</sup> Human Rights Advisory Panel, Case No 26/08 (26 February 2016) (*‘NM v UNMIK (Opinion)’*) <[http://www.unmikonline.org/hrap/Eng/Cases%20Eng/DC\\_No\\_26-08.pdf](http://www.unmikonline.org/hrap/Eng/Cases%20Eng/DC_No_26-08.pdf)> archived at <<https://perma.cc/HZ9R-7YGB>>.

claims process,<sup>60</sup> meaning that the Romani families and their search for justice had advanced little beyond square one. More recently in 2017, António Guterres acted on the matter in line with the former UN Secretary-General's response to the cholera crisis.<sup>61</sup> He expressed 'profound regret', which fell short of a full apology, and set up a trust fund for voluntary contributions totalling US\$5 million, without a view to providing individual compensation.<sup>62</sup>

A different UN in different times could have rendered a more sympathetic response to the Haitian, Srebrenica and Romani victims. In the mid-1960s, the then UN Secretary-General, U Thant, entered into 'global settlement agreements' with a number of states and the International Committee of the Red Cross ('Red Cross'), having breached its obligations to them during a UN operation in the Congo.<sup>63</sup> Perhaps this was a more progressive UN, driven by what Thant described as 'considerations of equity and humanity' towards victims, 'which the UN cannot ignore'.<sup>64</sup> Or perhaps the claimants exercised more clout, being primarily First World states. Now, beholden to organisations such as the UN and the North Atlantic Treaty Organization for the existence of their precarious democracies, states (and nascent states) such as Haiti, Bosnia and Herzegovina and Kosovo are reluctant to challenge these organisations on their role in contributing to the losses.

Therefore, the victims have accepted the offerings of Western lawyers. These offerings have been particularly momentous in *Georges*, an enterprise unmatched in the extent travelled to secure compensation from the UN. *Georges* unfolded on the distant shores of New York where there is no shortage of legal resources, and where, given the culture of legal expansionism, litigiousness and charity, it would seem that anything is possible.

#### IV A FOUNDATION IN US LEGAL CULTURE

##### A *Expansionism*

With an eye for new legal opportunities, the American judicial system began to consider matters quite detached from the US long before *Georges*. As Hermann states, the US has had a culture, '[r]ight from the beginning', of a 'lack of governmental activity that left so many things to be decided by the courts'.<sup>65</sup> These 'things' would appear to include certain questions on the immunity of international organisations. Charles Brower observes that 'US courts stand at the

<sup>60</sup> See Hemi Mistry, 'International Law Meeting Summary — The Kosovo Human Rights Advocacy Panel' (Meeting Summary, Chatham House, 26 January 2012) 10 <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/260112summary.pdf>> archived at <<https://perma.cc/2U4Z-9925>>.

<sup>61</sup> See Austin Ramzy, 'UN Offers Regret but No Compensation for Kosovo Poisoning Victims', *The New York Times* (online), 26 May 2017 <<https://www.nytimes.com/2017/05/26/world/europe/un-united-nations-kosovo-roma-lead-poisoning.html>> archived at <<https://perma.cc/2R7V-SZRQ>>.

<sup>62</sup> *Ibid.*

<sup>63</sup> See Boon, above n 51, 377.

<sup>64</sup> *Report of the International Law Commission, Fifty-Ninth Session (7 May – 5 June and 9 July – 10 August 2007)*, GA Res 62/10, UN GAOR, 62nd sess, Supp No 10, UN Doc A/62/10 (2007) 210.

<sup>65</sup> A H Hermann, 'Why is the United States of America so Litigious?' (1991) 12 *Business Law Review* 216, 216.

vanguard of efforts to decide whether international organizations should relinquish their immunity for claims arising from commercial activities' and that, in contrast with European domestic courts, US courts tend to be preoccupied with 'distinctly US legal norms' and elude foreign sources of law in deciding matters of international immunity.<sup>66</sup> These 'things' would also appear to include torts with a decidedly foreign element, lending US law somewhat of an expansionist character.

For example, dating back to 1789, the *Alien Tort Claims Act*, also referred to as the *Alien Tort Statute* ('ATS'), allows foreigners to sue in the US court system for a tort that violates international law or a US treaty,<sup>67</sup> which some commentators say cements the role of the US 'as a moral leader in the international community'<sup>68</sup> and key contributor to the 'global accountability movement'.<sup>69</sup> Under this *Act*, courts in the US can cast their legal opinion on acts committed in a foreign jurisdiction by foreigners against foreigners, in cases that are referred to as 'foreign many times over', 'foreign cubed' and 'foreign squared'.<sup>70</sup> They have taken up this challenge with alacrity since the landmark 1980 *Filártiga v Peña-Irala* case,<sup>71</sup> which has led to the establishment of a 'multi-billion dollar [alien tort] litigation industry'.<sup>72</sup> This keen engagement with external affairs by the US legislature and courts, which the Second Circuit has noted is 'apparently unknown to any other legal system in the world',<sup>73</sup> is commonly looked upon as a legal marvel by lawyers from other legal systems.

It must be pointed out, however, that the US Supreme Court has contracted this extraterritorial jurisdiction in the last decade, with cases such as *Morrison v National Australia Bank Ltd* and *Kiobel v Royal Dutch Petroleum Co.*<sup>74</sup> Although, evidently, the purpose of this contraction has not been to limit extraterritoriality per se, but to protect commercial and political interests that

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<sup>66</sup> Charles H Brower II, 'United States' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013) 303, 303, 326–7.

<sup>67</sup> *Alien Tort Claims Act*, 28 USC § 1350 (1789).

<sup>68</sup> See, eg, Chimène I Keitner, 'Some Functions of *Alien Tort Statute* Litigation' (2012) 43 *Georgetown Journal of International Law* 1015, 1016.

<sup>69</sup> See, eg, Beth Stephens et al, 'Preliminary Material' in Beth Stephens et al, *International Human Rights Litigation in US Courts* (Martinus Nijhoff, 2<sup>nd</sup> ed, 2008) i, xxv; Beth Stephens et al, 'Historical Justice Claims' in Beth Stephens et al, *International Human Rights Litigation in US Courts* (Martinus Nijhoff, 2<sup>nd</sup> ed, 2008) 541, 550; Beth Stephens, 'The Curious History of the *Alien Tort Statute*' (2014) 89 *Notre Dame Law Review* 1467, 1542.

<sup>70</sup> See, eg, Stephen J Schnably, 'The Transformation of Human Rights Litigation: The *Alien Tort Statute*, the *Anti-Terrorism Act*, and *JASTA*' (2017) 24 *University of Miami International and Comparative Law Review* 285, 286, 319; Oona A Hathaway and Carlton Forbes, 'Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases' on *SCOTUS Blog* (18 April 2013) <<http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>> archived at <<https://perma.cc/WB7R-MZQB>>.

<sup>71</sup> *Filártiga v Peña-Irala*, 630 F 2d 876 (2<sup>nd</sup> Cir, 1980).

<sup>72</sup> Ben Kerschberg, 'Corporate Executives: Get Ready for a Billion Dollar Lawsuit', *Huffington Post* (online), 25 May 2011 <[http://www.huffingtonpost.com/ben-kerschberg/corporate-executives-get-\\_b\\_791292.html#/](http://www.huffingtonpost.com/ben-kerschberg/corporate-executives-get-_b_791292.html#/)> archived at <<https://perma.cc/G5TZ-2QBK>>.

<sup>73</sup> *Kiobel v Royal Dutch Petroleum Co.*, 621 F 3d 111, 115 (2<sup>nd</sup> Cir, 2010) (Cabranes J).

<sup>74</sup> *Morrison v National Australia Bank Ltd*, 561 US 247 (2010); *Kiobel v Royal Dutch Petroleum Co.*, 133 US 1659 (2013).

were being compromised with the increasing application of the *Act* against corporations and government officials. Beth Stephens states that judicial attitudes ‘changed dramatically when the *ATS* threatened to generate enforceable judgments against defendants with significant economic and political power ... as if the very future of global capitalism and diplomatic relations were at risk’.<sup>75</sup> Multinational companies in particular are now seen as ‘[t]he winners of this recalibrated transnational legal system’.<sup>76</sup>

Given this reformed legal landscape, one may get a sense that Europe could continue to emerge as an alternative venue for high-profile UN immunity cases, with its own drawbacks as a major global player and a centre of activity for human rights law. Yet we have witnessed legal sentiment ebb and flow with regard to alien tort litigation, and in any case, the US history of legal expansionism extends beyond this legal framework.

For example, US courts dealing with general matters of private international law have been known for their narrow interpretation of the doctrine of *forum non conveniens* and thus enthusiastic reception of disputes of a foreign nature, at least where the plaintiff is American.<sup>77</sup> In 2003, John Willems noted an increasing reluctance of US courts to apply this doctrine and a consequential concern expressed by commentators that these courts are assuming the function of ‘world courts’.<sup>78</sup> More recently, Pamela Bookman has, however, observed their greater responsiveness to ‘avoidance doctrines’, but has also commented on their relative permissiveness in enforcing foreign judgments.<sup>79</sup> Pertinently, she relates the history of US courts favouring US laws even for torts occurring overseas.<sup>80</sup> This favouritism discounts the conflict of laws principle *lex loci delicti commissi* that would, as suggested by Frédéric Mégret, have rendered Haitian courts a logical venue for the cholera litigation.<sup>81</sup> Although the US location was not necessarily a legally invalid choice, Haiti could be considered to have a stronger connection.

In another sign of legal expansionism, US law has increasingly enabled US nationals to bring civil claims against foreign states for international terrorist acts. For example, the *Foreign Sovereign Immunities Act* has had a terrorism exception since 1996,<sup>82</sup> which permits suit against designated state sponsors of terrorism and accords courts ‘an unusual degree of discretion over evidentiary

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<sup>75</sup> Stephens, above n 69, 1468, 1543. On the contraction of extraterritoriality in US litigation. See also Pamela K Bookman, ‘Litigation Isolationism’ (2015) 67 *Stanford Law Review* 1081, 1097–9.

<sup>76</sup> Bookman, above n 75, 1130.

<sup>77</sup> See Alexander Reus, ‘Judicial Discretion: A Comparative View of the Doctrine of *Forum Non Conveniens* in the United States, the United Kingdom, and Germany’ (1994) 16 *Loyola of Los Angeles International and Comparative Law Journal* 455, 467.

<sup>78</sup> John S Willems, ‘Shutting the US Courthouse Door? *Forum Non Conveniens* in International Arbitration’ (2003) August/October *Dispute Resolution Journal* 54, 55, 57.

<sup>79</sup> Bookman, above n 75, 1083–5, 1093–6.

<sup>80</sup> *Ibid* 1090.

<sup>81</sup> Frédéric Mégret, ‘*La responsabilité des nations unies aux temps du choléra*’ (2013) 46 *Revue Belge de Droit International* 161, 177.

<sup>82</sup> *Foreign Sovereign Immunities Act*, 28 USC § 1605(a)(7) (1976/Supp II 1996). The exception came into effect via an amendment to the *Foreign Sovereign Immunities Act* in the *Antiterrorism and Effective Death Penalty Act*. See *Antiterrorism and Effective Death Penalty Act*, Pub L No 104-132, § 221, 110 Stat 1214 (1996).

rulings'.<sup>83</sup> In 2018, the parents and estate of Otto Warmbier who mysteriously became fatally ill in custody in North Korea were, pursuant to this exception, awarded over US\$500 million in damages,<sup>84</sup> despite no eyewitness testimony or autopsy to establish the cause of death.<sup>85</sup> The *Justice against Sponsors of Terrorism Act*, enacted in 2016, represents the latest iteration of this legislative trend, in expanding the jurisdiction for anti-terrorism lawsuits.<sup>86</sup> Stephen Schnably argues that such 'nationalistic' laws are 'little more than another foreign policy instrument' that is 'deployed selectively against foreign states'.<sup>87</sup> He continues: '[t]he weaponization of judicial redress for severe human rights violations disrespects the victims whose interests it claims to vindicate and undercuts the integrity of the judicial process'.<sup>88</sup> These laws, together with, in some cases, personal support from the White House,<sup>89</sup> have encouraged people to sue countries with which the US has strained bilateral relations, including Cuba and Iran.<sup>90</sup> Once final judgments are secured, up to US\$20 million for individuals and US\$35 million for families can be drawn from the US Victims of State Sponsored Terrorism Fund.<sup>91</sup>

In a similar vein, the US jurisdiction has a Foreign Claims Settlement Commission — a quasi-judicial body in which US nationals who have suffered from perceived injustices overseas at the hands of foreign governments, such as property expropriation, can seek compensation.<sup>92</sup> Since its inception in the 1950s, the Foreign Claims Settlement Commission has awarded billions of dollars, payable by foreign states,<sup>93</sup> adding to the perception of a US legal system that is expansionist — in applying local legal values to foreign situations — rather than inclined towards international comity.

<sup>83</sup> *Owens v Republic of Sudan*, F 3d 751 (DC Cir, 2017) 785.

<sup>84</sup> *Warmbier v Democratic People's Republic of Korea*, Civil Action No 18-977 (BAH) (DDC, 2018).

<sup>85</sup> See 'Political Pawn? N Korea Ordered to Pay \$501mn over US Student's Death as Trump Pushes New Kim Talks', *RT* (online), 25 December 2018 <<https://www.rt.com/news/447339-warmbier-case-trump-kim/>> archived at <<https://perma.cc/UH9H-WRLU>>.

<sup>86</sup> See Schnably, above n 70, 285; *Justice Against Sponsors of Terrorism Act*, Pub L No 114-222, 130 Stat 852 (2016).

<sup>87</sup> Schnably, above n 70, 294, 436.

<sup>88</sup> *Ibid* 294.

<sup>89</sup> Mark Landler, 'Parents Sue North Korea Over College Student's Death after Time in Prison', *The New York Times* (online), 26 April 2018 <<https://www.nytimes.com/2018/04/26/us/politics/otto-warmbier-lawsuit-north-korea.html>> archived at <<https://perma.cc/A5K8-JAAB>>.

<sup>90</sup> See *Burnett v Islamic Republic of Iran (In re Terrorist Attacks on September 11, 2001)*, SD NY LEXIS 128430 (SD NY, 2018); 'US Judge: Iran Must Pay \$6bn to Victims of 9/11 Attacks', *Al Jazeera* (online), 2 May 2018 <<https://www.aljazeera.com/news/2018/05/judge-iran-pay-6bn-victims-911-attacks-180501120240366.html>> archived at <<https://perma.cc/HEF5-FUV8>>; Schnably, above n 70, 344.

<sup>91</sup> United States Victims of State Sponsored Terrorism Fund, *Frequently Asked Questions* (2018) <<http://www.usvsst.com/faq.php>> archived at <<https://perma.cc/BU7L-VR26>>.

<sup>92</sup> United States Department of Justice, *Foreign Claims Settlement Commission of the US: About the Commission* (10 July 2015) <<https://www.justice.gov/fcsc/about-commission/>>.

<sup>93</sup> See Foreign Claims Settlement Commission of the United States, US Department of Justice, 'Annual Report' (Annual Report, 2015) 2 <<https://www.justice.gov/fcsc/page/file/934631/download>> archived at <<https://perma.cc/AC4Z-YZKC>>.

Just before this time, the US was still applying its criminal laws extraterritorially under 19<sup>th</sup> century agreements with various Asian, African and Middle Eastern states.<sup>94</sup> It did this through its own ‘extraterritorial courts’ and through ‘mixed courts’ established in foreign lands in tandem with the major colonial powers.<sup>95</sup> The idea was to provide US nationals with a right to access a more civilised system of law involving more advanced concepts of justice, though this ‘civilised’ system was not without faults, including Western corruption that compromised the courts.<sup>96</sup>

With such a rich history of drawing foreign matters within the competence of US judicial and quasi-judicial bodies, whether in the US or overseas, it is perhaps to be expected that US courts would be willing to hear the claims of the Haitian victims in *Georges*. That said, the courts did not reach the stage of examining the merits of the case — that is, the plaintiffs’ private law claims for compensation — having found quite decisively that the defendants enjoyed immunity from suit and legal process pursuant to the *CPIUN* and the *Vienna Convention on Diplomatic Relations*. The Second Circuit did, however, appear to leave a window open for a merits hearing, in suggesting that if it could be shown that ‘the offended sovereign’, Haiti, did ‘protest or object’ to any failure by the UN to provide a means of settling the dispute, the plaintiffs might have a more stable platform on which to mount a case against immunity.<sup>97</sup>

The Second Circuit decision was also characteristic of legal expansionism in its political overtones. The court gave ample hearing to the political wing of the US government — the executive branch that interceded in the case — and its arguments regarding the *CPIUN*. It noted twice in its judgment that the executive branch’s legal opinion is ‘entitled to great weight’.<sup>98</sup> Certainly, it is the executive branch that enters into a treaty. It does so with a particular knowledge of the subject of the treaty and the history and reasoning behind it and with a particular vision for how the treaty should operate in domestic law. Moreover, while the UN historically filed *amicus curiae* briefs in defending against national suits, it has more recently expected the relevant state party to the *CPIUN* to do so.<sup>99</sup> Yet, while the US government’s involvement in the case may be pertinent to the public law aspect of the case, the government would appear to have broader interests in relation to the private law aspect that could give rise to a conflict of interest.

First, the US government has a vested interest in maintaining the UN intervention in Haiti, given that this intervention is the legacy of its own ‘Operation Uphold Democracy’ intervention in Haiti of 1994–95. The UN intervention is said to amount to the execution of US foreign policy ‘at a

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<sup>94</sup> See David R Buck, ‘Extraterritoriality, Right of’ in Stanley I Kutler (ed), *Dictionary of American History* (Charles Scribner’s Sons, 3<sup>rd</sup> ed, 2003) vol 3, 304.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Georges v United Nations*, 84 F 3d 88 (2<sup>nd</sup> Cir, 2016) 19.

<sup>98</sup> *Ibid* 10, 13.

<sup>99</sup> August Reinisch, ‘Immunity of Property, Funds, and Assets (Article II Section 2 *General Convention*)’ in August Reinisch and Peter Bachmayer (eds), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford University Press, 2016) 63, 90–2.

discount' to the US.<sup>100</sup> A finding that the UN was liable for the epidemic could disturb the UN intervention and, therefore, the US involvement in Haiti that carries with it a long history. This history includes an economic embargo on Haiti in the 1800s, the occupation of Haiti in the early and late 1900s, the sponsorship of a Haitian dictatorship and coups d'état, a continued military presence in Haiti following the UN intervention and, in conjunction with the UN, the development of structural adjustment programs for Haiti in recent decades.<sup>101</sup> The cholera epidemic has already increased the Haitian community's sense of distrust of the UN peacekeeping force,<sup>102</sup> and any finding against the UN, as well as any failure by the UN to heed such finding, could deepen this sentiment and thus upset US objectives.

Indeed, two leading experts on the situation in Haiti — UN Special Rapporteur on extreme poverty and human rights, Philip Alston, who helped galvanise the UN into action on its 'new approach' to the epidemic,<sup>103</sup> and Jonathan Katz, an investigative journalist stationed in Haiti when the outbreak occurred<sup>104</sup> — take the view that the 'refusal' of the UN 'to accept legal responsibility is covered with US fingerprints'.<sup>105</sup> Alston reported to the General Assembly's Third Committee that the UN disavowal of responsibility has been 'consistent' with the 'strongly pressed' US position of denial in relation to its role in Haiti.<sup>106</sup> Furthermore, in his exposé on the response to the cholera outbreak, Katz revealed how US officials immediately went into 'damage control' when cholera struck Haiti, with 'multiple government departments

<sup>100</sup> See Jonathan M Katz, 'What They Knew, and When They Knew It', *Slate* (online), 30 March 2017 <[http://www.slate.com/articles/news\\_and\\_politics/foreigners/2017/03/when\\_the\\_u\\_n\\_sowed\\_cholera\\_in\\_haiti\\_how\\_fast\\_did\\_americans\\_know.html](http://www.slate.com/articles/news_and_politics/foreigners/2017/03/when_the_u_n_sowed_cholera_in_haiti_how_fast_did_americans_know.html)> archived at <<https://perma.cc/2H7X-H7EH>>.

<sup>101</sup> See Leon D Pamphile, *Contrary Destinies: A Century of America's Occupation, Deoccupation, and Reoccupation of Haiti* (University Press of Florida, 2015) prologue, 114; Mark Weisbrot, 'Structural Adjustment in Haiti' (1997) 48(8) *Monthly Review* 25, 25–6, 29, 38.

<sup>102</sup> See *Baseball in the Time of Cholera* (Mario Joseph, Institute for Justice and Democracy in Haiti, 13 December 2012) 15:08–17:07 <[https://www.youtube.com/watch?v=7le7clp\\_7Sg/](https://www.youtube.com/watch?v=7le7clp_7Sg/)>.

<sup>103</sup> See Philip Alston, 'Extracting Accountability: Special Rapporteurs and the United Nations' Responsibility for Cholera in Haiti' (Working Paper No 18-10, New York University, February 2018) 3; Philip Alston, *Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights: UN Responsibility for the Introduction of Cholera into Haiti*, UN GAOR, 3<sup>rd</sup> Committee, 71<sup>st</sup> sess, Agenda Item 68(b&c) (25 October 2016) para 2 <<http://lawsdocbox.com/Immigration/67904562-Statement-by-philip-alston-special-rapporteur-on-extreme-poverty-and-human-rights.html>> archived at <<https://perma.cc/G52P-7H9B>> ('*Extreme Poverty and Human Rights*'); Philip Alston, *Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights) at Third Committee, 29th meeting — 71st General Assembly* (25 October 2016, UN Web TV) 5:12–5:23 <<http://webtv.un.org/meetings-events/general-assembly/main-committees/3rd-committee/watch/philip-alston-special-rapporteur-on-extreme-poverty-and-human-rights-at-third-committee-29th-meeting-71st-general-assembly/5184849642001/>>.

<sup>104</sup> See Jonathan M Katz *The Big Truck That Went By: How the World Came to Save Haiti and Left behind a Disaster* (Palgrave MacMillan, 2013) ch 11.

<sup>105</sup> Katz, above n 100: referring to a comment by Philip Alston.

<sup>106</sup> Alston, 'Extracting', above n 103, 89; *Extreme Poverty and Human Rights*, 4. See also Philip Alston, 'Bash the UN? There's Another Side to the Story', *The New York Times* (online), 27 March 2018 <<https://www.nytimes.com/2018/03/27/opinion/united-nations.html>> archived at <<https://perma.cc/2B4W-AHXA>>.

clos[ing] ranks to defend the UN'.<sup>107</sup> According to Katz, the US intended to protect the UN peacekeeping force so that this force could oversee Haitian elections that the US had been funding.<sup>108</sup>

Secondly, the US has a particular interest in the financial affairs of the UN. If the UN were to execute an award of compensation, the US government might effectively have to fund much of this award, having the steepest financial obligations to the UN and its Haitian peacekeeping force of any state.<sup>109</sup> This situation may not suit the US, which is currently one of the most reluctant contributors to the regular and peacekeeping budgets of the UN, having accrued significant debt to the organisation.<sup>110</sup>

Thirdly, the incumbent US administration has expressed in no uncertain terms a prejudice against people of Haitian ethnicity, which could possibly be reflective of broader attitudes in US government at the time of *Georges*. In a White House meeting in January 2018, President Trump controversially opposed the immigration of people from Haiti and some African nations, referring to these parts of the world as 'shithole[s]',<sup>111</sup> much to the consternation of many global leaders.<sup>112</sup> This outlook does not appear to be conducive to the provision of financial assistance to Haitians in the form of compensation.

So, while the US government intervened in *Georges* ostensibly to help decipher the question of UN immunity as a matter of state responsibility, it seemed to have political and economic interests beyond this question that would have, we may infer, given it a preference for a particular legal outcome and thus rendered it conflicted. Moreover, although a conflict of interest would apply most directly to the executive arm of government intervening in the case, it might additionally extend to the judiciary that provided a forum for the case, to the extent that the judiciary represents an arm of the same government and that arms of government in liberal democracies are relatively, not absolutely, independent.

Notwithstanding the formal legal doctrine of separation of powers, the two arms of government could, in practical terms, be said to have assisted one another. The executive government's apparent interest in influencing international and foreign affairs, which informed its contribution to the case, complemented the interest of the US judiciary in influencing legal affairs outside the US. As an alternative approach, the US government could have encouraged a resolution of the issue of immunity through diplomatic channels at an

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<sup>107</sup> Katz, above n 100.

<sup>108</sup> Ibid.

<sup>109</sup> See *ibid.*

<sup>110</sup> See Denis Fitzgerald, 'As Obama Heads to General Assembly, US Debt to UN Balloons to \$3 Billion', *UN Tribune* (online), 14 September 2015 <<http://untribune.com/as-obama-heads-to-general-assembly-us-debt-to-un-balloons-to-3-billion/>> archived at <<https://perma.cc/W57H-5LHA>>.

<sup>111</sup> Julie Hirschfeld Davis, Sheryl Gay Stolberg and Thomas Kaplan, 'Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa', *The New York Times* (online), 11 January 2018 <<https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html>> archived at <<https://perma.cc/EL3C-MVEG>>.

<sup>112</sup> Jina Moore and Catherine Porter, "'Don't Feed the Troll': Much of the World Reacts in Anger at Trump's Insult", *The New York Times* (online), 12 January 2018 <<https://www.nytimes.com/2018/01/12/world/africa/africa-trump-shithole.html>> archived at <<https://perma.cc/2QZ7-BUYJ>>.

international level, where the international community could provide guidance on this matter that goes to the heart of the *Charter of the United Nations* and forms the subject of one of the UN's first treaties. It could also have suggested that the sovereign nation of Haiti take up the issue of compensation with the UN. It instead went along with a US judicial intervention in pursuing its greater interests, but also in keeping with the expansionism of the US legal system that would seem to be one aspect of US legal culture underpinning *Georges*.

### B Litigiousness

Another aspect of US legal culture informing the case appears to be the culture of litigation in US society. It has been said: '[t]here is a widespread tendency in the western world towards the juridification of all kinds of social issues, as if law were the only means available, or desirable, for their solution'.<sup>113</sup> Having come to occupy the centre of the Western world, citizens of the US have earned the reputation, from the time of Alexis de Tocqueville, for being 'the most litigious race on earth', given 'the number and prosperity of their lawyers' and 'the proliferation of courts which they keep busy'.<sup>114</sup> Foreigners have been keen to capitalise on this tendency, as Lord Denning famously wrote: '[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side'.<sup>115</sup> In this way, the litigant embraces the local mindset. Supposedly, in the US more than any other place in the world, there is a sense that justice can best be exacted in monetary terms and that suing one's opponent is a fundamental means of solving problems.

The class action method of litigation represents this concept writ large. It enables swathes of people, from groups to entire sections of populations, to seek redress through the judicial system. Where the defendant is a state, international organisation or large private entity, the class can be in a position to demand vast amounts of money. One striking example, albeit from the other side of the Atlantic Ocean where class actions also have a significant history, is a case struck out by the UK High Court in 2015 in which US\$4 trillion was sought from the UK government. The class in this case, which potentially numbered in the millions of people, consisted of descendants of Indian labourers who were transported to Malaysia over a century ago by the British Empire, in effect 'tied to their workplace' and exploited in the interests of British trade.<sup>116</sup>

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<sup>113</sup> Willem van Genugten and Camilo Perez-Bustillo, 'Human Rights as a Source of Inspiration and an Instrument for the Eradication of Extreme Poverty: The Need for an Integrated Economic, Political and Legal Approach' in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights: Human Rights and the Eradication of Poverty* (Zed Books, 2001) 184, 201.

<sup>114</sup> Hermann, above n 65, 216. See also Alexis de Tocqueville, *Democracy in America* (Henry Steele Commager trans, Oxford University Press, 1946) ch 16 [trans of: *De la démocratie en Amérique* (first published 1835–1840)], section entitled 'The Profession of the Law in the United States Serves to Counterpoise the Democracy'.

<sup>115</sup> *Smith Kline & French Lab Ltd v Bloch* [1983] 1 WLR 730, 733 (Lord Denning).

<sup>116</sup> Amarjit Kaur, 'Indians in Malaysia, 1900–2010: Different Migration Streams, One Diaspora' in Om Prakash Dwivedi (ed), *Tracing the New Indian Diaspora* (Brill, 2014) 45, 49.

Of course, there may be an important degree to which such large class actions are initiated to elevate a given issue's profile in the Western world and to cultivate a popular movement around the issue. They may be undertaken to incite a political response, such as the UN's apology to Haitians and its financial pledge of 2016. They can also send an animated message of disapproval of former colonial regimes. The UK case and the case of *Georges* have been driven by NGOs with a broader social agenda and not necessarily a meritorious legal case. Indeed, not expecting a victory from his legal team's efforts, Kurzban described *Georges*, albeit in hindsight, as 'almost an impossible case'.<sup>117</sup>

However, it is notable that in the UK action, which was commenced by a coalition of thirty NGOs, a US\$4 trillion award could have amounted to US\$2 million per capita,<sup>118</sup> even though the class had not directly experienced loss. The sheer magnitude of this award represents a significant financial benefit in addition to any symbolic political victory. Perhaps this award could be warranted from a government that has never formally recognised the error of its colonialist ways. Or maybe, with its distinctly Western flavour and scale, the litigation might be seen to weaken the political principles advanced in the legal campaign. It could raise the question of motive.

Likewise, the astronomical US-style damages pursued in *Georges* could serve to undermine the credibility of the case. To proceed from a cordial attempt at engaging in discussions with the UN, to suing the organisation beyond its means, in the form of a major class action, suggests a litigious reaction of US proportions. An approach less defined by its financial demands and more driven by its quality of argumentation might have placed the NGOs in a better position to both negotiate with the UN and draw support from the wider international community.

A similar style of class action to the UK case, *Rukoro v Federal Republic of Germany*, is currently underway in New York. It concerns the genocide of tens of thousands of people from two Namibian tribes by German colonialists from 1904 to 1908. The plaintiffs include both US and non-US citizens and a New York NGO.<sup>119</sup> The plaintiffs have spoken of seeking trillions of dollars in reparations, which could again make millionaires of each class member.<sup>120</sup> They consider reparations for the two tribes that specifically resisted German occupation preferable to development aid for the whole of Namibia,<sup>121</sup> arguing that the German government should not only apply the Western model of

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<sup>117</sup> Kurzban, above n 24, 16:36–16:43.

<sup>118</sup> See Arunajeet Kaur, 'Hindraf as a Response to Islamization in Malaysia' in Bernhard Platzdasch and Johan Saravanamuttu (eds), *Religious Diversity in Muslim-Majority States in Southeast Asia: Areas of Toleration and Conflict* (ISEAS Publishing, 2014) 341, 342.

<sup>119</sup> *Rukoro v Federal Republic of Germany* (SD NY, No 17-0062, 5 January 2017), 7–9, 59.

<sup>120</sup> *Namibia's Genocide: Descendants Sue Germany for Reparations* (Caroline Dumay and Stefan Carstens, France 24, 2018) 1:42–1:50 <<http://www.france24.com/en/20180123-focus-namibia-genocide-germany-compensation-lawsuit-nama-herero-tribes>>.

<sup>121</sup> See *Vekuii Rukoro Talks About the Lawsuit against the German Government* (Directed by Joseph Sheefeni, One Africa Television, 2018) 13:13–13:37 <<https://www.youtube.com/watch?v=BmTibG-9QmY>>; Hisham Aidi, 'Forgotten Genocide: Namibia's Quest for Reparations', *Al Jazeera* (online), 7 August 2015 <<https://www.aljazeera.com/indepth/opinion/2015/07/forgotten-genocide-namibia-quest-reparations-150730090349305.html>> archived at <<https://perma.cc/VXH3-CANZ>>.

reparations and human rights to Jews, but also to those with black skin.<sup>122</sup> They have spoken of using the reparations to buy back ancestral lands from white people who currently own nearly 60 per cent of private Namibian land while making up only six per cent of the total population —<sup>123</sup> though it is unclear whether the intention is to place the acquired land under communal or individual ownership, which would influence the extent to which the claim bears Western characteristics. It is known, at least, that the lead plaintiff, Vekuii Rukoro, who is a leading businessman in Namibia, has stated that the reparations format should be consistent with the context of the new economic conditions and that Namibians from other tribes may benefit indirectly.<sup>124</sup>

Nevertheless, it is questionable whether responding to the issues through a legal medium can, in fact, detract from the broader significance of the injustice.<sup>125</sup> In tort cases, the legal system constructs a narrative of injustice around the elements of duty, breach and causation, generally limiting its purview to immediate causation and single exchanges between parties. Where a problem of international political proportions arises, a legal construction will not always capture pertinent themes that may have less direct but not necessarily less essential bearing on the matter. Examples of these themes include the British Imperial system which sanctioned the indentured labour of colonised peoples, the competition for colonies that was often pursued at all costs, particularly by Germany which endeavoured to gain ground after entering the race relatively late in the piece, and the potentially unwarranted US/UN intervention in Haiti under which the cholera epidemic occurred. In the Haitian case, there was no legal advantage in demonstrating linkage between the malfeasance and the intervention, so the latter issue that might have been relevant to a global assessment of the matter was inevitably minimised. At the same time, the US system received kudos for enabling the litigation, despite the fact that the wrongs may not have been committed but for its intervention.

While legal and political approaches can clearly serve the same end,<sup>126</sup> there might also be instances where they lead to quite contrary outcomes, as Natalie Davidson has observed of US alien tort litigation.<sup>127</sup> She suggests that on the legal front this litigation has achieved lucrative victories for plaintiffs who have suffered at the hands of former foreign dictators and their functionaries, but that on the political front it has been regressive in effectively absolving the US government of joint culpability in overseas atrocities. The courts have only recognised foreign policy issues of states other than the US so as to maintain a separation of powers,<sup>128</sup> even though the powers may not appear so separate

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<sup>122</sup> Dumay and Carstens, above n 120, 4:53–5:14.

<sup>123</sup> ‘Namibians Want Reparations from Germany for a Genocide that Killed Thousands’, *Vice News*, *HBO*, 30 May 2018, 3:06–3:15 <<https://www.youtube.com/watch?v=9gOOXzGtd2w>>.

<sup>124</sup> See Sheefeni, above n 121, 14:18–15:55, 26:52–29:15.

<sup>125</sup> See especially Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2<sup>nd</sup> ed, 2008) 423–9. See also Richard Thompson Ford, *Universal Rights Down to Earth* (W W Norton & Company, 2011) 14–15.

<sup>126</sup> See David Beetham, ‘Introduction: Human Rights in the Study of Politics’ (1995) 43 *Political Studies* 1, 7.

<sup>127</sup> Natalie R Davidson, ‘Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in *Filártiga* and *Marcos*’ (2017) 28 *European Journal of International Law* 147.

<sup>128</sup> *Ibid* 165, 168.

where judicial outcomes ineluctably work in the executive's favour. Alien tort litigation, Davidson says, has therefore narrowed and 'individualized' the source of the wrong, 'creating a trade-off between individual accountability and narratives about US hegemony'.<sup>129</sup> She states that although there may potentially be appropriate legal strategies to 'uncovering deep foundations' of political injustices, 'we should not expect' US legal mechanisms to produce 'critical histories of the USA' when they only consider a selective policy context of the matters at hand —<sup>130</sup> a limitation that would render an examination of US policy in *Georges* ultra vires.

In contrast, Stephens et al state that alien tort litigation brings to the foreground human rights issues that the executive would prefer to conceal, including those that concern the US.<sup>131</sup> Schnably similarly maintains that, consistent with the democratic interest, this litigation can shed light on the US dimensions of foreign human rights violations which he thus considers not so 'foreign cubed' after all.<sup>132</sup> Davidson, however, explains that the form and content of the litigation itself, as opposed to any historical excavation that commentators may conduct around it, can deflect from this light and work against correcting the historical record.

Whereas Stephens et al suggest that the objectives of the litigation, which relate to a legal tradition in the US around human rights and the public interest, far surpass the relief sought,<sup>133</sup> Davidson observes a flagrant opportunism of plaintiffs in alien tort actions. She writes that 'even the most principled victims within the class were willing to sacrifice the details of the historical narrative, including the part played by the USA'.<sup>134</sup> Demonstrating a tendency towards litigiousness, their desire to seek justice in a US legal system that is jurisdictionally flexible seemed to have been more pronounced than their wish to establish a correct record for the world at large to acknowledge and their interest in holding all relevant parties to account. Ironically, however, even in the event of legal victory, their litigiousness would not necessarily reap financial benefit, given impediments to the enforcement of judgments where assets have been scattered across the globe.<sup>135</sup>

The same opportunism may be observed of lawyers involved in transnational class actions, with the cholera case being no exception. With potentially high dividends for lawyers, as legal fees for class actions are usually a percentage of the win,<sup>136</sup> *Georges* appears to have been a siren call. Not long after *Georges* was filed, the UN became the subject of two further, hitherto unsuccessful class actions — *LaVenture v United Nations* ('*LaVenture*') and *Jean-Robert v United Nations* ('*Jean-Robert*') — brought by private US law firms representing Haitian

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<sup>129</sup> Ibid 147, 154.

<sup>130</sup> Ibid 150, 167.

<sup>131</sup> Stephens et al, 'Preliminary Material', above n 69, xxvi.

<sup>132</sup> Schnably, above n 70, 286, 408, 432.

<sup>133</sup> Stephens et al, 'Preliminary Material', above n 69, xxvi.

<sup>134</sup> Davidson, above n 127, 166.

<sup>135</sup> Ibid 161.

<sup>136</sup> See Deborah R Hensler et al, 'Class Action Dilemmas: Pursuing Public Goals for Private Gain — Executive Summary' (Executive Summary, RAND Institute for Civil Justice, 1999) 9 <[http://www.rand.org/pubs/monograph\\_reports/MR969z1.html](http://www.rand.org/pubs/monograph_reports/MR969z1.html)> archived at <<https://perma.cc/X78D-99LW>>.

victims of cholera.<sup>137</sup> Therefore, it has not simply been NGOs, or what is commonly referred to as civil society, that have attempted to hold the UN to account. Rather, lawyers from the private sector of the US have also waded into the matter.

Although these new actions borrowed claimants and pleadings from *Georges* to form their case, they also presented new claimants and pleadings.<sup>138</sup> So while the Managing Attorney of the BAI, Mario Joseph, gallantly announced that he would keep ‘walking until I find the last victims of cholera’,<sup>139</sup> it seems the new lawyers also commenced this walk. They went to great lengths even to serve the court papers on UN officials, despite US law shielding the UN and its office-bearers from service of process.<sup>140</sup> A lawyer for the plaintiffs in *LaVenture* declared that his process server placed the papers into the very hands of Ban Ki-moon, in contrast to the process server for the IJDH who had only affixed them to the former Secretary-General’s door.<sup>141</sup> A UN spokesperson disagreed, saying that Ban Ki-moon witnessed the attempted service, but the papers never touched his hands. In any case, as one commentator noted, the event amounted to ‘[a] theater of the absurd’.<sup>142</sup> It demonstrated the logistical difficulty of fitting UN problems into the mould of US litigation.

Notably, *Georges* has played out against the backdrop of a recent surge in challenges in the US to the immunity of the UN and its officials. These cases include not only *LaVenture* and *Jean-Robert*, but also *Brzak v United Nations* and *Koumoin v Ban Ki-moon* involving UN workers with employment grievances.<sup>143</sup> In addition, the US Supreme Court was scheduled to hear a case in late 2018 on whether the World Bank is entitled to immunity.<sup>144</sup> If the UN were to be divested of jurisdiction over the resolution of UN torts, then US courts, it may have seemed, would be the place to assume the responsibility of hearing these cases. It would be here, in the nation’s bustling private legal arena, that lawyers would defy the UN ‘decision to treat’ its handling of the cholera issue

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<sup>137</sup> ‘Class Action Complaint’, *LaVenture v United Nations* (EN DY, No 14-cv-1611, filed 11 March 2014); ‘Trial Pleading’, *Jean-Robert v United Nations* (SD NY, No 14-cv-1545, filed 6 March 2014).

<sup>138</sup> See Kristen Boon, ‘Developments in the Haiti Cholera Case: US Supports Absolute Immunity of UN and Two New Suits Filed’ on *Opinio Juris* (13 March 2014) <<http://opiniojuris.org/2014/03/13/developments-haiti-cholera-claims-un-us-support-uns-absolute-immunity-two-new-suits-filed/>> archived at <<https://perma.cc/PS8G-RGME>>.

<sup>139</sup> Institute for Justice and Democracy in Haiti, above n 102, 26:42–26:50.

<sup>140</sup> *International Organizations Immunity Act*, 22 USC §§288a(b), 288d (1945). See also Ted Folkman, ‘New Case: *Georges v United Nations*’ on *Letters Blogatory* (3 December 2013) <<https://lettersblogatory.com/2013/12/03/new-case-georges-v-united-nations-2/>> archived at <<https://perma.cc/ZYL7-TQHC>>.

<sup>141</sup> See Rick Gladstone, ‘UN Chief Served Papers in Suit by Haitian Victims, Lawyers Say’, *The New York Times* (online), 20 June 2014 <<https://www.nytimes.com/2014/06/21/world/americas/un-chief-served-papers-in-suit-by-haitian-cholera-victims-lawyers-say.html/>> archived at <<https://perma.cc/AFB7-YCMQ>>.

<sup>142</sup> Ted Folkman, ‘*LaVenture v United Nations*: The Romance of the Process Server’ on *Letters Blogatory* (23 June 2014) <<https://lettersblogatory.com/2014/06/23/laventure-v-united-nations-romance-process-server/>> archived at <<https://perma.cc/P3P7-2QWL>>.

<sup>143</sup> *Brzak v United Nations*, 597 F 3d 107 (2<sup>nd</sup> Cir, 2010); *Koumoin v Ban Ki-moon* (SD NY, No 16-cv-2111, 13 December 2016).

<sup>144</sup> *Budha Ismail Jam v International Finance Corporation*, 138 Sup Ct 2026 (NY, 2018) (Certiorari granted).

‘as an expression of “solidarity” rather than as remedies for a legal wrong’,<sup>145</sup> and seek a more typically American mode of resolution.

### C Charity

Whether or not the parallel class action suits of *LaVenture* and *Jean-Robert* have been undertaken with charitable intentions, it is significant that the masterminds of *Georges* are NGOs with a considerable history of charitable work in Haiti. Therefore, it would appear that yet another factor in the case of *Georges* is the culture of charity.

In basic terms, charity is a function of wealth. It is an opportunity to share wealth, if not also a means of settling the conscience of the owners of wealth where they engage in the redistribution of it. Oscar Wilde commented that these owners ‘use private property in order to alleviate the horrible evils that result from the institution of private property’.<sup>146</sup> It is natural that in the world’s most affluent society, the US, charitable institutions have thrived and become an integral part of the society. Many wealthy US entrepreneurs have established philanthropic foundations, some of which have become as familiar as the businesses behind them.<sup>147</sup> The middle-class has followed suit with its culture of fundraising and of appealing to the generosity of ‘ordinary’ people to support those in need. Donations are made as an alternative to the governmental redistribution of wealth, with private rather than public charity flourishing in US culture.

The ideology of charity has entered many spheres of life, including the legal sphere where the performance of pro bono legal work is an expectation of the legal profession. Moreover, legal charity is commonly exported in response to the global problem of economic and social underdevelopment. Indeed, the attorneys behind *Georges* can be added to the growing list of US lawyers involved in assisting people in developing countries. As with the battle of the last quarter of a century of US lawyers against the energy corporations Texaco and Chevron for devastation done to the environment in Ecuador,<sup>148</sup> the IIDH and BAI have worked relentlessly to find legal remedies to multiple injustices in Haiti, not just the importation of cholera.

The charitable organisations act on the basis that government cannot be depended upon to meet the needs of the people. In the case of the Haitian government, there has been evidence of ministerial corruption, capitulation to the will of US governments and an increasing acclimatisation to global business structures that have led it to implement the neoliberal structural adjustment policies of the international financial institutions.<sup>149</sup> The present author is unaware of any efforts made by the Haitian government to question the UN on these economic policies that have accompanied a steady decrease in real wages

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<sup>145</sup> Beatrice Lindstrom, ‘The UN’s Apology Won’t Heal Disease, but It’s a First Step to Justice’ on *Opinio Juris* (2 January 2017) <<http://opiniojuris.org/2017/01/02/the-uns-apology-wont-heal-disease-but-its-a-first-step-to-justice/>> archived at <<https://perma.cc/LC23-TX9V>>.

<sup>146</sup> Oscar Wilde, *The Soul of Man Under Socialism* (Arthur L Humphreys, 1900) 4.

<sup>147</sup> See generally Matthew Bishop and Michael Green, *Philanthrocapitalism: How Giving Can Save the World* (Bloomsbury Press, 2008).

<sup>148</sup> See generally Damira Khatam, ‘Chevron and Ecuador Proceedings: A Primer on Transnational Litigation Strategies’ (2017) 53 *Stanford Journal of International Law* 249.

<sup>149</sup> See Pamphile, above n 101, 157.

over decades,<sup>150</sup> let alone enter into discussions with the organisation on a compensation plan for its role in introducing cholera into the beleaguered nation.<sup>151</sup> Even if the government negotiated with the UN a sum of money to distribute among victims and their families, for which there is precedent,<sup>152</sup> civil society might question whether the government could undertake the compensation process faithfully. Without confidence in the government, the IJDH and BAI have bypassed it, forging a new area of private law in which they can address a major national crisis and predicament of international law without government involvement.

Their interest in accountability is part of a wider conceptual framework. In general, charitable organisations that provide assistance in the developing world, whether through aid or legal services, might be guided by any one of an array of principles. These principles range from impartiality and neutrality — as with the Red Cross — to Christianity, workers' solidarity, Western democracy and human rights. As its name suggests, the IJDH concerns the latter two. The group has set out to bring these legal principles to Haitian society in an attempt to lend stability to a country that has, since gaining independence two centuries ago, been subjected to gunboat diplomacy by European powers, heavy-handed control by the US, a great many coups and twenty-three new constitutions,<sup>153</sup> including one imposed by the US to accommodate its economic interests.<sup>154</sup>

The lawyers in *Georges* presented a fundamental human rights argument in their submissions to the US courts, influenced by jurisprudence of the ECHR.<sup>155</sup> Their charitable interest in human rights complemented an emerging human rights discourse on immunity. The lawyers contended that 'the US citizen Plaintiffs' had 'constitutional rights to access the federal courts' with their claims for compensation,<sup>156</sup> and that 'this right is necessary for the protection of all of the other rights'.<sup>157</sup> Presumably, they did so out of genuine commitment to human rights principles, but also as a legal strategy, given that some domestic judges sitting on immunity cases have in the past given consideration to this right, in addition to the right to a fair trial, especially where the defendant is an

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<sup>150</sup> See Eirin Mobekk and Spyros I Spyrou, 'Re-Evaluating IMF Involvement in Low-Income Countries: The Case of Haiti' (2002) 29 *International Journal of Social Economics* 527, 535.

<sup>151</sup> See José Alvarez, 'The United Nations in the Time of Cholera' (2014) 108 *AJIL Unbound* 22, 23–34.

<sup>152</sup> See Wouters and Schmitt, above n 4, 105.

<sup>153</sup> See Pamphile, above n 101, 118.

<sup>154</sup> See *ibid* 27–8; Ronald Sanders, 'No Regrets for Making Haiti a 'Shithole'?', *Telesur* (online), 13 January 2018 <<https://www.telesurtv.net/english/opinion/No-Regrets-for-Making-Haiti-a-Shithole-20180113-0021.html>>.

<sup>155</sup> *Waite v Germany* (European Court of Human Rights, Grand Chamber, Application Number 26083/94, 18 February 1999); *Beer and Regan v Germany* (European Court of Human Rights, Grand Chamber, Application Number 28934/95, 18 February 1999).

<sup>156</sup> *Georges v United Nations*, 834 F 3d 88, 98 (2<sup>nd</sup> Cir, 2016).

<sup>157</sup> Transcript of Proceedings, *Georges v United Nations*, (SD NY, 13-cv-7146-JPO, 24 October 2014) 46.

international organisation other than the UN.<sup>158</sup> The lawyers had hoped to succeed with this argument in relation to UN defendants.

The argument was used in an attempt to breach the barrier of UN immunity. But it was also a means of lending validity to the idea of a US court adjudicating the case. This is because human rights doctrine, being generalist in nature, does not provide guidance on which court should hear a matter; it simply necessitates a forum. If no international court or tribunal were made available, the consequence of a successful human rights challenge, given this omission, would be to have the case heard in the court where the matter was brought — in this case, in the US. Human rights law is not designed to give consideration to the appropriateness of the forum, other than, say, requiring that the forum dispense justice in a manner that is not arbitrary. While proponents of a traditional international law approach might view a national legal challenge to UN immunity as destabilising the international legal regime, proponents of a purely human rights approach, who like to imagine an ‘alternative human rights universe’,<sup>159</sup> do not tend to be cognisant of such matters of international relations and politics. Instead, they are focused on maximising the rights of specific individuals in specific cases and on the duty of all states to afford these rights, even where this duty necessitates an extraterritorial application of law.<sup>160</sup>

In this way, human rights-minded courts and advocates would not necessarily have come to question the fact that the litigation had a US location. On the contrary, it is likely they would see benefit in a US legal system that has well-established concepts of human rights. The justice and democracy institute leading the US litigation might especially take this view, given that its work is, generally speaking, directed at bringing the Western rule of law to Haiti. Thus, as with the expansionist and litigious tendencies in US legal culture, the charitable tendency underpinning *Georges* reflects such an entrenched faith in Western legal institutions that it may entail tacit acceptance of the US judicial system hearing a case whose features are largely unrelated to the US, if not a view of the US as a ‘saviour’.<sup>161</sup>

## V BETWEEN ASSISTANCE AND INTERVENTION

So, what is to be made of the US legal system’s tendency to bring matters its way and address them using its own legal apparatus? Could not necessity, the mother of invention, justify this US foray into international and foreign affairs, and might not such action be vindicated on the basis that it could have ultimately benefitted the Haitian people and other victims of UN torts? The US is well regarded as a country that gets things done legally. And, as the proverb goes, one

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<sup>158</sup> See Wouters and Schmitt, above n 4, 96–101; Grütters, above n 13, 245; Reinisch, above n 3, 11; August Reinisch and Ralph R A Janik, ‘The Personality, Privileges, and Immunities of International Organizations before National Courts — Room for Dialogue’ in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013) 329, 332.

<sup>159</sup> See Alvarez, above n 151, 27.

<sup>160</sup> See Todd Howland, ‘The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights’ (2007) 35 *Denver Journal of International Law and Policy* 389, 389; Hugh King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 *Human Rights Law Review* 521.

<sup>161</sup> See Mégret, above n 38.

should not look a gift horse in the mouth. If US law has been known to help downtrodden parts of society win legal victories driven by pioneering lawyers working against great odds, then perhaps instigating proceedings in the US was a judicious course of action. It might have helped the Haitian victims attain a sizeable award that could not have otherwise been contemplated in Haiti. Of course, while lawyers can retain a large proportion of awards in class action suits — a practice identified as a significant barrier to justice —<sup>162</sup> there is more obvious benefit for the class where a charitable organisation is at the helm of the class action.

Furthermore, if the form of US-centred dispute resolution used in *Georges* was successful, it could have become the most pragmatic and expeditious route for victims of UN torts to secure compensation from the UN, in comparison not only to litigation in other nations and regions of the world, but also to litigation using the legal machinery of the UN itself. The UN currently exercises restraint in providing compensation to groups and populations who have haplessly suffered injury under its watch. Even its apology to the victims of cholera is commonly regarded as a ‘half-apology’.<sup>163</sup> A decisive US response could have set a new tone for UN responses to mass torts.

However, despite presenting opportunities, it would appear that US law could also take opportunities away. By their very nature as domestic courts, US courts may be limited in dealing with issues with pronounced international dimensions. With their local judges, lawyers and rules, they can be expected to bring their own legal values, culture and history, rather than international values or the values of the relevant foreign legal system. Moreover, if the US courts did pierce UN immunity, they might order remedies and means of enforcing remedies that would be unsuited to the international stage. One can frivolously imagine debt collectors garnisheeing the income of the UN and seizing chattels from its Manhattan complex should it fail to recognise a compensation order against it.

Alternatively, international decision-making bodies could potentially bring a more global perspective to the matter. They could determine compensation with reference to the capacity of the UN to provide it. They could coordinate medical and logistical responses to the Haitian cholera crisis with responses to other public health crises in Haiti, including the lymphatic filariasis pandemic in which approximately one quarter of the Haitian population is infected with parasites affecting the lymphatic system,<sup>164</sup> as well as responses to public health crises across the world. For, even though the international community has not directly caused all of the world’s pandemics, it may still bear as much moral responsibility to remedy them as it has legal responsibility to eradicate cholera from Haiti. The UN could also look at improving the standard of UN peacekeeping operations, given that these operations have increasingly become

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<sup>162</sup> See, eg, Michael Legg, ‘Great Southern Class Action Calls for Debate on Lawyers Fees’, *The Conversation* (online), 19 December 2014 <<https://theconversation.com/great-southern-class-action-calls-for-debate-on-lawyers-fees-32266/>> archived at <<https://perma.cc/G8H4-72LW>>.

<sup>163</sup> See Bureau des Avocats Internationaux and Institute for Justice and Democracy in Haiti, *Mixed Reactions to the UN’s Cholera ‘Half-Apology’* (1 December 2016) <<http://www.ijdh.org/2016/12/topics/health/un-admits-for-first-time-that-peacekeepers-brought-cholera-to-haiti/>> archived at <<https://perma.cc/BY3E-5C6H>>.

<sup>164</sup> See Pamphile, above n 101, 145.

embroiled in scandal. It might question the need for a UN peacekeeping presence in Haiti at all, rather than simply renaming the operation and reducing its presence.<sup>165</sup>

Furthermore, a forward-thinking international community may wish to address the critical state of underdevelopment in Haiti that, as the abovementioned panel of independent experts acknowledged, was a contributing factor in the outbreak.<sup>166</sup> In today's day and age, only Third World conditions can enable the spread of cholera. Yemen provides a case in point, having recently eclipsed Haiti in the number of cholera infections, which have been contracted under circumstances of war, poverty, malnutrition and water shortage. *The Lancet* reported in May 2018 that '[t]he disease continues to plague Yemen today in what has become the largest documented cholera epidemic of modern times'.<sup>167</sup> The international community might therefore like to assess whether the UN Sustainable Development Goals and other initiatives on development, or even on international conflict, are in need of reconceptualisation. It might also clarify the role of the UN Special Rapporteur on extreme poverty and human rights who has, ironically, helped in shifting the debate on Haiti from poverty to torts, thereby minimising poverty as a cause, as though it were merely an egg-shell skull issue.

While the UN handling of the situation in Haiti may be deserving of critique, it could be premature to conclude that a US legal response can be an appropriate replacement, or 'plan B', as though international and national legal systems are interchangeable. International law operates on a different conceptual plane to the legal traditions of national legal systems. As stated in the *Reparations* case, the UN is not simply a 'super-State'.<sup>168</sup> Jan Wouters and Pierre Schmitt similarly remark that, in deciding whether UN immunity might be dismantled in a particular case, 'one should not compare internal mechanisms established by international organizations to national jurisdictions to assess the notion of fair trial, but rather to international administrative tribunals'.<sup>169</sup>

Yet the NGOs behind *Georges* were unconvinced. Given the legal opportunity that the US jurisdiction presented and the lawyers' professional responsibility to pursue all possible options, they persevered with the litigation through various US courts, despite the complexities of transplanting to the US a matter involving multifarious layers of UN and Haitian laws and politics.

The NGOs were aware that they were not pursuing justice on neutral territory. The US is a key player and 'vital force in regime changes in Haiti'.<sup>170</sup> It has asserted power through its military forces, as well as through the UN peacekeeping mission since achieving heightened influence over the UN at the end of the Cold War. Joseph of the BAI has accordingly said of the cholera case: '[w]e are facing off with the United Nations. The UN is the USA, France,

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<sup>165</sup> See *Security Council Resolution 2410*, UN SCOR, 8226th mtg, UN Doc S/RES/2410 (10 April 2018).

<sup>166</sup> *Expert Report on Cholera Outbreak in Haiti*, above n 17, 4, 29.

<sup>167</sup> Anton Camacho et al, 'Cholera Epidemic in Yemen, 2016–18: An Analysis of Surveillance Data' (2018) 6 *The Lancet Global Health* 680, 680.

<sup>168</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

<sup>169</sup> Wouters and Schmitt, above n 4, 110.

<sup>170</sup> Pamphile, above n 101, xvii.

Canada, the big imperialists'.<sup>171</sup> These states, in addition to pre-Bolivarian Venezuela, have traditionally referred to themselves as the 'Four Friends' of Haiti that promote its road to democracy.<sup>172</sup> Yet they have failed to earn the trust of many Haitians, including Joseph, who has expressed concern at the prospect of a UN arbiter made up of representatives of the Four Friends. Perhaps a US arbiter should have invoked a comparable sense of consternation. Just as there may be some contradiction in pursuing justice through the UN rather than an independent international body or third party, such as the Permanent Court of Arbitration,<sup>173</sup> there could be limits as to what can be achieved from pursuing justice in a nation that is similarly identified as a participant in the injustice.

In addition, it is notable that the NGOs have prioritised a single negligent act of the UN over the deliberate policies of hundreds of years of the 'big imperialists' to which Joseph refers. These imperialists may be said to have put Haiti in a position of being susceptible to the spread of introduced disease. For example, France placed significant economic strain on Haiti for nearly 150 years up to 1947. Over this time, the former colonial power collected from Haiti 90 million gold francs (equivalent to US\$40 billion, not including interest accrued on loans) as compensation for financial losses from the Haitian Revolution that had defeated slavery and colonialism —<sup>174</sup> money that could have been used to prevent poverty and plagues and deal with Haiti's recent spate of natural disasters rather than buy freedom that should have come for free. As Roger Normand and Sarah Zaidi reflect, while Third World nations were able to eject Western nations in the decolonisation process, they were less able to then exact a fair economic playing field from them.<sup>175</sup> The financial pressures that the US has exerted on Haiti also continue to this day.

There appears to be further ideological inconsistency in US-based or -affiliated NGOs responding to the problems in Haiti. The NGOs have made it their mission to bring the 'good' parts of Western ideology to Haiti: democracy, human rights and the rule of law. They have done so while denouncing the West for the devastation it left in the wake of colonising Haiti. But, as Jeffrey Wasserstrom points out, the West practised colonialism around the time it was advancing its classical theories of rights.<sup>176</sup> These theories would provide a justification for the 'free' economic relations that European and US powers sought to establish in Haiti, particularly the right to private property ownership,

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<sup>171</sup> *The Fight against Cholera in Haiti* (Mario Joseph, Institute for Justice and Democracy in Haiti, 23 December 2016) 1:40–1:50 <<https://www.youtube.com/watch?v=bijEUxkb0VA&frags=pl%2Cwn>>.

<sup>172</sup> See Pamphile, above n 101, 103.

<sup>173</sup> For a discussion on the possibility of the Permanent Court of Arbitration and the International Court of Justice hearing cases against international organisations, see Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar, 2017) 328–9. See also Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 *European Journal of International Law* 991, 992.

<sup>174</sup> Sanders, above n 154.

<sup>175</sup> Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press, 2008) 294.

<sup>176</sup> Jeffrey N Wasserstrom, 'The Chinese Revolution and Contemporary Paradoxes' in Jeffrey N Wasserstrom et al (eds), *Human Rights and Revolutions* (Rowman & Littlefield, 2<sup>nd</sup> ed, 2007) 21, 23.

just as they would be used to temper any deleterious effects of the assertion of this right. These two functions of rights have gone hand-in-hand in the negotiation of a capitalist model for Haiti. Therefore, while the NGOs appear to offer good will, it cannot be discounted that their doctrine of human rights may be tied in some way to broader economic goals. This paradox is commonly encountered where charitable organisations endeavour to impart their wisdom on the Third World — a practice that, when accompanied by the West's initiatives to open up economies to capitalist enterprise, can take the character of both assistance and intervention.

Manifestly aware of these dynamics, many Haitians are palpably uncomfortable with the large presence of NGOs in the Caribbean nation, now numbering in the thousands and earning Haiti the moniker 'NGO's republic'.<sup>177</sup> Leon Pamphile, a bishop and celebrated writer in Haiti, observes that 'NGOs do not have a good image in Haiti', with many of them being 'phantom organizations' used for the private gain of the NGOs, or as 'another channel for American control'.<sup>178</sup> He refers to research demonstrating how funds earmarked for humanitarian assistance and the development of the Haitian economy have, in an overwhelming number of cases, instead been funnelled to American companies.<sup>179</sup> Moreover, some charities have been known to compromise the social fabric of Haiti in bringing certain excesses of Western culture. In a widely publicised case of sexual misconduct, senior members of the British NGO Oxfam were implicated in 2018 for holding 'sex parties' involving Haitian prostitutes, including some allegedly underaged.<sup>180</sup>

Another inconsistency in the *Georges* litigation relates to judicial independence. With its history of expansionism, the US legal system had been poised to provide a legal forum to resolve injustices occurring in foreign lands. Accordingly, it embraced the opportunity to bring to bear the legal expertise of an advanced nation in the cholera matter. Yet legal systems do not operate in isolation of politics and the case of *Georges* was no exception. The courts in *Georges* cast judgment on a matter in which the US government has interests with regard to both Haiti and the UN. They did not declare these interests and made decisions in keeping with these interests. One might get the impression, therefore, that the US government has intervened in Haiti not only directly, through its National Security Council and military, but also indirectly, through its legal counsel and judiciary. It has sought to influence the situation in Haiti from different angles that could not be entirely disassociated from one another. Thus, the predicament would be as follows: a US legal system willing and able to respond to the legal quandary facing the Haitian victims, but with its legitimacy to act constrained by the greater ideological implications of its contribution.

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<sup>177</sup> Pamphile, above n 101, 132.

<sup>178</sup> Ibid 132–3.

<sup>179</sup> Ibid 133–4, citing the Center for Economic and Policy Research.

<sup>180</sup> Richard Pérez-Peña, 'Oxfam, British Charity, Admits Sexual Misconduct by Workers in Haiti', *The New York Times* (online), 9 February 2018 <<https://www.nytimes.com/2018/02/09/world/americas/oxfam-haiti-sexual-misconduct.html>> archived at <<https://perma.cc/CF9A-P3XS>>.

Needless to say, *Georges* did not render a game-changing decision. However, it has reinforced the message in the international community that the US jurisdiction continues to keep a watchful eye on Haitian affairs, in addition to the affairs of the UN. It has brought into sharp relief political complications that can arise from the US legal system becoming involved in external matters, even where this influence is ostensibly in the interests of the Haitian people who have, through no fault of their own, found themselves in great need.

## VI CONCLUSION

In concluding this article, it is apt to allude to the anecdote of the scourge of cholera thwarting Alexander the Great's plans of conquering India. If this anecdote is true, then the disease had far-reaching international implications. The same can be said of cholera in contemporary Haiti. The disease, which has devastated a generation of Haitians, has brought to a head numerous outstanding international issues. These issues include UN responsibility for its actions, the means in which international mechanisms handle complaints against the UN, the possibilities for national courts handling these complaints and the novelty of them doing so in relation to mass UN torts. There is also the question, visited in this article, of the appropriateness of US courts per se handling complaints of mass UN torts committed in foreign states.

It has been argued in this article that while US legal culture is consistent with such initiative, with different parts of this culture converging to give rise to the case of *Georges*, the US may not be the most suitable place for this litigation — if indeed any national venue is suited to dealing with the intricate public and private law questions involved in a large compensation suit against the UN. The US, in particular, has a vested interest in Haitian affairs and a history of imposing its will on Haiti. The *Georges* litigation, with little proximity to the cholera outbreak in Haiti, may not easily be set apart from this history. While intended to relieve the plight of the Haitian victims, it also has some characteristics of a show trial that has reinforced a degree of US paternalism. Thus, while the world has been looking on, hoping for the best outcome for the Haitian victims of cholera, some observers are also likely to be sceptical of a nation that thinks it can circumvent international procedures, as lacking as they may be, and decide the issues using its own courts.

Victims of cholera are left in a precarious position, wedged between an international legal system without distinct avenues to sue the UN independently, a UN that has demonstrated an indisposition to indemnify the injured parties and end the epidemic once and for all, a Haitian government that has declined to exercise its contractual right to seek redress from the UN and a US legal system that has stepped in to remedy the situation with mixed interests at heart.

While US courts did not provide a solution for the victims, and perhaps never could given the unlikelihood of the UN heeding their decisions, it is clear that there is increasing pressure in the international legal community for local suits against the UN to compensate for shortfalls in international measures. Arguments are being advanced that UN immunity should be interpreted broadly rather than absolutely,<sup>181</sup> that human rights doctrine can form a sound legal basis

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<sup>181</sup> See, eg, Boon, above n 51, 345, 374.

of domestic suits against the UN<sup>182</sup> and that the US Federal Court system is a 'highly respected' forum in which to run such cases.<sup>183</sup> Therefore, with the continuing search for appropriate models of dispute resolution for alleged UN misconduct, the book on UN responsibility for its misdeeds remains wide open, with chapters waiting to be written not least by American lawyers.

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<sup>182</sup> See, eg, Ryngaert, above n 5, 147.

<sup>183</sup> Melina Garcin, 'The Haitian Cholera Victims' Complaints against the United Nations' (2015) 75 *Heidelberg Journal of International Law* 671, 704–5.