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# The battle for reparation for cholera victims in Haiti

*A study on the compatibility of the United Nations' New Approach to cholera in Haiti with the right to reparation, and the substance of the recognition of moral responsibility by the United Nations*

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# Summary

In 2010, an explosive cholera epidemic erupted in Haiti, killing close to 10.000 people and injuring some 800.000. Several scientific reports have traced the spread of the bacterium back to the United Nations base in the Mirebalais in Haiti, which hosted the Nepalese peacekeeping contingent. Subsequent claims for reparation filed by cholera victims have been rejected by the United Nations which deem them to be non-receivable in the Organization's internal claims settlement process. The attempt to obtain remedy in court has been hindered by the immunity from legal suit of the United Nations, resulting in individual claimants being left without remedy or reparation. The legal response by the United Nations has been widely criticized as an "abdication approach" by Special Rapporteur on extreme poverty and human rights, Philip Alston.

Shortly after the Organization's immunities were upheld by a United States Federal Appeals Court, the United Nations announced that more needed to be done with regards to the cholera epidemic and its victims. In December 2016, the Secretary-General issued a public apology to the Haitian population, spoke of the Organization's "role in the initial cholera outbreak", and presented a New Approach to cholera in Haiti, that would include intensified general support, as well as targeted support to cholera victims. The United Nation does not admit legal responsibility in relation to the epidemic, or towards its victims, but has frequently referred to its moral responsibility with regards to the cholera case, including in the New Approach. This thesis focuses on an assessment of the New Approach to cholera in Haiti with regards to reparation principles under international human rights law, as well as of the recognition of moral responsibility and its content, in view of determining whether the cholera victims receive appropriate reparation.

The cholera case highlights the obstacles individuals may face in attempting to demand and obtain reparation from the United Nations. It illustrates the tensions between the doctrine of immunities and the right to reparation for individuals, and thus the conflict between the classic international legal subjects, identified as States and Organizations, and the recent introduction of the individual as subject

of international law. Based on the assessment of the New Approach to cholera in Haiti and of the content of the United Nation's moral responsibility, as presented by the Organization, I conclude that the admission of moral responsibility, rather than legal, is not an obstacle *per se* to affording proper reparation, as reparation law provides for many non-judicial measures. In principle, many of the most crucial aspects of reparation can be ensured by the United Nations under the New Approach and on the basis of its recognition of moral responsibility. However, the *de facto* outcome of the New Approach presents several problems: because of severe underfunding the most relevant reparation aspects under the New Approach are at risk of not being implemented. The New Approach is presented as an expression of the UN's regret and moral duty, but the funding of the new response is not mandatory for Member States. The question arises whether the recognition of moral responsibility is anything more than absence of legal responsibility. Whereas theoretically, moral responsibility can generate obligations if referencing acts in the past, in practice the United Nations has phrased its moral responsibility for the future, and without any causal link with the cholera outbreak. In sum, the New Approach to cholera in Haiti entails a recognition of responsibility, without accountability. For the victims of the cholera epidemic, it translates into a failure to honour their right to reparation.

# Preface

Completing this Master's thesis has been a tremendous learning experience, and I was fortunate enough to carry out a minor field study in Haiti in connection to writing it. What can be read about the cholera crisis in news and scholarly articles rarely reflect the opinions of the victims themselves, and it was very significant to me to meet with some of the people directly affected by the epidemic in Haiti, and hear what they had to say. I would like to start by thanking these persons that I met in Port au Prince and in the Mirebalais for taking the time to speak to me. *Merci anpil*. I am infinitely grateful to Mario Joseph and Job Gene, from the Bureau des Avocats Internationaux, for your indispensable help in setting up the group interviews in the Mirebalais.

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# Abbreviations

ARIO	Articles of the Responsibility of International Organizations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BAI	Bureau des Avocats Internationaux
CPIUN	Convention on the Privileges and Immunities of the United Nations
HNP	Haitian National Police
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IJDH	Institute for Justice and Democracy in Haiti
MINUJUSTH	United Nations Mission for Justice Support in Haiti
MINUSTAH	United Nations Stabilization Mission in Haiti
SOFA	Status-of-Forces Agreement
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council

# 1 Introduction

## 1.1 Background

The present study concerns the response and responsibility of the United Nations (hereinafter the “UN”, or, the “Organization”) in connection to the cholera epidemic in Haiti which erupted in October 2010, and the source of which has been scientifically determined as the Organization’s peacekeeping base in Mirebalais, Haiti, by way of substandard sanitary facilities which helped spread the cholera bacterium carried by soldiers of the Nepalese peacekeeping contingent serving in the United Nations Stabilization Mission in Haiti known under its French acronym MINUSTAH – *Mission des Nations Unies pour la stabilisation en Haiti*. Since the outbreak of the epidemic and the disclosure of scientific reports establishing the UN’s peacekeeping contingent from Nepal as the source of the infectious disease which to date has led to approximately 10.000 deaths and 800.000 infected individuals, numerous scholars and legal practitioners have argued that the United Nations negligently caused the epidemic, thereby engaging its legal responsibility and obliging the Organization to provide means for victims to obtain compensation for the harms they have suffered.

In 2011, claims were filed with MINUSTAH by a non-governmental human rights organization based in Boston, the Institute for Justice and Democracy in Haiti, on behalf of some 5000 victims. The claims were deemed non-receivable under the UN’s internal claims settlement procedure, which brought the legal representatives of the cholera victims to file a lawsuit against the UN in a Federal court in New York. Because the UN has immunity from legal suit the claims were dismissed for lack of subject matter jurisdiction by the First District Court, and later the Organization’s immunities were upheld in a Federal Appeals Court. The cholera victims seemed to have reached a dead end. The UN’s response to the cholera epidemic by rejecting the demands for compensation, brought Special Rapporteur on extreme poverty and human rights, Philip Alston, to denounce the Organization’s position as “morally unconscionable, legally indefensible [...]”

politically self-defeating [and] entirely unnecessary”<sup>1</sup>, and international media has described it as an “immoral cover-up”<sup>2</sup>, or as “legal escapism”<sup>3</sup>. Although the UN’s legal position has not changed, in 2016 the office of the Secretary-General declared that the UN needs to do more with regards to the cholera epidemic, and that a New Approach to help Haiti end the cholera epidemic would be announced, with the aim of intensifying the Organization’s current efforts to eliminate the disease, and to better support the victims.

The director of the *Bureau des Avocats Internationaux* in Haiti, Mario Joseph, is at the forefront of the battle to obtain reparation for cholera victims. As of 2017, Joseph has met with at least 200 cholera victims to brief them about the New Approach and allow them to choose the optimal means of reparation for their situation. On 23 February 2017, Haiti’s oldest daily newspaper *Le Nouvelliste* wrote that the United Nations having admitted for the first time since the outbreak that the Organization caused the contamination, affording remedies to victims would be the appropriate step to follow<sup>4</sup>. However, contrary to what the article in *Le Nouvelliste* claims, the United Nations has not admitted to bringing about the cholera epidemic, which will be discussed in further detail in the present study, and the crucial question remains: will the victims of the Haiti cholera outbreak receive reparation?

The issues of criminal conduct and responsibility in peacekeeping operations have been widely discussed, notably with regards to individual peacekeepers who commit harmful acts against the people that they are ultimately there to protect. Prosecution then is within the jurisdiction of the State of Nationality of the peacekeeper. The UN can also bear responsibility, albeit not criminal, by virtue of

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<sup>1</sup>UNGA, Report of the Special Rapporteur on extreme poverty and human rights, A/71/40823, 5 August 2016. Advance Unedited Version, p. 1

<sup>2</sup>Young, Nancy, *The Immoral “Moral Responsibility” of Ban Ki-moon and the UN*. Medium Corporation. published on Oct 16, 2016, retrieved from [https://medium.com/@nancyyoung\\_33269/the-immoral-moral-responsibility-of-ban-ki-moon-and-the-un-38547c462d](https://medium.com/@nancyyoung_33269/the-immoral-moral-responsibility-of-ban-ki-moon-and-the-un-38547c462d)

<sup>3</sup> <http://opiniojuris.org/2016/12/12/un-apologies-for-cholera-outbreak-moral-responsibility-and-legal-escapism/>

<sup>4</sup>Lambert, Ricardo, *Les victimes du choléra se préparent à recevoir l’indemnisation promise par les Nations unies*, 2017-02-22, *Le Nouvelliste* <http://www.lenouvelliste.com/m/public/index.php/article/168687/les-victimes-du-cholera-se-preparent-a-recevoir-lindemnisation-promise-par-les-nations-unies>, authors own translation. The original French language article uses the term “occasionné” to describe that the UN caused the epidemic.

its legal personality in international law, but enjoys immunity from legal process and suit. The Organization can therefore be responsible, but not *held* responsible in the same way as in a national legal system. In order to process claims from third parties, such as companies or individuals, the Organization can establish out-of-court mechanisms to settle demands for reparation. The cholera case illustrates the difficulties for individuals to have standing in international law, and to obtain redress from the UN.

## **1.2 Research question and delimitations**

The concept of responsibility has been approached in two different manners by philosophers: authors such as John Stuart Mill and Max Weber have referred to responsibility in the relationship between representative government and the people, establishing principles and ethics for politicians; whereas thinkers such as Kant interested himself with responsibility in interpersonal relationships, identifying the source of responsibility in the free will of individuals.

The present study finds its basis in a normative theory of right and a duty to repair wrongdoings. Its starting point is the assumption that the concept of responsibility is intrinsically connected to the right to reparation, insofar as if the action of one person causes another person damages, the latter has a right to see its injuries repaired by the one responsible for them. Legally, it can be said that violating a person's rights engages the responsibility of the wrongdoer, the duty-bearer, towards the former, the rights-bearer. Such a rights-based approach can be based on an idea of natural rights, or on the concept of human rights. In the present study, the victims of the cholera epidemic in Haiti are identified as the rights-bearers, and the United Nations is identified as the duty-bearer.

Departing from this basic assumption, the present study takes interest in the responsibility of the United Nations and the right to reparation for cholera victims in Haiti, to examine more specifically how the United Nations' response to cholera in Haiti corresponds to international human rights standards for reparation and to what extent the Organization's acknowledgement of moral responsibility, rather than legal, has an incidence on its response. In doing so, the study discussed the legal, and to a certain extent, practical, obstacles individuals encounter in the

process to obtain reparation from the United Nations, as illustrated by the Haiti cholera case.

The topic of the UN's responsibility and the right to reparation has been approached through two main research questions. Firstly: *The degree of compatibility of the United Nations' New Approach to cholera in Haiti with international human rights standards for reparations*. For the purpose of the study, the assessment of the UN's response refers to the New Approach announced on 1 December 2016, unless otherwise indicated. The position of the UN prior to that, i.e., between the cholera outbreak in October 2010 until December 2016, will be mentioned but not examined in detail, as many legal scholars have addressed it already. Compatibility with international human rights standards for reparation is examined with focus on the New Approach of the United Nations. To respond to this question, the study attempts to identify the international applicable *lex lata*, thus focusing on reparation law in international public law and international human rights law, how they can be considered applicable to the United Nations, as well as the Organization's obligations to provide reparations articulate with immunity. The response to the cholera epidemic under the New Approach is then examined in the light of the human rights reparation standards considered relevant and applicable to the United Nations. Moreover, a *de lege ferenda* reasoning is carried out with regards to the degree of compatibility of the New Approach with reparation standards for victims, in order to suggest how the UN can improve compliance within the limits of what can be considered realistically feasible under the New Approach.

The second key question to be examined is: *the impact of the recognition of moral responsibility as grounds for the New Approach to cholera in Haiti*. Based on the United Nation's own reference to moral responsibility and duty, the study attempts to define the substance of this responsibility and the incidence it has on the Organization's response to the epidemic, for which it does not recognize *legal* responsibility. The question arises how the Organization itself defines this form of responsibility, whether any obligation can emanate from it, and if an effective reparation can be offered on this basis. From the victim's perspective, does moral responsibility substantially differ from absence of legal responsibility?

The right to reparation is one element of the right to effective remedy, and the study focuses on this right as well as the right to information to that effect. The judicial aspect of the right to effective remedy is mentioned with regards to the United Nations' response but since it is absented under the New Approach, it is not examined in further detail.

The response of the United Nations refers to the United Nations legal position towards the cholera outbreak. When this refers to the response prior to the New Approach this is explicitly stated, in other cases it refers to the response under the New Approach.

### **1.3 Methodology**

Throughout the present study, reference will be made to previous claims for compensation presented to the UN: the cases are related to the genocide in Rwanda; the genocide in Srebrenica, and lead poisoning in Kosovo under the UN's interim administration. These cases are pertinent in that they help understanding the UN's internal policy for receiving or rejecting claims, and by comparison they allow to identify the particularities of the cholera claims.

To answer the aforementioned research questions, the study has been structured in three parts, and the materials used are as follows:

The first part of the study, Chapter two, discusses the international legal sources and frameworks applicable to responsibility and immunity, in order to identify their interrelationship with the right to reparation. To this effect, a legal dogmatic research has been carried out by consulting legal sources such as Conventions, doctrine, and other legal texts with authoritative value. The International Law Commission being considered an authoritative source, the regime of State responsibility and reparations has been analyzed based on the Commission's projects: the Draft Articles on Responsibility of States and of international organizations. The reparation regime applicable to individuals has been examined in part based on the standards of the ICCPR, but mainly on the UN Principles and Guidelines on reparation for victims of gross human rights violations, since the latter is the first comprehensive codification on reparation law for victims of human rights violations and is referenced by international and regional courts. It is

also explained that reparation is one element of the right to effective remedy, and that the present study will to a large extent focus exclusively on reparation. This is motivated by the fact that the UN's rejection of the cholera victims' claims and the UN's immunity from suite already rule out the judicial dimension of remedy. The doctrine of immunities is discussed with regards to the United Nations and the study focuses on the Convention on the Privileges and Immunities of the UN as well as other internal UN policies which clarify the relationship between immunity and the duty to settle claims presented by third parties who have suffered injury allegedly caused by the UN's activities. Lastly, having discussed the content of international responsibility and its corollary obligation to afford reparation, Chapter two discusses the possibility of the UN to incur moral responsibility and what type of obligations it could generate. To this effect, Erskine's work has been considered particularly relevant as her definition of moral agency is applicable to the UN, and because she provides a classification of moral responsibility statements which allow us to analyze the recognition made by the UN.

Secondly, in Chapter three, the right to reparation will be placed in the context of the cholera epidemic in Haiti, in view of discussing the legal reasons which precluded the possibility for cholera victims to obtain reparations through the claims regime provided for by Convention on UN immunities, and the UN's legal framework applicable to claims in peacekeeping contexts. Furthermore, the chapter will discuss the arguments of the proponents for holding the UN legally responsible. There is scarce information on the legal reasoning of the United Nations that shaped its initial position in the legal response to the cholera outbreak, and correspondence between the UN Office of Legal Affairs and relevant persons or entities will be consulted, as well as other UN documents that showcase the Organizations' policies that are relevant to understanding the cholera case. In order to convey the critique against the UN's position, scholarly articles and reports have been consulted, thereamong the report by Special Rapporteur Philip Alston which has been considered as particularly pertinent for the present study. Several scholars have provided detailed studies of the UN's internal claims process and the articulation of these mechanisms with the privileges and immunities of the UN. These have been particularly important to understanding the obstacles for individuals to obtain reparation from the

Organization. The class action lawsuit filed by the Institute for Justice and Democracy in Haiti has also been relevant to the extent that it reflects the limits of the UN's internal claims settlement mechanisms, the conflict between immunities and the right to reparation and the lack of standing for individuals in international law.

The third part, Chapter Four, analyzes the New Approach to the cholera epidemic with regards to the content of the reparation standards. The compliance of the UN's response with the Principles and Guidelines and Guidelines on reparation is discussed as well as the content of the Organization's moral responsibility. A semantic analysis of statements by UN officials, as well as of the references to moral responsibility in UN documents, is used in order to identify how the Organization defines its own moral responsibility.

Since international human rights legal standards for reparation are intended to complement international legal standards which were adopted with States' interests in mind, and therefore are drafted in a victim-centered manner, the study includes cholera victims' views on the New Approach. To this effect, the study has included a field study in Haiti, where a sociological method has been applied to collect qualitative data through a number of semi-structured individual and group interviews, with persons considered relevant for the study. The interviews were carried out on four occasions in March-April 2017 in Port-au-Prince, and in the Mirebalais region, in Haiti. The interview questions were asked to the informants in French and translated into Haitian Creole when needed, and answers were translated into French when needed. Interviews were conducted with cholera victims in Haiti, including individuals who had contracted cholera and survived, and persons whose family members had died from the epidemic, as well as with lawyers representing, or working with, cholera victims.

## **1.4 Definition of key terms**

*Responsibility.* Etymologically the term responsibility originates from the latin *respondere* which means to answer and be answerable to another and for something. It can mean to be accountable for one's action, which links it to the

principle of reparation.<sup>5</sup> It can be defined as “the obligation to answer for an act done, and to repair any injury it may have caused.”<sup>6</sup>

*Remedy.* “Any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement. A civil remedy may be granted by a court to a party to a civil action. It may include the common law remedy of damages [...]”. Relief or redress can also mean remedy. *Oxford Dictionary of Law*, 7th edition. It refers to the “means to achieve justice in any matter in which legal rights are involved, [...] and [r]emedies may be ordered by the court, granted by judgment after trial or hearing, [or] by agreement (settlement) between the person claiming harm and the person he/she believes has caused it [...]”<sup>7</sup>. As such, remedies are generally “intended to compensate the injured party for any harm he or she has suffered [...]”<sup>8</sup>. Redress and relief are terms often used as synonyms to remedy.

*Reparations.* “In international law. 1. Compensation for injuries or international torts (breaches of international obligations). Whenever possible, international courts or arbitration tribunals will rule that reparations be made by means of restitution in kind; if this is not possible, compensation is by payment of a sum equivalent to the value of restitution in kind. The aim of reparations is to eradicate the consequences of the illegal act. It is not clear, however, whether there is an obligation to make reparations for all breaches of international law. 2. Payments made by a defeated state to the conquering state to compensate for damage suffered by the victor”. *Oxford Dictionary of Law*, 7th edition. Furthermore, “[i]t has been recognized that reparation must “fully” repair any injury, including any material or moral damage caused by the wrongful act”. “[...] The obligation to make reparation follows a determination that a particular act caused, or sufficiently contributed to, the harm or damages and implies a level of wrongfulness. However, certain international law agreements may also impose an obligation to afford reparation for losses irrespective of fault”. “[...] Article 34 in

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<sup>5</sup>Online Etymology Dictionary, s.v. “responsible”, <http://www.etymonline.com/index.php?term=responsible>

<sup>6</sup>The Law Dictionary, s.v., “responsibility”, <http://thelawdictionary.org/responsibility/>

<sup>7</sup><http://legal-dictionary.thefreedictionary.com/remedy>, Copyright © 1981-2005 by Gerald N. Hill and Kathleen T. Hill

<sup>8</sup>*West's Encyclopedia of American Law*, edition 2. (2008). Retrieved April 24 2017 from <http://legal-dictionary.thefreedictionary.com/remedy>.

the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts lists restitution, compensation, and satisfaction as the forms of reparation." In international human rights law, reparation constitutes one of the elements of effective remedy. The right to effective remedy is enshrined in numerous international and regional human rights conventions for the benefit of individuals whose human rights under a given convention have been violated. In 2005, the UN General Assembly adopted the Principles and Guidelines and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, which have significantly contributed to the codification of reparation law. The forms of reparation recognized by this document "are variably understood as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition".

*Injury.* "1. Infringement of a right. 2. Actual harm causes to people of property"<sup>i</sup> as per the Oxford Dictionary of Law. Also defined as "any damage, whether material or moral, caused by the internationally wrongful act" in article 31 of the Draft Articles on State Responsibility by the International Law Commission.

*Victim.* "A person is a victim if he or she suffered physical or mental harm, economic loss, or impairment of his or her fundamental rights". As per the definition contained in the *Principles and Guidelines and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, there can be both direct victims and indirect victims, such as family members or dependents of the direct victim; and persons can suffer harm individually or collectively<sup>9</sup>.

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<sup>9</sup>UN General Assembly, *Principles and Guidelines and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, principles 8-9.

## **2 International legal framework of responsibility, reparation and immunity**

The legal frameworks establishing the United Nations' responsibility as an international organization and the right of individual to obtain reparation for harms, originate from classic theories of State responsibility and reparation principles. The present study therefore necessarily begins with the connection between the regime of responsibility and principles of reparation in international law, and their articulation with immunity.

### **2.1 Codification of State responsibility and the corollary principle of reparation**

In 2001 the International Law Commission adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the “Draft Articles”), 53 years after the Commission was established by the United Nations General Assembly. State Responsibility had already been on the agenda of the predecessor of the UN, the League of Nations<sup>10</sup>, but the project of codification was never initiated. State Responsibility remained of central interest up until the International Law Commission began its work, and was selected among the first 14 topics to be examined.<sup>11</sup> Article 1 of the Draft Articles lays down the fundamental principle according to which:

“Every internationally wrongful act of a State entails the international responsibility of that State”.<sup>12</sup>

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<sup>10</sup>Intergovernmental organisation founded on 10 January 1920 as a result of the Paris Peace Conference that ended the First World War, and the predecessor of the United Nations founded in 1945

<sup>11</sup>Crawford, James, *Introductory Note to Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations Audiovisual Library of International Law, 2012. p. 1

<sup>12</sup>International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 27 May 2017]

The principle of reparation is found in the second part of the Draft Articles which concerns the consequences of State responsibility and incurs the obligations of cessation, non-repetition and reparation. The principle of reparation is the direct corollary of State responsibility for a wrongful act, as it amounts to an “obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States.”<sup>13</sup> According to article 30:

”The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require”.<sup>14</sup>

The principles of reparation is provided for in article 31:

”1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”.<sup>15</sup>

According to Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, these articles specify the “new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done [...]”<sup>16</sup>. The International Law Commission desired the regime to be adapted to the realities and concerns of governments in disputes over responsibility, in which cases reparation is rarely the primary preoccupation, if at all one.<sup>17</sup> Early on, the drafters of the compilation had therefore concluded that cessation of the internationally illegal act combined with non-repetition were equivalent in status to reparation.

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<sup>13</sup>International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*. (DARSIWA with Commentaries) Yearbook of the International Law Commission, 2001, vol. II, Part Two. p.91, parag.4. available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf)

<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup>ILC, *DARSIWA with Commentaries*, p. 31

<sup>17</sup>ILC, *DARSIWA with Commentaries*, para. 4, p. 89

The obligation of reparation is nevertheless a longstanding principle of law, upon which the Permanent Court of International Justice elaborated in the *Factory at Chorsów* case in 1926. Recognizing reparation as a principle “established by international practice and in particular by the decisions of arbitral tribunals”, the international judges explained its central role in the following words: “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself [...]”.<sup>18</sup> In the merits of the case, the PCIJ specified the desirable forms and outcome of reparation, with a clear preference for restitution in first hand, and compensation if the former is not an option:

“[t]he essential principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”.

The forms of reparation laid out in the *Factory at Chorsów* case are echoed in article 34 which provides that:

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”.<sup>19</sup>

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<sup>18</sup>Permanent Court of International Justice (PCIJ), *Factory at Chorsów* case, Series A. No.17, September 13, 1928. para. 1, p. 21

<sup>19</sup>ARSIWA, articles 35-37

In principle, the injured State is entitled to choose the form of reparation<sup>20</sup>, but restitution is clearly viewed as the proper form of reparation with compensation as a solution if the former is not feasible, as per articles 35 to 37:

“insofar as [...] damage is not made good by restitution”  
compensation is mandatory and shall cover “financially assessable  
damage including loss of profits insofar as it is established”.<sup>21</sup>

## **2.2 The codification of the responsibility of international organizations and the principle of reparation**

The Draft Articles had mainly dealt with the responsibility of one State towards another. At the exception of certain articles which also concerns the obligations a State may have towards an international organization, the Draft Articles did not address a number of issues such as when an international organization is responsible for a breach of an obligation towards another organization<sup>22</sup>. In the same year as the Draft Articles on Responsibility of States for Internationally Wrongful Acts was adopted, the International Law Commission began its work on the Draft Articles on Responsibility of International Organizations completed ten years later, by 2011.

Although as Gaja recalled, the “[...] articles on the responsibility of international organizations are not based on any presumption that the rules on the responsibility of States for internationally wrongful acts are generally applicable to international organizations”, the International Law Commission considered that certain important rules apply to both States and international organizations, and to the extent that this holds true, the drafting of the new compilation applicable to

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<sup>20</sup> ARSIWA, article 43

<sup>21</sup> ARSIWA, article 36(1)

<sup>22</sup> Gaja, Giorgio, *Introductory Note to the Articles on the Responsibility of International Organizations*. United Nations Audiovisual Library of International Law 2014. p. 1

international organizations essentially follows the articles on State responsibility.<sup>23</sup> Thus, in the general principles, article 3, we find that:

“Every internationally wrongful act of an international organization entails the international responsibility of that organization”.<sup>24</sup>

The content of the international responsibility of an international organization also entails the obligation to make full reparation<sup>25</sup> in article 31, and the forms of reparation which are substantially the same as those applicable to States, including restitution, compensation and satisfaction<sup>26</sup>, are provided for in articles 34 to 37.

Although lacking a general definition of what constitutes an international organization, for the purpose of the compilation, article 2(a) defines them as

“[...] an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality [...]”.<sup>27</sup>

The articles do not provide a definition of what obligations are binding upon international organizations, nor to what extent the rules of the organization must be considered as part of international law. Article 10(2) of the Draft Articles on Responsibility of International Organizations states that a breach of an international obligation:

“[...] includes the breach of *any* international obligation that may arise for an international organization towards its members under the rules of the organization” (*emphasis added*).<sup>28</sup>

Importantly, as it is the case for the articles on State responsibility, the Draft Articles on Responsibility of International Organizations do not apply to cases of

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<sup>23</sup>Gaja, G. *Introductory Note*, p. 4.

<sup>24</sup>International Law Commission, *Draft Articles on the Responsibility of International Organizations (DARIO)*, adopted at Sixty-third session in 2011, article 3

<sup>25</sup>DARIO, article 31

<sup>26</sup>DARIO, articles 34-37

<sup>27</sup>DARIO, article 2(a)

<sup>28</sup>DARIO, article 10§2

responsibility towards any entity other than a State or an international organization, and individuals are left out. Historically, in the sphere of international law individuals have only benefitted from diplomatic protection, that could be exercised by the State of nationality on their behalf. However, Gaja implies that individuals have not been entirely forgotten, pointing to article 50 which is as follows:

“Th[e provisions on countermeasures are] without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization”.<sup>29</sup>

The provisions in article 50 have been interpreted to convey that the responsibility of an international organization may create rights for individuals.<sup>30</sup> At least, the statement serves the purpose of conveying that the provisions “are not intended to exclude any such entitlement”.<sup>31</sup> The same provisions are found in the Draft Articles on State responsibility in article 33, and are interpreted as conveying that an obligation of reparation towards a State may create rights for an individual: “[State] responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights”.<sup>32</sup>

Indeed, with the development of international human rights law after the end of the second world war, the role of the individual as subject of international law has progressed significantly.

## **2.3 The development of the right to reparation in international human rights law, and the**

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<sup>29</sup>DARIO, article 50

<sup>30</sup>Gaja, G. *Introductory Note*, p.2.

<sup>31</sup>DARSIWA with Commentaries, commentary to article 50, paragr. 2

<sup>32</sup>DARSIWA with Commentaries, article 33, p. 95.

## **emergence of the individual as beneficiary thereof**

Following the adoption of the Universal Declaration of Human Rights in 1948, international conventions have defined human rights and freedoms, that *ipso facto* benefit individuals, and which place obligations on ratifying Governments to protect their citizens from human rights violations. Based on the principles of reparation under the regime of State responsibility, international and regional human rights treaties have extended the reparation principles for the benefit of individuals who are victims of human rights violations.

### **2.3.1 The status of the individual reinforced with the development of international human rights law**

According to the classic theory of international law, only States are subjects of international law, since no direct relation between that law and individuals exist<sup>33</sup>. Thus, international law has been defined as the "rules which are considered legally binding by states with each other", or as "the principles which are in force between all independent nations".<sup>34</sup> The classic perception of international law as ascribing rights and obligations only to interstate relationships meant that it did not create obligations for States with regards to their nationals<sup>35</sup>. Nevertheless, Brownlie asserted in a 1966 edition of principles of international law, that there was no general rule which precluded the individual from being a subject of international law.

Within the context of international criminal law individuals were first recognized as having obligations under international law, which could engage their criminal responsibility in case of violations thereof. In the Nüremberg trials, perpetrators of the German Nazi regime would have been left without legal obligations if they were only considered to be subject to German national law, and not to obligations

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<sup>33</sup>Nørgaard, Carl Aage. *The position of the individual*. (1962), p. 11

<sup>34</sup>Bentham, J., *An introduction to the principles of morals and legislation*, (J. Burns & H.L.A. Hart eds. 1970), p. 296

<sup>35</sup>*Supra* note 33, pp. 82-96

of international law<sup>36</sup>. Moreover, Cassese argued that the obligations incumbent upon individuals to respect certain crucial values are mirrored by “corresponding rights”.<sup>37</sup> In the lines of this reasoning, the same obligations in, for instance, international criminal law which prohibits war crimes, crimes against humanity, aggression and torture, would be “mirrored” by a right of individuals not to be subjected to these acts. In the words of Cassese “[i]t would be not only consistent from the viewpoint of legal logic but also in keeping with the new trends emerging in the world community to argue that the international right in respect of those obligations accrues to all individuals”.<sup>38</sup>

The emergence of international human rights law, the catalyst of which was the adoption of the Universal Declaration of Human Rights in 1948, has indeed contributed significantly to the development of the individual as a subject of international law. Until the end of the second world war, the treatment of individuals was a prerogative of the national State. The Universal Declaration of Human Rights, although not legally binding, is significant in that it was the first international document to be adopted with the ambition to achieve universal respect for human rights.

The International Covenant on Civil and Political Rights (hereinafter the “ICCPR”), that entered into force in 1976, is among the numerous human rights treaties which have been since been adopted to develop the rights and freedoms contained in the Universal Declaration of Human Rights, including the right to reparation for victims of human rights violations. Several human rights treaties recognize the right to reparations for victims, as part of the right to effective remedy in international human rights law. The ICCPR is particularly significant since the United Nations Human Rights Council (hereinafter the “Human Rights Council”) in its General Comment no. 31 on the Nature of the General Obligation Imposed on States Parties to the ICCPR, defines pertinent elements of the principle of reparation for the benefit of individuals.

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<sup>36</sup>Janis, W. *Individuals as Subjects of International Law*, Cornell International Law Journal, Volume 17, Issue 1 Winter 1984. p. 73

<sup>37</sup>Andrew, Clapman, *The Role of the Individual in International Law*, The European Journal of International Law Vol. 21 no. 1. P. 21

<sup>38</sup>Cassese, Antonio. 2005. *International law*. 2nd Ed. n.p.: Oxford : Oxford University Press, 2005. p.145.

### 2.3.2 International human rights standards for the protection of the right to remedies and reparations for individuals.

In the responsibility regime as previously discussed with regards to States and international organizations, the right to reparation is a corollary to the responsibility for an internationally wrongful act. In international human rights law, the right to reparation is a component of the right to effective remedy which relates to the possibility for individuals and groups to make complaints for alleged violations of their rights under a given convention. The right to effective remedy is thus a consequence of the obligation of States to protect their citizens from violations of their fundamental rights. The origins of remedy rights in international human rights law are found in article 8 of the Universal Declaration of Human Rights which states that:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

Drawing on the key elements of the Universal Declaration of Human Rights, article 2(3) of the ICCPR states that each State party undertakes to:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>39</sup>

The right to effective remedy thus entails a procedural dimension of ensuring the victim’s access to a court and to have the claim adjudicated, but the Human Rights

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<sup>39</sup>UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Article 2§3

Council has considered that it also includes a substantive dimension, namely reparation.<sup>40</sup> The Human Rights Council notes that States have a general obligation to effectively investigate allegations of violations through independent and impartial bodies, and that article 2 of the Covenant should be interpreted as requiring States Parties to make reparation to individuals whose rights have been violated. Reparation is a vital aspect of ensuring effective remedy according to the Human Rights Council which states that “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy [...] is not discharged”. The Human Rights Committee notes that reparations can be monetary or non-monetary, and take the forms of restitution; rehabilitation; and measures of satisfaction, such as public apologies; public memorials; guarantees of non-repetition and changes in relevant laws and practices; as well as bringing to justice the perpetrators of human rights violations.<sup>41</sup> However, it considers that “the Covenant generally entails appropriate compensation”.

The General Comment no. 31 provided some guidance on the obligations of States pertaining to remedies and reparations for victims of violations of their rights under the ICCPR, the UN Principles and Guidelines and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter the “Principles and Guidelines”) is the first comprehensive codification of reparation law for individuals and was adopted in view of broad applicability. The preamble of the Principles and Guidelines clarifies that the document “does not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law [...]”.<sup>42</sup>

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<sup>40</sup>UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragr. 16.

<sup>41</sup>*Ibid.*

<sup>42</sup>Boven, Theo van, *Introductory Note to the Principles and Guidelines and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UN Principles and Guidelines and Guidelines*. United Nations Audiovisual Library of International Law. 2010., p. 5

The Principles and Guidelines originated from a study in the 1990's on the right to restitution, compensation and rehabilitation for victims of grave human rights violations. At the time, transitional justice mechanisms emerged around the world to address the interconnected issues of impunity of perpetrators and reparatory justice for victims that arise in societies recovering from episodes of civil war, persecutions or genocide<sup>43</sup>. Although focusing on the rights of victims of *gross* violations of international human rights law and serious violations of international humanitarian law, the Principles and Guidelines clarifies that “[i]t is understood that the present Principles and Guidelines and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law [...]”.<sup>44</sup>

The Principles and Guidelines enlist reparation as a component of effective remedy, in line with the ICCPR, but entails an additional right to information for the victim. Principle 11 provides that remedies include:

“(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation”.<sup>45</sup>

The Principles and Guidelines establish a range of material and symbolic means to provide both monetary and non-monetary forms of reparations to victims of human rights violations. Non-monetary forms of redress include public services and social infrastructure development such as construction of medical facilities and educational programmes. Thus, individual reparations, whether monetary or not, are supposed to be compensatory and “return the victim to the status quo ante”. Collective reparations are intended to be rehabilitative for the community and to improve its living conditions.<sup>46</sup> The forms of reparation enlisted in principles 19 to 23 are as follows:

“19. *Restitution* refers to measures which ‘restore the victim to the original situation before the gross violations of international human

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<sup>43</sup>Boven, Theo van, *Introductory Note*. p. 1

<sup>44</sup>*Supra* note 9, paragr. 16 on non-derogation.

<sup>45</sup>*Ibid*, Section 7, principle 11

<sup>46</sup>D'Argent, P, *Reparations : Redressing past wrongs, human rights in development yearbook 2001, EUROPEAN JOURNAL OF INTERNATIONAL LAW*; FEB, page 27.

rights law and serious violations of international humanitarian law occurred” [...];

20. *Compensation*: ‘should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case’. The damage giving rise to compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services;

21. *Rehabilitation* includes medical and psychological care, as well as legal and social services;

22. *Satisfaction* includes a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, and human rights training;

23. *Guarantees of non-repetition* comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry and psychological and social services”.<sup>47</sup>

Furthermore, paragraph 5 of the preamble to the Principles and Guidelines, which addresses the International Criminal Court, emphasizes the importance of victim participation in the reparation process, by asking the court to: “[...] permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”.<sup>48</sup>

In principle, all victims of human rights violations are entitled to reparations, and the State of nationality has the primary duty to protect their citizens from human rights violations and to give alleged victims access to effective remedy. In practice, however, the capacity to accommodate large number of claims for

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<sup>47</sup>Boven, Theo van, *Introductory Note*. p. 4

<sup>48</sup>Paragraph 5, preamble to the Principles and Guidelines, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

compensation can be restricted, and international and regional human rights treaties have suggested mechanisms and procedures for cases that State are unable or unwilling to address. The Principles and Guidelines suggest that States should “[...] establish national programmes for reparation [...] to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligation”. Furthermore, the Optional Protocol to the ICCPR suggests that international human rights treaties create rights and remedies for the individual with regards to any injuring State, not only the State of nationality, by way of petitioning a human rights monitoring body.<sup>49</sup>

We have seen that reparation standards originate from principles on State responsibility extended to international organizations, and to further to individuals through the ratification of human rights treaties creating obligations on States, which translate directly into rights for the benefit of individuals. The question that arises is to what extent international human rights law and the reparation standards can be considered applicable to international organizations and to the UN.

### 2.3.3 Is the United Nations bound by international human rights law?

With human rights constituting one of the three main pillars of the work of the United Nations, the question of whether the organization is bound by international human rights law may appear superfluous. But as previously noted, in principle international human rights law apply applies in the relationship between the State and its nationals, and the State remains the primary safe-keeper of individual rights. Nevertheless, the recognition of certain human rights as *jus cogens*, thus forming part of customary law, as well the significant role of the United Nations in advancing human rights, make strong arguments in favour of applicability of human rights beyond the relationship between State and individual.

Indeed, there is no consensus if and on what legal basis international human rights law apply to international organizations. However, the works of the International

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<sup>49</sup>UNGA, Report of the International Law Commission, Supplement No:10. A/61/10. 2006. p. 88

Court of Justice in the past two decades has advanced the recognition of human rights as customary law, and as constituting general principles of law. And, as Evans points out, with some human rights recognized as jus cogens, individuals become subjects in general international law. Consequently, the individual is entitled to protection of her inviolable rights beyond ratification of human rights treaties by the State of nationality, and the obligation to protect them would incur to both State and non-State actors.

Dannenbaum argues that human rights standards apply to the UN as “[...] a consequence of the UN’s legal personality at international law that it is bound by customary international law”, and because human rights constitute one of the main pillars of the work of the UN, the Organization “is constitutionally mandated to promote the advancement of human rights” in Article 1(3) of the U.N. Charter”.<sup>50</sup>

Furthermore, Special Rapporteur Philip Alston considers it an agreed principle that the UN’s actions should be in line with human rights standards, on the basis of statements made by UN officials. Alston refers to a communication by the Assistant-Secretary-General and Senior Coordinator for Cholera, Pedro Medrano, expressing that the UN seeks to “ensure that its peacekeeping operations and their personnel operate within the normative framework of international human rights law and are held accountable for alleged violations”.<sup>51</sup>

Although the reparation standards relating in the Principles and Guidelines were based on the provisions of the articles on State responsibility and upon the concept of State responsibility, just as the reparation standards for the ICCPR, the ultimate goal was to maintain a victim-oriented perspective on human rights violations and allow victims to obtain remedy irrespective of which entity was responsible for the violation.<sup>52</sup> In the discussions preceding the adoption of the Principles and Guidelines, responsibility of non-State actors such as entities who exercise “effective control” as well as companies with economic power were considered,

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<sup>50</sup>Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARVARD INT’L L. J. 301 (2010), p 303-304.

<sup>51</sup>UNGA, Report of the Special Rapporteur on extreme poverty and human rights, A/71/40823, 5 August 2016. Advance Unedited Version. Parag. 47, quoting a letter of 25 November 2014 to Special Procedures mandate-holders from Pedro Medrano in paragraph 57.

<sup>52</sup>Supra note 9, section 9, principle 3(c)

and there was an agreement that the right to remedies and reparations would be based not on State responsibility but on “legal liability and human solidarity”.<sup>53</sup> Consequently, the Principles and Guidelines provides that “acts or omissions which can be attributed to the State [...] and [i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim”.<sup>54</sup>

Cassese noted, however, that the rights of individuals in international law “at least for the time being [are not] attended by a specific means, or power, of enforcement that belongs to individuals”.<sup>55</sup> Nonetheless, Boon asserts that “the door is ajar to human rights claims, and it accompanies a growing chorus that the U.N. is bound by international human rights and that it must be accountable for its actions, both in terms of procedural rights of access and substantive remedies”.<sup>56</sup>

For the purpose of this study, and bearing in mind the very purposes of the work of the UN, the compatibility of the UN’s actions and policies with human rights standards are considered to be of central importance, notwithstanding the divergence in positive law and in doctrinal discussion as to whether the UN is effectively bound by international human rights law.

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<sup>53</sup>Boven, Theo van, *Introductory Note*. p.3.

<sup>54</sup>Supra note 9, section 9, principle 15.

<sup>55</sup>Cassese, *International Law*, p.145.

<sup>56</sup>Boon, Kristen E. "The United Nations as Good Samaritan: Immunity and Responsibility" *Chicago Journal of International Law* 16, no. 2 (Winter 2016 2016): 341-385. P.367.

## 2.4 The immunities of the United Nations and its coexistence with responsibility and reparations in international law

International organizations benefit from an analogy to the principle of State immunity<sup>57</sup>, which give States immunity from suit before the courts of another State, by virtue of the principle of equal sovereignty in international law. In applying the principle to international organizations, courts have reasoned that immunity should be granted on the basis that international organizations are composed of sovereign States, or that immunity to international organizations form part of customary international law<sup>58</sup>. With regards to the UN, immunity is to a large extent viewed as “an indispensable means of protecting it from political attacks, and avoiding putting it at the mercy of unpredictable and perhaps ill-intentioned or hostile nation courts”, bearing in mind its complex task to, *inter alia*, suppress act of aggression and threats to peace as well as maintaining international peace through interstate collaboration.<sup>59</sup>

Article 105 of the UN Charter and the Convention on the Privileges and Immunities of the United Nations (hereinafter the “CPIUN”) are the sources of the doctrine of immunities of the UN. The provisions of article 105 of the UN Charter establishes the principle according to which:

“[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes”.<sup>60</sup>

The CPIUN adopted in 1946 develops the regime of immunity of the UN, establishing in its article 2 that

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<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

<sup>59</sup>UN Charter, article 1: The purposes of the United Nations are (1) To maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

<sup>60</sup>And as per article 105(2) the principle extends to “[r]epresentatives of the Members of the United Nations and officials of the Organization [who] shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.”

“[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution”.

Immunity, in its absolute form thus constitutes an obstacle to holding the UN legally responsible, and claim reparation, in court. Therefore, the UN’s immunity is broad but not absolute. The Convention provides that "the Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization"<sup>61</sup>. Additionally, the CPIUN contains provisions that aim to safeguard the rights of individuals and companies to obtain remedies outside of the courtroom. Pertaining to the settlement of disputes, Section 29 requires that:

“[t]he United Nations shall make provisions for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General”.<sup>62</sup>

The dispute settlement regime thus establishes a distinction between private and other claims, and demands that the UN provide alternative modes of settlement for the former only. A report of the Secretary-General from 1995 on the implementation procedures for Section 29 elaborates upon the different categories

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<sup>61</sup>UN General Assembly, Convention on the Privileges and Immunities of the United Nations (CPIUN) , 13 February 1946, Article 5, section 20

<sup>62</sup>CPIUN, Section 29, reads as follows:

The [UN] shall make provisions for appropriate modes of settlement of:

(a) disputes arising out of contracts or other disputes of a private law character to which the [UN] is a part

(b) disputes involving any official of the [UN] who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General. CPIUN art. VIII, § 29.

of receivable and not receivable claims, and provide specific rules for peacekeeping contexts.

Claims of private law character related to UN peacekeeping operations concern either “claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation within the ‘mission area’ concerned”, or claims arising out of commercial agreements [...]”<sup>63</sup>. As for private claims relating to personal injury, loss or damage, there is a model Status-of-Forces Agreement between the UN and the respective host countries containing a procedural settlement framework, according to which any such claim shall be settled by a standing claims commission that is to be established for that particular purpose<sup>64</sup>. However, the report of 1995 explains that it has been the practice for claims to be settled by an internal local claims review board established in the mission rather than by a claims commission, and that has remained the case until today.

The Status-of-Forces Agreement, including that of MINUSTAH, the peacekeeping operation in Haiti, suggest the internal settlement procedures as the preferred way of dealing with third party claims for compensation. Only in the event that the claims cannot be settled through the internal procedure shall there be a standing claims commission<sup>65</sup>, in accordance with the temporal limit of six months to submit the claim as established by the Agreement<sup>66</sup>, and the financial limits to paying compensation as established by the General Assembly resolution 52/247.<sup>67</sup> The liability of the UN is also limited as to exclude claims of a “public” nature.

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<sup>63</sup>UNGA, Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, 1995. A/C.5/49/65, parag. 15.

<sup>64</sup>UNGA, Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, 1995. SG Report, A/C.5/49/65, parag. 16.

<sup>65</sup>See Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, Volume 2271, 1-40460 (July 9, 2004), parag. 55.

<sup>66</sup>*Ibid.*, parag. 54.

<sup>67</sup>UNGA, Resoultion Adopted by the General Assembly, 17 July 1998, A/RES/52/247: Where the liability of the Organization is engaged in relation to third-party claims against the Organization resulting from peacekeeping operations, the Organization will not pay compensation in regard to such claims submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation, provided that in exceptional circumstances, such as described in paragraph 20 of the report of the Secretary-General, the Secretary-General may accept for consideration a claim made at a later date; para 8.

These claims would typically be “[...] based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters [...]”, and the Secretary-General “considers that it would be inappropriate to utilize public funds to submit to any form of litigation with the claimants to address such issues”.<sup>68</sup>

The restricted liability regime contained in the 1995 Secretary-General report can be justified with regards to the nature and objective of a peacekeeping operation. A peacekeeping operation is adopted under chapter 7 of the UN Charter with the authorization of the host-State. Historically, this type of operation was established for interstate conflicts, for instance in view of maintaining a ceasefire agreement between two belligerent States. With the multiplication of civil wars, the operations today are mandated to operate within the territory of a single State, and do not focus only on security aspects but on long term State building including strengthening the Rule of Law and respect for human rights. The limits on liability are explained in the following terms by the 1995 Report: “The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for the damage arising from such an operation. As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations”.<sup>69</sup>

While no standing claims commission has been established to date, few claims have been rejected as non-receivable in the context of peacekeeping operations,

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<sup>68</sup>*Supra* note 65, paragr. 23.

<sup>69</sup>*Supra* note 65, p. 23.

since most claims are solved through amicable settlement by the internal claims procedures previously mentioned. The cases that have been rejected include, on the one hand, claims for compensation for damages resulting lead contamination in camps managed by UNMIK - the UN Interim Administration in, and on the other hand for failures to prevent the genocides in Serbia and Rwanda, and thereby the failure to fulfill the respective peacekeeping mandates. The three cases were considered not to be of a private law character and thus non-receivable, on the basis that they amounted to a review of the performance of the operations' mandates.<sup>70</sup> Logically, no alternative claims settlement mechanisms are provided for cases where the claim is non-receivable. Yet, in spite of the non-receivability of the UNMIK claim, a UN Human Rights Advisory Panel proceeded to investigate alleged human rights abuses and came to the conclusion that UNMIK had been responsible for compromising fundamental rights of children living in the camps.<sup>71</sup>

This illustrates the limits of the regime of UN immunities regarding the right to remedy and reparations. To the extent that claims fall under a receivable category, there appears to be a fair balance between upholding the immunities of the UN and providing remedy to individuals through (internal) claims settlement procedures. Despite a legal framework intended to protect the right to remedy for victims, and irrespective of whether claims are rejected in perfect accordance with the UN's immunity regime, the UNMIK case illustrates that victims of human rights violations may find themselves without legal recourse. For such situations, Boon deplors that "[m]ember States of the UN are protected by absolute immunity at the expense of the individuals, who are the intended beneficiaries of the UN's actions". She argues that in case of a lawsuit against the UN in a national court, States may even be required by their Constitutions to give prevalence to their obligations under ratified human rights law over the UN's immunity if it fails to provide alternative modes of claims settlement in accordance with Section 29 of

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<sup>70</sup>Supra note 53, para. 48: "*citing a letter from Pedro Medrano, Assistant U.N. Secretary-General, Senior Coordinator for Cholera Response, to Special procedures mandate holders Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque, Nov.25, 2014.*"

<sup>71</sup>UNGA, Report of the Special Rapporteur on extreme poverty and human rights, A/71/40823, 5 August 2016. Advance Unedited Version. para. 36 and Gladstone Rick, "Roma Poisoned at U.N. Camps in Kosovo May Get Apology and Compensation". *New York Times*. April 7, 2016. Available at [https://www.nytimes.com/2016/04/08/world/europe/roma-poisoned-at-un-camps-in-kosovo-may-get-apology-and-compensation.html?\\_r=0](https://www.nytimes.com/2016/04/08/world/europe/roma-poisoned-at-un-camps-in-kosovo-may-get-apology-and-compensation.html?_r=0).

the CPIUN<sup>72</sup>. However, the normative conflict is unlikely to be solved in the way suggested by Boon, bearing in mind the strong support among States in favour of broad UN immunities. With States being the historical main actor in international relations, international has to a large extent been shaped around States' interests, and the broad reading of UN immunities is no exception. Member States have guarded their interests when drafting the regime of UN immunities, as Boon suggests. As recalled by Freedman, "most [States] insist that the UN is a special organization that retains absolute immunity"<sup>73</sup>. The idea for the complex peacekeeping operations were not thought of when the UN Charter was drafted, but today both troop contributing countries and funding States continue to argue for a wide application of immunities.<sup>74</sup> The priority given to States' interests in the articulation of immunities and reparations is therefore striking, but not surprising, considering the modest, albeit growing, status of the individual as a subject of in international law.

## **2.5 Applicability of moral responsibility to the United Nations**

Legal and moral responsibility are sometimes complementary to each other. As will be discussed in detail in the following chapter, with regards to the cholera victims case, the UN's legal position refuted legal responsibility yet embraced moral responsibility. Therefore, having viewed the main international legal frameworks on responsibility and reparation which are applicable to the UN, this chapter attempts to provide a definition of moral responsibility and examine the ways in which it can be attributed to an organization such as the UN.

The question of moral responsibility predominantly occurs in relation to individual human beings. When a person "performs or fails to perform a morally significant action, we sometimes think that a particular kind of response is warranted. Praise and blame are perhaps the most obvious forms this reaction

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<sup>72</sup>Supra Note 58, p. 364.

<sup>73</sup>Freedman, Rosa. "UN Immunity or Impunity: A Human Rights Based Challenge [article]." *European Journal Of International Law* no. 1 (2014): 239. 243.

<sup>74</sup>Supra Note 58, p. 369.

might take”.<sup>75</sup> The individualistic approach to morality can be traced back to Kant, who sought to define the fundamental moral duties a human being has towards herself and others. To Kant, moral responsibility has its source in abstract reason and the free will which enables the individual to make a choice when faced with the questions “what ought I do?”. The notion of collective responsibility can therefore be controversial, as it traces the source of moral responsibility to collective actions taken by a group, qualified as a moral agent and distinct from its individual members, as per Erskine’s definition.<sup>76</sup> Furthermore, the notion of collective (moral) responsibility is different from the concept of shared responsibility in international law, for instance, where the responsibility for an internationally wrongful act can be engaged by multiple actors having contributed to causing harm to a third party.<sup>77</sup>

Collective moral responsibility refers to individuals forming a collective which is considered a moral agent based on its capacity to make decisions, and cause harm, while distinct from its individual human components.<sup>78</sup> Contemporary scholars such as Erskine, who defends the idea that collectives and institutions can be moral agents, has explained that the interdependence between the notions of moral responsibility and moral agency lies in the ability of moral agents to choose between multiple courses of action and to evaluate the consequences thereof, which render them susceptible to the “assignment of duties and the apportioning of moral praise and blame in relation to [these] actions [...]”, and thus also responsibility.<sup>79</sup> For the concept of moral responsibility itself, Erskine defines it as “[... ] being answerable for a particular act or outcome in accordance with what are understood to be moral imperatives. [...] Moral imperatives—especially at the international level—are [...] variously grounded and conceived”<sup>80</sup>, alluding to the

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<sup>75</sup>Eshleman, Andrew, "Moral Responsibility", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/win2016/entries/moral-responsibility/>

<sup>76</sup>T. Erskine, ‘Blood on UN’s Hands? Assigning Duties and Apportioning Blame to an Intergovernmental Organization’, 18(1) *Global Society* (2004): p. 24

<sup>77</sup>Nollkaemper, Andre, and Dov Jacobs. "Shared Responsibility in International Law: A Conceptual Framework [article]." *Michigan Journal Of International Law* no. 2 (2012): 359. p.

<sup>78</sup>Smiley, Marion, "Collective Responsibility", *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/>.

<sup>79</sup>Erskine, Toni. "Locating Responsibility: The Problem of Moral Agency in International Relations." *The Oxford Handbook of International Relations* (2008): *Oxford Handbooks Online*. p. 698-705

<sup>80</sup>Erskine T., *Locating Responsibility*, p. 700

fact that moral imperatives on the international level may be different from moral imperatives on the national societal, or interpersonal, level. Erskine finds that statements of moral responsibility can refer to two different understandings of responsibility: *ex ante* judgments which refer to future acts that ought to be performed, and *ex post facto* judgements which refer to an act or omission in the past, due to which the agent is made the object of praise or blame. Thus, the former statement is associated with claims to duty and obligation and the latter makes reference to blame but also claims of accountability. In the context of international relations, the *ex ante* statement could thus refer to a moral duty to provide humanitarian assistance to a country in crisis, while the *ex post facto* statement could refer to the moral duty to answer for failures in the humanitarian intervention. Erskine argues that issues of moral agency are fundamentally important to understanding world politics, as stakeholders such as politicians, policy-makers and scholars attempt to identify obligations to respond to and tackle global humanitarian and environmental problems.<sup>81</sup>

Erskine provides examples for the *ex ante* and *ex post facto* statements by reference to the words of world leaders: “[R]escuing nations from poverty and debt is “a grave and unconditional moral responsibility”; “the developed world has a moral duty to tackle climate change”; and “the international community is guilty of sins of omission” in the context of the Rwandan genocide”. She further underscores that “to be meaningful, either type of statement must be directed toward those entities capable of responding to ethical imperatives. In short, they must be directed toward moral agents”. The statements were made respectively by Pope Benedict XVI, Gordon Brown and lastly to former UN Secretary-General Kofi Annan, which brings us to examine to what extent the UN can be qualified as a moral agent.<sup>82</sup>

Erskine argues that a collectivity or institution can be a moral agent if it has a “[...] corporate identity, or an identity greater than the sum of identities of its constitutive parts, [...] a decision-making structure, and an executive function that

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<sup>81</sup>Erskine T., *Locating Responsibility*, p. 699

<sup>82</sup>*Ibid*

allows it to act on decisions [...]”.<sup>83</sup> On the basis of this definition, a multitude of actors such as corporations, States, religious institutions and international organizations such as the European Union and the UN are entities susceptible of qualifying as moral agents, as they “can conceivably be assigned duties and apportioned blame in ways not reducible to their individual members”.<sup>84</sup>

With regards to responsibility for systemic military atrocities in situations of armed conflict, Crawford’s argument for a distinction between individual and collective moral responsibility lies in that “[i]ndividual perpetrators are responsible for systemic atrocity, but because the cause of these deaths is in some degree structural, responsibility also lies with collectives.” Based on the premise that collectives have structurally important roles in the war system, Crawford argues that collectives can be said to have moral agency<sup>85</sup>. Arguably, this reasoning could be extended by analogy to various situations where a group or individual working on behalf of an institution or international organization has caused harm, because Crawford observes that “[b]ureaucratic organizations that can be said to have moral agency, and hence moral responsibility, include autonomous corporations [...] and international organizations such as the United Nations”.<sup>86</sup>

Drawing on the example of the apology offered by former Secretary-General Kofi Annan for the mistakes made in Bosnia’s civil war and with reference to the Srebrenica massacre, some have argued that the UN’s capacity of self-criticism and to alter its behaviour ultimately demonstrates its ability of moral deliberation.<sup>87</sup>

Arguably, the UN can thus be considered a moral agent capable of incurring moral obligations, based on its organizational identity which surpassed its

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<sup>83</sup>Erskine, T. 2001. Assigning responsibilities to institutional moral agents: the case of states and quasi-states. *Ethics and International Affairs*, 15: 67–85.

<sup>84</sup>Erskine T., *Locating Responsibility*, p. 701

<sup>85</sup>Crawford defines collective as “an organized group with an entity and a decision-making structure”, employing the same elements as Erskine. Crawford, Neta C. "Individual and Collective Moral Responsibility for Systemic Military Atrocity." *Journal Of Political Philosophy* 15, no. 2 (June 2007): 187-212. *Political Science Complete*.

<sup>86</sup> *Ibid* at 198.

<sup>87</sup>Erskine, *supra* note 78, p. 34.

constituent parts, which could include Member States and sub-organs, and its capacity to reevaluate its actions for which the cholera case provides an example.

The following chapter accounts for the cholera epidemic, the UN's legal position with regards to demands for reparation and the subsequent discussions on the issues raised by the UN's response.

# **3 MINUSTAH: the United Nations peacekeeping operation in Haiti, the cholera epidemic, and a legal crisis**

The following chapter discusses the UN's role in Haiti, the peacekeeping mission MINUSTAH, and the cholera outbreak which occurred in the context of the peacekeeping operation as well as the implications of UN peacekeepers. Furthermore, the UN's legal response to the epidemic and the subsequent claims for reparation is discussed in view of analyzing the legal issues that the cholera victims face in their efforts to receive redress.

## **3.1 The United Nations' presence in Haiti from the 1990's until today**

### **3.1.1 Peacekeeping in the Haitian context**

On 13 April 2017, the United Nations Security Council's 15 members unanimously adopted the resolution<sup>88</sup> that will put an end to the mandate of the stabilization mission in Haiti, MINUSTAH, by October 2017, after over 13 years of operation. However, the presence of the United Nations in Haiti goes further back in time, and began in 1990 under a mandate to observe the election processes which resulted in Jean-Bertrand Aristide legitimately elected President. Following a military coup that occurred shortly after the elections, the first peacekeeping operation in Haiti was initiated in July 1994. Deploying a 20,000-strong multinational peacekeeping force, the operation aimed at helping to reinstate the legitimate government under Aristide, to maintain stability and security in Haiti, as well as to promote the rule of law. The current operation, MINUSTAH, was established in 2004 with a multidimensional peacekeeping mandate that includes military presence of peacekeepers, and civilian staff engaged in nation-building

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<sup>88</sup>UNSC, Resolution 2350 (2017), S/RES/2350 (2017).

efforts affecting multiple levels of society. MINUSTAH mandate also encompasses reinforcing government institutions and strengthening the national capacity for rule of law, police development, and human rights.<sup>89</sup> Originally, MINUSTAH was set up to support the Transitional Government with the crucial tasks of reforming the Haitian National Police, to address the problem of proliferation of arms and violent gangs, in order to help restore public safety and order as well as the rule of law in Haiti. The mandate further included to assist in the organization of free and fair elections on municipal, parliamentary and presidential level, and to help improve the human rights situation around the country. MINUSTAH has had important military troop components as well as police components, whose numbers have varied over the years as the security and socio-political situation in the country has changed.

The below information provides an overview of the peacekeeping mission in numbers:

United Nations Stabilization Mission in Haiti (MINUSTAH) <sup>90</sup> <i>In Haiti since June 2004</i> <b>Strength: 5,927 total, including:</b> <ul style="list-style-type: none"><li>● Uniformed personnel: 4,757<ul style="list-style-type: none"><li>○ Troops: 2,342</li><li>○ Police: 2,414</li></ul></li><li>● Civilian personnel: 1,082<ul style="list-style-type: none"><li>○ International civilians: 278</li><li>○ Local civilians: 804</li></ul></li><li>● UN Volunteers: 88</li></ul> <b>Fatalities:</b> 186 <b>Approved budget (07/2016 – 06/2017):</b> \$345,926,700
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In Resolution no. 2350 adopted on 13 April 2017<sup>91</sup>, the Security-Council decided to extend the mission's mandate for a final period of six months, during which its military component shall gradually withdraw from Haiti in order to be fully

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<sup>89</sup>*Supra* note 90.

<sup>90</sup>United Nations, Peacekeeping Fact Sheet, *available at* <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml#MINUST>.

<sup>91</sup> *Supra* note 84

withdrawn by 15 October 2017. MINUSTAH's mandate is indeed ending, but the UN will maintain a presence in Haiti through a new follow-on United Nations Mission for Justice Support in Haiti ("MINUJUSTH"). The new mission whose mandate is adopted for an initial six months, or until 25 April 2018, will not have a military component but will be composed of a reduced number of police units and officers to support the development of the Haitian National Police (HNP)<sup>92</sup>. MINUJUSTH is also mandated to assist the Haitian Government in its efforts to strengthen rule of law institutions and engage in human rights "monitoring, reporting and analysis".<sup>93</sup>

### 3.1.2 The outbreak of the cholera epidemic

On 12 October 2010, only months after a devastating earthquake hit Haiti with fatal consequences on the country's infrastructure, economy, and for the living conditions of the Haitian population, the first cholera victim was registered in the Mirebalais in the plateau central region<sup>94</sup>: Jean Salgadeau Pelette. Some say cholera had not been seen in Haiti for over a hundred years, many say the disease was unknown to Haitians before 2010<sup>95</sup>. Following the first victim was registered, people living near the Meille Tributary<sup>96</sup> began dying and within in a month all ten departments of Haiti were affected by the cholera outbreak (*see image below*). The disastrous effects of the earthquake on the weak public sanitation system had created ideal conditions for an infectious disease to spread. By the end of 2010, or a little over two months after the initial outbreak, more than 3500 persons had died from the disease. Cholera is an acute infection of the small intestine caused by ingestion of food or water contaminated with the bacterium *Vibrio cholerae*. It

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<sup>92</sup>UNSC, *Security Council Grants Final Mandate Extension for United Nations Stabilization Mission in Haiti, Unanimously Adopting Resolution 2350 (2017)*, SC/12794, 13.04.2017. parag 8 and parag 9: "MINUJUSTH shall retain seven FPU, reduced from MINUSTAH's current 11"; and "295 IPOs reduced from MINUSTAH's authorized 1,001 would play a key role in the implementation of the priorities in the HNP Strategic Development Plan 2017-2021"

<sup>93</sup>*Ibid*, parag 5

<sup>94</sup>Ivers, Louise C, and David A. Walton. "The "first" case of cholera in Haiti: lessons for global health." *The American Journal of Tropical Medicine And Hygiene* 86, no. 1 (January 2012): 36-38.

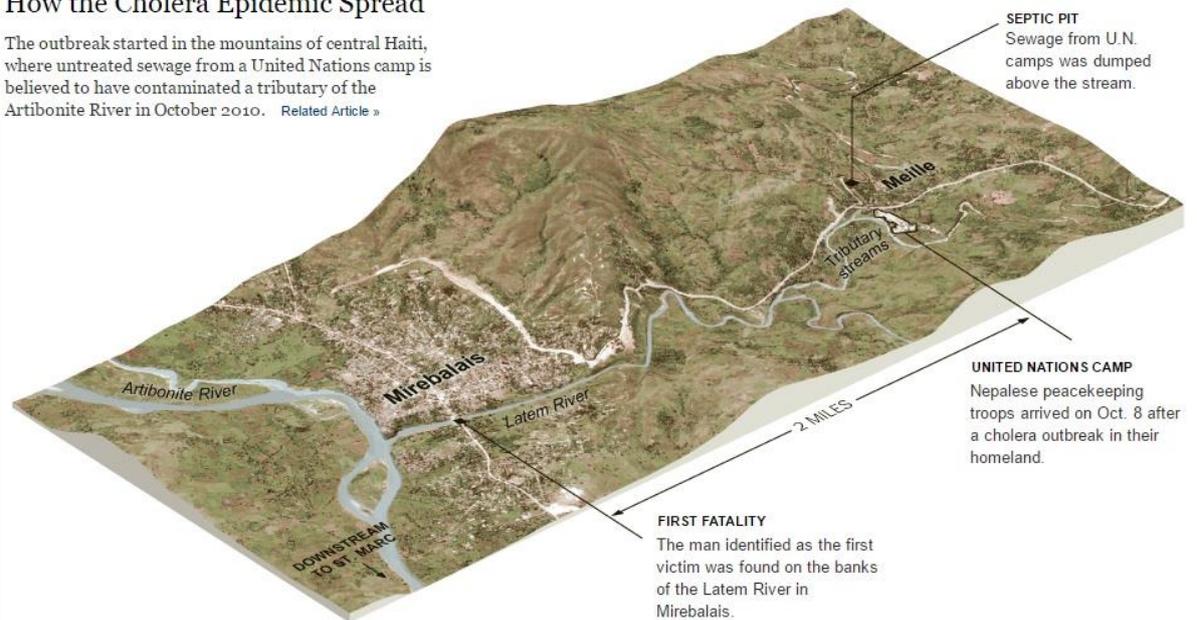
<sup>95</sup>UNGA, Report of the Special Rapporteur on extreme poverty and human rights, A/71/40823, 5 August 2016. Advance Unedited Version. parag 14.

<sup>96</sup>The Meille Tributary flows into the Artibonite river, the longest river of the Hispaniola island.

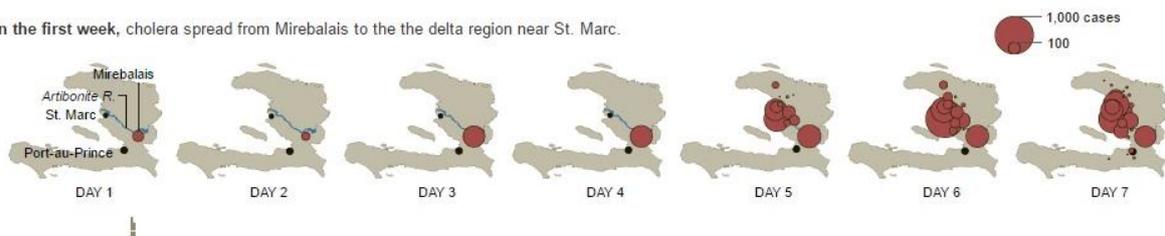
is characterized by profuse watery diarrhea, vomiting and cramps, and can kill adults and infants in less than 12 hours if left untreated<sup>97</sup>.

### How the Cholera Epidemic Spread

The outbreak started in the mountains of central Haiti, where untreated sewage from a United Nations camp is believed to have contaminated a tributary of the Artibonite River in October 2010. [Related Article »](#)



In the first week, cholera spread from Mirebalais to the the delta region near St. Marc.



Source : <http://www.nytimes.com/interactive/2012/03/31/world/americas/how-the-haiti-cholera-epidemic-spread.html#>

As of May 2017, nearly 10,000 people, or some 4-5 % of the entire population<sup>98</sup>, perhaps more<sup>99</sup>, have contracted the disease which, in the words of Philip Alston in his report to the Secretary-General, “[...] has had its greatest impact on those living in poverty who are poorly placed to cope with the consequences of the disease or to take the precautions necessary to reduce the risks involved. It has also diverted scarce resources in an already impoverished country”.<sup>100</sup>

<sup>97</sup>WHO, Cholera, Fact Sheet, Updated October 2016. Available at <http://www.who.int/mediacentre/factsheets/fs107/en/>

<sup>98</sup>Some sources say 5 % and some say 4 %: Sontag, Deborah, “In Haiti, Global Failures on a Cholera Epidemic”. *New York Times*. MARCH 31, 2012. <http://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html> and UNHRC, A/HRC/32/31 respectively.

<sup>99</sup>Gladstone, Rick, “Cholera Deaths in Haiti Could Far Exceed Official Count”. *New York Times*. March 18, 2016. Available at <https://www.nytimes.com/2016/03/19/world/americas/cholera-deaths-in-haiti-could-far-exceed-official-count.html>.

<sup>100</sup>*Supra* note 1, parag. 5.

On 8 October 2010, only a few days before Pelette was found dead, hundreds of Nepalese peacekeepers, known as blue helmets, arrived in Haiti to serve in MINUSTAH. In Nepal, cholera is endemic and prior to the soldiers' arrival in Haiti their home country had suffered an outbreak. Thus, it didn't take more than a week for suspicions as to the origin of the cholera outbreak in Haiti to be directed towards the UN peacekeeping base in the Mirebalais. Shortly after, international media revealed the substandard state of the waste management system at the UN base: through the intermediary of a Haitian contractor, sewage from the base was transported to a nearby waste disposal site which consisted of a pit in open air, in close proximity to the Meille tributary and residential areas. Rainy weather could easily cause overflowing of the pits with sewage flowing directly into the river.

DNA sequencing of samples from the Haitian and Nepalese cholera outbreaks proved the two strains to be nearly identical.<sup>101</sup> The results were confirmed by additional tests run by a French-Haitian investigation lead by a Dr. Piarroux, who also studied the proliferation of cholera cases and mapped the geographical development of the epidemic. International Media reported of hundreds of people marching on the peacekeeping base, demonstrations and riots around the country, and of *Houngans*<sup>102</sup> being lynched on suspicions of having brought the "curse of cholera" upon the country.<sup>103</sup>

Upon request of Secretary-General Ban Ki-moon, a panel of Independent Experts were sent to Haiti to investigate the outbreak. The panel concluded that the cholera strain originated from South Asia and that it most likely came from the Meille tributary next to the peacekeeping base. Yet, after finding that "the source of the Haiti cholera outbreak was due to contamination of the Meille Tributary of the Artibonite River with a pathogenic strain of current South Asian type *Vibrio*

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<sup>101</sup>Frerichs, R. R., et al. "Nepalese origin of cholera epidemic in Haiti." *Clinical Microbiology & Infection* 18, no. 6 (June 2012): E158-E163. *Academic Search Complete*, and Based on samples tested by a research institute in Arizona and by the Centers for Disease Control and Prevention in Haiti (CDC): Orata, Fabini D., Paul S. Keim, and Yan Boucher. "The 2010 Cholera Outbreak in Haiti: How Science Solved a Controversy." *Plos Pathogens* 10, no. 4 (April 2014): 1-5. *Academic Search Complete*.

<sup>102</sup>*Houngan* is the creole term from Voodoo priest in Haiti

<sup>103</sup>Sontag, Deborah, "In Haiti, Global Failures on a Cholera Epidemic". *New York Times*. MARCH 31, 2012. <http://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html>,

cholerae as a result of human activity”, the panel experts stated that the extent of the outbreak was due to additional factors such as sanitation deficiencies and water insecurity. As was later noted by Special Rapporteur Philip Alston, although the Panel adopted a scientific approach to determining the source of the outbreak, they nevertheless presented a legal conclusion that no *fault* could be found, without either legal standard or legal assessment of evidence. By referring to the source of the outbreak as a ‘confluence of circumstances’, including deficient water, sanitation and health care systems, Alston argues the Panel “sought to mitigate the UN’s responsibility”.<sup>104</sup>

Based on the somewhat contradictory results of the Panel report, and the non-fault statements<sup>105</sup>, the UN argued that the results were inconclusive, and that it could not be established with certainty that Nepalese troops were implicated. Assistant-Secretary-General Anthony Banbury said “we don’t think the cholera outbreak can be attributed to any single factor”.<sup>106</sup> In the case of the cholera outbreak in Haiti, determining from where the outbreak originated was without incidence on the efforts to stop the disease, but it accrued increasing importance as the view grew stronger that there had been mismanagement of the sanitation facilities at the peacekeeping base, and that the UN was at fault.

### **3.2 The United Nation’s legal response to demands for reparation and the reactions thereto**

A year after the epidemic broke out, claims for compensation were brought against the UN, arguing that negligence and recklessness of the Organization was the cause of the cholera outbreak. The Plaintiffs sought to hold the UN responsible and demanded reparation for moral and material damages. The UN argued that the cholera claims were not receivable under its internal settlement mechanisms for third party claims in accordance with the Convention of the Privileges and Immunities of the UN, and the Status-of-Forces Agreement, and

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<sup>104</sup>*Supra* note 1, parag. 23-24

<sup>105</sup>*Supra* note 1, parag 23.

<sup>106</sup>*Supra* note 107

rejected the claims. In the subsequent lawsuit, the Plaintiffs argued that the failure to provide alternative means to settle claims would upend the UN's immunities under the CPIUN were not sufficient and the case was dismissed by the United States' Courts.

### 3.2.1 The legal complaint against MINUSTAH

On 3 November 2011, the Institute for Justice and Democracy in Haiti (the "IJDH") lodged a petition for relief and reparation with MINUSTAH on behalf of around 5000 cholera victims. The "trailblazing class action"<sup>107</sup> was filed under the standard clause on third party claims in the Status-of-Forces Agreement (the "SOFA") pertaining to MINUSTAH. The claims demanded that the UN 1) install a national water and sanitation system that will control the epidemic; 2) provide individual victims of cholera with compensation for their losses in the amount of \$50,000 for injured, and \$100,000 for deceased; and 3) issue a public apology for its wrongful acts.<sup>108</sup> The Plaintiffs sought damages, and to hold defendants responsible, for personal injury; wrongful death; emotional distress; loss of use of property and natural resources; and breach of contract.<sup>109</sup> According to the claim, introducing cholera to Haiti allegedly made the UN responsible for violating Haitian national law, and human rights obligations including the right to life and the right to effective remedy. Furthermore, the complaint alleged that the cholera outbreak was directly attributable to negligent, reckless and tortious conduct of the UN and MINUSTAH.<sup>110</sup> Additionally, the defendants allegedly failed to exercise due care to prevent a disease-outbreak by 'disregarding the risk of transmission when deploying personnel from a country in which cholera is endemic', and without thorough screening, while knowing that the Haitian water and sanitation system is fragile. The claim alleged that the defendants knew, or should have known, that the mismanagement of the disposal of the human waste at the UN base in the Mirebalais, and the discharge of raw untreated sewage into

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<sup>107</sup>Boon, Kristen, "The Haiti Cholera Case against the UN". *Opinio Juris*, October 26th, 2012. <http://opiniojuris.org/2012/10/26/the-haiti-cholera-case-against-the-un/>

<sup>108</sup>Petition for Relief to Chief, Claims Unit, MINUSTAH. November 3, 2011. <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>

<sup>109</sup>Georges et al v. United Nations et al (Georges v. United Nations), United States District Court Southern District of New York. January 9, 2015, 13-CV-7146 (JPO). Available at [http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62\\_Opinion\\_and\\_Order\\_01\\_09\\_15.pdf](http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62_Opinion_and_Order_01_09_15.pdf)

<sup>110</sup>The UN, MINUSTAH, the Secretary-General and Under Secretary General for MINUSTAH Edmond Mulet.

Haiti's primary water source, the Meille Tributary, created an elevated risk for a cholera outbreak.<sup>111</sup>

The response from the UN legal counsel came in February 2013 and dismissed the cholera claims on the basis that they “necessarily include a review of political and policy matters”.<sup>112</sup> The letter expressed sympathy for the suffering caused by the catastrophic outbreak of the disease, and emphasized the emergency assistance that the UN has provided to Haiti in reaction to the cholera outbreak. It asserted, however, that “[w]ith respect to the claims submitted, [they] are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations [...]”.<sup>113</sup> Subsequently, the IJDH requested mediation or a meeting with the UN to discuss the submitted claims, a request which was rejected by the Legal Counsel because the claims were considered non-receivable.<sup>114</sup>

### 3.2.2 The lawsuit against the United Nations

Upon the negative response from the UN to the request for further discussions and mediation, on 9 October 2013 the IJDH, along with the Haitian organization *Bureau des avocats internationaux*, and an American law firm<sup>115</sup>, filed a federal class action lawsuit against the UN on behalf of the cholera victims.<sup>116</sup> In the procedure that followed, the U.S. Government insisted on the UN's immunity from suit and process. In response, the Plaintiffs have asserted that the UN breached its treaty obligations to provide victims with an alternative mechanism for settling their claims, and consequently can no longer assert immunity under the CPIUN. They argue that “the obligation to settle claims and UN immunity are two sides of the same coin and [...] must be read together”, and that “the enjoyment of immunity and the obligation to provide alternative modes of settlement are envisioned together in the convention, which is a balanced framework that, on the one hand, grants broad immunities to the United Nations, and for good reason, but, on the other hand, also carefully safeguards victims'

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<sup>111</sup>*Supra* note 113

<sup>112</sup>Letter from Legal Counsel Patricia O'Brien to the Director of the IJDH Brian Concannon, Institute for Justice and Democracy in Haiti, 21 February 2013. Retrieved from <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>.

<sup>113</sup>*Ibid.*

<sup>114</sup>*Ibid.*

<sup>115</sup>Kurzban, Kurzban, Weinger, Tetzelli & Pratt, P.A. (KKWT). Florida based civil rights law firm.

<sup>116</sup>*Supra* note 108, p.1.: “*In the suit the Plaintiffs are five named Haitian and Haitian-American victims, “on behalf of themselves and all others similarly situated”.*”

ability to seek remedy somewhere”.<sup>117</sup> The plaintiffs thus argued not the existence of waiver of immunity, but that immunity as provided for in article 2 of the CPIUN is in fact granted on the condition that the obligation under section 29 to provide alternative claims settlement mechanisms is fulfilled. The Defense on the other hand responded that a “complete failure to adhere to one portion of the Convention in no way eviscerates the immunities provided to the UN”.<sup>118</sup> In January 2015, Judge Oetken of the federal court in the Southern District of New York ruled in favour of the Defense, dismissing the case for lack of subject matter jurisdiction.

In the appeal<sup>119</sup> to the Second Circuit Court of Appeals the question remained whether the UN’s fulfillment of its obligations under Section 29 of the CPIUN to “make provisions for appropriate modes of settlement of [...] disputes arising out of contracts or other disputes of a private law character to which the [UN] is a party, [...] if immunity has not been waived by the Secretary-General, is a condition precedent to its immunity under Section 2 of the CPIUN [...], such that the UN’s alleged disregard of its Section 29 obligation ‘compel[s] the conclusion that the UN’s immunity does not exist’, as argued by the Plaintiffs”.<sup>120</sup> On appeal, the plaintiffs argue the District erred in asserting the UN’s immunities because 1) fulfillment of Section 29 obligations is a condition precedent to Section 2 immunities under the CPIUN, and 2) the UN materially breached the CPIUN by failing to fulfill its obligations under Section 29 and therefore is no longer entitled to benefit from immunity<sup>121</sup>. However, the appellate judges found the Plaintiffs’ arguments unpersuasive. The material breach argument was rejected<sup>122</sup>, as well as the condition precedent argument, by reference *inter alia* to principles such as *expressio unius est exclusio alterius* - express mention of one thing excludes all others. Indeed, the CPIUN provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has *expressly*

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<sup>117</sup>Beatrice Lindstrom from IJDH representing Plaintiffs, Transcript of Cholera Litigation Oral Arguments. *George v. United Nations*, October 23, 2014. Available at <http://www.ijdh.org/2014/10/topics/health/transcript-of-cholera-litigation-oral-arguments/>.

<sup>118</sup>Ellen Blain, Assistant US Attorney, *Transcript of Cholera Litigation Oral Arguments*. October 23, 2014

<sup>119</sup>*Georges v. United Nations*, United States Court of Appeals for the Second Circuit, August Term 2015 No. 15-455-cv.

<sup>120</sup>*Ibid.*, p. 2.

<sup>121</sup>*Ibid.*, p.8-9.

<sup>122</sup>*Ibid.*, p. 19-21

*waived its immunity*”<sup>123</sup>, which means that “the ‘express mention of’ the UN’s express waiver as a circumstance in which the UN ‘shall [not] enjoy immunity’ negatively implies that ‘all other[.]’ circumstances, [...] are ‘exclude[d]’”. As a result, the Appellate Court rejects that the fulfillment of Section 29 obligations is a condition precedent to the immunity of the UN.<sup>124</sup>

As the procedural history demonstrates, the UN’s immunity from legal process is a considerable obstacle for claimants to receive redress and reparation, and the question of the alleged material breach of the Section 29 obligation to provide alternative means to settle private law claims is but examined with regards to whether it affects the immunities of the UN. Once the claims are considered non-receivable within the Organization’s internal settlement procedures, there appear to be few options left. As a consequence of the UN’s rejection of the cholera victims’ claims on the basis of arguable not have a private law character, the Organization has no obligation to provide any out-of-court procedure, and that decision cannot be appealed. As pointed out by Boon and confirmed by the Second District Appeals Court, “[a]ny attempt to bring a case will be met with an immediate invocation of immunity”.<sup>125</sup>

### 3.2.3 The critique of the UN’s legal response and the proponents of legal responsibility for the cholera outbreak

The authors and scholars who disagree with the UN’s position to reject the cholera victims’ claims have *inter alia* argued that that the private-public distinction is self-serving or deficient. They have asserted that the claims *are* in fact of a private law character, and therefore ought to be receivable. Therefore, some have argued that the UN’s omission to provide alternative mechanisms to settle the claims out of court causes its absolute immunities to be unjustified and that they should not be upheld.

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<sup>123</sup>CPIUN, article 2, para 2, emphasis added.

<sup>124</sup>*Supra* note 123., p. 12.

<sup>125</sup>Boon Kristen, “UN Flatly Rejects Haiti Cholera Claim”. *Opinio Juris*. February 22nd, 2013. <http://opiniojuris.org/2013/02/22/un-flatly-rejects-haiti-cholera-claim/>

Firstly, several scholars are sceptical to the public/private distinction<sup>126</sup> or disagree entirely with the qualification of the cholera claims as belonging to the former category, and argue that the cholera lawsuit for compensation for personal injury and death caused by negligent conduct attributable to MINUSTAH do correspond to the categories defined in the Secretary-General's report from 1995<sup>127</sup>, and have all the characteristics of "classic third-party claims".<sup>128</sup> Authors have argued that the negligent conduct ought to engage the UN's legal responsibility based on obligations of due diligence "directly analogous to those owed by a company [...] to ensure adequate waste management [...] to prevent spreading diseases"<sup>129</sup>, and to the "good samaritan's" duty to exercise reasonable care "when undertaking to perform a rescue".<sup>130</sup>

As previously noted, no claims commission has ever been established under Section 29 of the CPIUN or the SOFA: s in the context of peacekeeping, and claims of personal injury or illness are usually settled through amicable agreements. In fact, there is little information available on these procedures, which are settled confidentially, but Alston notes that on at least one occasion the UN has provided monetary compensation to a Haitian claimant for a private torts claim on an ex gratia basis.<sup>131</sup> The rejection of the cholera claims on the basis that they would require a review of "political and policy matters"<sup>132</sup>, and the lack of further clarification, has been widely criticized by legal scholars, practitioners and by international media. Comparing with other peacekeeping-related claims that were rejected for not presenting a private law character, Alston notes that there are significant differences in the alleged conduct of the UN in Haiti and in the other operations. For instance, the cases against UNAMIR in Rwanda, and against UNPROFOR in Croatia, Bosnia and Herzegovina and Macedonia during the Balkan wars, pertained to failures to prevent genocide and thus failures to fulfill the peacekeeping mandates as such. They were rejected because they "amounted

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<sup>126</sup>Mégret, Mergret, Frederic. "Responsabilité des Nations Unies Aux Temps du Cholera, La [article]." *Revue Belge De Droit International / Belgian Review Of International Law* no. 1 (2013): 161. P.5-8.

<sup>127</sup>*Supra* note 58, p. 356.

<sup>128</sup>*Supra* note 1, parag. 33.

<sup>129</sup>*Supra* note 1, parag. 34

<sup>130</sup>*Supra* note 58, p. 354

<sup>131</sup>Interoffice memorandum to the Controller, Assistant Secretary- General, Office of Programme Planning, Budgets and Accounts, regarding ex gratia payment to an injured civilian Haitian, 10 July 2009, U.N. Jurid. Y.B. 428–30 (2009)

<sup>132</sup> *Supra* note 116.

to a review of the performance of the peacekeeping mandates” and were not of private law character.<sup>133</sup> Whereas, in the cholera case, negligence is “at heart of the legal issue of fault”.<sup>134</sup> The UNMIK lead contamination claim asked for compensation for similar types of personal injury as in the cholera case, but with the difference that the UN acted as an interim administration and “should not be held responsible for contamination predating its arrival”.<sup>135</sup>

These cases illustrate the conflict between the UN’s immunities and the right to effective remedy for individuals, and the UN’s legal response to the cholera claims brought scholars to question the legitimacy of UN’s broad immunities and the IJDH’s cholera litigation was called “the most organized challenge to UN immunity yet”.<sup>136</sup> It has been argued that the organization’s immunity “has shifted too far towards the organization at the expense of the people it is meant to serve”<sup>137</sup>, that “the independence of the organization [has] trumped the dignity of affected individuals”<sup>138</sup>, and that the “[...] UN’s handling of this high profile claim stands in stark contrast to its stated position on the rule of law [...]”<sup>139</sup>. Therefore, some authors are of the view that the immunities of the UN should be functional and not absolute. In the words of Boon, “[...] the UN and courts have implicitly transformed the UN’s immunities *rationae materiae* into immunity *rationae personae*. In other words, judges and policy-makers justify upholding the UN’s immunity because it is the UN, rather than on the basis of the UN’s functional needs” (emphasis added).<sup>140</sup>

Additionally, Freedman notes that a straightforward reading of the UN Charter indicates that immunity is restricted by its human rights obligation enshrined

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<sup>133</sup>Bruce C. Rashkow, ‘Immunity of the United Nations: Practice and Challenges’, in: Niels Blokker & Nico Schrijver (eds.), *Immunity of International Organizations* (2015), p. 86. Cited from Supra note 91, p. 32.

<sup>134</sup>Supra note 1, parag. 23.

<sup>135</sup>Supra note 91, parag. 36.

<sup>136</sup>Gladstone, Rick, “Peacekeeping by U.N. Faces New Scrutiny on 2 Fronts”, *New York Times*. October 9, 2013. <http://www.nytimes.com/2013/10/10/world/peacekeeping-by-un-faces-new-scrutiny-on-2-fronts.html>

<sup>137</sup>Mara Pillinger, Ian Hurd and Michael N. Barnett, “Thousands died when the U.N. brought cholera to Haiti. Here’s why it’s getting off scot-free”. *The Washington Post*. March 28, 2016. Available at [https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/28/thousands-died-when-the-u-n-brought-cholera-to-haiti-heres-why-its-getting-off-scot-free/?utm\\_campaign=pubexchange\\_article&utm\\_medium=referral&utm\\_source=huffingtonpost.com&utm\\_term=.35fdafbb94af](https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/28/thousands-died-when-the-u-n-brought-cholera-to-haiti-heres-why-its-getting-off-scot-free/?utm_campaign=pubexchange_article&utm_medium=referral&utm_source=huffingtonpost.com&utm_term=.35fdafbb94af)

<sup>138</sup>Supra note 58, p. 341.

<sup>139</sup> Boon, *The Haiti Cholera Case against the UN*.

<sup>140</sup>Supra note 58, p. 370.

therein. “Any actions that violated human rights would contradict the UN’s purposes and certainly would not be ‘necessary’ for their achievement; it appears contradictory, at best, that the UN would hold immunity with regard to such acts”.<sup>141</sup> She recalls however that although absolute immunity may no longer be the prevailing theory for international organizations, the UN’s immunities are enshrined in treaty law and therefore does not evolve like state immunity based on customary law - “meaning that even if the UN’s immunity was conceived of as functional, it was codified as absolute”.<sup>142</sup>

Boon further argued that limited immunity could have a deterring effect on wrongful conduct. She argues that immunity takes away the incentive to behave as promised, and that lesser immunity could incentivize the UN not to commit future torts by, for example, encouraging investment in appropriate equipment and quick reactions when problems occur. As for the cholera epidemic in Haiti, “narrower immunities might have led to better screening guidelines, the proper installation of lavatories, and a faster reaction after cholera was discovered”.<sup>143</sup> Some of the most ardent criticism of the UN’s position came from Philip Alston, a New York University law professor who serves as a special rapporteur advising the United Nations on human rights issues. Alston’s confidential report which was sent to the Secretary-General on 8 August 2016<sup>144</sup>, and later published by the New York Times, calls the UN’s legal position an “abdication approach”<sup>145</sup> and provides a thorough analysis of the UN’s response to cholera and the victims thereof, and why it can change without jeopardizing vital interests of the Organization and of its Member States. Alston underscores the need to provide justice to the victims and argues that “[t]he provision of remedies for wrongdoing is an essential dimension of the law relating to immunity, of human rights law, of the rule of law, and of the principle of accountability [...]. Even in the context of armed conflicts, various UN bodies have urged States to provide forms of compensation, whether ex gratia or otherwise, to the killed or injured even though the legal obligation to

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<sup>141</sup>Freedman, Rosa. "UN Immunity or Impunity: A Human Rights Based Challenge [article]." *European Journal Of International Law* no. 1 (2014): 239. p. 243

<sup>142</sup>*Ibid*

<sup>143</sup>*Supra* note 58, p. 369.

<sup>144</sup>Katz, M. Jonathan, “U.N. Admits Role in Cholera Epidemic in Haiti”. *New York Times*. Aug 17, 2016. <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html>

<sup>145</sup>*Supra* note 1, parag. 3.

provide such compensation is not uncontested”.<sup>146</sup> Encouraging the UN to draw upon *inter alia* precedents for lump sum settlements at the national level, and the Human Rights Up Front initiative<sup>147</sup> which aims to improve how the UN addresses human rights issues across its different areas of work, the Special Rapporteur suggested the UN adopt a new approach with the following steps:

“(1) First and foremost, there should be an apology and an acceptance of Responsibility in the name of the Secretary-General.

(2) The United Nations should acknowledge that the claims are of a private law character and accordingly should offer an appropriate remedy, as is legally required of it. The new approach announced by the Deputy Secretary-General could go a long way towards constituting such a Remedy.

(3) Since August 2016 the Secretary-General appears to have accepted that existing project-based initiatives cannot be seen as a substitute for

personal compensation for victims and their families. His proposed new package should ensure adequate compensation, taking account of the elements identified above.

(4) In line with the Deputy Secretary-General’s statement, the process should reflect a newfound commitment to consulting with all stakeholders on as transparent a basis as possible.

(5) The process outlined here should also provide the basis for the approach to be adopted by the United Nations in the future in such cases”.<sup>148</sup>

Briefly after the report of the Special Rapporteur was released, UN officials made remarks conveying that the UN would provide a better response to the cholera epidemic, and did indeed announce a “New Approach”. The content of the New Approach is discussed in the following chapter, in order to determine its compliance with international human rights standards for reparation, and to identify the impact of the recognition of moral responsibility on the new form of response provided by the Organization.

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<sup>146</sup>*Supra* note 1, parag. 70.

<sup>147</sup>UN Secretary-General, 'Human Rights Up Front' Initiative, <https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative>

<sup>148</sup>*Supra* note 1, parag. 77.

## 4 The New Approach to cholera in Haiti, and the content of the United Nations' moral responsibility.

While the legal position of the Organization remains unchanged, a New Approach to cholera in Haiti was presented by the UN together with a public apology by the Secretary-General addressed to the Haitian population. Although not qualified as such by the UN itself, the New Approach can be considered a *de facto* reparation, or reparation *ex gratia*, in light of the presentation of the New Approach as a “demonstration of deep regret for the suffering of Haitians as a result of the cholera epidemic”<sup>149</sup> and legal and factual circumstances preceding the announcement of the New Approach, as examined in previous chapter of the present study. This chapter examines the compatibility this new form of response to cholera with reparation standards under the Principles and Guidelines. The analysis of the New Approach includes both the actual measures contained in the Secretary-General's report, as well as the apology and additional statements made by the UN. This enables an understanding of the compliance with international human rights standards for reparation, and to identify the substance of the moral responsibility as acknowledged by the UN, in view of analyzing its incidence on the new response provided by the Organization.

Several aspects of the material support that the New Approach intends to deliver correspond to valid forms of reparation in international human rights law. However, for legal as well as for practical reasons, the most pertinent forms of reparation are unlikely to be delivered. Based on an analysis of the language of the UN's own statements, it can be concluded that neither the apology nor the moral responsibility recognized by the Organization have any causal link with the cholera outbreak. The analysis shows that the New Approach is not the expression of an obligation, or a responsibility for something that the UN has done. Therefore, even the theoretical possibility of basing claims upon moral responsibility is out-ruled. Translated into practical terms, the UN's qualification of the New Approach as a pure act of good will implies that its financing is not

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<sup>149</sup>*Infra* note 152, paragr. 7

mandatory, which as the analysis shows puts the most relevant aspects of the New Approach at risk, and thus its compliance with human rights standards for reparation.

## **4.1 Application of international human rights legal standards for reparation to the New Approach to cholera in Haiti**

### **4.1.1 Introducing the United Nation's New Approach**

The first significant swift in the UN's position towards the cholera epidemic came in July 2014, when the UN Secretary-General declared, in an interview prior to a visit to Haiti, that “[r]egardless of what the legal implication may be, [...] I believe that the international community, including the United Nations, has a moral responsibility to help the Haitian people stem the further spread of this cholera epidemic”.<sup>150</sup> Shortly after the report of the Special Rapporteur was leaked in August 2016, the Deputy Spokesman for the Secretary General acknowledged that the United Nations *played a role* in the initial outbreak of cholera, stating that the UN needs to do more.<sup>151</sup> On 19 August 2016, the Secretary-General announced a “New Approach” by the United Nations to cholera in Haiti, and indicated that he deeply regrets the terrible suffering the people of Haiti have endured as a result of the cholera epidemic, and that the United Nations has a moral duty to the victims of the cholera epidemic and to support Haiti in overcoming the epidemic and building sound water, sanitation and health systems.<sup>152</sup> On 1 December 2016, the UN Secretary-General presented the New Approach to the Member States and in the remarks to the General Assembly he issued an official apology to the Haitian people:

“The United Nations deeply regrets the loss of life and suffering caused by the cholera

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<sup>150</sup>Charles, Jacqueline, “United Nations top official goes to Haiti to promote cholera elimination, elections”, *Miami Herald*. July 13, 2014. Available at <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article1975427.html>

<sup>151</sup>Katz, Jonathan M., “U.N. Admits role in cholera epidemic in Haiti”, *New York Times*. August 17, 2016. Available at <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html>

<sup>152</sup>UNGA, A new approach to cholera in Haiti: Report by the Secretary-General, 25 November 2016, A/71/620

outbreak in Haiti.

On behalf of the United Nations, I want to say very clearly: we apologize to the Haitian

People.

We simply did not do enough with regard to the cholera outbreak and its spread in Haiti.

We are profoundly sorry for our role”.<sup>153</sup>

The New Approach, is described as “[...] an act of *good faith* and a genuine effort to concretely *demonstrate deep regret* for the suffering of Haitians as a result of the cholera epidemic”, in the Secretary-General’s report. It reiterates that the UN has a *moral duty* “to those who have been most directly affected” *and* to eliminate cholera from Haiti. According to the Secretary-General, a lasting solution to the cholera crisis in Haiti is a “*collective endeavor* by Member States, United Nations entities and partners outside the United Nations” (all emphasis added).<sup>154</sup> The new strategy to address the cholera crisis in Haiti aims to control and eliminate cholera by building upon the Organization’s humanitarian response to cholera already in place, and to provide material assistance and support to the most affected communities in Haiti. The goals set up by the New Approach and the measures intended to allow their fulfillment are divided into two main tracks:

1) eliminating cholera by intensifying “immediate efforts to decrease the transmission of cholera and improve access to care and treatment (constituting “Track 1A”); and address the longer-term issues of access to clean water, sanitation and health-care systems (constituting “Track 1B”), of which the latter is expected to last for a period of 10 to 15 years<sup>155</sup>;

and 2) to provide a meaningful response to the impact of cholera on individuals, families and communities by developing a “package” which is “intended to reflect the Organization’s recognition and acknowledgement of the suffering of the

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<sup>153</sup>Remarks of the Secretary-General, 1 December 2016. *retrieved from* <https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>.

<sup>154</sup>*Supra* note 152, parag. 7, all emphasis added

<sup>155</sup>*Supra* note 152, parag. 27

people of Haiti due to the cholera outbreak and its commitment to assist and support those most directly affected”.<sup>156</sup>

In sum, the objectives of the New Approach are to end cholera, and to help those most directly affected by the disease, including the families of the individuals who died, and those who contracted cholera themselves. The second track also has two branches: a community approach; and an individual approach. The Secretary-General has pledged to consult with victims and their families in the development of the material assistance package, if sufficient funding has been secured.<sup>157</sup> The community approach would target the victims and families of victims who were the most severely impacted by the epidemic, and communities would be prioritized based on mortality rates.<sup>158</sup> The package could, to the extent that it is properly funded, include community projects such as: equipping of health-care centers; improvement of infrastructure; waste management solutions; as well as non-monetary individual benefits such as education scholarships and other education-related services. The report notes that community projects also could include initiatives commemorative of the victims of cholera.<sup>159</sup> Furthermore, the Secretary-General’s report states that the community approach would include a participatory process “and that design and management decisions are responsive to the views of affected communities and victims of cholera, even in the absence of an individual approach”.<sup>160</sup> Concerning the individual approach, and depending on the outlook for its funding, payment of money to families of individuals who died of cholera has been considered, in the form of a fixed amount for every deceased individual. In addition to gathering sufficient funding, the report notes that identifying, and determining the number of, victims is a challenge to implementing the individual approach, due to insufficient or incoherent registration of victims since the epidemic started.<sup>161</sup>

Finally, the report identifies six central tenets to guide the overall implementation of the New Approach, including consulting with “[...] individuals and communities in developing the package of material assistance and support”, and

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<sup>156</sup>*Supra* note 152, parag. 36

<sup>157</sup>*Supra* note 152, parag. 37

<sup>158</sup>*Supra* note 152, parag. 47

<sup>159</sup>*Supra* note 152, parag. 42-44

<sup>160</sup>*Supra* note 152, parag. 49

<sup>161</sup>*Supra* note 152, parag. 54-57

putting “victims at the center of the work and be responsive to their needs and concerns”.<sup>162</sup> The General Assembly, “recognizing that the United Nations has a moral responsibility to the victims of the cholera epidemic in Haiti, as well as to support Haiti in overcoming the epidemic and building sound water, sanitation and health systems”, and calling upon Member States to give it their full support, adopted the Secretary-General’s report on the New Approach on 16 December 2016.<sup>163</sup> As of April 2017, only \$2.6 million of the requested \$400 million in funding of the New Approach has been secured.<sup>164</sup>

#### 4.1.2 The New Approach: a *de facto* reparation or compensation *ex gratia*

The New Approach as presented in General-Assembly Resolution 71/620 contains few references to “legal language” connected to reparation law. The term *duty* is used twice; *moral responsibility* twice; *caused* is found on five pages with regards to the harms the epidemic has brought, and one time with reference to the “confluence of circumstances”, as first noted by the independent panel on the topic of what caused the cholera outbreak itself<sup>165</sup>; the term *victim(s)* is used on nine occasions; whereas the terms *liability*, *obligation*, *reparation*, *compensation*, *restitution* and *satisfaction* are not used at all. Nevertheless, reparation can be provided in the absence of admission of fault or legal liability. Such a reparation for damages would constitute an *ex gratia* compensation and do correspond with the Secretary-General’s presentation of the New Approach as “an act of good faith”.<sup>166</sup> Moreover, Bodeau-Livinec argues that providing reparation can be a way to “substantiate a form of responsibility which would not say its name” and that “responsibility does not need to be expressly acknowledged to exist as a matter of international law”.<sup>167</sup> He refers to the commentary to article 37 of the Articles on

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<sup>162</sup>*Ibid* parag. 26

<sup>163</sup>UNGA, *Resolution adopted by the General Assembly on 16 December 2016*. 13 January 2017. A/RES/71/161.

<sup>164</sup>UN Haiti Cholera Response Multi-Partner Trust Fund Factsheet. April 2017, *available at* <http://mptf.undp.org/document/download/16954>

<sup>165</sup>*Supra* note 152, parag. 21

<sup>166</sup>*Supra* note 152, parag. 7.

<sup>167</sup>Bodeau-Livinec, Pierre, UN Apologies for Cholera Outbreak: “Moral Responsibility” and Legal Escapism”, *Opinio Juris*, December 12th, 2016. *Available at* <http://opiniojuris.org/2016/12/12/un-apologies-for-cholera-outbreak-moral-responsibility-and-legal-escapism/>

the Responsibility of International Organizations on satisfaction which identifies the apologies given by the Secretary-General for the UN's failure to prevent the genocides of Srebrenica and Rwanda as appropriate examples of satisfaction, although there was in fact no admission of fault or responsibility in either of those cases. The commentary provides that "[a]lthough the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach".<sup>168</sup> Bodeau-Livinec however adds that the UN itself had refrained from attempts to "qualify the nature of those expression"<sup>169</sup>. The question can thus arise whether responsibility can be implicitly admitted but exist as a matter of international law as suggested by Bodeau-Livinec, but for the purpose of evaluating the UN's new response, the New Approach will be considered a *de facto* reparation or reparation *ex gratia*, and analyzed in connection with the recognition of moral responsibility.

As previously discussed, it has proved impossible in the cholera case to demand reparation from the UN in court. The New Approach is not the result of a court order, a judgement or a settlement, and therefore does not have the character of a remedy *stricto sensu*, meaning a judicial remedy, which enforces an obligation to provide relief to a victim, and often through reparations.<sup>170</sup> *A fortiori*, the New Approach does not constitute reparation as a component of judicial remedy. For these reasons, when reference is made to remedy or remedies in this chapter, it excludes the meaning "equal and effective access to justice" in the sense of principle 11(a) in the Principles and Guidelines, since it refers to the access to court and trial. Instead, remedy or remedies are used in reference to the two other aspects, namely the rights to: (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation.<sup>171</sup>

As we have seen, the qualification of the cholera victims' claims as being of "public" character relieves the UN from the obligation to provide alternative

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<sup>168</sup>ARIO, commentary to article 37

<sup>169</sup>*Supra* note 172.

<sup>170</sup>*Supra* note 42, parag. 16.

<sup>171</sup>*Supra* note 9, principle 11

settlement mechanisms in its internal claims procedure, and, as a consequence of the UN's immunity from legal suit, the possibility of engaging the Organization's legal responsibility "externally" in a court of law is excluded. Nevertheless, the obligation to provide effective remedies remains an integral part of international human rights law which does not concern itself with the public/private schism of the UN's third party claim regime. For the reasons exposed in section 2.4 of the present study, including in view of the UN's aims and purposes under the UN Charter to advance the universal respect for human rights, it is considered that the UN is bound by international human rights law. Therefore, insofar as the New Approach, including the public apology by the Secretary-General, correspond to a form of reparation, it is relevant to examine its content in light of the reparation standards as defined by instruments of international human rights law. For that purpose it will be considered that cholera victims are victims in the sense of the Principles and Guidelines, and that the physical and moral harms they suffered were caused by the UN's unintentional introduction of cholera to Haiti based on the many scientific investigations that consider this as a proven fact.

## **4.2 The compatibility of the New Approach with international human rights legal standards for reparation**

According to the Principles and Guidelines, "[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law [...], and "victims [...] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition".<sup>172</sup> The preamble to the Principles and Guidelines notes the importance of the participation of victims at all "stages of the proceedings determined to be appropriate by the Court".<sup>173</sup>

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<sup>172</sup>*Supra* note 9, Section 9, Principle 15.

<sup>173</sup>*Ibid*, parag. 5

#### 4.2.1 The victims' perspective: "padon pa geri malad"<sup>174</sup>

The interviews carried out with cholera victims - individuals whose family members had died of the disease, or who had themselves contracted the disease and recovered - were conducted in view of gathering a victims' perspective on the New Approach, including the apology and proposed assistance package. The purpose was to provide a victim's perspective on the measures contained in the New Approach, and the questions asked can be found in the appendix to the present study. The informants were asked to state how the cholera epidemic had affected their lives and their answers included harms such as: physical damages due to sickness; financial loss due to lost working opportunities or that informants had to sell livestock or vehicles they lived off in order to pay for burial costs or medical expenses; loss of the breadwinner of the family; or debts due to burial costs and medical expenses. In sum, informants expressed a preference for individual rather than collective forms of reparation, with reference to having personally suffered physical or other injury; and generally expressed a preference for monetary compensation with reference to their personal financial loss due to medical expenses, burial expenses of loss of family members and income.

Indeed, most of the informants expressed a preference for individual monetary compensation and were opposed to community projects as a form of reparation. Several persons expressed that the community projects would put money in the pockets of NGOs rather than compensate those who contracted cholera or lost family members. Especially the informants who had themselves contracted cholera and recovered emphasized that they should receive individual (monetary) compensation, because they were the ones who had been physically sick, and that a community project would not differentiate between recipients. A minority of informants had no particular opinion on whether the reparation was individual or collective. No informants recalled having been contacted by UN officials or Haitian government officials with regard the New Approach. Furthermore, there was a significant difference in the informants' answers depending on whether they had received information from the Bureau des Avocats Internationaux. The large

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<sup>174</sup>Meaning "sorry does not heal the sick" in Haitian Creole, in the words of BAI director Mario Josph, esq., Lambert, Ricardo, *Les victimes du choléra se préparent à recevoir l'indemnisation promise par les Nations unies*, 2017-02-22, Le Nouvelliste. Available at <http://www.lenouvelliste.com/m/public/index.php/article/168687/les-victimes-du-cholera-se-preparent-a-recevoir-lindemnisation-promise-par-les-nations-unies>

majority of informants who had been briefed about the New Approach by the Bureau des Avocats Internationaux had a clear preference for individual reparations, and among those who had not been briefed some did not express a preference or did appear to clearly perceive the difference between individual reparation and collective projects, but they expressed a preference for reparation in the form of money. As for the Secretary-General's apology, informants were asked what it represented to them. Some of those who had not been briefed by the BAI were not aware that an apology had been issued. The informants who had been briefed by the BAI all answered with one voice: *Padon pa geri malad*.

#### 4.2.2 The New Approach - Track 1: Eliminating cholera from Haiti

Principle 21 of the Principles and Guidelines and Guidelines provides that: “[r]ehabilitation should include medical and psychological care as well as [...] social services”. The first track of the New Approach consists mainly in consolidating already existing humanitarian response mechanisms in Haiti and in improving concerted international and national efforts to eliminate cholera from the country. As previously mentioned, these efforts are aimed at quickly decreasing the transmission of cholera and improving *access to care and treatment* (emphasis added). As such, track 1 marginally corresponds to certain aspects of the principle of *rehabilitation*. However, insofar as ending the cholera outbreak correspond to a “cessation of continuing violations”, the work under track 1 to decrease the transmission of, and eliminating, cholera, can be seen as conform to principle 22(a) pertaining to *satisfaction*. Collective forms of reparation are accepted as valid under international human rights law, particularly since serious human rights violations often affect a large number of victims, and in some cases of ‘mass violations’ it may be more appropriate to provide collective reparations rather than individual. If admitted that the cholera epidemic constituted a violation of the right to life, and that the outbreak has caused close to 10.000 deaths and around 800.000 persons to contract the disease, arguably the collective reparation forms applicable to mass violations of human rights could be appropriate in Haiti. Human rights organizations such as REDRESS have however raised the issue that collective forms of reparations, including the

construction of medical centers which is part of the New Approach, may become too similar to (ongoing) humanitarian or development projects, and therefore lose their victim-focus and reparative character and objective.<sup>175</sup>

### 4.2.3 The New Approach - Track 2: Providing material assistance and support

#### 4.2.3.1 Track 2(a): the community approach

The “assistance package” consisting of suggested projects that attempt to address issues related to poor housing conditions, lack of basic services and public health, notably through equipping of health-care centers, in specific cholera-affected communities, arguably qualify as a form of *rehabilitation* under principle 21 and as *satisfaction* as per principle 22(a) in that they constitute measures aiming at cessation of violations, i.e. of the spread of cholera infections. Initiatives “aimed at remembering or commemorating the victims of cholera”<sup>176</sup> as suggested under the community approach would qualify as a form of satisfaction under principle 22(g). *Restitution* is not an option in that physical harm and death cannot be undone, however, if the community projects provide work opportunities it could potentially correspond to restoration of employment, as mentioned in principle 19, for those who lost their livelihood as a result of contracting cholera. The projects that could be construed under the community approach, although intended to specifically target families who were severely affected by the cholera epidemic, do not differentiate between victims and non-victims within the community, and are therefore susceptible to similar critique as track 1 of losing their victim-focus and reparative character. Although acceptable as collective forms of remedy, they present a weak reparatory character for the victims.

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<sup>175</sup>Elena Birchall, Evie Francq and Annick Pijnenburg, *The International Criminal Court and Reparations for Child Victims of Armed Conflict*, Reparations Unit, Briefing Paper No.4, Published in August 2011, Edited by Dr. Clara Sandoval, parag. 37.

<sup>176</sup>*Supra* note 152, parag. 44.

#### 4.2.3.2 Track 2(b): the individual approach

The “payment of money to the families of those individuals who died of cholera”<sup>177</sup> would be an optimal means of reparation, corresponding to *compensation* which pursuant to principle 20 “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”. It would compensate victims for *inter alia* loss of earnings, moral damage and costs required for medical services. This form of individual compensation is described as “one consideration” in conditional terms depending on the funding of the Multi Partner Trust Fund. The already hypothetical proposition to provide individual compensation does not include in potential beneficiaries the cholera victims who recovered, although the damages caused by correspond to the same as those who lost family members, with the one important difference that they personally suffered physical harm as a consequence of contracting the disease.

### 4.3 A partially sufficient offer of reparation to the cholera victims

A brief recollection of the reparation standards to determine how the New Approach complies: The Principles and Guidelines’ standard for reparation were drafted with reference to the articles of State responsibility which include in the forms of reparation: restitution compensation; and satisfaction, just as international human rights instrument such as the Principles and Guidelines and General Comment no. 31. Where the Human Rights Committee considers that reparation “generally entails appropriate compensation”, adding that, “where appropriate, [it] can involve restitution, rehabilitation and measures of satisfaction, such as public apologies”<sup>178</sup>, the ARSIWA clearly establishes a hierarchy between the means of reparation where compensation should be awarded for any assessable damage ‘insofar as reparation is not made good by restitution’. The Principles and Guidelines is drafted differently but with a similar outcome: restitution should apply “whenever possible” and compensation is to be

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<sup>177</sup>*Supra* note 152, parag. 54

<sup>178</sup>*Supra* note 42, parag. 16.

provided for “any economically assessable damage”. In sum, reparation should be afforded to victims, and depending of what is determined to be appropriate on a casuistic basis the reparations can be afforded through various means. However, the aforementioned instruments emphasize the provision of compensation, and restitution in first place if possible.

Several aspects of the New Approach correspond to means of affording reparation to victims as mentioned in the Principles and Guidelines and Guidelines: rehabilitation, satisfaction, partial restitution for secondary damages, and compensation. However, the efforts under Track 1 are presented as certain to be implemented, while those under Track 2 are presented in conditional language as *would be* options if the UN receives funding. As previously noted, although projects under Track 1 correspond to certain forms of reparation, they do not differentiate between victims and non-victims and cannot significantly be distinguished from other humanitarian assistance projects. Track 2 of the New Approach therefore contains the measures which theoretically correspond the best to the means of providing reparation.

With its material assistance and support package it is per definition intended to be more victim-focused, through both its community and individual approach. Their intention to include victims and communities in the shaping of the various projects is in line with the Principles and Guidelines’ preamble’s reference to including the participation of victims throughout the reparation process. However, as expressly noted in the New Approach, consultations will not begin until sufficient funding has been secured. This highlights two major problems 1) considering the severe underfunding of the Trust Fund, track 2 may never be implemented, in either its collective or individual approach, which will compromise the right to appropriate forms of reparations; and 2) as a result, consultations with victims regarding the status of track 2, and their needs, would not be carried out.

The non-execution of Track 2 would reduce the reparation under the New Approach to short term and long term efforts to reduce cholera transmission and eliminate cholera from Haiti, as suggested under Track 1. However, the efforts to definitely end the epidemic understandably do not discriminate between recipient

regions, or attempt to identify particularly affected communities, let alone distinguish between victims and non-victims. It focuses on preventing future victims and to provide better care to those that are, or will be, ill. If the statement in the preamble to the Principles and Guidelines that victims may be persons who “collectively” suffered harm<sup>179</sup> can be interpreted as validating collective reparations, they are nevertheless intended to benefit *victims*. If this is not the case, there is a risk that means of reparation become no different than a development project. With regards to collective reparations ordered by the ICC, it has been argued that “without the combined support of specific and targeted individual reparations, these [collective means of reparation] alone may easily lose their reparative objective, becoming humanitarian or developmental in nature. The Court must therefore be careful to ensure that it continues to fulfil its mandate to provide reparations which, at the very least, address the principles of restitution, compensation and rehabilitation”.<sup>180</sup> Nevertheless, TRC recommendations often involve reparations by way of development programmes, as well as symbolic measures<sup>181</sup>. Furthermore, with regards to reparations in the African human rights system, it has been asserted that collective reparation should complement individual reparation and not a substitute: “[w]hile the group identified as [victims] might be entitled to collective reparation, it is important to emphasize that this does not exclude the individual victims’ right to reparation for individual harm”.<sup>182</sup> In international criminal law cases of mass-violations where the number of claims is high, collective reparations can be deemed more appropriate than individual forms.<sup>183</sup> For international organizations, the financial capacity to respond to reparation requirements is often inadequate<sup>184</sup> which could be a factor for considering collective reparation as more appropriate.

In sum, the non-execution of Track 2 would remove the victim focus, both individually and collectively, and result in no monetary compensation.

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<sup>179</sup>*Supra* note 9, “Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively”, para. 9.

<sup>180</sup>*Supra* note 177.

<sup>181</sup>Contreras-Garduño, Diana, *Defining Beneficiaries of Collective Reparations: The experience of the IACtHR*, Amsterdam Law Forum, Vrije Universiteit Amsterdam, Vol. 4, No. 3 (2012), p 47.

<sup>182</sup>Reaching for Justice, *The Right to Reparation in the African Human Rights System*, October 2013, retrieved from <http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf>.

<sup>183</sup>International Criminal Court (ICC), *ICC Rules of Procedure and Evidence*, 2002, Rule 98(3).

<sup>184</sup>DARIO with commentaries, p. 59, para 5.

Nevertheless, whether reparation is afforded collectively or individually, the participation of victims in the process should not be neglected. In the *Lubanga case*, the ICC ordered that the collective reparations programmes would be decided in consultation with their beneficiaries”.<sup>185</sup> Indeed, transitional justice initiatives often highlight the importance of participation and consultation of victims<sup>186</sup>. The judges considered that “[t]he Court should attempt to hear from as many victims as possible, in order to ensure reparations adequately reflect the wishes of those most affected. Such measures would ensure that the ICC acts in accordance with the UN Principles and Guidelines and Guidelines on a Right to a Remedy and Reparation, which requires that victims have their right to access to justice and redress mechanisms fully respected, and are granted access to relevant information concerning violations and reparation mechanisms”.<sup>187</sup> This also confirms that participation is indeed a requirement for full compliance with the Principles and Guidelines.

With only Track 1 which lacks victim focus, the New Approach would thus be lacking the participatory dimension referenced in paragraph 5 of the preamble to the Principles and Guidelines and would undermine the response of the UN and reduce its compatibility with international human rights standards.

#### 4.3.1 The public apology issued to the Haitian population

To issue a public apology corresponds to reparation in the form of satisfaction and should additionally include “acknowledgement of the facts and acceptance of responsibility” as per principle 22(e) of the Principles and Guidelines. The Secretary-General’s remarks to the General Assembly in December 2016 included an apology to the Haitian people as well as reference to moral duties of the Organization. The apology to the Haitian population is however drafted in terms

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<sup>185</sup>ICC, *Lubanga Case*, ICC-01/04-01/06, 7 August 2012, parag.187.

<sup>186</sup>Elena Birchall, Evie Francq and Annick Pijnenburg, *The International Criminal Court and Reparations for Child Victims of Armed Conflict*, Reparations Unit, Briefing Paper No.4, Published in August 2011, Edited by Dr. Clara Sandoval, p.26.

<sup>187</sup>ICC, *THE PROSECUTOR v. GERMAIN KATANGA case*, Trial Chamber II, ICC-01/04-01/07, 14 May 2015. Available at [https://www.icc-cpi.int/CourtRecords/CR2015\\_05810.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_05810.PDF). P. 10

as not to establish a causal link between the apology and the outbreak of cholera. It expresses regret for the suffering of the cholera victims, but is not an apology for the outbreak of the disease. The language is indeed absent of any conjunctions that express a causal link:

“The United Nations deeply regrets the loss of life and suffering caused by the cholera outbreak in Haiti”.

- It expresses regret for the suffering caused by the outbreak, but there is no mention of what initially caused the outbreak or of any causal link;

“On behalf of the United Nations, I want to say very clearly: we apologize to the Haitian People”.

-The Secretary-General apologizes on behalf of the Organization, without specifying what for;

“We simply did not do enough with regard to the cholera outbreak and its spread in Haiti. We are profoundly sorry for our role”.<sup>188</sup>

The reference to “not doing enough” perhaps constitutes the strongest language and can be seen as recognizing an omission. However, the wording “with regards to” the outbreak and its spread is a rather neutral language which does not illustrate the link between UN peacekeepers and the actual outbreak. The apology is unrestricted and unqualified, yet drafted in such terms that it could have been issued whether the UN negligently caused the outbreak or not. Moreover, it is addressed to the Haitian population as a whole and does not make specific reference to cholera victims. Furthermore, the International Center for Transitional Justice has found that, in order to be effective, an apology should “tell victims what else will be done to redress the harm that was caused as well as what is being done to keep them safe from further harm”<sup>189</sup>, which is not the case for the apology addressed to the Haitian population.

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<sup>188</sup>Remarks of the Secretary-General, 1 December 2016. *available at* <https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>

<sup>189</sup> Ruben Carranza, Cristián Correa, and Elena Naughton, *More than just words, apologies as a form of reparation*, International Center for Transitional Justice, December 2015, p. 18. *Available at* <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf>

Shelton has analyzed the various ways in which States respond to increasing numbers of historical injustice claims, including the resort to apology. She identifies two categories of apologies: the first is an acknowledgement of the suffering of others and intends to express regret “over events that are outside the control of the speaker” and comparable to an expression such as “I am really sorry about the terrible weather we are having”; secondly the apology can be an acceptance of fault, such as apologizing for loosing someone’s book, and Shelton asserts that “only in the last instance that apology may carry with it legal implications, establishing a causal link between the action of the speaker and the injury suffered”.<sup>190</sup> Shelton further notes that States may be reluctant to issuing apologies since they may be used to strengthen a legal claim for remedy. Apologies as reparation are nevertheless a common feature in transitional justice<sup>191</sup> which can entail both judicial and non-judicial mechanisms to address widespread human rights violations. Transitional justice mechanisms are thus an example of how an apology can include acknowledgement of responsibility without the “risk” of legal repercussions. Yet, the apology to the Haitian population is drafted in terms as not to express causality or an acknowledgement of responsibility, legal or not, despite the fact that the class-action’s procedural history has already manifested the impossibility to bring the Organization to court.

Apologies have been offered by the UN in other situations where claims have been rejected as non-receivable. In a statement pertaining to the genocide in Rwanda, the Secretary-General at the time said that “[o]n behalf of the United Nations, I acknowledge this failure and express my deep remorse”.<sup>192</sup> And in the Security-Council’s report related to the Srebrenica massacres, the Secretary-General expressed that “[i]t was with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica”.<sup>193</sup> Although none of the apologies contain express reference to

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<sup>190</sup>Shelton, Dinah. *Remedies in international human rights law*. n.p.: Oxford: Oxford University Press, 2005, 2005. p. 277.

<sup>191</sup>*Supra* note 188, p. 3

<sup>192</sup>UN, Secretary General, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, Press Release, SG/SM/7263, available at <http://www.un.org/press/en/1999/19991216.sgsm7263.doc.html>

<sup>193</sup>UN SC, Report of the Secretary-general pursuant to General Assembly resolution 53/35, 15 November 1999, A/54/549, available at,

responsibility, their language is arguably drafted in stronger language than that addressed with regards to the cholera epidemic. The first apology contains the terms “acknowledge” and “failure”, and the second refers to the Organization’s “actions” and “decisions” rather than its “role” as expressed in the apology to the Haitian population. Without comparing or equating the introduction of cholera and genocide, it is interesting that the UN’s language in the apologies regarding Rwanda and Srebrenica are stronger than that in the apology regarding Haiti, considering that the former concern a failure to prevent an atrocity caused by someone else, while the cholera case concern the failure to prevent the spreading of a disease caused by the UN’s own negligence in health controls and waste management.

It appears indeed that the cholera claims present differences compared to the previous cases of claims rejected as being of public character. In his report to the Secretary-General, Alston suggested that a response could be shaped based on elements both from the law of torts and from international human rights law, because no international legal regime seem fit the cholera claims perfectly.<sup>194</sup> Indeed, the proponents for engaging the UN’s legal responsibility have asserted that the cholera claims have the typical character of third party claims, while the large number of claims recalls the situations where transitional justice measures are applied to provide reparation for mass-violations of human rights. Perhaps the particularity of the cholera claims and their contested categorization can explain why the apology to Haiti has been drafted in such careful terms, avoiding causality and reference to any responsibility, when both previous examples of UN apologies and transitional justice measures demonstrate that stronger language can be used.

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[http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_549\\_1999.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_549_1999.pdf) , parag. 503

<sup>194</sup>*Supra* note 1, parag. 61.

#### **4.4 The substance of the Moral Responsibility recognized by the UN with regards to the cholera crisis: responsibility without accountability**

The form of moral responsibility acknowledged by the Organization is not such as to establish causality with the cholera outbreak, but constitutes a recognition of moral responsibility for the future. While we have seen in previous chapters that no claims can be made in court to engage the UN's *legal* responsibility, this chapter shows that the moral responsibility of the UN has been defined so as to avoid the possibility to make claim on its basis as well. In theory, the recognition of moral responsibility is not an obstacle *per se* to respecting the principles of reparation, but in light of the underlying reasons for the insufficient reparation measures in the New Approach, we can conclude that for the Haiti cholera case, it is an obstacle. The insufficient funding causes the compensatory aspects of the New Approach that are most in line with reparation law to be unexecuted, and as a consequence the participatory aspects are omitted as well. Whether legal or moral, the responsibility of the UN should be for, not only its role in the cholera outbreak, but for its role in *causing* the outbreak. And any response based on this type of recognition ought to have included an *obligation* of funding for the UN Member States, so as to give substance to its responsibility and effectively guarantee the right to reparation for the benefit of the cholera victims in Haiti. The New Approach is indeed intending to possibly provide remedy to the victims, not based on obligation, but on good will only. The responsibility thus has no accountability dimension, and seen from the perspective of the cholera victims, represent no more than absence of legal responsibility.

The UN has provided a new response, by way of reparation *ex gratia*, for the cholera crisis in Haiti based not on legal but on moral responsibility. By analyzing the language used to recognize responsibility and to draft the New Approach, this chapter argues that the UN's moral responsibility refers to responsibility *ex ante*, to help Haiti eliminate cholera, and not a responsibility *ex post facto*, which would correspond to a responsibility for something that the UN did. This chapter aims to identify to what extent the reparation under the New Approach is conditioned by

its foundation in moral responsibility. In previous chapters, it has been discussed how the UN may be qualified to be a moral agent, and thus have moral responsibility, there is no definition of what moral responsibility or obligations denote for the UN or with regards to its activities. However, because the UN itself refers to moral responsibility as is the case for the New Approach to cholera in Haiti, an attempt will be made to analyze what the understanding of the UN's moral responsibility corresponds to for the Organization in the cholera context, based on its statements in that regard, and with a view to the content of the New Approach.

As mentioned in previous chapters, Erskine defines moral responsibility as “[...] being answerable for a particular act or outcome in accordance with what are understood to be moral imperatives”. As for moral imperatives, she noted that at the international level they can be variously grounded and conceived. In order to understand what they may be in the international community one may refer to the UN's preamble which *inter alia* reads “We the people of the United Nations determined: to save succeeding generations from the scourge of war [...]; and “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...]”. This can be interpreted as constituting moral imperatives of the Organization, based on which its purposes are established. Furthermore it can be confirmed by statements such as a Security-Council presidential remark which reads that the council “remains deeply concerned by the devastating humanitarian, political and economic consequences of armed conflicts; and stresses the overriding political and moral imperatives to prevent the outbreak and escalation of armed conflicts and humanitarian crises, and the benefits therein for peace and development and friendly relations among all States”<sup>195</sup>, describing the prevention of armed conflicts and humanitarian crisis as moral imperatives.

In the remarks to the General Assembly announcing the New Approach, as well as in the resolution that served to adopt it, the Secretary-General mentioned the Organization's “moral responsibility to those who have been most directly affected”; encouraged Member States to “step up in solidarity to our moral duty”;

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<sup>195</sup>UN Security Council, Statement by the President of the Security Council, 12 July 2005, UN Security-Council S/PRST/2005/30, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PRST/2005/30](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2005/30), parag 3.

and that “we have a moral responsibility to act. And [...] a collective responsibility to deliver”.<sup>196</sup> The resolution summarized the UN chief’s statements as follows: [the] United Nations has a moral responsibility to the victims of the cholera epidemic and to support Haiti in overcoming the epidemic and building sound water, sanitation and health systems”<sup>197</sup>. Erskine’s categorization of statements on moral responsibility can be applied to the UN’s references thereto with regards to the New Approach, in order to determine what understanding of responsibility they reflect. The *ex post facto* judgements are statements that refer to an act or omission in the past. However, the abovementioned statements make no reference to past actions, only to responsibility towards the most affected victims, and to support Haiti in ending cholera. There is no mention of responsibility *for* any of the UN’s actions. According to Erskine’s dichotomy, the statements thus qualify as *ex ante* judgements: referring to future acts that ought to be performed. It can therefore be concluded that the responsibility in question, since the statement makes no connection with past events, is not based thereupon but on something else, such as the moral imperatives previously discussed.

Other references to moral responsibility or obligation by the UN include the Secretary-General’s statement that the UN “has a moral duty to act on the lessons of Rwanda”<sup>198</sup>, or that there is a “moral and political obligation to help those who are fleeing wars, human rights violations and persecution”.<sup>199</sup> With regards to the situation in Syria, the UN even stated that “moral and ethical accountability” befalls all those who hinder the access of humanitarian convoys.<sup>200</sup> The two former statements fall under the *ex ante* judgement category, in that they refer to future acts, whereas the last statement refer to moral accountability which necessarily exist with regards to an act in the past, but is not addressed towards the UN itself. What the situations that gave rise to the statements have in common is the absence of legal responsibility. For the genocide in Rwanda, the reasons for rejecting demands to engage the UN’s legal responsibility have been discussed,

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<sup>196</sup>UNSG, Press Release, Parag. 10, 34 and 37, SG/SM/18323-GA/11862, 1 DECEMBER 2016

<sup>197</sup>*Supra* note 152, p. 1

<sup>198</sup>UNSG, United Nations has Moral Duty to Act on Lessons of Rwanda, Says Secretary-General in Message to Mark Fourteenth Anniversary of 1994 Genocide, 4 April 2008, SG/SM11495-  
AFR/1674. Available at <http://www.un.org/press/en/2008/sgsm11495.doc.htm>

<sup>199</sup>UN, “Civilians in Syria’s ‘Four Towns’ need support as humanitarian catastrophe looms – UN relief official”, UN News Centre. Available at

[http://www.un.org/apps/news/story.asp?NewsID=56164#.WRI54\\_nyjcs](http://www.un.org/apps/news/story.asp?NewsID=56164#.WRI54_nyjcs)

<sup>200</sup>*Ibid.*

and there are no legal obligations to provide humanitarian assistance. With regards to the UN's own moral responsibility, it appears that a duty to act may arise although the Organization is not legally required to do so, and the statements to this effect refer to future acts. As seen in the cholera case, only the apology issued by the Secretary-General mentions past events, and not doing enough "with regards to the cholera epidemic", but is devoid of references to responsibility, fault, causality or without acts that will stem from the apology. Thus, the UN has provided an apology for the past, and recognition of moral responsibility for the future. By way of an *a contrario* interpretation of the UN's own understanding of responsibility, it can be deduced that the UN is not morally responsible for causing the cholera epidemic in Haiti, or, in other words, it is *responsible*, but not *accountable*.

#### 4.4.1 Moral responsibility *ex ante* and the New Approach to cholera

The moral responsibility as recognized by the UN generates a moral duty to help eliminate cholera, and thus does not constitute a responsibility for causing cholera. *Quid* the statements that referred to a duty towards those most affected by the outbreak? Since the admission of responsibility towards cholera victims is not *ex post facto*, it is not based on their capacity as victims in the legal sense of *victim* of wrongdoing, but merely as victims of the cholera outbreak in general. In this sense, the cholera outbreak could have occurred irrespective of fault or negligence, let alone that of the UN. The fault dimension, even in the moral sphere as referred to by the UN, is absent. Therefore, the UN's New Approach to cholera is not substantially different from an emergency response to a humanitarian disaster.

In the cholera case, the presentation of the New Approach as an act of good will based on a moral duty to help, and not a moral duty for causing harm, translates into funding through voluntary contributions at the discretion of Member States. In the current state of affairs, the insufficient funding will cause Track 2 to not be implemented, which constituted the part of the New Approach most in line with international human rights standards for reparation.

In theory, recognition of moral responsibility rather than legal responsibility is not an obstacle *per se* to providing victims with full reparation. With the exception of the judicial dimension of access to court that the right to effective remedy entails, remedy and reparation including compensation can be provided out of court. In the present case however, the content of the moral responsibility towards the cholera victims is devoid of an accountability dimension, meaning that for the victims it is equivalent to little more than a mere absence of legal responsibility.

Erskine speaks of an “intuitive sense that entities such as the UN can be held morally responsible”, and because the accountability dimension is lacking, the recognition of moral responsibility in connection to the cholera crisis has the effect of undermining the UN’s moral authority. The UN can be seen as a ‘global governance actor’ exercising what can be referred to as international public authority which generates expectations in the international community that it will be answerable and subordinated to the Rule of Law in similar ways as a State. It is also notable that strengthening the Rule of Law and Haiti’s justice system has been one of the main preoccupations of MINUSTAH is what the coming operation MINUJUSTH will inherit from the previous mandate.. The cholera case illustrates several conflicts and developments in the international legal sphere. It illustrates the conflict between the regime of immunities with the right of individuals to reparation for human rights violations, which in turn exposes the tensions between the interests of individuals as subjects of international law and the interests of States and international organizations – the giants who have long dominated the scene. The multidimensional UN peacekeeping mandates often involve supporting State functions and concern both legal and political institutions. The evolution of the right and obligations of individuals as subjects of international law has perhaps brought us on a path towards an international legal system more resembling of our vertical national ones, where all institutions, including on the international level, can be held responsible not out of good will, but because they must.



# Field study in Haiti: Interview questions

Semi-structured interviews were carried out with cholera victims and lawyers in Port au Prince, in order to gather qualitative information on views on the reparation and how they perceive the content of the United Nations New Approach.

In accordance with ethical guidelines for interviews, the informants were granted anonymity as to their personal information.

Individual and group interviews were conducted on 12 March and 30 March, in Port au Prince and in the Mirebalais region where the outbreak erupted.

The same questions were asked to the lawyers as to the cholera victims, with the exception of question no. 1 which was not asked to lawyers. Question no. 2 was altered to “which reparation would best correspond to the victims’ needs” when asked to lawyers.

1. In what way were you affected by the cholera epidemic?
2. Which reparation would best respond to your needs?
3. What do you think of the apology offered by the UN Secretary-General to the Haitian people for the UN’s role in the cholera outbreak?
4. What do you think of community projects as reparation?
5. What do you think of individual reparation?



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