

# The Haitian Cholera Victims' Complaints Against the United Nations

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Abstract	672
I. Contextual and Legal Approach	673
1. International Commitment and the Establishment of MINUSTAH in Haiti	673
2. The Cholera Outbreak	674
3. Legal and Political Steps Taken	675
a) Petition to the Inter-American Commission on Human Rights	675
b) Petition for Relief Submitted to the United Nations on Behalf of 5,000 Victims	676
c) Class Action Complaints before United States District Courts	677
4. Problematization	679
a) Immunity	679
b) International Responsibility	680
c) Attribution of Responsibility	680
d) Competent Authority to Receive Claims Against the UN	681
e) Other Questions	681
II. Legal Analysis	682
1. International Responsibility and Liability	682
a) Competence	682
b) Dispute of Private Law Character	683
c) Prior Acknowledgment of Liability	684
2. Immunity of the UN	685
a) Interpretation of Immunity in U.S. Courts	685
b) The Condition Precedent to Immunity	687
3. Human Rights-Based Approach	689
a) Violation of Procedural Rights	689
aa) The Right to a Remedy	689
International Human Right to a Remedy	689
Domestic Right to a Remedy	690
bb) The Right to a Remedy in Tension with the Immunity Principle	691
cc) The "Reconciliation" Approach	692
European Court of Human Rights Ruling	692
Domestic Courts' Palliative	693
b) Violation of Substantive Rights	695
aa) The Right to a Healthy Environment	695
bb) The Right to Water	695
cc) The Right to Health	696
dd) The Right to Life	697

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III. Outlook	698
1. Opportuneness of the Complaints	698
a) The UN as Aid Provider and Guarantor?	698
b) The UN's Immunity vs. Moral Duty	698
c) Difficulties Facing the UN	699
aa) Financial Impact	699
bb) Future Peacekeeping Activities	700
cc) Judicial Precedent	700
2. Further Considerations	701
a) At United Nations Level	701
aa) Standing Inspection Panel	701
bb) Ombudsperson Institution and Human Rights Advisory Panel	701
b) At Joint, State and Individual Level	702
aa) Standing Claims Commission	702
bb) High-Level Committee for the Elimination of Cholera in Haiti	703
cc) Human Rights Treaty Bodies	703
dd) Joint Responsibility Attribution	703
IV. Conclusions	704

## Abstract

The Republic of Haiti has followed a path full of successive hindrances. The process towards democracy, the rule of law, and the fulfillment of human rights in Haiti has been long-lasting, and has not yet been achieved. Haiti's historical framework shows that Haiti has been repeatedly affected by political crises as well as killer diseases imported from abroad. International intervention has developed throughout Haiti's history and brings us to the understanding of the role and the reason of a United Nations' (UN) subsidiary organ's presence on-site. UN peacekeeping operations can turn out to be more destructive than constructive. In the case at hand, peacekeepers from Nepal introduced *Vibrio cholerae* into Haiti, which sickened and killed thousands of people in- and outside the country. This led to several actions against the world Organization. To discuss the *Haiti Cholera* case, the context and an update on the legal steps which have been undertaken so far provides for a framework towards understanding which issues are at stake (Part I.). The concrete questionings arising from the *Haiti Cholera* case will then be analyzed, taking into account a human rights-based perspective, allowing an opening towards a more general and fundamental approach (Part II.). Finally, the discussion takes into account different parameters to objectively assess the situation as it stands, and suggests further steps to be taken (Part III.), before a final assessment (Part IV.).

## I. Contextual and Legal Approach

### 1. International Commitment and the Establishment of MINUSTAH in Haiti

The United Nations have been in Haiti since 1990 when the country witnessed its first democratic and free elections<sup>1</sup> under intense observation of the international community.<sup>2</sup> In 1993, the United Nations Security Council (UNSC) authorized the establishment of the first peacekeeping operation in the country; the United Nations Mission in Haiti (UNMIH).<sup>3</sup> By its Resolution 940 and acting under Chapter VII of the Charter of the United Nations (the UN Charter),<sup>4</sup> the UNSC authorized military intervention in Haiti<sup>5</sup> to restore Government to power after a military coup. As a result, the President was able to return to the country in 1994. Tensions kept going and increased significantly thereafter. The United Nations Stabilization Mission in Haiti (MINUSTAH) was established on 1.6.2004<sup>6</sup> and its mandate has been extended repeatedly, last time until 15.10.2015, with the intention of further renewal.<sup>7</sup> The devastating 2010 earthquake led to the death of approximately 217,300 people and 2.1 million homeless.<sup>8</sup> The quake destroyed much of Haiti's infrastructure, and strained the country's already fragile social and political order.<sup>9</sup> The overall force levels of MINUSTAH were increased in order to support immediate recovery, reconstruction and stability efforts in Haiti.<sup>10</sup> The military amounted to 8,940 troops and the police force to 4,391 officers.<sup>11</sup> The UNSC affirmed that the mission had a critical role to play in ensuring stability and security in Haiti.<sup>12</sup> The January 2010 earthquake damaged already poor drinking water treatment facilities

<sup>1</sup> I. P. Stotzky, *The Truth about Haiti*, Conn. J. Int'l L. 26 (2010), 17.

<sup>2</sup> J. Leininger, *Democracy and UN Peace-Keeping – Conflict Resolution through State-Building and Democracy Promotion in Haiti*, Max Planck UNYB 10 (2006), 491.

<sup>3</sup> UN Security Council [hereinafter UNSC], S/RES/867 (1993) of 23.9.1993.

<sup>4</sup> Charter of the United Nations of 24.10.1945, UNTS, Vol. 1, 16 (hereinafter UN Charter).

<sup>5</sup> UNSC, S/RES/940 (1994) of 31.7.1994.

<sup>6</sup> UNSC, S/RES/1542 (2004) of 30.4.2004.

<sup>7</sup> UNSC, S/RES/2180 (2014) of 14.10.2014, para. 1.

<sup>8</sup> United Nations Office for the Coordination of Humanitarian Affairs, *Humanitarian Action Plan for Haiti 2013*, 18.12.2012.

<sup>9</sup> UN Secretary-General's Report on the United Nations Stabilization Mission in Haiti, S/2004/908 of 18.11.2004, para. 2-4.

<sup>10</sup> UNSC, S/RES/1908 (2010) of 19.1.2010, para. 1.

<sup>11</sup> UNSC, S/RES/1927 (2010) of 4.6.2010.

<sup>12</sup> UNSC, S/RES/1927 (2010) of 4.6.2010; UNSC, S/RES/1944 (2010) of 14.10.2010.

and piped water distribution systems, and displaced an estimated 2.3 million Haitians.

## 2. The Cholera Outbreak

In October 2010, a cholera epidemic broke out.<sup>13</sup> The epidemic began west of the MINUSTAH camp housing newly arrived peacekeeping troops.<sup>14</sup> Cholera is an acutely dehydrating diarrheal disease and can be fatal to its victims within hours.<sup>15</sup> The disease is usually transmitted through food or contaminated water. In the few weeks since the first cases were confirmed in the Artibonite region, the disease had reached all ten departments of Haiti.<sup>16</sup> Within two months, 3,000 people had been killed by cholera in Haiti.<sup>17</sup> Since the beginning of the epidemic and until November 2014, there were 717,203 cholera cases in Haiti, 404,371 of which were hospitalized and 8,721 died. The new UN peacekeeping troops included about 1,000 troops from Nepal.<sup>18</sup> Cholera being endemic to Nepal, the country experiences irregular outbreaks every year. The Nepalese peacekeeping troops were gathered in Kathmandu for three months of training starting in July 2010. During their time there, cholera was at epidemic levels in the capital.<sup>19</sup> According to the Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, a medical examination was completed before they left Kathmandu.<sup>20</sup> Since none of the troops exhibited symptoms of cholera, no follow-up tests were carried out.<sup>21</sup> About 75 % of people infected with *Vibrio cholera* do not develop any symptoms (i.e., are asymptomatic), although the bacteria are present in their feces for seven to 14 days after

<sup>13</sup> Centers for Disease Control and Prevention, Update: Cholera Outbreak – Haiti 2010, Morbidity and Mortality Weekly Report 59 (2010), 1473 et seq.

<sup>14</sup> R. R. Frerichs, Epilogue of the Origin of Cholera in Haiti, UCLA Department of Epidemiology, School of Public Health, 20.7.2011.

<sup>15</sup> C.-S. Chin et al., The Origin of the Haitian Cholera Outbreak Strain, The New England Journal of Medicine 364 (2011), 33 et seq. (34).

<sup>16</sup> M. Basu, Cholera Death Toll in Haiti Rises to More Than 3,000, C.N.N., 31.12.2010.

<sup>17</sup> S. E. Jordan, The Aftershock of Haiti's Earthquake, Cal. W. Int'l L. J. 42 (2011), 221 et seq. (228).

<sup>18</sup> R. R. Frerichs (note 14); MINUSTAH being composed of contingents from many different countries.

<sup>19</sup> L. Maharjan, Cholera Outbreak Looms Over Capital. The Himalayan Times, 23.9.2010.

<sup>20</sup> A. Cravioto et al., Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, 4.5.2011, available at: <<http://www.un.org>>.

<sup>21</sup> Editorial Board, Haiti Cholera Outbreak: Nepal Troops Not Tested, B.B.C. News, 8.12.2010.

infection and are shed into the environment, potentially infecting other people.<sup>22</sup> Genetic evidence shows that the Haitian strain is descended from a *Vibrio cholera* strain of Nepalese origin.<sup>23</sup> Furthermore the construction of the water pipes in the showering and toilet areas of the MINUSTAH camp was unsatisfactory; there were leakages from broken pipes and critical pipe connections.<sup>24</sup> These poor sanitation conditions at the camp led to the leak of waste into the nearby waterways, resulting in the introduction of the bacterium into the Artibonite River. Direct spillage of human waste outside the camp also contaminated the river waters.<sup>25</sup> The Artibonite River serves as the source of drinking and bathing water for tens of thousands of Haitians. As a consequence, Haitians consuming water from those waterways contracted cholera.

### 3. Legal and Political Steps Taken

#### a) Petition to the Inter-American Commission on Human Rights

A year after the cholera outbreak, the Law Faculty of Santa Maria in Brazil (FADISMA) submitted a Petition<sup>26</sup> to the Inter-American Commission on Human Rights (the Commission) against the UN concerning the violation by the Organization of the human right to life and humane treatment, enshrined in the American Convention on Human Rights (ACHR)<sup>27</sup> and in the American Declaration of the Rights and Duties of Man (the American Declaration).<sup>28</sup> According to the Petitioner, since international organizations possess legal personality, they are subjected to all norms in force in the international order. The Petitioner claimed for the recognition of the responsibility of the UN for its acts of omission and negligence leading to the violation of human rights. The Petitioner argued that since the UN had a duty not to harm any others, it had to be held responsible in case of harm.

<sup>22</sup> WHO Media Centre, Cholera, Fact Sheet N°107, Reviewed 02.2014.

<sup>23</sup> R. S. Hendriksen *et al.*, Population Genetics of *Vibrio Cholerae* from Nepal in 2010: Evidence on the Origin of the Haitian Outbreak, 2 mBio 1 (2011), 2-3.

<sup>24</sup> A. Cravioto *et al.* (note 20), 21.

<sup>25</sup> A. Cravioto *et al.* (note 20), 22.

<sup>26</sup> Faculdade de Direito de Santa Maria, Petition to the Inter-American Commission on Human Rights concerning the violation, by the United Nations Organization, of the human right to life and humane treatment, enshrined in articles 4 and 5 of the ACHR and article 1 of the American Declaration of the Rights and Duties of Man, 10.2011, available at: <<http://www.fadisma.com>>.

<sup>27</sup> ACHR, Art. 4 and 5.

<sup>28</sup> American Declaration, Art. 1.

Avoiding this responsibility would deny the binding force of the international legal order over the UN and degrade the very idea of an international public order. The Petitioner therefore requested the Commission to recognize and declare the international responsibility of the UN for the contamination, sickening and death of tens of thousands of people infected by cholera in Haiti. Although the ACHR allows the Commission to receive petitions filed by a non-governmental organization or another body on behalf of the victims,<sup>29</sup> it only foresees petitions charging state parties for violating any of the rights enumerated in the Convention, and not claims against international organizations, leading to the probable inadmissibility of the petition.

#### **b) Petition for Relief Submitted to the United Nations on Behalf of 5,000 Victims**

In 2011, attorneys from the United States (U.S.)-based Institute for Justice and Democracy in Haiti (IJDH), from the Haiti-based Bureau des Avocats Internationaux (BAI), and from a U.S. Civil Rights law firm, submitted a petition for relief against the UN and MINUSTAH enclosing a set of complaints filed on behalf of over 5,000 Haitian cholera victims who have either been injured personally or who are parents of minor children; or next-of-kin of family members who died.<sup>30</sup> The petition was addressed to the Claims Unit of MINUSTAH in Haiti as well as to the Office of the UN Secretary-General in the United States. The petitioners denounced the UN's negligence, gross negligence, recklessness and deliberate indifference to the health and lives of Haiti's citizens. The petitioners also condemned the UN's denial of access to information about the source of the cholera outbreak, as well as their failure to establish a claims commission to provide a remedy for the victims. The petitioners demanded the public acknowledgment of responsibility by the UN and MINUSTAH for the cholera outbreak and its associated harms. The Legal Counsel of the UN acknowledged receipt of the petition<sup>31</sup> stating that the UN was in the process of reviewing the claims, and that a response would be provided in due course.<sup>32</sup>

<sup>29</sup> ACHR, Art. 44.

<sup>30</sup> IJDH-BAI, Petition for Relief, 3.11.2011, available at: <<http://www.ijdh.org>>.

<sup>31</sup> *P. O'Brien*, Under-Secretary-General for Legal Affairs, UN Legal Counsel, Letter to Mr. Concannon on the Petition for Relief – Claim for Compensation – Outbreak of Cholera in Haiti of 21.12.2011, available at: <<http://www.ijdh.org>>.

<sup>32</sup> 48 civil society groups then requested the UN Secretary-General to respond to the claims for reparations of the victims of cholera in Haiti; 104 Members of the U.S. Congress

15 months after the acknowledgment of the petition, the UN finally provided an answer to the petitioners summarily dismissing their claims, while enumerating the steps taken by the UN to improve the situation in Haiti since the outbreak.<sup>33</sup> Although IJDH-BAI asked for clarification of the UN's conclusion and requested a meeting or mediation to discuss the issue,<sup>34</sup> the Organization solely restated its position and refused to engage in dialogue.<sup>35</sup>

### c) Class Action Complaints before United States District Courts

On 9.10.2013, a class action lawsuit on behalf of five claimants, whose family members had died or were infected with cholera, was filed before the U.S. District Court for the Southern District of New York.<sup>36</sup> The complaint is directed against the UN, MINUSTAH, the UN Secretary-General, and the former Under-Secretary-General for MINUSTAH. The plaintiffs denounced the failure of the UN to take into account the foreseeable risk of introducing the cholera bacterium into Haiti by negligently deploying personnel from Nepal and condemned the failure to exercise reasonable care to test or screen the personnel prior to deployment (as foreseen in the Medical Support Manual for UN Peacekeeping Operations)<sup>37</sup> as well as to take into account the area where the personnel was stationed known to be vulnerable to cholera. The Under-Secretary-General for Legal Affairs and UN Legal Counsel addressed a letter to the Permanent Representative of the U.S. to the UN requesting that the competent U.S. authorities take the necessary

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encouraged the U.S. Ambassador to the UN to take a leading role in addressing the cholera crisis and urged the UN to ensure full funding and speedy implementation of a new initiative aimed at eliminating cholera in Haiti.

<sup>33</sup> P. O'Brien, Letter to Mr. Concannon of 21.2.2013, available at: <<http://www.ijdh.org>>.

<sup>34</sup> IJDH-BAI *et al.*, Letter to the Under-Secretary-General O'Brien of 7.5.2013, available at: <<http://www.ijdh.org>>.

<sup>35</sup> P. O'Brien, Letter to Mr. Concannon of 5.7.2013, available at: <<http://www.ijdh.org>>.

In the meantime, the UN Secretary-General underlined the UN's efforts in responding to the cholera crisis, mentioning the convening of the Independent Panel of Experts and stating that the majority of their recommendations had been adopted and were being implemented by the UN system.

<sup>36</sup> *Georges et al. v. United Nations et al.* of 9.10.2013, Class Action Complaint, 1:13-cv-07146-JPO, U.S. District Court, Southern District of New York.

<sup>37</sup> United Nations Department of Peacekeeping Operations, Medical Support Manual for UN Peacekeeping Operations, available at: <<http://www.reliefweb.int>>.

steps to ensure that the immunity of the UN and its officials be respected.<sup>38</sup> The U.S. Department of Justice took position on the case in March 2014 and sustained the UN's position, since all defendants in the matter were immune from legal process and suit.<sup>39</sup> It therefore advised the Court to dismiss the action.<sup>40</sup> The plaintiffs then responded to the U.S. Government, arguing that the UN does not enjoy immunity when it has breached its treaty obligations to provide victims access to an out-of-court process for settling their claims.<sup>41</sup> The U.S. Government recalled its advice to the Court to dismiss the action. In March 2014, two other lawsuits were filed claiming that the UN does not enjoy legal immunity from liability for the cholera outbreak.<sup>42</sup> In October 2014, a hearing on the UN's immunity in the first *Haiti Cholera* case took place, constituting a milestone for the plaintiffs since it was the first time they could argue the case in a tribunal.<sup>43</sup> Despite all these efforts, the judge handling the first class action decided on 9.1.2015 that all defendants were immune. The case was therefore dismissed for lack of subject matter jurisdiction,<sup>44</sup> and the plaintiffs' appeal is currently pending.<sup>45</sup>

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<sup>38</sup> *M. de Serpa Soares*, Under-Secretary-General for Legal Affairs and UN Legal Counsel, Letter to Ms. Samantha Power of 20.12.2013, Exhibit A, 12, available at: <<http://www.ijdh.org>>.

<sup>39</sup> U.S. Department of Justice, U.S. Attorney Southern District of New York, Letter to Judge Oetken, U.S. District Judge of 7.3.2014, 1, available at: <<http://www.ijdh.org>>.

<sup>40</sup> *J. Charles*, Haitian-American Officials to State Department: Don't Intervene in Cholera Lawsuit, Miami Herald, 5.3.2014.

<sup>41</sup> The same day, a memorandum of law by international law scholars and practitioners as *Amici Curiae* was written in opposition to the Government's statement, claiming that several international treaties, as well as the UN's own General Assembly resolutions, legal opinions and practices establish an obligation for the Organization to compensate people harmed by UN operations.

<sup>42</sup> *Jean-Robert et al. v. United Nations et al.* of 6.3.2014, 1:2014cv01545, U.S. District Court, Southern District of New York; and *LaVenture et al. V. United Nations et al.* of 11.3.2014, 1:2014cv01611, U.S. District Court, Eastern District of New York.

<sup>43</sup> The Judge's invitation to a hearing was an unusual and important development since hearings on privileges and immunities are rarely granted by domestic courts; where judges generally rely on the written submissions to make a decision.

<sup>44</sup> *Georges et al. v. United Nations et al.* of 9.1.2015, Opinion and Order, 1:13-cv-07146-JPO, U.S. District Court, Southern District of New York.

<sup>45</sup> Notice of Appeal of 12.2.2015, available at: <<http://www.ijdh.org>>.



## 4. Problematization

### a) Immunity

The factual findings on the *Haitian Cholera* case and its embedment within the existing legal provisions and general practice raise several legal questions and issues. The first and most important one is the immunity of the UN, its subsidiary organ MINUSTAH and its officials. The UN enjoys immunity in the territory of its Members as is necessary for the fulfillment of its purpose.<sup>46</sup> Senior officials<sup>47</sup> also enjoy immunity.<sup>48</sup> Lower officials<sup>49</sup> are only immune from liability for acts performed by them in their official capacity (i.e. functional immunity).<sup>50</sup> The status-of-forces agreement (SOFA) between MINUSTAH and Haiti<sup>51</sup> provides for the application of the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN) to MINUSTAH<sup>52</sup> and also recalls its members' immunity for acts performed "within their official capacity".<sup>53</sup> In that sense, gross recklessness and gross negligence would be outside the scope of the official duties of the MINUSTAH peacekeepers. The International Court of Justice (ICJ) made it nonetheless clear that the immunity of a UN official was presumed, and had to be given "the greatest weight" by the domestic courts, but could still be set aside "for the most compelling reasons".<sup>54</sup>

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<sup>46</sup> UN Charter, Art. 105, para. 1.

<sup>47</sup> Such as the UN Secretary-General and all Assistant Secretaries-General, and Security Council representatives.

<sup>48</sup> UN Charter, Art. 105, para. 2; cf. Convention on the Privileges and Immunities of the United Nations of 13.2.1946, UNTS, Vol. 1, 15 (hereinafter CPIUN), Art. V, Sect. 19 (it assumes that UN officials have the same immunity as "diplomatic envoys". An example of the kind of immunity a diplomat customarily receives can be found in the Vienna Convention on Diplomatic Relations of 18.4.1961, UNTS, Vol. 500, 95, Art. 31).

<sup>49</sup> As the MINUSTAH commander arguably qualifies, see *M. Halling*, Peacekeeping in Name Alone: Accountability for the United Nations in Haiti, *Hastings Int'l & Comp. L. Rev.* 31 (2008), 461 et seq. (480).

<sup>50</sup> CPIUN, Art. V, Sect. 18.

<sup>51</sup> Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti of 9.7.2004, UNTS, Vol. 2271, 235 (hereinafter SOFA).

<sup>52</sup> SOFA, Art. III, para. 4.

<sup>53</sup> SOFA, Art. VI, para. 50.

<sup>54</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62 et seq., para. 61.

## b) International Responsibility

Besides the questionings on the immunity from legal process of the UN and its organs, the responsibility the UN and MINUSTAH hold towards the victims of the cholera outbreak is a relevant issue raised by the *Haiti Cholera* case. The Draft Articles on the Responsibility of International Organizations state that when an international organization commits a wrongful act, its responsibility is entailed.<sup>55</sup> An internationally wrongful act of an international organization consists of an action or an omission which is attributable to the organization under international law and which constitutes a breach of an international obligation of that organization.<sup>56</sup> The draft articles underline the obligation for an international organization to provide the organization with sufficient means to make reparation when it is responsible for injury.<sup>57</sup> One has to bear in mind that the ICJ stated, “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.”<sup>58</sup>

## c) Attribution of Responsibility

At a time when the UN seems to be deploying an ever-increasing number of peacekeepers, the question is being asked who should be held responsible for the actions of peacekeepers – the UN as a whole or only the peacekeeping forces, the personnel contributing countries, or the peacekeepers themselves.<sup>59</sup> Because the UN does not have armed forces of its own, it relies on member states to contribute personnel to such operations voluntarily. These troops are placed under the control of the UN, but they remain in their national service and their sending states retain certain powers over them.<sup>60</sup> The ICJ states on the question of attribution that conduct of the UN includes acts or omissions of its principal and subsidiary organs, as well as those of its “agents”. Although peacekeeping forces are regarded as subsidiary or-

<sup>55</sup> Report of the International Law Commission (ILC), 63<sup>rd</sup> session, 2011, Draft Articles on the Responsibility of International Organizations with Commentaries, A/66/10, 67 et seq., Art. 3.

<sup>56</sup> Report of the ILC (note 55), Art. 4.

<sup>57</sup> Report of the ILC (note 55), Art. 40.

<sup>58</sup> Difference Relating to Immunity from Legal Process, ICJ (note 54), para. 66.

<sup>59</sup> M. Zwanenburg, UN Peacekeepers: Who Is Accountable for Their Misdeeds?, *The World Today*, 06.2014, Vol. 70, Nr. 3.

<sup>60</sup> M. Zwanenburg (note 59).

gans of the UN, they are made up of national personnel, and the question of attribution of conduct is therefore not clear-cut.

#### d) Competent Authority to Receive Claims Against the UN

Another question at hand is in which country and to which body the proceedings can be brought; standing claims commission, UN local claims review boards, UN human rights treaty bodies,<sup>61</sup> the ICJ, the Inter-American Commission on Human Rights, Haitian courts, personnel contributing states' courts, other domestic courts of states hosting UN headquarters, or to states acting because of their belonging to the international organization, and if so, even the European Court of Human Rights? As a matter of fact, depending on whose liability is sought, multiple options seem to be open to seek redress.

#### e) Other Questions

Related to that previous question, which legal bases are the relevant ones? Should the claims be based on (customary) international law, international humanitarian law, international human rights law, UN law, or domestic law? The parties to the legal dispute have also to be taken into consideration; is it a dispute between the international organization and its personnel,<sup>62</sup> between local victims and the personnel of the international organization, between local victims and the international organization itself,<sup>63</sup> or between local victims and a state?<sup>64</sup>

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<sup>61</sup> As e.g. the Human Rights Committee monitoring the implementation of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and its optional protocols of 19.12.1966, UNTS, Vol. 999, 171.

<sup>62</sup> As was the case in the *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, 18.2.1999, nos. 26083/94 and 28934/95, ECtHR.

<sup>63</sup> *Stichting Mothers of Srebrenica and Others v. the Netherlands* of 11.6.2013, No. 65542/12, ECtHR.

<sup>64</sup> *Germany v. Italy* of 3.2.2012, ICJ Reports 2012, 99 et seq.

## II. Legal Analysis

### 1. International Responsibility and Liability

#### a) Competence

Beside the CPIUN which obliges the UN to make provisions for appropriate modes of settlement of disputes,<sup>65</sup> the SOFA encompasses a procedural framework for this purpose. In cases of illness or death arising from or directly attributed to MINUSTAH, third-party claims of a private-law character are to be settled by a standing claims commission.<sup>66</sup> “Private law” claims are those usually brought by the private individuals who were harmed, or by their representatives. The appropriate mechanism for the victims of cholera is therefore to bring their claims against the UN before such a commission. The commission has to be invoked either by the UN or by the Haitian government since the SOFA applies to those two parties. But no such commission has been established in Haiti (or elsewhere). As it is practice to address third-party claims to local claims review boards instead, IJDH-BAI, submitted their petition for relief to the Claims Unit of MINUSTAH in Haiti. Claims against the UN of a private law nature as personal injury claims are settled amicably, e.g. by discussions between the Organization and the injured party.<sup>67</sup> The petitioners requested that the UN consent to mediation regarding the reviewability and merits of their claims. The UN answered that there was no basis for the engagement of a mediator in connection with claims that were not receivable.<sup>68</sup> In the case at hand, since the petitioners exhausted their extrajudicial options for pursuing a remedy for their injuries and damages, and since the UN did not consider further discussing the matter, IJDH-BAI decided to go on filing a lawsuit against the UN. Pursuing the action in a court was indeed the only option left for the victims to seek enforcement of their right to a remedy and other rights protected under domestic and international law.

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<sup>65</sup> CPIUN, Art. VIII, Sect. 29.

<sup>66</sup> SOFA, paras. 54 and 55.

<sup>67</sup> UN Secretariat, *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities*, Yearbook of the International Law Commission, 1967, Vol. II, A/CN.4/L.118 and Add.1 and 2, Part Two, Sect. A, Chap. I, Sect. 4 (c), para. 44.

<sup>68</sup> UN Legal Counsel's Letter of 5.7.2013 (note 35).

## b) Dispute of Private Law Character

The Legal Counsel of the UN dismissed the petition on the ground that consideration of the claims “would necessarily include a review of political and policy matters”.<sup>69</sup> The UN Legal Counsel did not go further into details. According to the UN Assistant Secretary-General for Legal Affairs, troop screening and camp management constitute UN policy issues.<sup>70</sup> The UN argues that it would therefore not constitute a dispute of private law character to which the UN is a party and as foreseen in the settlement of disputes provision of the SOFA.<sup>71</sup> This argument is questionable. The alleged tortious behavior described in the claims is not related to the official functions of the peacekeeping mission, nor to how those functions are being performed. The complaint primarily constitutes a dispute of private law character related to UN peacekeeping operations, consisting of third-party claims for compensation for personal injury, death or property loss or damage. The Report of the Secretary General on the implementation of the dispute settlement provision of the CPIUN<sup>72</sup> excludes the possibility of engaging in litigation against the UN on claims<sup>73</sup> based on political or policy-related damages.<sup>74</sup> These latter claims are characterized as being “usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters”. The overall increase of the MINUSTAH forces decided by the UNSC cannot be considered as being the reason for the cholera outbreak. It is not the sole increase of the troops which caused the virus to spread but the failure to screen troops for cholera infection prior to deployment to Haiti and the failure to maintain sanitation facilities and waste disposal at MINUSTAH camp, among others. Using a broad interpretation, those acts or omissions could be considered as related to or derived from decisions taken by the UNSC, but neither the facts nor the legal grounds in the petition refer to specific actions or decisions by the Security Council or the General Assembly. This category of claims consists furthermore in “denouncing the policies of the Organization and alleging

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<sup>69</sup> UN Legal Counsel's Letter of 21.2.2013 (note 33).

<sup>70</sup> Conference in Luxembourg on “The Rule of Law and Its Application to the United Nations”, Oral exchange with the UN Assistant Secretary-General for Legal Affairs, 11.9.2014.

<sup>71</sup> SOFA, para. 55.

<sup>72</sup> UN Secretary-General's Report on the Procedures in Place for Implementation of Article VIII, Sect. 29 of the CPIUN, A/C.5/49/65 of 24.4.1995.

<sup>73</sup> Separate from the one dedicated to “Disputes of a Private Law Character Related to UN Peacekeeping Operations” which is the relevant one in the *Haiti Cholera* case.

<sup>74</sup> UN Secretary-General's Report (note 72), para. 23.

that specific actions of the Security Council or the General Assembly have caused the claimant to sustain financial losses". In the *Cholera* case, the petitioners are not seeking compensation for policy-induced financial losses, but for personal injury or death suffered by individuals. A tort for injury compensation is a private law claim such as the one covered by the provisions of the CPIUN and the SOFA.<sup>75</sup> In the *Cholera* case, since the cause of legal action was not a crime as the intentional element is missing and since the harm was due to negligence, the victims of the harm should be able to recover their loss as damages.

### c) Prior Acknowledgment of Liability

The UN has admitted its liability for damage to third parties caused by members of its forces in the performance of their duties when it created the SOFAs. Upon determination of liability as provided for in the SOFA, the UN shall pay compensation within the financial limitations as had been approved by the General Assembly.<sup>76</sup> The money to satisfy the liability comes from funds specifically authorized by the General Assembly for a particular activity, e.g. for a particular peacekeeping mission or a particular contract.<sup>77</sup> The Secretary-General affirmed that the practice of actual settlement of disputes of a private law nature submitted against the UN shows evidence of the recognition on the part of the UN that "liability for damage caused by members of UN forces is attributable to the Organization".<sup>78</sup> While reference is made here and in other instances to private law claims, it is implied that the same principle concerning attribution of conduct would apply in relation to responsibility under international law. This transition was clearly made by a UN Legal Counsel who stated that "an act of a peacekeeping force [...] committed in violation of an international obligation [involves] the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members

<sup>75</sup> R. E. Barnett, Foreword: Four Senses of the Public Law – Private Law Distinction, Harv. J. L. & Pub. Pol'y 9 (1986), 267 et seq.

<sup>76</sup> UN General Assembly (hereinafter UNGA), Resolution Establishing Temporal and Financial Limitations on Its Liabilities to Third Parties Resulting or Arising from Peacekeeping Operations, A/RES/52/247 of 17.7.1998.

<sup>77</sup> Chapter VI, Selected Legal Opinions of the Secretariats of the UN and Related Intergovernmental Organizations. Memorandum to the Controller, in: UN Juridical Yearbook, 2001, 381 et seq., para. 18.

<sup>78</sup> UN Secretary-General's Report on Financing of the United Nations Peacekeeping Operations, A/51/389 of 20.9.1996, para. 8.

of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the UN vis-à-vis third states or individuals.”<sup>79</sup>

## 2. Immunity of the UN

### a) Interpretation of Immunity in U.S. Courts

Under international law, while the CPIUN recognizes the immunity of the UN from every form of legal process with the exception that the Organization has expressly waived this immunity in a particular case,<sup>80</sup> the UN Charter foresees that the UN should only enjoy such immunities that are necessary for the fulfillment of the Organization's purposes.<sup>81</sup> Since both the UN Charter and the CPIUN are legally binding documents, the immunity of the UN appears to be conferred to the Organization as a prerogative, subject to limitations (if the UN acted outside its scope) and/or exceptions (if the UN waived its immunity). Under U.S. law, international organizations enjoy immunities set forth in duly ratified treaties as well as those set forth in the International Organizations Immunities Act (IOIA),<sup>82</sup> concluded to supplement the general provisions of the treaties. The decisions of the U.S. courts mostly reflect the issues regarding the distinction between self-executing and non-self-executing treaty provisions. They also focus on the interaction between domestic acts governing the immunities of international organizations<sup>83</sup> and domestic acts governing the immunities of foreign states.<sup>84</sup> While the Supremacy Clause of the U.S. Constitution may suggest that all treaties have direct effect as U.S. law,<sup>85</sup> early Supreme Court decisions adopted a distinction between self-executing and non-self-executing treaties. As recounted by numerous observers, the identification

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<sup>79</sup> As the United Nations Legal Counsel wrote on 3.2.2004 to the Director of the Codification Division, it is “in connection with peacekeeping operations where principles of international responsibility [...] have for the most part been developed in a fifty-year practice of the Organization”, cited in the Special Rapporteur's Second Report on the Responsibility of International Organizations, *Giorgio Gaja*, A/CN.4/541 of 2.04.2004, 16.

<sup>80</sup> CPIUN, Art. II, Sect. 2.

<sup>81</sup> UN Charter, Art. 105, para. 1.

<sup>82</sup> International Organizations Immunities Act of 9.12.1945, 22 U.S.C. para. 288 (hereinafter IOIA).

<sup>83</sup> Like the IOIA.

<sup>84</sup> Foreign Sovereign Immunities Act of 21.10.1976, 28 U.S.C. paras. 1330, 1602-1611 (hereinafter FSIA).

<sup>85</sup> U.S. Constitution, Art. VI, para. 2.

whether treaties are self-executing or non-self-executing can be unpredictable,<sup>86</sup> especially since presumptions regarding the proper designation of treaties seem to have shifted over time. But the consequences of attaching either label are clear. In the *Brzak* case<sup>87</sup> for example, designation of the CPIUN as self-executing means that the Organization can require U.S. courts to apply directly the absolute jurisdictional immunity created by that instrument, whereas designation as non-self-executing treaty would mean that the Organization could only rely on the implementing IOIA, which foresees exceptions to immunity, in the light of the Foreign Sovereign Immunities Act (FSIA).<sup>88</sup> Restrictive state immunity constitutes settled case-law in the U.S. An assimilation of the IOIA with the FSIA implies that international organizations also only enjoy restrictive immunity.<sup>89</sup> The precarious identification of self-executing and non-self-executing treaties in U.S. courts leads to hesitations concerning the application of the IOIA and the argumentation around its assimilation to the FSIA. At a larger scale, not knowing the value of international treaties in the U.S. as a whole and not having a common rule leads to legal uncertainty and to a difference in treatment between international organizations. As far as the UN is concerned, the argumentation seems rather clear. On several occasions and in their practice of U.S. law, U.S. courts have decided that the CPIUN was a self-executing instrument; meaning that the UN enjoyed absolute immunity from legal process, as enshrined in the Convention. The UN Charter is on the contrary not self-executing in U.S. courts, which leaves no room for immunity limitations as implied in the UN Charter within the U.S. court system.<sup>90</sup> One could nonetheless wonder if the court could have decided to review its case-law to pronounce the CPIUN as non-self-executing because of the importance of the issue at stake, with the many thousands of people killed and the more than 700,000 sickened by the imported virus. If the court had overturned its existing case-law, the IOIA could have been applicable to the case, leading to a relative immunity as opposed to the absolute immunity provision of the CPIUN. In the *OSS Nokalva* case,<sup>91</sup> the court

<sup>86</sup> R. Brewster, *The Domestic Origins of International Agreements*, Va. J. Int'l L. 44 (2004), 501, 520.

<sup>87</sup> *Brzak v. United Nations* of 2.3.2010, 597 F.3d 107, 2<sup>nd</sup> Circuit Court.

<sup>88</sup> C. H. Brower, *United States*, in: A. Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*, 2013, 308; cf. IOIA, Title I, Sect. 2(b).

<sup>89</sup> A. Reinisch, *Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations – An Introduction*, in: A. Reinisch (note 88), 10; cf. *OSS Nokalva v. European Space Agency* of 16.8.2010, 617 F.3d 756, 3<sup>rd</sup> Circuit Court.

<sup>90</sup> *United State v. Al Liby* of 22.5.2014, No. S10 98 Crim. 1023, S.D.N.Y.

<sup>91</sup> *OSS Nokalva* (note 89).



stated that since foreign governments did not enjoy immunity for claims based on their commercial activities, there was no reason “why a group of states acting through an international organization is entitled to broader immunity than its member states when acting alone”. In fact, the Court believed this could encourage “foreign governments to evade legal obligations by acting through international organizations”. This approach could have been used by the court or could be used by other courts in the future to review their case-law on the self-executing nature of the CPIUN, by proving that the UN’s absolute immunity is not as evident as it is currently perceived in U.S. courts. If the IOIA found application, it would be relevant for the cholera claim, since the IOIA gives authorization to the President to withhold or withdraw from an international organization, its officers or its employees any of its immunities, or to limit the enjoyment of any immunity.<sup>92</sup> Of course the use of this provision would engage a lot of political disagreements and controversies – were they internal or external to the world Organization, but one should be aware that this possibility exists and that it opens new options, maybe more in line with the unpredictable tragic events occurring nowadays. This would also allow more flexibility to counterbalance the UN’s absolute immunity from jurisdiction. During the first hearing of the *Cholera* case on the immunity of the UN, the judge expressed interest in whether courts elsewhere have faced similar questions or come to a different conclusion with regard to the scope of the UN’s immunities. Nevertheless, he recalled that he was bound by 2<sup>nd</sup> circuit precedent and cases like *Brzak*; statement which seems to have taken over any more progressive approach in the *Georges v. UN* case.

## b) The Condition Precedent to Immunity

The CPIUN confers on the UN the responsibility to provide remedy for harm caused by the actions or inactions of the Organization itself or of its agents before granting its immunity before the courts.<sup>93</sup> While Section 29(a) of the CPIUN foresees appropriate modes of settlement for disputes of a private law character to which the UN is a party as an international organization, Section 29(b) of the Convention concerns disputes involving officials of the UN who enjoy immunity by reason of their official position within the Organization.<sup>94</sup> There is no need for the term “immunity” to be

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<sup>92</sup> IOIA, Sect. 1.

<sup>93</sup> CPIUN, Art. VIII, Sect. 29.

<sup>94</sup> CPIUN, Art. VIII, Sect. 29(a) and (b).

expressly mentioned in Section 29(a) of the CPIUN since Section 2 of the CPIUN grants immunity to the UN for every form of legal process. Section 29 of the CPIUN is intrinsic to the scope of UN immunity and cannot be read separately from it. It is therefore clear that in the context of disputes of a private law character involving the UN, appropriate modes of settlement should be made prior to the immunity blockage which would occur before the courts. In contrast, since UN officials only enjoy functional immunity, it was necessary to write down in Section 29(b) that appropriate modes of settlement should be foreseen in disputes involving those officials who enjoy immunity before the courts. The condition precedent can also be drawn from the drafting history of the CPIUN.<sup>95</sup> It is well-established under both U.S. and international law 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.<sup>96</sup> Treaties are to be interpreted upon the principles which govern contract law, with a view to making effective the purposes of the contracting parties.<sup>97</sup> In the case at hand, the UN asked for recognition of its immunity while it did not provide for the other side of the bargain, namely an appropriate mode of settlement, leading to a breach of the contract. The convention's object and purpose of granting the UN immunities without leading to impunity is undermined in that case. Another argument to be brought up is the uniform international interpretation of international treaties. Thus, other signatories to the CPIUN than the U.S. have regularly held that the existence of alternative means of dispute settlement was a material condition to international organization's enjoyment of immunity. Although not binding on the U.S. Court, "[t]he 'opinions of [the] sister signatories' [...] are 'entitled to considerable weight'" in interpreting any treaty.<sup>98</sup> The same applies to the SOFA's dispute resolution clause which relates the settlement of claims to immunity, calling for the establishment of an alternative mechanism (i.e. a standing claims commission) in cases of disputes or claims over which the courts of Haiti do not have jurisdiction.<sup>99</sup> During the first hearing of the *Cholera* case, the judge acknowledged the condition precedent argument.

<sup>95</sup> See developments in Plaintiffs' surreply of 28.8.2014, available at: <<http://www.ijdh.org>>.

<sup>96</sup> Vienna Convention on the Law of Treaties of 23.5.1969, UNTS, Vol. 115, 331, Art. 60.

<sup>97</sup> See *Bank of New York v. Yugoimport SDPR J.P.* of 29.4.2011, 780 F. Supp. 2d 344, 359, S.D.N.Y., quoting *Sullivan v. Kidd* of 3.1.1921, 254 U.S. 433, 439.

<sup>98</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* of 12.1.1999, 525 U.S. 155, 176, quoting *Air France v. Saks* of 4.3.1985, 470 U.S. 392, 404.

<sup>99</sup> SOFA, Art. VII, para. 55, cf. para. 50.

He also underlined the wording of Article 29 CPIUN stating that the UN “shall” provide appropriate modes of settlement, not may or might.

### 3. Human Rights-Based Approach

#### a) Violation of Procedural Rights

##### aa) The Right to a Remedy

##### International Human Right to a Remedy

In the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,<sup>100</sup> the General Assembly provided details concerning the right to equal and effective access to justice and to an effective judicial remedy for victims of violations of human rights law, as well as the type of adequate, effective and prompt reparation required by international law.<sup>101</sup> The independent expert on the situation of human rights in Haiti affirmed that accountability for the cholera epidemic should be established in accordance with the Basic Principles and added that the UN should be the first to honor these principles.<sup>102</sup> Although those Basic Principles are primarily addressed to states, they contain the obligation to respect and implement international human rights law and international humanitarian law, which includes the duty to provide victims with effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation.<sup>103</sup> According to the Basic Principles, “victims” are<sup>104</sup> persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.<sup>105</sup> Such violations are established when no precautions to avoid loss of life and injury have been carried out, leading to the death of more than 8,700 people. The American Convention on Human Rights

<sup>100</sup> UNGA, A/RES/60/147 of 16.12.2005.

<sup>101</sup> UNGA (note 100), paras. 15-22.

<sup>102</sup> Independent Expert's Report on the Situation of Human Rights in Haiti, *Gustavo Gallon*, A/HRC/25/71 of 7.2.2014, para. 77.

<sup>103</sup> UNGA (note 100), Annex, II., 3 (c).

<sup>104</sup> As in the *Haiti Cholera* case.

<sup>105</sup> UNGA (note 100), Annex, V., 8.

(ACHR) foresees that the consequences of the situation that constituted the breach of a right have to be provided with a remedy.<sup>106</sup> The judicial guarantees essential for the protection of rights are recognized as an absolute standard not subject to suspension.<sup>107</sup> As a party to the Charter of the Organization of American States,<sup>108</sup> the U.S. is bound by the international obligations provided by the American Declaration of the Rights and Duties of Man,<sup>109</sup> which affirms that “[e]very person may resort to the courts to ensure respect for his legal rights”.<sup>110</sup> The Inter-American Court of Human Rights (IACtHR) affirmed there was an obligation for states to adopt affirmative measures to guarantee that no injurious occurrences will take place again in the future.<sup>111</sup> For the U.S. to consecrate immunity over the right to a remedy is therefore contrary to provisions of the International Covenant on Civil and Political Rights (ICCPR), the ACHR and the American Declaration, since immunity factually hinders access to justice in the *Cholera* case. The peculiarities of U.S. practice lead to a situation in which courts must apply a treaty granting absolute immunity to the UN, but cannot apply human rights treaties that might call into question the legitimate scope of immunities under international law.<sup>112</sup>

#### Domestic Right to a Remedy

The SOFA between the Government of Haiti and the UN foresees that MINUSTAH and its members have to act in accordance with the impartial and international nature of their duties, and have to respect the Haitian laws and regulations.<sup>113</sup> The Civil Code of Haiti creates a cause of action and remedy for injuries resulting from negligence, including negligent transmission of disease. It requires the party responsible for an act causing damage to another, to provide a remedy.<sup>114</sup> Each person is responsible for the damage that he/she causes, not only by his/her action, but also by his/her negligence and imprudence. Agreements absolving parties of responsibility for

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<sup>106</sup> ACHR, Art. 63(1).

<sup>107</sup> ACHR, Art. 27(2).

<sup>108</sup> Charter of the Organization of American States, UNTS, Vol. 119, 3.

<sup>109</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights of 14.7.1989, Advisory Opinion OC-10/89, IACtHR, para. 45.

<sup>110</sup> The American Declaration of the Rights and Duties of Man of 1948, OAS Res. XXX (hereinafter the American Declaration), Art. XVIII.

<sup>111</sup> *La Cantuta v. Peru* of 29.11.2006, OEA/Ser. C./No. 162, IACtHR, paras. 199-201.

<sup>112</sup> *C. H. Brower* (note 88), 310.

<sup>113</sup> SOFA, Art. IV, para. 5.

<sup>114</sup> Civil Code of Haiti, Art. 1168.

such damage are rendered void as being contrary to public policy. The transmission of a contagious disease constitutes a tort for which the author is responsible even if the transmission was not made intentionally but rather resulted from the carelessness or negligence of the person who was ill.<sup>115</sup>

bb) The Right to a Remedy in Tension with the Immunity Principle

UN members in general have a positive duty to enforce the UN Charter's human rights obligations, which should therefore be done over and above international law granting immunity. When human rights are violated, a corollary right to remedy is usually triggered.<sup>116</sup> In international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective remedies. The right to a remedy is part of the human rights that must be universally respected and observed within the meaning of the UN Charter. For these reasons, it can be affirmed that the immunity provision of the UN Charter<sup>117</sup> has to be interpreted in light of the human rights provisions of the UN Charter.<sup>118</sup> The limited immunity encompassed in the UN Charter cannot be "necessary" when human rights violations are at stake. For the same reasons, the immunity provisions of the CPIUN are not consistent with the human rights provisions of the UN Charter. The Charter foresees that the obligations of the members of the UN under the Charter prevail over their obligations under any other international agreement.<sup>119</sup> The universal respect and observance of human rights by the UN and by its member states must therefore prevail over the immunity provision in the CPIUN.<sup>120</sup> The domestic courts should therefore take on this argumentation when deciding on the immunity issue of the UN. The UN itself should also absorb this reasoning all the way long, but particularly before relying on its immunity in pre-trial procedures.

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<sup>115</sup> Civil Code of Haiti, Art. 1169, paras. 1, 2 and 4.

<sup>116</sup> American Convention on Human Rights of 18.7.1978, UNTS, Vol. 1144, 123, Art. 25; European Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.1950, ETS, Nr. 5, Art. 13; ICCPR, Art. 2; Universal Declaration of Human Rights of 10.12.1948, UN Doc. A/810, Art. 8; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa of 11.7.2003, Art. 25.

<sup>117</sup> UN Charter, Art. 105.

<sup>118</sup> UN Charter, Art. 1, para. 3 and Art. 55(c).

<sup>119</sup> UN Charter, Art. 103.

<sup>120</sup> *J. J. Paust*, The UN Is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Non-Immunity, *Harv. Int'l L. J.* 51 (2010), 301.

## cc) The “Reconciliation” Approach

## European Court of Human Rights Ruling

The U.S. way to proceed is highly questionable considering the existing transnational judicial dialogue about the reconciliation of international immunities with human rights norms taking place outside of U.S. courts. European Court of Human Rights (ECtHR) cases underline the relevance of international human rights law with regard to the immunity of international organizations. In the *Waite and Kennedy* and *Beer and Regan* cases,<sup>121</sup> the ECtHR stated that an international organization enjoys immunity before domestic courts only if it provides an alternative means of dispute settlement for individuals seeking redress against the organization. The Court does not refer to specific texts encompassing dispute settlement provisions (as the SOFA-Haiti in the *Cholera* case), which demonstrates the universal value given to the alternative means of settlement rationale and suggests its applicability independently of whether positive legal obligations require organizations to set up alternative means of dispute settlement or not.<sup>122</sup> Regarding the *Haiti Cholera* case, the ECtHR’s reasoning would provide for the necessary compromise between the immunity principle and the human rights-based obligations of states to respect individuals’ right to a remedy. The ICJ also affirmed that in the event that immunity of the UN was asserted, an appropriate means of settlement had to be afforded to claimants seeking redress. Immunity of the UN, or its agents, cannot leave a plaintiff without remedy.<sup>123</sup> At the European level, there has nevertheless been no ruling on the implementation of the ECtHR’s decisions nor has it been decided upon the type of remedies to be granted in such cases where no alternative means of dispute settlement are in place. This seems problematic with regard to the fact that the principle forbidding denial of justice ranks as one of the universally recognized fundamental principles of law.<sup>124</sup> In the *Stichting Mothers of Srebrenica* case,<sup>125</sup> the ECtHR considered<sup>126</sup> that the availability of reasonable alternative means to protect effectively the right of ac-

<sup>121</sup> *Waite and Kennedy* and *Beer and Regan*, ECtHR (note 62).

<sup>122</sup> *T. Neumann/A. Peters*, Case Commentary on *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany*, ECtHR, in: C. Ryngaert/I. Dekker/R. A. Wessel/J. Wouters, *Leading Judicial Decisions of the Law of International Organizations*, Oxford University Press, forthcoming.

<sup>123</sup> *Difference Relating to Immunity from Legal Process*, ICJ (note 54).

<sup>124</sup> *Golder v. The United Kingdom* of 21.2.1975, No. 4451/70, ECtHR, para. 35.

<sup>125</sup> *Stichting Mothers* (note 63), para. 163.

<sup>126</sup> Quoting its previous case-law *Waite and Kennedy*, para. 68; and *Beer and Regan*, para. 58.

cess to a court was a “material factor” in determining whether granting the UN immunity from domestic jurisdiction was permissible under the Convention. The Court then admitted that in the case at hand, it was “beyond doubt that no such alternative means existed” either under domestic law or under the law of the UN. Despite this demonstration, the Court did not draw the conclusion that recognition of immunity was *ipso facto* constitutive of a violation of the right of access to a court. Since the UN is not party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and since the contracting state (i.e. the Netherlands) cannot be compelled by the ECtHR to provide a remedy against the UN in its own courts, the Court did not feel urged to give any alternative solution or any detailed explanation on how to resolve the lack of access to a court in this case because of its jurisdictional limits.<sup>127</sup> Accordingly, the Court specified that Article 6(1) ECHR did not guarantee any particular content for “civil rights and obligations” in the substantive law of the contracting states and the Court had therefore no power to create a substantive right which has no legal basis in the state concerned. But that is where the argumentation of the Court stops, and this does not mean that domestic courts do not have or should not have any power to act on that gap.<sup>128</sup>

#### Domestic Courts' Palliative

This is exactly what the Supreme Court of the Netherlands did, having no choice but attributing the wrongful conduct to the Netherlands as the personnel contributing country having effective control over the disputed conduct and not to the UN.<sup>129</sup> Therefore, if the immunity of the UN seems to be the only hindrance to the human rights-based argumentation, the UN flag does not give immunity to the state. This argumentation, while appropriate and reasonable, underlines once more the core responsibility for the UN to accept waiving its immunity in some cases. As a matter of fact, if the Supreme Court of the Netherlands deems unacceptable the reasoning of a state which affirms that there is no scope for the courts to assess the conduct of a troop contingent in the context of a peace mission,<sup>130</sup> it is equally unacceptable for the UN to hold the same reasoning in the exact same cir-

<sup>127</sup> According to the ECtHR, it is indeed for the UN to provide alternative modes of settlement, but the Court has no power to force the UN to do so.

<sup>128</sup> As is suggested by the Court itself in *Stichting Mothers* (note 63), para. 167: “The Court cannot at present find it established that the applicants’ claims against the Netherlands State will necessarily fail.”

<sup>129</sup> *The State of the Netherlands v. Hasan Nuhanovic* of 6.9.2013, Supreme Court of the Netherlands.

<sup>130</sup> *Nuhanovic* (note 129), para. 3.18.3.

cumstances. The Dutch Court even goes as far as stating that its decision is not altered by the expectation that it will have an adverse effect on the implementation of peace operations by the UN, in particular on the willingness of member states to provide troops for such operations, which the Court affirms “should not [...] prevent the possibility of judicial assessment in retrospect of the conduct of the relevant troop contingent”.<sup>131</sup> Also, it is exceptional that states incur liability for the wrongful acts of the organization whose members they are, given the legal autonomy of international organizations. As a matter of fact, wrongful acts are usually attributable to the UN and not to its member states since the UNSC exercises “ultimate authority and control” and “effective control” over UN-authorized missions performing those acts.<sup>132</sup> By analogy with the *Haiti Cholera* case, it is explicitly stated in UNSC Resolution 1542 (2004) that the UN holds exclusive operational control over MINUSTAH. It is specifically because member states are ordinarily not liable for the acts of an organization that it is crucial that accountability mechanisms are put in place within the organization allowing individuals to file a liability claim, or a complaint when their human rights are violated.<sup>133</sup> In some European domestic courts, immunities have been limited based on conflicts with the right to an effective remedy and to access to a court,<sup>134</sup> although this has not yet been the case for the UN, as it is a very particular organization.

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<sup>131</sup> *Nuhanovic* (note 129), para. 3.18.3; cf. *Attorney General v. Nissan* of 11.2.1969, U.K. House of Lords.

<sup>132</sup> *Al-Jedda v. The United Kingdom*, No. 27021/08, ECtHR.

<sup>133</sup> C. Ryngaert, *The Accountability of International Organizations for Human Rights Violations: The Cases of the UN Mission in Kosovo (UNMIK) and the UN “Terrorism Blacklists”*, in: M. Fitzmaurice/P. Merkouris, *The Interpretation and Application of the European Convention of Human Rights*, 2013, 73 et seq., 73.

<sup>134</sup> *Western European Union v. Siedler, General Secretariat of the ACP Group v. Lutchmaya* and *General Secretariat of the ACP Group v. B.D.* of 21.12.2009, Belgian Court of Cassation; *Drago v. International Plant Genetic Resources Institute* of 19.2.2007, Italian Court of Cassation, paras. 6 and 7 (the immunity provision contained in the Headquarters Agreement was not compatible with the fundamental right to institute proceedings to protect ones rights encompassed in the Italian Constitution); *UNESCO v. Boulois* of 19.6.1998, French Appellate Court (the request for immunity was rejected since preventing the plaintiff from bringing his case to a court would constitute a denial of justice and a violation of Art. 6(1) of the ECHR); *International Centre for Superior Mediterranean Agricultural Studies* of 1991, Court of Appeals of Crete (the immunity of the Centre was denied since otherwise there would have been no alternative forum for claims against the organization).



## b) Violation of Substantive Rights

### aa) The Right to a Healthy Environment

The right for everyone to a healthy and pleasant environment, including the constitutional obligation of protecting the environment, is recognized in Haitian law.<sup>135</sup> Any action that can harm the environment carries the direct or indirect responsibility of the person who commits or sponsors such action. Drainage and tossing of human excrement in, *inter alia*, streams, springs, ponds, and reservoirs are prohibited.<sup>136</sup> The environment is the natural framework of the life of the people, and any practices that might disturb the ecological balance are therefore strictly prohibited.<sup>137</sup> Respecting the environment of the host country is also encompassed in the Code of Conduct applying to UN peacekeeping personnel.<sup>138</sup> UN Standards of Conduct are based on key principles, one of which corresponding to the accountability of those in command who fail to enforce them. In the matter at hand and although it might not have been on purpose, the lack of attempt to improve the poor sanitation conditions at the MINUSTAH base, as well as the failure to repair the haphazard drainage infrastructure, leading to a risk of flooding and to the contamination with waste and sewage of the Artibonite river appears to be contrary to the quoted standards of behavior and conduct.

### bb) The Right to Water

The runoff of cholera-laced human waste coming from the MINUSTAH base into the Artibonite River, which is the major Haitian water source, contravened to the preservation of the Haitian environment and failed to respect victims' human right to clean water and sanitation.<sup>139</sup> Haiti's local laws and regulations encompass any treaty provisions to which Haiti has

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<sup>135</sup> Decree concerning the Environmental Management and Regulation of the conduct of citizens for Sustainable Development of 26.1.2006, Art. 9.

<sup>136</sup> Law No. XV on Rural Hygiene, Art. 297.

<sup>137</sup> Constitution of Haiti of 1987, Art. 253.

<sup>138</sup> United Nations Department of Peacekeeping Operations Training Unit, We are United Nations Peacekeepers, available at: <<http://www.un.org>>.

<sup>139</sup> Recognized by the UNGA, A/RES/64/292 of 3.8.2010, para. 2, which calls upon international organizations, among others, to make the necessary efforts to "provide safe, clean, accessible, and affordable drinking water and sanitation for all"; cf. Human Rights Council, A/HRC/RES/15/9 of 6.10.2010, para. 3, affirming that the right to water finds its origins in "the right to an adequate standard of living" for all; cf. UDHR, Art. 25; and International Covenant on Economic, Social and Cultural Rights, UNTS, Vol. 993, 3 (hereinafter ICESCR), Art. 11.

committed<sup>140</sup> and the UN must therefore respect Haiti's international law obligations. Haiti ratified the ACHR, and the IACtHR interpreted the right to life under the Convention to include access to safe drinking water and sanitation.<sup>141</sup> Moreover, the UN Committee on Economic, Social and Cultural Rights defined "safe water" as being "free from micro-organisms [...] that constitute a threat to a person's health."<sup>142</sup> The polluted water led to the victim's contraction of cholera and to sickness or death, thus violating their human rights to water, to health and to life.

### cc) The Right to Health

While the right to health is also enshrined in Haitian law<sup>143</sup> as well as in several international conventions and declarations,<sup>144</sup> the American Declaration, which the IACtHR has held as a source of binding international obligations for members of the Organization of American States (including Haiti), deems the preservation of health through sanitary and social measures an essential human right.<sup>145</sup> The UN Committee on Economic, Social and Cultural Rights affirms the collective responsibility of the international community to address the problem of diseases that are easily transmissible beyond the borders of one state.<sup>146</sup> The Code of Conduct applying to UN peacekeeping personnel foresees that peacekeepers should not be committing any act that could result in physical or psychological harm or suffering to members of the local population.<sup>147</sup> The MINUSTAH camp lacked adequate water and sanitation infrastructure that should have been

<sup>140</sup> Constitution of Haiti (note 137), Art. 276-2: "Once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them."

<sup>141</sup> *Sawhoyamaya Indigenous Community v. Paraguay* of 29.3.2006, IACtHR, paras. 168, 178.

<sup>142</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, 20.1.2003, para. 12.

<sup>143</sup> Constitution of Haiti (note 137), Art. 19.

<sup>144</sup> UDHR, Art. 25, para. 1; ICESCR, Art. 12(b) and (c); Convention on the Rights of the Child, UNTS, Vol. 1577, 3 (hereinafter CRC), Art. 24; Convention to Eliminate All Forms of Discrimination Against Women, UNTS, Vol. 1249, 13, Art. 12, para. 1; International Convention on the Elimination of All Forms of Racial Discrimination, UNTS, Vol. 660, 195, Art. 5(e)(iv); International Convention on the Rights of Persons with Disabilities, UNTS, Vol. 2515, 3, Art. 25; Constitution of the World Health Organization of 22.7.1946, Off. Rec. Wld Hlth Org., 2, 100.

<sup>145</sup> The American Declaration, Art. XI.

<sup>146</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11.8.2000, para. 40.

<sup>147</sup> United Nations Department of Peacekeeping Operations Training Unit (note 138).

properly put into place by the UN. By not preventing the introduction of cholera into Haiti, the UN failed to respect the human right to health, leading to the non-observance of international human rights law but also to local obligations, and therefore creating a breach of the SOFA. The International Health Regulations of 2005 (IHR) are binding on all WHO member states (including Haiti), and recognize that cholera possesses the “ability to cause serious public health impact and to spread rapidly internationally,” and thus constitutes a particular risk for causing a public health emergency of international concern.<sup>148</sup> According to the IHR, the member parties have to communicate to the WHO timely and sufficiently detailed public health information, including the source of the risk.<sup>149</sup> Since the UN did not cooperate with the Haitian Government on leading investigations on the origins of the virus right after it broke out, there has been non-observance of international law, creating another breach of the SOFA which provides that MINUSTAH shall cooperate with the Haitian Government with respect to sanitary services. Each other shall extend “the fullest cooperation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions”.<sup>150</sup>

#### dd) The Right to Life

The right to life is naturally encompassed in international human rights treaties ratified by Haiti<sup>151</sup> as well as in Haitian domestic law<sup>152</sup> and has been violated by the introduction of the *Vibrio cholerae* into the country, leading to thousands of people's death. The violation of human rights incorporated in international treaties should have been taken into account by the U.S. courts while appreciating the admissibility of the complaints, before concluding towards an automatic recognition of the UN's immunity before domestic jurisdictions.

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<sup>148</sup> International Health Regulations, 2<sup>nd</sup> ed. 2005 Annex 2.

<sup>149</sup> International Health Regulations (note 148), Art. VI, para. 2.

<sup>150</sup> SOFA, Art. V, para. 23.

<sup>151</sup> ICCPR, Art. 6; CRC, Art. 6; ACHR, Art. 4, para. 1.

<sup>152</sup> Constitution of Haiti (note 137), Art. 19.

### III. Outlook

#### 1. Opportuneness of the Complaints

##### a) The UN as Aid Provider and Guarantor?

The question of the opportuneness of the complaint against the UN first arises from the apparent contradiction between the world Organization providing aid to the people in Haiti after the 2010 earthquake, and the cholera victims asking that aid provider for compensation, being aware that the outbreak was not caused intentionally by the Organization.

##### b) The UN's Immunity vs. Moral Duty

Immunities are meant to protect the independent functioning of international organizations and shield them from litigation. They face indeed greater vulnerabilities when performing mandates that lie beyond the capacities of a single state. Immunity corresponds to the protection of a function. It is self-explanatory that the UN as the world Organization has to enjoy broad immunity to fulfill its core functions and missions. The CPIUN was one of the first treaties passed by the UN at its inception in 1946, which might thus reveal the necessity of an adaptation of its interpretation and its implementation nowadays. In pursuit of its ideals, the Organization aims to establish conditions under which justice and the obligations arising from treaties and other sources of international law are respected. Such an objective is only credible if the UN sets the right example for states to follow. Throughout the years and by amicably settling third-party claims, the UN was willing to be fair in dealing with individuals injured as a direct result of UN actions. However and for now, the UN's handling of the high profile claim at hand stands in contrast to the importance that the Organization professes to attach to the rule of law and human rights; the UN seems to be avoiding how to address the application of national or international law to itself. It has been argued that such cases like the *Haiti Cholera* case, while having reputational and damaging implications for the UN system as a whole, do not constitute representative cases involving the UN.<sup>153</sup> At large, the UN system is working and it appears easy to blame the UN as being the

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<sup>153</sup> Conference in Luxembourg on The Rule of Law and Its Application to the United Nations, 11.-12.9.2014.

bad guy. But is this a valid reason for those cases to be ignored? For the UN to invoke its immunity is made controversial by the extreme distress to which it relates in Haiti. It seems indeed difficult for the UN to evade accountability for acts of negligence and recklessness that directly caused one of the deadliest torts in the past decade. If a company dumped lethal waste into a river in the U.S. for example, it would be sued for negligence. The UN was not represented at the hearing of 23.10.2014 and while the U.S. Attorney argued against the plaintiffs and in favor of the immunity of the UN, she did not make herself available for comments after the hearing.<sup>154</sup>

### c) Difficulties Facing the UN

#### aa) Financial Impact

Sensitivities are running high within the UN headquarters in New York. The admissibility of the Haiti lawsuit would impose an immense financial burden on the Organization and on its member states paying the expenses of it. The question rises whether the UN should accept actions in cases where it is not covered. A successful lawsuit could invite similar lawsuits, regardless of merit, thereby making UN member states vulnerable to significant future financial costs. As an illustration, if the UN had to pay full compensation and restitution to Haitians harmed by cholera, that is, paying the maximum sum of 50,000 dollars<sup>155</sup> to the more than 700,000 victims, it would amount to a more than 35 billion dollars payment. Of course, this maximum amount could be reduced for the sake of the Organization and its member states, but also by reference to local compensation standards,<sup>156</sup> considering Haiti's low per capita income. Since the UN is financed by its member states, they could decide on cutting their financial contribution if it keeps on being used to pay off damages to individuals. It is also important to underline that those directly responsible for the epidemic (MINUSTAH officials and the Nepalese government that provided the infected peacekeepers) would not be the ones who would directly bear the burden of compensation. As a matter of fact, the costs would be passed on to all UN member states through the budget process, with the U.S. supplying for the largest amount, while Nepal's contribution lying very low. Despite this, the UN's independent human rights expert on Haiti demanded full compensa-

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<sup>154</sup> *J. Le Masurier/S. Pilgrim*, U.S. Judge Wavers on UN Immunity in Haiti Cholera Case, France 24, 24.10.2014, available at: <<http://www.france24.com>>.

<sup>155</sup> UNGA, A/RES/52/247 of 17.7.1998, para. 9(d).

<sup>156</sup> UNGA (note 155), para. 9(d).

tion for cholera victims earlier this year,<sup>157</sup> endorsing the words of his predecessor, who deplored that certain organizations have exploited the cholera issue for political ends and who underlined the need for victims or their families to know the truth and perhaps even to be given compensation. He recalled that silence was the worst response.<sup>158</sup> The UN High Commissioner for Human Rights also supported compensation for victims who suffered from the cholera epidemic, constituting another rare admission about the need to provide compensation<sup>159</sup> which cannot be ignored in good conscience coming from one of the UN's top officials.

#### bb) Future Peacekeeping Activities

Not only would a settlement create a huge financial burden on the Organization, but it might deter future peacekeeping efforts. Member states might be far less willing to approve UN field activities if they were vulnerable to significant financial risk. Although UN operations can be ineffective or even damaging – as attested by the situation in Haiti – they have also proven to be a useful or even the only option for addressing humanitarian crises. A reduction in UN field activities could lead to broader suffering elsewhere.

#### cc) Judicial Precedent

The case would set a precedent and would unquestionably influence how mass claims against the UN are lodged and resolved in the future. Putting the immunity of the UN aside might weaken the Organization's immunity in other contexts. The UN and its affiliated organizations are engaged in a multitude of activities that frequently result in casualties, property damage, or other negative consequences. On the other hand, a narrow, fact-specific ruling that limits UN exposure to liability for private law tort claims in a case where the UN refuses to provide any alternative remedies would not impact the UN's core functions or undermine the underlying policy considerations that have justified courts' protection of UN immunity in the past. It would not automatically mean that all the other cases would be admissible; only those where the UN refuses to provide any alternative remedies.

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<sup>157</sup> *Gustavo Gallon's Report* (note 102), available at: <<http://www.daccess-dds-ny.un.org>>.

<sup>158</sup> Independent Expert's Report on the Situation of Human Rights in Haiti, *Michel Forst*, A/HRC/22/65 of 7.2.2013, para. 89, available at: <<http://www.ohchr.org>>.

<sup>159</sup> *T. Daniel*, UN Official Pushes Compensation for Haiti Victims, Associated Press, 8.10.2013.

Considering the claims together with the victims' representatives at the petition stage could have given the UN an opportunity towards finding a common solution without putting at risk the entire functioning of the World Organization. One can only regret the lack of settlement at that early stage.

## 2. Further Considerations

### a) At United Nations Level

#### aa) Standing Inspection Panel

There have been suggestions on establishing a standing inspection panel based on the World Bank Inspection Panel which is a complaints mechanism for people and communities who believe that they have been affected by a World Bank-funded project. Since it is an internal mechanism, its independence can be questioned. The basis of such a Panel could be aligned with the interpretation of the UN Charter, and would therefore encompass a human rights scrutiny. The failure of the UN to fulfill the right to access to justice leads to the assessment that it is time to upgrade some of its mechanisms and that its liability should evolve towards a human rights-based approach.

#### bb) Ombudsperson Institution and Human Rights Advisory Panel

The question can be raised whether an analogy could be drawn between MINUSTAH and the UN Interim Administration Mission in Kosovo (UNMIK). The Mission made it clear that it was prepared to be held accountable for acts that had an impact on the enjoyment of human rights by individuals living in Kosovo. An Ombudsperson Institution was therefore created, which criticized the action or inaction of UNMIK in light of international human rights standards.<sup>160</sup> The Ombudsperson ruled that the enjoyment of privileges and immunities by UNMIK and its staff was not compatible with recognized international human rights standards.<sup>161</sup> The Kosovo Human Rights Advisory Panel (HRAP) was also established<sup>162</sup> and

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<sup>160</sup> UN UNMIK, UNMIK/REG/2000/38 of 30.6.2000.

<sup>161</sup> Ombudsperson Institution in Kosovo, Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, 2001, para. 28.

<sup>162</sup> UN UNMIK, UNMIK/REG/2006/12 of 23.3.2006.

examines complaints of alleged human rights violations committed by, or attributable to UNMIK. In doing so, the Panel applies the ECHR as well as other key international human rights conventions and makes non-binding recommendations to the Special Representative of the Secretary-General.<sup>163</sup> The Panel's decisions also rely on UN human rights committees' and Inter-American Court of Human Rights' case-law, which led the HRAP to urge UNMIK to undertake a series of measures, such as public apologies, reflecting the jurisprudence of the IACtHR. In Haiti, since physical harm and material damage (i.e. burial costs) have been caused, one could imagine that such a panel established towards the actions and inactions of MINUSTAH in the *Cholera* case could issue decisions on compensation. The Special Representative of the Secretary-General mentioned that the issue would be addressed at UN Headquarters in New York with the aim of drawing attention of the UN General Assembly to the need for a thorough review of its compensation rules currently in force.<sup>164</sup> In any event the UN should learn a lesson out of this and improve its management of such a situation by developing appropriate insurance mechanisms, by raising funds from various actors without making false promises, by making sure that the screening policies, the hygiene policies and camp management are properly maintained, as safeguards for the future.

## b) At Joint, State and Individual Level

### aa) Standing Claims Commission

The most appropriate solution in such a case would be to establish a standing claims commission to settle the dispute,<sup>165</sup> which could also have jurisdiction over determining whether the claims are of a private or public law nature. The mechanism provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par.<sup>166</sup> In comparison, the local claims review boards, being UN bodies, can be perceived as acting as a judge in their own case. However, since Haiti expressly elected not to participate in the dispute, it seems unlikely that it will call for a standing claims commission to be established. This is regrettable because as a mechanism exists in the texts, it should be

<sup>163</sup> UN UNMIK (note 162), para. 15.3.

<sup>164</sup> Conference in Luxembourg (note 153).

<sup>165</sup> Model SOFA, para. 51; cf. SOFA, para. 55.

<sup>166</sup> UN Secretary-General's Report on Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, A/51/903 of 21.5.1997, para. 10.



established. The UN was founded to fulfill its purpose and member states have to meet their obligations too.

bb) High-Level Committee for the Elimination of Cholera in Haiti

Following a plea of the Prime-Minister of Haiti, a High-Level Committee for the Elimination of Cholera in Haiti was established in 2014 by the Haitian government and the UN which is supposed to provide assistance to the affected victims and families. This institution is indeed necessary to address the ongoing Cholera crisis, but it does not create a liability mechanism with the purpose of holding the UN accountable for the damages it caused.

cc) Human Rights Treaty Bodies

Turning to the Human Rights Treaty Bodies (HRTB), they are also mandated to monitor the implementation of the international human rights treaties. They make recommendations to state parties to international human rights treaties, to take steps to ensure that everyone in the state can enjoy the rights set out in those treaties. The Haitian state has a responsibility under Articles 2 and 3 of the ICCPR to ensure to all individuals within its territory and subject to its jurisdiction and whose rights are violated the right to an effective remedy. In its Concluding Observations on Haiti, the Human Rights Committee stated that Haiti shall ensure that the ICCPR's provisions are taken into consideration before and by domestic courts. The Committee also underlined the necessity to provide effective access to justice.<sup>167</sup>

dd) Joint Responsibility Attribution

The question then rises about joint attribution of responsibility between the UN and the personnel contributing country, that is to say Nepal in the case at hand. If human rights violations occurred under the control of both the UN and personnel contributing states, a system of joint liability could be applied in the interests of maximizing victims' access to just reparation.<sup>168</sup> Before deployment, medical examination, immunization and clearance of personnel from national contingents of a peacekeeping force remain indeed the responsibility of the personnel contributing country. The force medical officer is responsible for providing guidance and overseeing imple-

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<sup>167</sup> Human Rights Committee, CCPR/C/HTI/CO/1 of 21.11.2014, paras. 5 and 16, available in French at: <<http://www.daccess-dds-ny.un.org>>.

<sup>168</sup> T. Dannenbaum, Translating the Standard of Effective Control into a System of Effective Accountability, in: Harv. Int'l L. J. 51 (2010), 113 et seq., 175.

mentation of “preventive health measures, disease prophylaxis and field hygiene, including food and water inspections, sanitation and waste disposal”.<sup>169</sup> It would then be for the body that has jurisdiction over the case to decide on the respective liability attribution.<sup>170</sup> Liability costs for human rights violations could lead to a positive preventive effect. To avoid those costs indeed, the UN and personnel contributing countries would send rigorously selected, well trained, and effectively disciplined troops on mission.<sup>171</sup> Another call would be for the UN to cooperate with Haitian authorities to waive the immunity of the UN officials if it can be determined that their actions or negligence led to the spread of the epidemic and were committed outside of their official functions. Those officials would then be brought to trial. While the liability of those officials would lead to the sound administration of justice, it might still not constitute the appropriate answer to the *Haiti Cholera* case, considering the limited liability of individuals compared to the number of victims.

#### IV. Conclusions

Haiti has been very poorly governed throughout its history. Although the international community has been providing long-lasting assistance to Haiti, the country is not significantly better off than it was in 1993.<sup>172</sup> The earthquake of 2010 worsened the situation tragically. In its aftermath, while one could criticize the sole upholding of MINUSTAH on site, the fact that there are no formal means to secure accountability deepens the perception of the Mission not only as that of an occupying force, but also as a harming actor. Whereas MINUSTAH is supposed to help and protect the victims, the violation of its code of conduct, of medical standards, and of camp management clearly led to a massive breach of fundamental rights. The reasons why the UN enjoys immunity are more than understandable, but it is less so that such a principle leads to the infringement of human rights as well as to legal uncertainty. Filing the case in U.S. courts had two aims; firstly obtaining a binding judgment on behalf of the victims of cholera. The U.S. Federal Courts system is indeed highly respected, and the UN would be

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<sup>169</sup> UN Department of Peacekeeping Operations (note 37), 16, 45, 62, available at: <<http://www.reliefweb.int>>.

<sup>170</sup> As did the Supreme Court of the Netherlands in the *Nuhanovic* case (note 129).

<sup>171</sup> *T. Dannenbaum* (note 168), 186.

<sup>172</sup> *B. D. Schaefer*, *Haiti Cholera Lawsuit Against the UN: Recommendations for U.S. Policy*, The Heritage Foundation Backgrounder, No. 2859, 12.11.2013.

under significant pressure to comply with any adverse judgment. Secondly, filing in the U.S. courts provides an opportunity to apply outside pressure on the UN, from members of the U.S. Congress, Haitian-American organizations, members of the press. If U.S. courts continue refusing to accept the *Cholera* case, IJDH-BAI have the intention to file elsewhere;<sup>173</sup> and first before European courts, which are more advanced in counterweighing the need for the UN to enjoy immunity with the human rights of individuals to an effective remedy. If necessary, the victims' defenders would also file in Haitian courts. Until now, they have avoided doing so for two reasons; firstly because the Haitian government has opposed the case and because the government and the UN together exert an enormous influence on the judicial branch in Haiti, leading to concerns about obtaining a fair trial. Secondly, if the victims were to prevail in Haitian courts, the UN could use the argument of the weakness of the Haitian judiciary to oppose the implementation of the judgment. Domestic courts should be opened to more flexibility and adapt in an effective manner to the issues at stake instead of relying on common interests with the UN. Indeed, one cannot help noticing a difference between U.S. courts following the UN's opinion – the U.S. being the biggest donor, the biggest actor on the international scene – and European courts which are more sensitive to human rights issues. In spite of the 9.1.2015 decision, the UN is still under substantial pressure to respond in a fair manner to the cholera victims, all the more since all the different actors who are defending the Haitian victims' rights will not surrender until the UN gets Haiti's cholera crisis tackled. The victims' defenders are convinced that at some point, the UN will be forced to accept its responsibility for the cholera outbreak in Haiti, unfortunately after squandering a substantial amount of goodwill and credibility. Justice has to be done, one way or the other.

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<sup>173</sup> Email exchange with IJDH Executive Director *B. Concannon*, 29.3.2014.

