

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

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April 11, 2014

The Honorable John Kerry
Secretary of State
US Department of State
Harry S. Truman Building
2201 C Street, NW
Washington, DC 20520

Dear Mr. Secretary:

The Association of the Bar of the City of New York is a 140-year-old organization of more than 24,000 members from New York City, throughout the United States and around the globe with a long history of engagement in legal policy issues to promote the rule of law. The Association's 150 committees focus on various international legal issues including international law, human rights and United Nations law.

There is evidence pointing to United Nations peacekeepers or personnel being the most likely source of the cholera epidemic in Haiti. It has been alleged that more than 8,000 persons have died as a result of the epidemic and hundreds of thousands more have been infected. Recently, a class action complaint has been filed by victims of that epidemic in the Federal District Court for the Southern District of New York against the United Nations ("UN"), the UN Stabilization Mission in Haiti and certain UN officials. Earlier, representatives of victims petitioned the Organization (the UN) to provide a dispute settlement mechanism to deal with their claims. The then-Legal Counsel of the UN replied that consideration of those claims would necessarily include a "review of political and policy matters" and that accordingly, the claims were "not receivable" pursuant to section 29 of the 1946 Convention on the Privileges and Immunities of the UN ("the 1946 Convention").

The United States has been a party to the 1946 Convention since 1970. While technically the UN cannot be a party to that Convention, it sets out UN rights and obligations and was approved by the General Assembly in 1946. The UN stated to the International Court of Justice in 1949 that it considers itself to be a party to the 1946 Convention and the Court's advisory opinion in 1949 on "Reparation for injuries suffered in the service of the United Nations" confirmed that the 1946 Convention "creates rights and duties between each of the signatories and the Organization."

This Association has a long tradition of supporting such fundamental international law principles as "pacta sunt servanda" (every treaty in force is binding on the parties to it and must be performed by them in good faith), a principle to which the United States attaches great importance as well. We are particularly concerned that the position taken by the UN in this matter is not consistent with its obligations under the 1946 Convention and runs the risk of undermining not only UN immunity world-wide but also in the United States as the host State of the Organization and in New York City as host City. It also exposes the UN to charges that it is using its treaty-based immunity to deny victims of a cholera epidemic any recourse to justice. We urge the United States Government, as a party to the 1946

Convention, to call upon the UN to perform its obligations under that Convention and provide an appropriate mode for settling the cholera claims.

The 1946 Convention provides in section 2 that the UN shall be immune from interference, whether by executive, administrative, judicial or legislative action. On the other hand, section 29 provides that UN “shall make provisions for appropriate modes of settlement of disputes arising out of contracts and other disputes of a private law character” to which the UN is a party. Thus, for claims of a private law character, section 2 does not provide an absolute shield against claims. The alleged tortious behavior described in the claims are not related to the official functions of the peacekeeping mission nor to how those functions are being performed. It is not credible for the UN to maintain that these tort claims brought by individuals would somehow “necessarily include a review of political and policy matters” and thus relieve the UN of its obligation to provide an appropriate alternate mode of settlement. The self-serving judgment that it is relieved of that obligation under the 1946 Convention is subject to challenge by any State party to the 1946 Convention that, in turn, could lead to proceedings before the International Court of Justice.

The position taken by the UN runs the risk of encouraging governments or courts around the world to lift the UN’s immunity, which is not in the interest of either the UN or the United States. A Party to the 1946 Convention, either through executive decision or possibly even judicial decision, could take the position that the Organization is in material breach of its obligations under the 1946 Convention, shielding itself from any appropriate settlement procedure and leaving the claimants in a private law tort case without recourse, judicial or otherwise. Under the law of treaties there is a general principle that a party cannot be called upon to fulfill its obligations under a treaty when the other party has failed in a material way to fulfill its own obligations under the same treaty. Extending to the UN the immunity provided under the 1946 Convention might well be made subject to the UN fulfilling its own obligations under the treaty to provide some form of dispute settlement mechanism.

It is in the legal and foreign policy interests of the United States to promote the rule of law, international law and compliance with international treaty obligations, including by the UN itself. We therefore urge the United States Government, as a party to the 1946 Convention, to call upon the UN to perform its obligations under that Convention and provide an appropriate mode for settling the cholera claims.

Thank you for your careful consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Carey Dunne", with a horizontal line extending to the right.

Carey Dunne
President

cc: H.E. Ms. Samantha Power
Permanent Representative of the United States to the UN

Ms. Mary McLeod
Acting Legal Adviser, US Department of State

H.E. Mr. Ban Ki-Moon
Secretary-General, United Nations

Mr. Miguel de Serpa Soares
Under Secretary-General, The Legal Counsel of the UN

Ms. Navi Pillay
UN High Commissioner for Human Rights