CHOLERA IN HAITI: UNITED NATIONS IMMUNITY AND ACCOUNTABILITY

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ABSTRACT

United Nations peacekeepers brought cholera to Haiti in the aftermath of the 2010 earthquake and the disease quickly spread into an epidemic, killing 3,000 people and sickening many more. Advocates for Haitians filed claims against the U.N., seeking reparations. However, despite strong circumstantial and genetic evidence of the U.N.’s responsibility for introducing the disease, it has escaped liability by successfully asserting legal immunity. This Note examines the sources of and rationale for U.N. immunity and the failed attempts of Haitian advocates to nonetheless recover for their clients. Special attention is given to the lawsuit Georges v. United Nations, brought in United States federal court. The Note concludes by advancing policy proposals that hold the U.N. accountable while respecting its obligations to current and future stakeholders.

I. INTRODUCTION .................................... 760

II. CHOLERA IN HAITI ................................. 760
   A. Poverty in Haiti. .............................. 761
   B. The Earthquake. ............................... 762
   C. Cholera Arrives ............................... 763
   D. U.N. Investigation and Report ............... 766

III. U.N. IMMUNITY ................................... 768
   A. Absolute Immunity. ........................... 769
   B. “Appropriate Modes of Settlement” ............ 770
   C. Suit in National Courts ....................... 772

IV. GEORGES V. UNITED NATIONS .................... 774
   A. A Claim Rejected .............................. 774
   B. Private Law Claim? ............................ 775
   C. Immunity Upheld in Court ..................... 778
   D. Georges was Legally Correct .................. 780
   E. Georges was Good Policy ....................... 781

V. A POSSIBLE SOLUTION ............................ 785
   A. To Whom is the United Nations Accountable? .... 785
   B. Potential Policy Response ..................... 787

VI. CONCLUSION ..................................... 791

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I. INTRODUCTION

Ten months after the 2010 earthquake in Haiti, United Nations peacekeepers introduced cholera to the country, where it quickly exploded into an epidemic, killing thousands of people and sickening hundreds of thousands. A U.N.-commissioned official report on the outbreak acknowledged the circumstantial evidence implicating the U.N. and commentators are nearly unanimous in identifying the U.N. as the source of the outbreak. But it has not taken responsibility for the ongoing epidemic. From internal claims procedures to federal district court, the U.N. has consistently asserted immunity and resisted the imposition of liability. This Note departs from much of the existing literature on the topic by arguing that the U.N.’s absolute immunity is good policy, despite the apparent unfairness to the victims of the disease. Part I introduces readers to Haiti and provides the factual context to understand the severity of the epidemic. Part II explains the legal basis for the U.N.’s assertions of absolute immunity and the legal theories which nonetheless attempt to impose liability on the U.N. Part III examines the claims of Haitian cholera victims: first, their claims made directly to the U.N. and second, the lawsuit filed in federal court. This Note argues that the U.N.’s decision to not receive the claims was consistent with their internal procedures, that the district court’s decision to dismiss the case was legally correct, and that both decisions—and U.N. immunity generally—are good policy. Part IV identifies the parties to which the U.N. is accountable, and from that perspective, suggests policies through which the U.N. can take responsibility for the cholera epidemic.

II. CHOLERA IN HAITI

“More misery in Haiti is an almost unfathomable thing.”

In 2010, a huge earthquake devastated Haiti, the western hemisphere’s poorest country. After the earthquake, the longstanding U.N. presence in the country turned towards helping it rebuild. Despite the U.N.’s good intentions, it caused another catastrophe in Haiti. Peacekeepers from Nepal introduced the virulent disease cholera ten months ago. 

later. With poor water and sanitation infrastructure throughout the
country, the disease spread quickly, sickening 140,000 people and
ekilling 3,000. Despite independent reports and circumstantial evidence
that identify U.N. peacekeepers as the source of the outbreak, the
U.N.’s own official report avoids placing responsibility on any one
actor. The epidemic continues today with no end in sight.

A. Poverty in Haiti

Haiti is a nation-state located on the Caribbean island of Hispaniola,
sixty miles east of Cuba. It is slightly larger than Maryland and only a
two-hour flight from Miami. But that two-hour flight covers the dis-
cance between the Western Hemisphere’s richest country and its
poorest. Haiti’s GDP per capita in 2013 was just USD $819, more than
sixty times smaller than the United States’.2 In recent history, a mess of
trouble has brought the country to its knees: hurricanes and earth-
quakes, military coups and election violence, ineffective and corrupt
governance, armed gangs, food shortages and widespread hunger—
and since 2010, an epidemic of cholera. As a result, the economy has
not grown on a per-capita basis in nearly twenty years.3

Slums, unemployment, scarce education, a dysfunctional govern-
ment, and a lack of basic services make life precarious for the 10.4
million4 people who live there. The country has the lowest Human
Development Index of any country in the Western Hemisphere.5 It is a
place without the opportunity of developed nations, where many
people cling to existence and the government itself is deeply depen-
don foreign aid.

For better or worse, the United Nations has a long history of
involvement in Haiti—its seven missions there are more than in any


3. Controlled for inflation. In 1998, the GPP per capita in 2000 U.S. dollars was $497. In 2012, the last year for which data is available, it was $473. GDP per capita (constant US $), Google (last updated Mar. 19, 2015). http://www.google.com/publicdata/explore?ds=d5bncppjof89_ &cttype=1&strail=false&bcs=d&nselm=1&net_y=ny_gdp_pcap_kd&scale_y=lin&ind_y=false&dim=region&dim=country&hl=en&dl=en&ind=false&xMax=5.025&xMin=-159.50465700048&yMax=40.5892370150804&mapType=t&icfg&iconSize=0.5.


other country. The current U.N. mission in Haiti began in 2004 and is known as MINUSTAH. Its mandate includes ensuring a secure and stable political environment and “support[ing] . . . efforts to promote and protect human rights . . . in order to ensure individual accountability for human rights abuses and redress for victims.” Despite the billions of dollars the U.N. has invested in Haiti, the organization is deeply unpopular there. Even before cholera, allegations of sexual abuse, partisan violence, and a sense that the U.N. is not prioritizing Haiti’s true development needs popularized “[t]he ubiquitous phrase . . . ‘MINUSTAH se an vakans’ –MINUSTAH is on vacation.” Nevertheless, in annual resolutions since 2004, the U.N. Security Council has recognized the ongoing need for the U.N. presence in Haiti and authorized the continued mission of MINUSTAH.

B. The Earthquake

A 7.0 magnitude earthquake devastated Haiti on January 22, 2010, the worst earthquake in more than 200 years. The earthquake devastated all aspects of society. The quake destroyed 250,000 homes and 30,000 businesses. The government estimated the number of dead at 217,000 and an additional 300,000 injured people. Even more were displaced. In the capital, the air stank with the smell of rotting corpses. Further, the government itself was crippled:

[U]p to one third of the country’s 60,000 civil servants perished. Many government buildings were destroyed or badly damaged, notably the National Palace, the Supreme Court, the Palais de Justice, the Parliament, the major courts and police

8. Id. ¶ 7.
13. Haiti quake death toll rises to 230,000, supra note 12.
14. KATZ, supra note 9, at 219.
facilities, and all but one Ministry. The Haitian National Police was hard hit, with 77 officers killed and hundreds injured or unaccounted for . . . . Half of the total 8,535 prisoners in Haiti escaped[.]

The lack of infrastructure in the country magnified the effects of the earthquake, particularly regarding vulnerability to disease. No effective sanitation system existed before the earthquake, and in the displaced persons camps human waste sat in open sewers. As the aftershocks lessened and aid organizations arrived, officials warned of the possibility of disease outbreak. For months, those warnings remained conjectural.

C. Cholera Arrives

Haiti was likely free from cholera during the entire twentieth century and may never have experienced the disease before. Cholera’s unwelcome arrival in Haiti was officially noted on October 22, 2010, with laboratory confirmation of the first modern case of the disease. Ten weeks later, the epidemic had spread to the entire country, sickening 140,000 and killing 3,000 people.

Cholera is a highly infectious disease that causes intense diarrhea that can dehydrate and kill a healthy adult within hours of infection.

18. See, e.g., id.; Haiti quake death toll rises to 230,000, supra note 12; Betsy McKay, Disease, Malnutrition Risk Grows in Haiti, WALL STREET J. (Jan. 22, 2010), http://www.wsj.com/articles/SB10001424052748704423204575017212438069120.
19. Cholera existed in other Caribbean nations, including the Dominican Republic, during the 19th century, but there is circumstantial evidence suggesting that Haiti was spared. Deborah Jenson et al., Cholera in Haiti and Other Caribbean Regions, 19th Century, 17 EMERGING INFECTIOUS DISEASES 2130, 2130 (2011).
22. FARMER, supra note 21, at 189.
It is a fecal-oral disease, spread through the consumption of contaminated food or water.\textsuperscript{23}

The diarrhea itself is not painful, but the disease can be extremely dangerous:

Cholera diarrhea literally runs out of the person like a faucet. In cholera treatment centers, special cots . . . constructed of heavy plastic with a 4- to 6-inch hole cut in the center [are used because patients cannot use a toilet]. A bucket with chlorine is placed underneath to collect the . . . up to 20 liters [of diarrhea] per day."\textsuperscript{24}

Even survivors of cholera may be permanently injured.\textsuperscript{25} Treatment with oral rehydration salts and I.V. rehydration can significantly decrease the fatality rate, from fifty percent to around one percent.\textsuperscript{26}

Even before the earthquake, Haiti lacked the clean water and sanitation infrastructure that could slow the disease’s spread.\textsuperscript{27} Consequently, by the time the first official case was confirmed on October 22, the outbreak was already well established along the Artibonite River, used by much of the country for drinking, bathing, and irrigation.\textsuperscript{28}

The disease spread quickly: one commentator likened the introduction of cholera to Haiti to be “like throwing a lighted match into a gasoline-filled room.”\textsuperscript{29} Epidemiological research has since identified the first hospitalized case of the disease as occurring on October 17, in a community called Mirebalais, located near a U.N. camp on a tributary of the Artibonite River.\textsuperscript{30}
But the story of cholera in Haiti actually begins weeks earlier and nine thousand miles away, in Kathmandu, Nepal. A September 23, 2010, story in *The Himalayan Times* reported twenty-five recent deaths from cholera in that city. U.N. Troops from Kathmandu arrived in Haiti, at the camp near the first recorded cases of cholera, on October 9 through 16—without having been tested for the disease. An AP reporter visited the Nepalese U.N. camp in the days after the outbreak and reported seeing a broken PVC pipe “[r]unning from a near what looked like a building of latrines . . . leak[ing] a foul-smelling black liquid toward the river.” The U.N.’s official report on the cholera outbreak concluded that “[t]he sanitation conditions at the Mirebalais MINUSTAH camp were not sufficient to prevent fecal contamination” of the river system and that contaminated river water was “the most likely cause of the outbreak.” Subsequent testing provided the ultimate circumstantial evidence: a genetic test confirmed that the strain of cholera responsible for the outbreak in Haiti was identical to the strain found in Nepal.

Today, the cholera epidemic continues in Haiti and the Caribbean region. More than 750,000 people have been sickened by the disease and more than 8,700 have died. Efforts to eliminate the disease have

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34. KATZ, supra note 9, at 228; see also Jonathan Katz, *Haiti Cholera Outbreak: UN Investigates Epidemic’s Origin*, HUFFINGTON POST (Oct. 28, 2010), http://www.huffingtonpost.com/2010/10/28/haiti-cholera-outbreak-un_n_775182.html (“The people who live nearby said both the on-base septic tank and the [sewage] pits constantly overflow into the babbling stream where they bathe, drink and wash clothes.”).
35. CRAVIOTO ET AL., supra note 20, at 3.
36. Id. at 18.
37. See Sontag, supra note 29; CRAVIOTO ET AL., supra note 20, at 27.
39. Id.
failed. The U.N.’s goal of eradicating the disease, announced in 2012, is foundering for lack of funding. A U.N. official noted that at current rates of donor funding it would take “more than 40 years” to develop Haiti’s basic health, water, and sanitation services to an acceptable level. This statement reveals the scale of the challenge: eliminating cholera is a goal that can only be met when clean water and toilet facilities are universally available—but this is a foundational development objective that has been a long time goal of Haiti and international development organizations. Cholera imposes an economic cost, impairing the ability of the country to rebuild and grow. It diverts resources from other health and development programs; and it sickens tens of thousands of people each year, killing hundreds, with no sign of stopping. Identifying the source of the outbreak may have had an epidemiological purpose early in the outbreak, but as time passes, the purpose of that investigation becomes more linked to principles of justice and responsibility.

D. U.N. Investigation and Report

Rumors about U.N. responsibility for the cholera epidemic surfaced quickly after the cholera outbreak. As circumstantial evidence—and public unrest—grew in Haiti, U.N. Secretary-General Ban Ki-moon ordered an official investigation into the cause of the outbreak on December 17. The official report was released in May 2011. It was scientifically accurate and politically cautious, and became a key document in the later legal effort to hold the U.N. accountable for the epidemic. One commentator accurately assessed the report: “the bulk

40. The seven-week period at the start of 2015 saw more reported cases of cholera—7,225—and more death from the disease—86—than the same period in 2014 and 2012. Id.
43. Id. (quoting Pedro Medrano Rojas, Senior UN Coordinator for the Cholera Response in Haiti).
44. See Anastasia Moloney, Cholera will plague Haiti until water, sanitation crisis solved—experts— TRF/Reuters (Mar. 26, 2015), http://in.reuters.com/article/2015/03/26/haiti-cholera-idINL6 NEWS0A620150326.
45. Katz, supra note 9, at 226.
of it [was] damning . . . [b]ut when it came to accountability, the report balked.”\textsuperscript{47} The Secretary-General announced the report’s findings:

[T]he cholera outbreak had been caused by a \textit{confluence of circumstances}, including the contamination of the Meye River Tributary System of the Artibonite River with a pathogenic strain of the current South Asian-type Vibrio cholerae bacterium, poor water and sanitation conditions in Haiti, and the widespread use of river water for washing, bathing, drinking and recreation, and . . . \textit{it was not the fault of—or due to deliberate action by—a group or individual.}\textsuperscript{48}

The report, despite its “confluence of circumstances” conclusion, carefully analyzed the circumstantial evidence—the outbreak of the disease after the arrival of Nepalese peacekeepers, the poor sanitation conditions of the camp, and the genetic evidence—that condemns the U.N. However, the conclusion was weak.

The report’s most significant flaw is the conclusion that a “confluence of circumstances” caused the outbreak. This conclusion is not faithful to the panel’s mandate “to determine the source” of the outbreak.\textsuperscript{49} A source cannot be a confluence of circumstances—rather, it is a single point of origin.\textsuperscript{50} No matter how many aggravating circumstances are present, there is one circumstance without which there cannot be a cholera outbreak: cholera itself. Comments by the report’s authors made after its release support this criticism. The lead author, Dr. Alejandro Cravioto, agreed that “all the evidence pointed to the U.N.”\textsuperscript{51} Another author, Dr. Daniele Lantagne, later said that “the most likely scenario is that the cholera began with someone at the Minustah base.”\textsuperscript{52}

Doctor Paul Farmer, a renowned public health expert, commented that a refusal to find the origin of the outbreak “sounds like politics to me, not science.”\textsuperscript{53} Politics shaped the report and the underlying

\begin{itemize}
\item \textsuperscript{47} \textit{Katz, supra} note 9, at 241-42.
\item \textsuperscript{49} \textit{Cravioto et al., supra} note 20, at 9.
\item \textsuperscript{50} \textit{Katz, supra} note 9, at 236-39 for a discussion of the importance of identifying the source of an outbreak.
\item \textsuperscript{51} \textit{Katz, supra} note 9, at 243.
\item \textsuperscript{52} Sontag, \textit{supra} note 29 (quoting Daniele Lantagne).
\item \textsuperscript{53} \textit{Katz, supra} note 9, at 237 (quoting Dr. Paul Farmer).
\end{itemize}
investigation. The U.N. refused to allow testing of the camp environment or the Nepalese troops in the period immediately following the outbreak, thus preventing any report from definitively identifying the source of the pathogen. 54 This was not coincidence. In the words of one commentator, “[t]he panel was missing the smoking gun, and in this sense, the cover-up worked.” 55 The milquetoast conclusion of the report did not end the investigation into the cause of the outbreak and the search for an accountable party; rather, it fueled the legal battles to follow.

III. U.N. IMMUNITY

“The history of foreign sovereign immunity [is] a well-known tale in which autonomy and privilege yield[] substantial ground to accountability and democratic ideals.” 56

The 1946 Convention on Privileges and Immunities of the United Nations (CPIUN) grants the organization absolute immunity from suit and lesser degrees of protection to U.N. personnel. 57 At the domestic level, bilateral agreements between the United Nations and a nation “hosting” a U.N. mission—known as a “status of forces agreement” or SOFA—and, in some counties, domestic legislation, contain immunity-granting provisions as well. 58 All of these expressions of immunity are limited, at least in theory, by a variety of exceptions. First, in some circumstances, the Secretary-General is obligated to waive immunity, and in others has discretion to do so. Second, language found in the CPIUN and many SOFAs calls for independent “standing claims commissions” to be established to receive claims from aggrieved third
parties. In reality, “internal claims review boards,” staffed by U.N. employees, serve the function of the standing claims commissions. Despite these procedures, injured parties across the world have are often not successful in establishing U.N. liability. Although there are nominally two exceptions to U.N. immunity, waiver and “appropriate modes of settlement,” the U.N. appears to only allow such exceptions, whether textually discretionary or obligatory, when doing so will not cause “prejudice to the interests of the United Nations.”

This section will first provide an overview of the legal basis of U.N. immunity, then discuss possible approaches for nonetheless imposing liability.

A. Absolute Immunity

The CPIUN, adopted at the first session of the General Assembly in 1946, grants the U.N. absolute immunity subject to an express waiver exception: “The United Nations, its property and assets wherever located and by whomever held, shall enjoy immunity from every form of legal process, except insofar as in a particular case it has expressly waived its immunity.” The CPUIN provides for an exception to this grant of absolute immunity: express waiver. Yet, the express waiver method does not provide a consistent route to the compensation or procedural justice that injured parties deserve.

The Secretary-General may waive the immunity protecting the United Nations and its personnel. Occasionally, the Secretary-General pro-


60. This language is part of the legal standard for the Secretary-General’s duty to waive the immunity of select U.N. personnel, but self-interest appears to guide the U.N.’s approach to all circumstances of immunity and potential liability. See CPIUN, supra note 57, §§ 20, 23.


62. CPIUN, supra note 57, § 29.

63. Id. §§ 20, 23. The Secretary-General is obligated to waive the immunity of U.N. personnel when “the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.” Id.

769
vides such a discretionary waiver and allows a suit against the organization to proceed in a national court. However, Secretaries General have been unwilling to waive liability in cases with the potential for huge damage awards and moral culpability. Injured parties seeking a court to hear claims against the U.N. will have trouble finding a court willing to do so if the U.N. does not want it to happen.

B. “Appropriate Modes of Settlement”

The CPIUN recognizes the lack of recourse for injured parties that absolute immunity creates and attempts to provide a solution. It commands that the U.N. “shall make provisions for appropriate modes of settlement of . . . disputes of a private law character to which the United Nations is a party.” However, the U.N. has largely not followed this command. The Secretary-General explained its procedures for complying with section 29 of the CPIUN in a 1995 report to the General Assembly. Notably, on the first page of the report, the Secretary-General paraphrases the text of the CPIUN and eliminates the imperative by writing, “the United Nations should make provisions for appropriate modes of settlement,” rather than “shall make,” as in the original CPUIN. This change sets the tone for the U.N.’s approach to fulfilling the mandate of section 29: it does so occasionally, at its discretion.

64. Michael Gerster & Dirk Rotenberg, Article 105 in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1318 (Bruno Simma et al. eds., 2d ed. 2002) (claiming that “the waiver of immunity has always been practiced conscientiously practiced by the organization” when there is not alternative means of legal recourse).

65. Secretary-General Kofi Annan did not waive immunity and allow a claim of institutional negligence and responsibility for the 1994 Rwandan genocide to proceed. See Mark Riley, UN to Seek Immunity on Rwanda, SYDNEY HERALD (Jan. 2000), https://www.globalpolicy.org/component/content/article/201/39245.html. U.N. immunity was asserted in the Mothers of Srebrenica case, where peacekeepers were alleged to have negligently failed to prevent the death of 8,000 to 10,000 people. See Matthew Pomy, Netherlands high court rules UN immune from suit, JURIST (Apr. 13, 2012), http://jurist.org/paperchase/2012/04/un-immune-from-prosecution-says-netherlands-high-court.php. Secretary-General Ban Ki-Moon did not waive immunity and allow the claims in Georges v. United Nations to proceed. See Letter from Preet Bharara, United States Attorney for the Southern District of New York to the Honorable J. Paul Oetken, United States District Judge (Mar. 7, 2014) (regarding Georges v. United Nations et al., Ex. 1 (letter from U.N. Legal Counsel stating that the “United Nations has expressly maintained its immunity”)).

66. CPIUN, supra note 57, § 29.

A model status of forces agreement (model SOFA), prepared in 1989 and designed to standardize the U.N.’s peacekeeping missions, provides that claims for compensation for personal injury, death, or property loss arising from peacekeeping operations, are to be resolved by a standing claims commission:

[A]ny dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party . . . shall be settled by a standing claims commission to be established for that purpose.

The U.N. regards this standing claims commission as the implementation of the obligation in section 29 of the CPIUN. Rulings of the standing claims commission would be binding on the United Nations. Crucially, however, a standing claims commission has never been established. In 1997, the Secretary-General disclaimed responsibility for the procedure having never been followed, calling the status quo “not inadequate” and suggesting that a “lack of political interest on the part of Host states” or claimants’ satisfaction with alternative procedures have caused the procedure to have gone unused.

The practical alternative to the standing claims board is an “internal claims review board” composed entirely of U.N. officials. This board

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68. See U.N. Secretary-General, supra note 59.


70. Letter from Pedro Medrano, Assistant Sec’y-General, United Nations, to Leilani Farha, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Office of the High Comm’r for Human Rights et al., 26 (Nov. 25, 2014), available at https://www.scribd.com/doc/261396640/Secretary-General’s-response, (“Paragraph 55 of the MINUSTAH SOFA [addressing the creation of a standing claims commission] is an implementation of Section 29(a.).”).

71. See U.N. Secretary-General, supra note 59.

72. U.N. Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the peacekeeping operations: Report of the Secretary-General, ¶ 8, U.N. Doc. A/51/903 (May 21, 1997) (“The standing claims commission as envisaged under the model agreement has never been established in the practice of United Nations peacekeeping operations.”); Matthew Russell Lee, UN Admits No Mission Has a Claims Commission, Like on Haiti Cholera, No Remedy, INNER CITY PRESS (Nov. 26, 2013), http://www.innercitypress.com/dpko1noremedy112613.html (quoting UN official saying, “we can confirm that no peacekeeping mission has a claims commission in place”).

73. Procedures in place, supra note 67, ¶ 17.
performs essentially the same function as a standing claims board would, but without several fundamental procedural safeguards. Un-
like standing claims commissions, such claims review boards have been
established and have awarded claimants compensation, including in
Haiti. However, the claims review board mechanism has been criti-
cized as insufficiently formal and “grossly inadequate.” One commen-
tator called the boards “incompatible” with fair process because, for
example, the U.N. is both adjudicator and a party to the proceedings.

In sum, the absolute immunity granted by the CPIUN is theoretically
tempered by possibility of an express waiver of immunity and the
mandate that the U.N. provide alternate means of settlement. In
practice, neither of these mechanisms are functional to a degree that a
claimant is ensured the procedural and substantial justice owed under
basic considerations of fairness.

C. *Suit in National Courts*

Despite the general rule of absolute U.N. immunity, many claimants
have brought claims in national courts—their “other option” after the
U.N. refuses to hear their claims. Claimants have had some success
limiting absolute immunity by asserting that the right to remedy
supersedes an organization’s immunity. Another approach is to file suit
in the troop-contributing nation, against the troop-contributing na-
tion. Neither avenue is a likely source of success for Haitian claimants.

Claimants’ primary theory for imposing liability on the U.N. is that
maintaining immunity would violate their right to remedy. The right to
remedy is articulated in the Universal Declaration of Human Rights:
“Everyone has the right to an effective remedy by the competent
national tribunals for acts violating the fundamental rights granted him

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74. For example, the proceedings of an internal local claims review board are not public and
the UN controls the membership of the board. See Karel Wellens, Remedies Against Interna-
tional Organizations 103-04 (2002).

75. Id. at 104. While the work of the internal review board is not public, an interoffice memo
Haiti existed in July 2008. See Assistant Sec’y-General, Interoffice Memorandum dated Mar. 26,
2009, from the Office of Program Planning to the Controller, Budgets and Accounts regarding ex

76. Tom Dannenbaum, Translating the Standard of Effective Control Into a System of Effective
Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop

77. Id.

78. See Wouters & Schmitt, supra note 58, at 78.
by the constitution or by law.” As the Universal Declaration is not binding, to succeed on this theory a claimant must show that the domestic court is bound to uphold that right. In the United States, case law forecloses the possibility of US courts denying U.N. immunity on the basis of a right to remedy. Some claimants have succeeded with this theory against other international organizations in Europe, but not against the U.N.

A second theory is that troop-contributing states can be held liable for the actions of U.N. peacekeepers to the extent that the U.N. is immune to those claims. However, this theory has not been argued successfully. It is likely to work only when the troops of the sovereign are clearly acting outside of their status as U.N. troops.

Haitian claimants face an uphill struggle to find a national court willing to set aside the U.N.’s immunity. As discussed below, U.S. case law is committed to the absolute immunity of the U.N. A suit in Nepalese court would also be extremely unlikely to succeed, given the role of peacekeeping in Nepal’s economy and the fact that cholera was caused while the peacekeepers were working within the scope of their U.N. duties.

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80. Charles H. Brower, II, United States, in The Privileges and Immunities of International Organizations in Domestic Courts 303, 310, 327 (August Reinish ed., 2013) (“US courts have shown little interest in . . . restrict[ing] international immunities as a means of increasing the effectiveness of human rights norms”). But see Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (“court must take great care not to unduly impair [a litigant’s] constitutional right of access to courts”).
81. See August Reinish & Ralph R. A. Janik, The Personality, Privileges, and Immunities of International Organizations before National Court—Room for Dialogue in The Privileges and Immunities of International Organizations in Domestic Courts 329, 329 (August Reinish ed., 2013) (“[T]he human rights obligations on forum states to accord litigants ‘access to justice’ . . . has led many domestic courts to balance the granting of jurisdictional immunity against the availability of reasonable alternative dispute-settlement options.”).
82. Dannenbaum, supra note 76, at 138 (arguing that troop-contributing countries are responsible for violations of human rights if the UN is not bound to uphold those rights).
84. See Katz, supra note 9, at 231 (describing the economic importance of Nepalese peacekeepers).
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IV. GEORGES V. UNITED NATIONS

“The Constitution is paper, the bayonet is steel”
-Haitian Proverb

The rule of law is scarce in Haiti. “[It] has seen thirty-two coups d’état in its two centuries as a nation, extensive foreign intervention in its domestic political affairs, and the gutting and rewriting of its constitution twenty-three times.” Dictators and foreign powers have extracted wealth and inflicted harm without accountability to the people of Haiti or the world. The damage inflicted by the U.N. through the introduction of cholera offered an opportunity for Haitians to hold someone accountable for the harm inflicted. However, the U.N. mission in Haiti rebuffed the claims submitted directly to it and the organization asserted immunity when suit was filed in United States federal court. To date, no entity has been held accountable for the cholera epidemic.

A. A Claim Rejected

The Institute for Justice and Democracy in Haiti (IDJH) has led a multi-pronged effort to recover compensation for Haitian victims of cholera. IDJH filed a formal claim for relief with MINUSTAH because, as had become standard U.N. practice, no standing claims commission was established in Haiti. The lengthy claim provided evidence of the U.N.’s responsibility for the outbreak and alleged negligence. It emphasized the petitioners’ right to a judicial remedy and asked for compensation of $50,000 USD for each petitioner injured by cholera and $100,000 for each killed by cholera; a national clean water system; and a public apology. The U.N. responded with a

85. Quigley, supra note 9, at 4.
86. Id. at 48. For a discussion of the dismal state of the justice system in Haiti, see the rest of that chapter.
87. See Leininger, supra note 6; Quigley, supra note 9, at 133-41.
91. Id.
two-page letter, quoting the official report on the cause of cholera as a “confluence of circumstances and . . . not the fault of, or deliberate action of, a group or individual.” It rejected the claims as “not receivable” because “consideration of these claims would necessarily involve a review of political and policy matters.”\footnote{92} This is a reference to the language of the CPIUN and SOFA, which call for U.N. to provide appropriate modes of settlement for “disputes of a private law character.”\footnote{93} Understanding the explanation requires examining how the UN conceives of the private law claims/not-private law claims distinction.

B. **Private Law Claim?**

Sound legal principles support the U.N.’s decision to not voluntarily make restitution payments to victims of cholera. These principles distinguish between actions made in a private context, as between two private parties, from political and policy decisions taken by a public sovereign.\footnote{94} The former is subject to common law principles of liability, while the later is not. The U.N.’s role in causing the cholera outbreak in Haiti, while containing elements of both, falls into the latter category.

Section 29 of the CPIUN, calling for the “provision of appropriate modes of settlement,” is by its terms limited to disputed of a “private law character” but provides no definition of that term.\footnote{95} The U.N. explains that in circumstances where the U.N. “is acting like a private person” the claims will be receivable.\footnote{96} In contrast, non-private-law claims are those “based on political or policy-related grievances,” such as those related to actions or decisions taken by the Security Council or the General Assembly” do not trigger the requirements of section 29.\footnote{97}


\footnote{93. \textit{See} CPIUN \textit{supra} note 57, § 29.}

\footnote{94. \textit{John W. Halderman, The United Nations and the Rule of Law} 215 (1966) (“It is the general practice to designate as ‘political’ those governmental issues and procedures as to which political forces are determinative . . . . They generally fall into categories designated as legislative, executive, and administrative. They are outside the political function, since this function is supposed to exclude political factors.”).}

\footnote{95. CPIUN, \textit{supra} note 57, § 29. The CPIUN provides that differences in the interpretation of the CPIUN “shall be referred” to the International Court of Justice (ICJ) for resolution. However, only the Security Council or the General Assembly may request an advisory opinion from the ICJ—thus recourse to the ICJ is well out of reach for IDJH or even Haiti. \textit{See} U.N. Charter art. 96.}

\footnote{96. Letter from Pedro Medrano, \textit{supra} note 70, at 27.}

\footnote{97. \textit{Id.}}
The boundary between these categories is indistinct because the U.N. uses an open standard to distinguish them. Thus, “an assertion that the United Nations has not adopted or implemented certain policies or practices does not generate a dispute of a private law character” because “[t]he nature of the duty allegedly owed by the [United Nations], the nature of the conduct or activity at issue, and other relevant circumstances” must be considered in determining whether the claim is of a private-law character.98 This expansive definition allows for the characterization of almost any claim as not private and not subject to private dispute resolution mechanisms. Thus, the interpretation given to the CPIUN provides legal justification for the U.N.’s discretionary approach to the textually mandatory “appropriate modes of settlement” provision.99 Indeed, Secretary-General Ban Ki-Moon said that he personally made the decision to reject the claims.100

The separation of legal and political matters, and the exclusion of public sovereign decisions from judicial recognition, has its basis in the principles of majority rule and judicial competence to adjudicate two-sided legal disputes rather than make open-ended policy decisions.101 The IDJH implicitly recognized this distinction when it characterized its claim as “[a] tort, i.e., a claim for injury suffered by individuals, [which] is an archetype of the kind of ‘private law’ claim such as that covered in the provisions of the CPIUN and SOFA.”102 They further pointed out that the U.N. had in the past accepted injuries caused by peacekeepers as private law claims, concluding that “under generally recognized definitions of private law and by the U.N.’s own standards, all of the characteristics of a private law claim are

98. Id.
99. For a description of how the U.N. reads “should” in place of “shall” in article 29, see note 67 and accompanying text. The U.N.’s position that section 29 is not mandatory is also reflected in the fact that a standing claims commission, as called for in the model SOFA and described as the “implementation” of Section 29, has never been established.
100. The Secretary-General made the comment when a news crew approached him as he left the UN building in New York. Fault Lines: Haiti in a Time of Cholera, Al JAZEERA AM. (Aug. 29, 2013), http://www.aljazeera.com/programmes/faultlines/2013/08/2013828102630903134.html (“Yes, it was my decision, but based on a careful consideration.”).
101. See Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 355 (1978) (“certain problems by their intrinsic nature fall beyond the proper limits of adjudication”).
present in this case.” However, the scope of their claim belies their characterization of it. For the “over 5,000 individual claimants,” the IDJH requested a minimum of $100,000 for each victim who died and $50,000 for each victim who suffered illness. The large number of claimants—and the fact that the claimants “represent only a small fraction of the individuals injured or yet-to-be injured by the cholera epidemic”—suggests that the dispute involves consideration of politics and policy.

Analyzing the factors for identifying whether or not a claim is one of private law shows support for the U.N.’s contention that IDJH’s claims are not private law claims. The U.N. lists (1) the nature of the duty allegedly breached, (2) the nature of the conduct at issue, and (3) other relevant circumstances as the factors for identifying a private law claim. IDJH alleged that the U.N. violated “its duty to adequately screen troops for cholera prior to deployment, . . . to properly manage its sanitation facilities, . . . to conduct proper water quality testing, . . . [and] to take immediate corrective action to properly address the outbreak of disease.” The second and third duties are similar to duties that a private party might owe, but the first and fourth are duties inseparable from activities the U.N. conducts in its status as a public body. Furthermore, the “other relevant circumstances” factor remains undefined and might include, for example, the size of potential liability or the incompatibility of accepting liability with other organization policies. These arguments draw support from the justification of the UN’s immunity in domestic courts. Furthermore, a legal body adjudicating the claim of Haiti cholera victims would have to consider, for example, the competing interests of past victims, who seek restitution; future victims, who seek prevention; the current policies and activities of the U.N. regarding cholera in Haiti; and the stakeholders and other beneficiaries of the U.N.’s activities, who seek to avoid limiting the U.N.’s organizational capacity. A resolution of the problem of cholera in Haiti—including, of course, the injury to victims—is best done at the political level, which is better suited to craft the policy answers to

103. Id.
104. Petition for Relief, supra note 90, at 34.
105. Id. at 34-35.
106. See Letter from Pedro Medrano, supra note 70, at 27.
108. Such as, imposing liability on the U.N. through article 29 for a policy based decision will not have the incentivizing effect that imposing liability on self-interested actors will. See infra note 133 and accompanying text.
competing considerations.109

C. Immunity Upheld in Court

As the U.N.’s internal claims process dead-ended, the IDJH filed suit in October 2013 against the U.N. in the United States District Court for the Southern District of New York, in a case captioned Georges v. United Nations. The sixty-seven-page complaint was brought on behalf of five named plaintiffs and sought to certify a class under Federal Rule of Civil Procedure 23.110 The class would represent “[a]ll individuals residing in Haiti or the United States who have been or will be injured or who are or will be the personal representative of a person who was or will be killed by cholera contracted in Haiti on or after October 9, 2010.”111 The class would contain at least 679,000 individuals, including personal representatives for more than 8,300 people who died from cholera.112 However, the federal court upheld U.N. immunity and this second attempt to seek relief also failed.

The suit named as defendants the United Nations, Secretary-General Ban Ki-Moon, and Edmond Mulet, former Under Secretary-General for MINUSTAH.113 As discussed above, the CPIUN grants the organization immunity from “every form of legal process” and its officials are “immune from legal process . . . [for] all acts performed by them in their official capacity.”114 All three defendants asserted immunity. The complaint did not explicitly address the CPIUN or the immunity of the United Nations and its officials named as defendants. Instead, the complaint’s theory of liability asserted that the U.N. “can incur legal liability and [has] an obligation to provide compensation for injury [it has] caused” and described how plaintiffs, represented by IDJH, made

109. The U.N. makes this point subtly as well. Each letter denying the claims contains a several-page recitation (longer than the legal response) of the expenditures and projects the U.N. has taken in Haiti to respond to the epidemic. The subtextual message appeared to be: “we are denying your claim, but we take responsibility for the outbreak and are working to end it.” See Letter from Patricia O’Brien, supra note 90. For a contrary opinion, arguing that the self-interested designation of disputes as political and not subject to legal regulation “has been used since the beginning of history and has never succeeded in establishing peaceful relations on a secure basis,” see HALDERSMAN, supra note 94, at 216.

110. Class Action Complaint, supra note 25, at 52-64.
111. Id. at 5.
112. Id.
113. Id. at 1. No U.N. Peacekeeper was ever confirmed as a carrier of the cholera disease, so none could be named in the suit.
114. CPIUN, supra note 57, §§ 2, 18.
claims directly to the U.N., which were rebuffed.\footnote{115} Having “exhausted
their extrajudicial options” for remedy, the plaintiffs sought enforce-
ment of their “right to a remedy and other rights protected under New
York law, the U.S. Constitution, and international law and Haitian
law.”\footnote{116}

Two amicus briefs provided legal arguments for imposing liability:
(1) that the U.N.’s immunity should be limited by the plaintiffs’
 inability to seek a remedy elsewhere and (2) that functional immunity
was not warranted because of the private law nature of the claims. The
briefs pointed to the Universal Declaration of Human Rights’ articula-
tion of a right to remedy, and statements made by the Secretary-
General and resolutions of the General Assembly to infer the U.N.’s
“acknowledgment” of the right.\footnote{117} The district court, they argued,
should treat the plaintiffs’ right to remedy as a prerequisite to upholding
the U.N.’s immunity, as several European courts have done.\footnote{118}

The briefs argued further that the private law nature of the claims
justified the imposition of liability, because of either (3) the U.N.’s
treaty obligations under the SOFA or (4) the principle that immunity
should be functional, rather than absolute. The briefs cited many past
examples of the U.N. providing compensation to claimants and corre-
sponding general statements by U.N. officials supporting the principle
of assuming liability.\footnote{119} In making these principled arguments, the
briefs rely almost exclusively on statements of legal scholars and foreign
courts—no on point, domestic case law is submitted in support.

The court’s decision, signed January 9, 2015, found the defendants
to be immune and dismissed the case for lack of jurisdiction.\footnote{120} The
court did not engage with the principled, rights-based arguments made
in the amicus briefs. Rather, it looked to the text of the CPIUN and a

\footnotesize{115. Class Action Complaint, supra note 25, at 40.
116. Id. at 20.
117. Memorandum of Law of Amici Curiae International Law Scholars and Practitioners in
Support of Plaintiffs’ Opposition to the Government’s Statement of Interest 3, Georges v. United
118. Memorandum of Law of Amici Curiae European Law Scholars and Practitioners in
Support of Plaintiffs’ Opposition to the Government’s Statement of Interest 2-3, Georges v.
119. Memorandum of Law of Amici Curiae International Law Scholars and Practitioners,
supra note 117, at 7.
2010 Second Circuit case, *Brzak v. United Nations*. The CPIUN grants the U.N. “immunity from every form of legal process” unless it expressly waives its immunity. The court found that the U.N. had expressly asserted its immunity, and relied on this. Further, it refused to find the immunity granted to the organization and its officials in sections two and eighteen of the CPIUN to be conditional on the “provision of appropriate modes of settlement” called for in section 29. *Brzak* supported this approach by holding US courts legally bound to apply the terms of the CPIUN treaty to domestic cases. The court in *Brzak* also held that a plaintiff’s right to remedy cannot limit the U.N.’s liability. The plaintiffs filed a notice of intent to appeal in February 2015, but they are unlikely to be successful given the opposing precedent.

D. Georges was Legally Correct

The district court in *Georges* correctly decided the case: under the current legal regime, the United Nations is unassailable to claims for liability from third parties unless it expressly waives its liability. *Brzak* is controlling on the case, foreclosing the plaintiffs’ arguments. Furthermore, the arguments advanced in the amicus briefs were out of sync with contemporary U.S. jurisprudence.

The court correctly concluded that *Brzak* commands the result in *Georges*. In *Brzak*, the immunity of the U.N. was upheld because the court held that the CPIUN was self-executing. In addressing the right to remedy argument, the court wrote that “[crediting arguments that] purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, . . . would
read the word ‘expressly’ out of the CPIUN.”129 Brzak made it clear that the immunity of the U.N. does not turn on the ability of claimants to seek an effective remedy; rather, only an express waiver of immunity by the U.N. allows a suit to proceed. This holding clearly controls in Georges.

The amicus briefs in Georges argued that the right to remedy limited the immunity of the U.N., drawing support from European legal scholars and jurisprudence. However, this argument does not attack the grounds for the decision in Brzak or Georges. The CPIUN’s terms effectively denied Haitian claimants legal relief; the right to remedy argument had little legal relevance to the Georges court.

E. Georges was Good Policy

Immunity for the U.N. is good policy because the U.N. is more like a state than it is a private party. Many of the arguments that support sovereign and diplomatic immunity apply to the U.N. as well.130 First, absolute legal immunity protects the U.N. from being vulnerable to threat of suit, as a disadvantaged and potentially disliked deep-pocketed foreigner, in national courts around the world.131 In nations without independent judiciaries, the U.N. could face unfavorable judgments from cooked-up charges heard by courts acting at the will of unhappy governments.132 Absolute immunity is essential to protect against this kind of bad-faith legal action, which would be difficult if U.N. immunity was limited to functional immunity.133 The unique

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129. Id.

130. See Moshe Hirsch, The Responsibility of International Organizations Towards Third Parties: Some Basic Principles 11 (1995) (“It is widely accepted that the principles of state responsibility are applicable, with some variation, by analogy, to the responsibility of international organizations.”).

131. See Brower, supra not 56, at 35 (“Writing in 1945, the League of Nations’ former legal adviser gave three justifications for international immunities . . . First, international organizations must have effective protection against biased municipal courts. Second, they need effective protection against baseless suits brought by the "cranks" and "fanatics" of the world. Third, international organizations require effective protection against the possibility that member states will interpret the legal effect of their acts in different, and possibly inconsistent, ways.”).


organizational structure of the U.N. justifies its immunity and satisfies the traditional purposes of tort liability: providing restitution to victims, incentivizing of socially efficient behavior, and validating victims’ claims.

A second reason for maintaining legal immunity relates to the U.N.’s status as a member-state funded organization. Member states finance the U.N. and control its expenditures through mandates. Exposing the U.N. to liability imposed without its consent would commit the U.N. to potentially large expenditures beyond the scope of its mission or mandate and defeat the purpose of member states’ funding. In this sense, the immunity of the U.N. is derived from the sovereign immunity of its member states. As a practical matter, the U.N. would lose the ability to effectuate its member nations’ policies if its pooled resources were exposed to more liability than the states acting alone.

Potent counterarguments to immunity are readily available to those that seek to impose liability on the U.N. What fairness is there to Delama Georges, named plaintiff in the case against the U.N., whose father died and mother was permanently injured by cholera? In a common law jurisdictions, the law of torts is founded on the principle that a violation of a duty that results in harm to another party requires the injured party be restored to how she would be had the injury not occurred. There is an additional justification: tort liability incentivizes socially beneficial behavior. However, tort principles cannot be meaningfully applied to the U.N. because of the additional considerations that flow from its status as a supra-national public organization.

Restitution for victims is a primary purpose of tort claims and the U.N.’s response to cholera in Haiti is a vivid example of the downside of the U.N.’s immunity. Had the Georges case been resolved as though it were between private parties, Delama Georges and his siblings would have received monetary compensation for the death of their father. In fact, no direct payment has or will be made. But the U.N., unlike a private party, is already in the business of providing benefits to needy people through its humanitarian and peacekeeping work. The Secretary-General has made this part of an explicit quid-pro-quo in justifying the organization’s immunity:

134. See U.N. Secretary-General, supra note 72, ¶ 12 (“[L]imiting 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.”).

135. See Class Action Complaint, supra note 25, at 47-49.
[The U.N.’s immunity] 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 damage arising from such an operation.136

The U.N., in its role as a public entity, provides benefits to people unilaterally, without compensation. That provision of benefits to some extent justifies and compensates for the imposition of injury. Again, an analogy may be made to the sovereign immunity of a state, which also provides benefits to the people and is immune from tort liability. In the case of the U.N., the benefits provided are not simply the redistribution of the nations’ own resources collected through taxes, but are funded—more altruistically, it may be argued—by foreign nations. Granted, this justification may not always remedy satisfactorily the specific injury suffered by a specific victim, but it does provide a theoretical response to the argument of restitution as the basis for liability.137

Another justification for imposition of liability is that it would provide a monetary incentive for the U.N. to act in a manner that is socially beneficial—i.e., incentivize it to prevent future injuries or rights violations.138 This argument founders again on the improper analogy of the U.N. to a private party, from which it differs here in two salient respects. First, the law and economics theory of maximizing efficient behavior relies on the assumption that the loss can be accurately and meaningfully monetized, as when it is a commercial loss.139

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136. U.N. Secretary-General, supra note 72, ¶ 12.
137. See Ulf Hauxler, Human Rights Accountability of International Organizations in the Lead of International Peace Missions, in ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS 215, 264-66 (Jan Wouters et al. eds., 2010). The author makes the point that “from the perspective of those suffering loss, it does not make a real difference whether such loss was caused in a lawful manner or is the effect of an illegal action” leading peacekeeping forces to make gratuitous payments to injured parties, “without acceptance of the action’s illegality even if so alleged by the claimant.” Id.
138. See Olivier De Schutter, Human Rights and the Rise of International Organizations, in ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS 51, 119-23 (Jan Wouters et al. eds., 2010) (arguing that “[t]he removal of immunities in human rights claims would not create the [important operational difficulties]” that would arise from lack of general immunity).
139. See, e.g., United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947) (holding that the defendant negligent and responsible for the loss of a barge of flour because the cost of eliminating
This theory loses analytic value when applied in the context of the human rights violations and loss of life, which cannot be meaningfully monetized.\textsuperscript{140} In cases where it is accused of rights violations, imposition of liability does not incentivize the efficient level of precaution, because there is no such calculable level.

Second, the U.N. differs from a private party in that it is not profit optimizing, but rather already charged with upholding human rights.\textsuperscript{141} Thus, as rights violations occur, the U.N. has an existing structural incentive to avoid them in the future. Evidence of this may be seen in the U.N.’s internal investigation regarding the outbreak of cholera in Haiti to identify means to avoid a similar occurrence elsewhere.\textsuperscript{142} This self-regulation of human rights compliance may allow the U.N. to “be perceived as legitimate and as operating in conformity with the shared values of human rights, without putting in jeopardy in any way its ability to perform the function[s enumerated in the U.N. charter that] it has been set up for” a result that is “the best of both worlds.”\textsuperscript{143}

A final purpose of liability is to provide recognition that the victim’s rights have been violated. This is the purpose served in tort by the award of nominal damages. A victim can be vindicated by other means, such as an official apology and admission of fault. The U.N.’s legal immunity does not preclude such an admission, so this purpose of liability is compatible with immunity.

United Nations immunity to tort liability is good policy for generally the same reasons that state sovereigns have that immunity. Amenability to suit would open the door to liability, some baseless and designed to further political goals, and generally would frustrate organization’s achievement of its missions. It would also violate the U.N.’s obligation to its member states to use their funding consistent with its organizational mandates. Furthermore, because the traditional purposes of tort liability—restitution to victims and incentivizing efficient behavior—are already served by the organizational structure, they are not persuasive reasons to imposing liability. It is a good outcome for the United

the risk of the accident was less than likelihood of the accident times the extent of the potential loss).

\textsuperscript{140} In countries like the U.S., monetary compensation for a wrongful death may be calculated by looking at lost income and other quantifiable aspects of a life. In a poor country such as Haiti, such calculations would lead to objectionably low valuations of life. The problem is compounded when the dead number in the thousands, as here.

\textsuperscript{141} The purposes of the United Nations include “[t]o achieve international co-operation in . . . promoting and encouraging respect for human rights.” U.N. Charter art. 1, ¶ 3.

\textsuperscript{142} Letter from Pedro Medrano, supra note 70, at 4.

\textsuperscript{143} De Schutter, supra note 108, at 108.
Nations and the world that the U.N. was found immune in Georges—but there are still policy changes that should occur to address the claims of Haitian cholera victims.

V. A POSSIBLE SOLUTION

“Accountability—acknowledging our mistakes and making it right—is the cornerstone of human rights.”

One perspective on the dismissal of Georges v. United Nations is that it represents the continuation of the tradition of impunity for harmful foreign incursions into Haiti. The lawsuit in U.S. federal district court was a last opportunity to impose liability on the U.N. With no real chance of a favorable decision on appeal, and other avenues for imposing liability even more far-fetched, Haitians seem to be no better off than they were when IDJH began to pursue claims against the U.N. Yet, this Note argues that there is a viable policy option for resolving the claims of injured Haitians in a way that protects the U.N.’s interests. Any policy solutions must balance the conflicting interests of the constituencies to whom the U.N. is accountable. These policies might include: improvements in cholera treatment to decrease case fatality rates, an outright assumption of moral responsibility and an apology, and a shift in priorities for the U.N. in Haiti from bolstering political stability to developing the clean water and sanitation infrastructure necessary to ultimately end cholera in Haiti. However, cash reparations, as demanded by IDJH, are inconsistent with the UN’s constituencies and should not occur. The aforementioned policies, in contrast, are effective, realistic, and ethically coherent because they are compatible with the U.N.’s accountability to injured Haitians, to its current stakeholders, including contributors and benefactors, and to its future as an organization.

A. To Whom is the United Nations Accountable?

A policy response to U.N.’s introduction of cholera to Haiti should be based in principles of accountability. The U.N. is accountable to many parties, the interests of whom should be weighed in composing a policy response. At a minimum, the U.N. is accountable to three

144. QUIGLEY, supra note 9, at 172 (quoting NYU Law Professor Margaret Satterthwaite).
145. See Edith Brown Weiss, On Being Accountable in a Kaleidoscopic World, 104 AM. SOC’Y INT’L L. PROC. 477, 489 (2010) (“One should be accountable not only to those who either established
groups. First, the U.N. is accountable to all Haitians for bringing cholera to the country. Second, the U.N. is accountable to the current stakeholders of the organization: the member states that compose it and fund it, and the people who are dependent on it. Third, the U.N. is accountable to its future self, to remain a viable, effective, capable organization. Though the interests of these parties may be in tension, there is room for movement.

Haitians have several interests regarding the U.N. Those who have already been sickened or killed by the disease deserve restitution for their injury. Restitution in this sense should be viewed broadly: actuarial calculations of loss are not meaningful in the context of epidemic disease in a poor country. No Haitian remains unaffected by the epidemic. Accordingly, widespread projects that benefit Haitian society broadly are a type of restitution that may be appropriate in this context. Additionally, Haitians have an interest in ending the epidemic and eliminating the potential of future injury from the disease. This has been the stated goal of the Haitian government, the United Nations, and other organizations since 2012, but the resources necessary to make this goal attainable have not backed these intentions.  

The current stakeholders of the U.N. include its member states, who are the source of the political legitimacy of the organization and who, in turn, represent most of the population of the world, and the vulnerable people around the world who currently or soon will benefit from actions of the U.N. These stakeholders represent an interest counter to that of Haitians: at some point, the resources of the U.N. are zero sum and efforts to help Haiti and its people come at the cost of efforts to help other people elsewhere. While this can be said of many other organizations, the U.N.’s unique quasi-sovereign status supports protecting it from imposed liability. Member states have an interest in the current capacity of the U.N.—for example, to intervene in an arising conflict—that could be undermined by a commitment to resources to Haiti. In essence, the limitation here is budgetary, since assisting the people of Haiti has no political cost.

Accountability to the future United Nations manifests in conservative interests as well. Similar financial constraints as those relevant to the

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146. See supra notes 41 & 42 and accompanying text. See also QUIGLEY, supra note 9, at 172 (“The UN and the international community initially committed to pay only a fraction of the estimated cost of the program.”).
interests of current stakeholders and beneficiaries are present in the considerations of the interests of the future United Nations: resources used now are not available in the future. The interests of the future organization go beyond financial concerns: political currencies, such as political will of member states, moral authority, and institutional reputation are important, as is the precedential legacy of present-day decisions. Apparent abdication of responsibility to Haiti will weaken the moral authority of the U.N. and decrease its ability to claim to stand for human rights. On the other hand, had the U.N. accepted in full the claims submitted by IDJH, it would have created a precedent that would limit political flexibility of the organization with a specter of huge liability.

B. Potential Policy Responses

Many people have suggested policies by which the U.N. could take responsibility for the cholera outbreak and uphold human rights. These suggestions, though not new, are supported here through an analysis of the parties to whom the U.N. is accountable. As this is primarily a legal, rather than policy, paper, the policy proposals are models of what can be, rather than specific prescriptions. First, the U.N. should immediately seek to reduce the case fatality rate by implementing public health measures. Second, it should issue a formal apology. Third, it should build a national clean water and sanitation system. It should not pay cash reparations to victims.

First, the U.N. should enact policies aimed at lessening the immediate threat posed by cholera. Current reports suggest that there will be more cholera infections in 2015 than 2012 and 2014. This presents an unacceptable continuation of injury inflicted on Haitians. The current case fatality rate in Haiti is 1.2 percent. The World Health Organization states that proper control and treatment of the disease can decrease the mortality rate to “ideally below 1%.” An “exceptionally large outbreak” of cholera in South Africa in 2000 had the low case


fatality rate of 0.22%, attributed to strong health education campaigns, good access to health care, and an excellent surveillance and reporting system. These measures should be implemented in Haiti. The chief obstacle to reducing the fatality rate is funding. Rather than waiting for international donors to fund these improvements, the U.N. budget for MINUSTAH—$500 million for the 2014/15 year—is a viable source for funding cholera public health initiatives.

Improving the cholera response system in Haiti aligns with the U.N.’s responsibilities to the parties to whom it is accountable. Obviously, it is responsive to the U.N.’s obligation to Haitians. For current stakeholders who support increased effort to fight cholera in Haiti, it is a positive step as well. For other beneficiaries of the U.N. in “competition” for U.N. resources, by shifting funding within MINUSTAH, there is no additional opportunity cost, so opposition would be minimal. Strong benefits accrue to the future of the organization: the more the U.N. is perceived as taking responsibility for the introduction of cholera to Haiti, the greater its moral authority is in the future.

Second, the U.N. should admit responsibility for introducing cholera to Haiti and make a formal apology. An official apology can repair relations between the Haitian people and the United Nations and sends a message that the rights of Haitians are important to the world at large. Recognition and validation of the suffering caused by cholera, and the U.N.’s role in causing it, are essential to the U.N. being accountable to the people of Haiti. To current stakeholders of the

150. WORLD HEALTH ORG., COMMUNICABLE DISEASES 2002: GLOBAL DEFENSE AGAINST THE INFECTIOUS DISEASE THREAT, supra note 23 at 79.
151. See Haiti: Cholera cases hit record highs due to under-funding, supra note 147.
152. International donors have been hesitant to fund cholera prevention efforts in Haiti. See note 142 and accompanying text.
154. Increased funding for health programs in Haiti would come at the cost of other U.N. programs in Haiti. However, the cholera epidemic is a problem of paramount importance in Haiti, especially given the U.N.’s unpopularity there. See QUIGLEY, supra note 9, at 169 (quoting a Haitian woman as saying “MINUSTAH came here and killed our families and God’s children, so I want them to leave and give us back our country”).
155. For example, the U.S. provides twenty-two percent of the U.N.’s funding. In 2014, seventy-seven members of Congress signed a letter to the Secretary-General urging “[the creation of] a fair process to adjudicate the claims” of cholera victims. Letter from seventy-seven members of Congress to Ban Ki-moon, Sec’y-Gen., United Nations (Dec. 18, 2014), http://www.ijdh.org/2014/12/topics/health/congressional-letter-to-ban-ki-moon-on-haiti-cholera/.
CHOLERA IN HAITI

U.N., an apology has no direct financial cost and may increase the reputation of the organization. To the extent that there is a general conclusion that the U.N. is responsible for causing the cholera epidemic, the organization’s failure to expressly recognize this conclusion is a blemish on its record that reduces its ability to be a world leader.157 The organization’s future interests are similar: an apology increases the moral authority of the organization and does not create a legal obligation of any kind.158 A sincere apology offers a real way to repair the reputation of the U.N. in Haiti and around the world at a low cost, and should be issued.

Third, the U.N. should develop and fund a national clean water and sanitation system. Such a system is the only way to end the epidemic.159 It will also have other benefits for the people and the country, including saving lives from other waterborne diseases.160 The Security Council could accomplish this by replacing MINUSTAH with a new Haiti mission mandated to prioritize public health and development goals.161 This is not a cheap suggestion: estimates place the cost of an adequate national water and sanitation system at between $800 million and $1.1 billion.162 While the U.N. has already committed to eradicating cholera from the island, its current model is flawed by relying on external funding that is not forthcoming.163 Many of the objectives of the original mandate of MINUSTAH have been achieved, creating the possibility of a significant restructuring of the nature of U.N. opera-


158. See QUIGLEY, supra note 9, at 172 (“Human rights are only going to be successful to the extent that powerful actors themselves recognize them, so it is absolutely necessary that you have this institutional acknowledgement.”) (quoting NYU Law Professor Margaret Satterthwaite).

159. Moloney, supra note 44. For a discussion of this policy suggestions, see QUIGLEY, supra note 9, at 170.

160. Brian Concannon of IDJH suggested that a clean water system could save more lives in a few years than have been lost to cholera so far. Center for Economic and Policy Research, Haiti Cholera Hill Briefing, April 18 2012, 51:50 YOUTUBE (Apr. 25, 2012), https://www.youtube.com/watch?v=naMTR4N8cm0 (Brian Concannon speaking).


163. See supra note 42 and accompanying text.
Developing a national clean water and sanitation system for the country completely meets the U.N.’s accountability to Haitians. It is the only way to end the epidemic and prevent future deaths. It also would serve as restitution to those already injured by the disease, because a clean water and sanitation system would benefit the entire country through improved standards of living. Forty percent of Haitians lack access to clean water and sixty percent of Haitian schools lack toilets. In one study, families reported spending twelve percent of their income on water. For current stakeholders, this policy represents a significant commitment of resources. However, if it were funded by re-allocating the existing $500 million annual MINUSTAH budget, the impact on existing U.N. funders and recipients would be lessened. As with the other policy suggestions, there would be political gains as the reputation and moral authority of the U.N. was restored. For the future United Nations, such a large expenditure creates a risk of setting a precedent that would lock the U.N. into expensive restitution policies. However, as has been demonstrated by the U.N. so far on this issue, persuasive, non-binding precedent can be ignored. Making future payments easier to avoid is not a good reason for ignoring current responsibilities.

The U.N. should not make cash reparations to injured Haitians, as demanded in IDJH’s claim to the U.N. Payments of $50,000 or $100,000 per person would adequately meet the U.N.’s responsibility to past victims of cholera. But they would not protect other Haitians from being sickened by the disease. Nor would it be consistent with the U.N.’s obligations to its member states and other states that benefit from its actions—such a large payout would be perceived as money spent entirely on the basis of reparations, not in furtherance of the

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164. Quigley, supra note 9, at 11 (quoting the departing president of Haiti, René Préval saying to the UN Security Council in 2011, “Tanks, armed vehicles and soldiers should have given way to bulldozers, engineers, more police instructors, and experts on reforming the judicial and prison systems”).

165. This idea is also discussed in Quigley, supra note 9, at 170-73.

166. Moloney, supra note 44 (citing Pan-American Health Organization statistics).

167. See Quigley, supra note 9, at 170-71.

168. Developing national clean water and sanitation infrastructure is part of the public health effort to reduce cholera mortality discussed infra at note 160 and accompanying text. A closer look at the financial feasibility of this suggestion is beyond the scope of this paper. MINUSTAH budget figure from MINUSTAH Facts and Figures, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/minustah/facts.shtml (last visited Apr. 24, 2015).
goals of the organization, and would come at the expense of other U.N. programs and missions. The possibility of incurring liability might limit future humanitarian missions. It would also create a bad precedent for the organization—while the IDJH claim only represented around 5,000 people, there would be no coherent reason to not make the same payout to other similarly injured Haitians, creating billions of dollars of liability. Future parties injured by the U.N. would have a stronger claim as well. Simply put, the U.N. should make whole those injured by its actions in a manner consistent with its responsibilities towards all parties.

VI. Conclusion

Circumstantial and genetic evidence has clearly established that the U.N. introduced cholera to Haiti, sparking an epidemic that has killed thousands and injured many more. Despite this evidence, the U.N. has continued to refuse to take responsibility. Victims of the epidemic have submitted claims to the U.N. directly and sought remedy through suit in US federal court, but have not been successful. Indeed, U.N. immunity is a good policy. Nonetheless, the U.N. should take responsibility for causing the epidemic and adopt policies that are responsive to the justly deserved remedy of Haitians. These policies should be sensitive to the interests of all parties to whom the U.N. is accountable. Through immediate action to reduce the fatality rate, an official apology, and development of a national clean water and sanitation system, the U.N. can live up to its ideals and be responsible to the people of Haiti without jeopardizing its other responsibilities.