Editorial

Judge and Jury

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On 23 October 2014, Judge J. Paul Oetken held hearings in the United States District Court for the Southern District of New York (Manhattan) in relation to the class action suit Georges et al. v. United Nations et al., bringing back to mind the disastrous cholera outbreak in Haiti in 2010. The case concerns claims that peacekeepers who were part of the United Nations Stabilization Mission in Haiti (‘MINUSTAH’) introduced the highly-infectious disease. The ensuing PR crisis was fuelled when, in February 2013, Under-Secretary-General Patricia O’Brien dedicated all of four lines by way of explanation into the UN’s refusal to enter into dispute settlement with those who suffered as a result of the outbreak:

[C]onsideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.

1 Case No. 13-cv-07146.
The brevity of this statement is astounding, given some 640,000 people were infected and over 8,000 died. Not that the UN has been inactive in efforts to curb the epidemic. However, the pledge of US$2.2 billion to programs aimed at improving Haiti’s devastated sanitation infrastructure has not assuaged criticism of the UN’s approach. Many feel that the UN has acted as both judge and jury when it adopted the interpretation of Section 29 extracted above and subsequently, on the basis of that interpretation, decided to reject the pursuit of alternative dispute settlement mechanisms under the provision.

It is undisputed that the object and purpose of alternative dispute settlement under Section 29 is to counterbalance the UN’s all-but-absolute immunity before domestic courts. However, according to the provision’s wording, the UN is only obliged to embark on alternative dispute settlement in cases involving claims of a ‘private law character’ — a phrase that principally embraces contract and tort claims between the claimant and the UN — rather than claims relating to a policy or mandate of the UN. This limitation creates a loophole that has been repeatedly used by the UN to deny dispute settlement and claims. True, a claim regarding the poor performance of a UN mission’s international mandate is, as a rule, a claim of a public international law character: claims of such a nature cannot be pursued by aggrieved individuals without direct rights stemming from the mandate, but can only be brought by willing Member States. Having said that, however, injuries that are attributable to the mission and not justifiable under cogent operational considerations would include deficient performance of the mandate, and are thus, by and large, UN policy-related. That analysis is valid for sexual abuse cases, looting or unjustified firearm use by UN peacekeepers, to name but few of such ‘hybrid’ claims. Even though the long-standing UN claims practice is, in many cases, to accept the private law character of these hybrid claims on the basis of the existing tort relationship between a claimant and the UN, it is ultimately the UN, acting as judge and jury, that decides on both the legal nature of the claims and on its duty to provide for alternative dispute settlement.

3 The same ‘private law character’ limitation can be found in paras. 54 and 55 of the Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, 9 July 2004, 2271 UNTS p. 235 (‘MINUSTAH SOFA’).