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### U.N. Sovereign Immunity: Using the Haitian Experience to Transition from Absolute to Qualified Immunity

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# U.N. Sovereign Immunity: Using the Haitian Experience to Transition from Absolute to Qualified Immunity

BRIANNA SAINTE\*

*The United Nations (“U.N.”) has been looked at globally and historically as an international organization that has given aid to millions of people in the hopes of promoting peace and reducing human rights violations. It is no surprise then that many countries have welcomed U.N. troops with open arms in the hopes of stabilizing communities. However, instead of receiving aid, imagine receiving a deadly disease. Imagine having the nearby river that has been your only*

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\* J.D. Candidate 2019, University of Miami School of Law. Being of Haitian descent, I wrote on this topic and the personal stories underlying it because I wanted to shine a light on the injustices felt in Haiti and make a small contribution to the community I love so much. Despite the topic of this paper being one of strife and sadness, I see Haiti through a different lens than most. It is a country full of resilient people who carry with them a resilient pride for their country. It is a beautiful country full of unspoken natural wonders. It is a fact that Haiti has suffered throughout its history both financially and environmentally, the cause of which can be traced to the negative treatment Haiti received from nation states during the time of Haiti’s slave rebellion. The fact that Haiti is not remembered as the first ever successful slave uprising is unfortunate. But Haiti nonetheless deserves to be respected for the place it has in history, specifically black history. I would personally like to thank my mother, Linda Sainte, for teaching me to *always* be proud of my Haitian heritage. Next, I would like to thank my aunt, Jocelyne Petit, who took the initiative to move back to Haiti and start a business, thereby fostering a permanent connection between Haiti and myself along with the rest of the second generation of my family who reside in the United States. I would also like to thank Professor James Nickel for being my faculty advisor in this endeavor and providing me with a sounding board to bounce ideas off of. Finally, I would like to thank my friends Megan Cheney, Alyssa D’Bazo, Christina Robinson, and Kristin Taylor who helped me through the all nighters of writing this Note with encouragement and snacks. Specifically, Megan and Christina, who willingly gave me the use of their cat Ellie for emotional support as I wrote the final words of this Note.

*source of water for drinking, laundry, and bathing for decades turned into a waste dump. It is from that river turned waste dump that you—and hundreds of thousands of other innocent people—have now contracted cholera.*

*This was the reality for thousands of Haitian citizens who now continue to suffer from cholera due to a U.N. base’s negligent disposal of its troops’ waste into a river the Haitian citizens depended on for survival. Despite being responsible for the cholera epidemic now plaguing Haiti—a third world country with too few resources struggling to support its citizens—the U.N. has failed to not only properly respond to the outbreak, but also to accept legal responsibility*

*This Note discusses different options to bring about financial, legal, and actual relief to the victims of the cholera outbreak in Haiti. It reviews the failed attempts of Haitian victims to hold the U.N. legally accountable for its actions and seeks to answer the following question: in what ways can relief be achieved, if at all, in the human rights realm.*

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## INTRODUCTION

“[T]he maintenance of international peace and security” is the mission statement put forth by the United Nations (“U.N.”), an intergovernmental organization created in 1945 in response to the

tragedy of the World War II.<sup>1</sup> What was once a fledgling alliance between fifty-one member states to prevent another world war has now grown into the largest intergovernmental organization comprising of 193 member states.<sup>2</sup> To realize the U.N.'s mission, U.N. peacekeeping troops are deployed to various parts of the world with the responsibility of creating the infrastructure needed to establish and maintain peace.<sup>3</sup> However, this task involves a complex web of international and domestic law and leaves large, gaping holes in jurisprudence concerning international organizations and the ability of the U.N. to operate within those gaps without consequence or accountability.<sup>4</sup>

It is common practice for the U.N. to set up Status of Force Agreements (“SOFAs”) between itself and the foreign state in which peacekeeping troops are to be deployed.<sup>5</sup> Under the 1994 Convention on the Safety of United Nations and Associated Personnel, all involved parties, including nation states and U.N. subsidiaries, are obliged to enter into SOFAs that cover all activities and personnel associated with U.N. operations in a foreign state.<sup>6</sup> SOFAs involving U.N. peacekeeping operations customarily contain an immunity clause that reinforces the 1946 Convention on the Privileges and Immunities of the United Nations (“General Convention”) and the U.N. Charter.<sup>7</sup> Together, the 1946 and 1994 conventions grant the

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<sup>1</sup> *What We Do*, UNITED NATIONS, <http://www.UN.org/en/sections/what-we-do/> (last visited June 24, 2018).

<sup>2</sup> *History of the United Nations*, UNITED NATIONS, <http://www.UN.org/en/sections/history/history-united-nations/> (last visited Sept. 14, 2018); *International Organization*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/international-organization/> (last visited Dec. 10, 2017); *Member States*, UNITED NATIONS, <http://www.UN.org/en/member-states/> (last visited Sept. 14, 2018).

<sup>3</sup> *International Organization*, *supra* note 2.

<sup>4</sup> See generally Rosa Freedman, *U.N. Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. OF INT'L L. 239, 242–45 (2014) (discussing developments in jurisprudence over the past fifty years moving away from giving intergovernmental organizations absolute immunity).

<sup>5</sup> Dieter Fleck, *The Legal Status of Personnel Involved in the United Nations Peace Operations*, 95 INT'L REV. RED CROSS 613, 621 (2013).

<sup>6</sup> *Id.* at 620–21; GA Res. 49/59, annex, Convention on the Safety of United Nations and Associated Personnel (Dec. 9, 1994), 34 I.L.M. 482 [hereinafter Safety Convention].

<sup>7</sup> Safety Convention, *supra* note 6; see U.N. Charter art. 105, ¶ 1; Convention on the Privileges and Immunities of the United Nations art. 2, Feb. 13, 1946,

U.N. sovereign immunity and immunity for civilian personnel working on behalf of the U.N.<sup>8</sup> While immunity is viewed as necessary to ensure the effective performance of peace operations, SOFAs drafted for U.N. peacekeeping operations provide countermeasures to safeguard the rights of private citizens and the host country itself.<sup>9</sup> It is these countermeasures, including alternative dispute resolution mechanisms such as the establishment of claims commissions and lump-sum payments, that the U.N. uses to justify the immunity granted to it in the SOFAs.<sup>10</sup> In theory, SOFAs are meant to help close the gap between international and domestic law.<sup>11</sup> In practice, however, this goal is rarely ever reached.<sup>12</sup>

In recent years, questions have arisen regarding the lack of accountability when countermeasures included in SOFAs have failed to be implemented, which has allowed for the actions of the U.N. to go unchecked due to its benefit of receiving immunity.<sup>13</sup> Such a failure is exemplified by the U.N.'s operations in Haiti over the last seven years. In 2010, a cholera outbreak occurred that ravaged the already devastated country of Haiti.<sup>14</sup> When reports emerged that the U.N. may have been responsible for the outbreak, the U.N. denied responsibility.<sup>15</sup> With the cholera epidemic now affecting over

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1 U.S.T. 1418, 1 U.N.T.S. 15. [hereinafter Privileges and Immunities Convention]; see also Freedman, *supra* note 4, at 247–8 (describing the immunities afforded by the U.N.'s Model SOFA).

<sup>8</sup> Safety Convention, *supra* note 6; Privileges and Immunities Convention, *supra* note 7; Freedman, *supra* note 4, at 243 (“[M]ost [states] insist that the U.N. . . . retains absolute immunity.”).

<sup>9</sup> Fleck, *supra* note 5, at 615–16 (describing the origins of immunity and its application in peacekeeping operations); Freedman, *supra* note 4, at 247 (appraising the Model SOFA and its provisions for alternative dispute resolution mechanisms as countermeasures to peacekeepers’ immunity).

<sup>10</sup> Freedman, *supra* note 4, at 241, 245–47.

<sup>11</sup> See Fleck, *supra* note 5, at 621, 629–34 (discussing common tensions and regulatory gaps that arise when international bodies and state governments negotiate and implement SOFAs).

<sup>12</sup> *Id.*

<sup>13</sup> See Freedman, *supra* note 4, at 246.

<sup>14</sup> Somini Sengupta, *U.N. Apologizes for Role in Haiti’s 2010 Cholera Outbreak*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html>.

<sup>15</sup> *Id.*; Kristina Duagirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 108 AM. J. INT’L L. 784, 819 (2014).

hundreds of thousands of Haitian victims, a global spotlight has been placed on the ramifications felt by Haitian victims who have yet to obtain monetary relief from the operations conducted by U.N. peacekeepers within that region.<sup>16</sup>

Many international news articles and journals have focused on the epidemic in Haiti and the U.N.'s lack of accountability.<sup>17</sup> This Note will focus on possible avenues of relief for Haitian victims. It will also address as future policy solutions that combat U.N. immunity in the hope that, in the midst of the complex conversation concerning how the U.N. will be allowed to operate in the future, the victims who were affected by the cholera outbreak may somehow achieve the justice they deserve.

Part I of this Note will summarize the beginnings of the cholera outbreak in Haiti as well as its impact on the locals, thereby detailing the foundation for the causal element of a legal framework that will also be discussed. Part II will examine the legal arguments presented by the victims in a previous petition to the U.N. as well as civil actions brought in United States federal courts. Part III will detail the lives of just a few of the victims of the cholera outbreak, so as to remember those victims and survivors who are sometimes forgotten. Finally, Part IV will examine the idea of using a human-rights based approach to challenge the U.N.'s absolute immunity. It will also discuss how such a challenge can lead to the emergence of a new norm in which the U.N. operates under a modified immunity.

## I. ORIGINS OF THE CHOLERA OUTBREAK IN HAITI

In August 2016, six years after the first cases of cholera were reported in 2010, then Secretary General Ban Ki-moon of the U.N.

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<sup>16</sup> Randal C. Archibold & Somini Sengupta, *U.N. Struggles to Stem Haiti Cholera Epidemic*, N.Y. TIMES (Apr. 19, 2014), <https://www.nytimes.com/2014/04/20/world/americas/U.N.-struggles-to-stem-haiti-cholera-epidemic.html>; Sengupta, *supra* note 14.

<sup>17</sup> See, e.g., American Society of International Law, *Contemporary Practice of the United States Relating To International Law*, 111 AM. J. INT'L L. 155, 162 (2017); Thomas G. Bode, *Cholera in Haiti: United Nations Immunity and Accountability*, 47 GEO. J. INT'L L. 759 (2016); Farhana Choudhury, *The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability*, 104 GEO. L.J. 725 (2016); Duagirdas & Mortenson, *supra* note 15, at 819; Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1 (2016).

publicly acknowledged, for the first time, that the U.N. “played a role” in the cholera outbreak in Haiti.<sup>18</sup> The public announcement also came five years after an independent, four-person panel of experts launched a full-scale investigation, under U.N. auspices, and quietly released a report in 2011 that came to a similar conclusion.<sup>19</sup>

Cholera, “an acute, diarrheal illness caused by infection of the intestine with the bacterium *Vibrio cholera*,” is usually spread by the ingestion of contaminated food or water.<sup>20</sup> Though the infection is often mild and can result in no symptoms at all, symptoms can turn severe and lead to death if treatment, such as proper rehydration, is not administered.<sup>21</sup> Symptoms include severe dehydration, extreme vomiting, dizziness, and diarrhea.<sup>22</sup>

The source of the initial cholera outbreak in Haiti was traced to a U.N. base located in the rural Centre Department of Haiti.<sup>23</sup> Specifically, the base was a United Nations Stabilisation Mission in Haiti (“MINUSTAH,” an acronym of the French name) camp located in the Mirebalais commune, which was constructed in 2004.<sup>24</sup> The victims of the first cholera cases in over half a century lived near the MINUSTAH camp, which at the time quartered U.N. peacekeepers who had just arrived from Nepal.<sup>25</sup> The Nepalese soldiers arrived between October 8th and October 24th of 2010.<sup>26</sup> Though it was customary to conduct a basic health screening for U.N. troops, the U.N. did not require testing for individuals who failed to show any active signs of an infectious disease.<sup>27</sup> Therefore,

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<sup>18</sup> Jonathan M. Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html>.

<sup>19</sup> ALEJANDO CRAVIOTO ET AL., FINAL REPORT OF THE INDEPENDENT PANEL OF EXPERTS ON THE CHOLERA OUTBREAK IN HAITI 29 (2011).

<sup>20</sup> *Cholera – Vibrio cholerae infection*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/cholera/general/index.html> (last visited Dec. 11, 2017).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> CRAVIOTO, *supra* note 19, at 20–23; Duagirdas & Mortenson, *supra* note 15, at 819.

<sup>24</sup> CRAVIOTO, *supra* note 19, at 8.

<sup>25</sup> Katz, *supra* note 18.

<sup>26</sup> CRAVIOTO, *supra* note 19, at 12.

<sup>27</sup> Freedman, *supra* note 4, at 240.

Nepalese troops did not undergo any testing for cholera before deployment to Haiti.<sup>28</sup> Rumors of a possible connection between the newly-arrived Nepalese soldiers and the sudden cholera outbreak began to spread, despite the initial denial of causation by senior officers.<sup>29</sup> The rumors were further bolstered when the World Health Organization reported that Nepal suffered from a cholera outbreak in August 2010, leaving 1,400 people infected and eight dead.<sup>30</sup>

The initial inspection of the MINUSTAH camp itself revealed a poor and faulty waste system.<sup>31</sup> The construction of the water pipes from the main toilet and shower area were deemed “haphazard” and posed a serious risk of cross-contamination.<sup>32</sup> Inspectors observed that several of the pipes crossed over a drainage ditch that ran from the camp and flowed directly into the Meye Tributary System (“Meye”).<sup>33</sup> Furthermore, contractors hired by MINUSTAH staff were seen disposing waste from the camp into a septic pit atop a hill that was not only open and unsecure, but also only a short walking distance from the southeast branch of the Meye.<sup>34</sup> The disposal site was “susceptible to flooding,” causing it to overflow into the Meye, which in turn flowed directly into the Artibonite River.<sup>35</sup> The importance of the Artibonite River to the Haitian community cannot be overstated as it is not only a place for recreation and washing, but also is the source of water thousands use to bathe, drink, and irrigate their crops.<sup>36</sup>

After its investigation of the MINUSTAH camp, the panel conducted comparative testing with cholera strains in Haiti and those found in various parts of the world.<sup>37</sup> The testing method used, known as Multiple-Locus Variable number tandem repeat Analysis (“MLVA”), found that the isolated Haitian strains were all closely

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<sup>28</sup> *Id.*

<sup>29</sup> Nita Bhalla, *U.N. Peacekeepers Not to Blame for Haiti's Cholera - Nepalese Army*, REUTERS (Nov. 10, 2010), <https://www.reuters.com/article/idINIndia-52626220101102>.

<sup>30</sup> *Id.*

<sup>31</sup> CRAVIOTO, *supra* note 19, at 21–23.

<sup>32</sup> *Id.* at 21.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 22.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 29.

<sup>37</sup> *Id.* at 25–26.



related to the cholera strains found in Nepal in 2009, as well as other regions within South Asia.<sup>38</sup> The data collected confirmed that the cholera outbreak did not originate within the Haitian community itself, but was introduced by something foreign.<sup>39</sup> While the panel report did not explicitly connect the Nepalese soldiers to the cholera outbreak in Haiti, the research did point to such a connection, and it was confirmed five years later by the U.N. secretary.<sup>40</sup>

In a country in where citizens had little access to clean water, and were already suffering from the devastating 2010 Haitian earthquake, the leakage of waste into the Artibonite River had devastating effects.<sup>41</sup> Within ten weeks of the first cholera outbreak in the communities surrounding the river, the disease had spread to all ten departments or provinces of the country.<sup>42</sup> In two years, the disease killed 7,000 people and, as of the end of 2017, it has been the cause of death for over 10,000 Haitians and led to the hospitalization of over a million people.<sup>43</sup>

Victims of cholera suffer from continuous vomiting and diarrhea and, due to the lack of hospital resources within Haiti, the disease itself has persisted for years.<sup>44</sup> The poor healthcare system was compounded by the U.N.'s delayed response in combating the epidemic because of its reluctance to admit its role in the cholera outbreak.<sup>45</sup> Had there been a more vigorous and efficient response by the U.N. when the disease first broke out, the effects would have been minimized and the disease contained.<sup>46</sup>

Not only did the U.N. fail to appropriately respond to the cholera outbreak when it first occurred, which lead to the disease's rapid

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<sup>38</sup> *Id.* at 27–28.

<sup>39</sup> *Id.* at 28.

<sup>40</sup> *Id.* at 29; Katz, *supra* note 18.

<sup>41</sup> See Sengupta, *supra* note 14.

<sup>42</sup> Alex Weppelmann, *Has Haiti's Cholera Epidemic Become a Permanent Problem?*, HUFFINGTON POST (Apr. 11, 2016, 1:57 PM), [https://www.huffingtonpost.com/the-conversation-us/has-haitis-cholera-epidem\\_b\\_9662348.html](https://www.huffingtonpost.com/the-conversation-us/has-haitis-cholera-epidem_b_9662348.html).

<sup>43</sup> *Haiti Cholera Epidemic Kills 7,000*, UPI (Jan. 7, 2012, 11:30 AM), <https://www.upi.com/Haiti-cholera-epidemic-kills-7000/34891325953846/>; Rick Gladstone, *U.N. Brought Cholera to Haiti. Now It Is Fumbling Its Effort to Atone.*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/world/americas/cholera-haiti-united-nations-peacekeepers-yemen.html>.

<sup>44</sup> Archibold & Sengupta, *supra* note 16.

<sup>45</sup> Sengupta, *supra* note 14.

<sup>46</sup> *Id.*

spread, but also the U.N. has only recently created a plan for eradication—a plan that does not seem achievable.<sup>47</sup> At the time of admission in 2016, Secretary Ban Ki-moon announced the “New Approach” plan to eradicate cholera from the country.<sup>48</sup> The plan detailed the need for \$400–500 million to (1) support cholera control and response, (2) restructure Haiti’s sanitation system, and (3) provide assistance to those who were affected by the epidemic.<sup>49</sup> As of October 2018, however, only \$9 million has been raised thanks to the voluntary donations from countries including Nepal, South Korea, France, Chile, India, and Liechtenstein.<sup>50</sup> The fund ran dry in early 2017, leading to pleas from Antonio Guterres, Mr. Ban’s successor as U.N. Secretary, to other member states for contributions.<sup>51</sup> However, as of October 2018, total funds remain at just \$9 million.<sup>52</sup> Without a steady stream of funds and donations, efforts to control the spread of cholera in Haiti, as well as attempts to bring justice for the thousands of victims, will be futile.<sup>53</sup>

## II. THE UPHILL LEGAL BATTLE

### A. *Petition to the United Nations*

With an admission of causation from the U.N., coupled with the lack of voluntarily given resources, Haitian victims have attempted to seek relief through the legal system, though that too has yet to

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<sup>47</sup> Editorial Board, *U.N. Accepts Blame but Dodges the Bill in Haiti*, N.Y. TIMES (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/opinion/U.N.-accepts-blame-but-dodges-the-bill-in-haiti.html>; see G.A. Res. A/71/L.42, The New United Nations Approach to Cholera in Haiti (Dec. 12, 2016).

<sup>48</sup> Editorial Board, *supra* note 47; *U.N. Haiti Cholera Response Multi-partner Trust Fund*, UNITED NATIONS, <http://mptf.undp.org/factsheet/fund/CLH00> (last visited October 4, 2018).

<sup>49</sup> *New U.N. System Approach on Cholera in Haiti*, UNITED NATIONS, [http://www.UN.org/News/dh/infocus/haiti/Haiti\\_U.N.\\_System\\_Cholera.pdf](http://www.UN.org/News/dh/infocus/haiti/Haiti_U.N._System_Cholera.pdf) (last visited Dec. 15, 2017).

<sup>50</sup> *U.N. Haiti Cholera Response Multi-partner Trust Fund*, *supra* note 48. The countries that have donated as of October 2018 include the Bahamas, Belgium, Belize, Canada, Côte d’Ivoire, Cuba, Cyprus, Grenada, Guyana, India, Ireland, Israel, Italy, Jamaica, Liechtenstein, Luxembourg, Mexico, Myanmar, Nepal, the Netherlands, Norway, Palau, Paraguay, Portugal, Senegal, Slovak Republic, Sri Lanka, Sudan, Ukraine, Uruguay and Venezuela. *Id.*

<sup>51</sup> Gladstone, *supra* note 43.

<sup>52</sup> *U.N. Haiti Cholera Response Multi-partner Trust Fund*, *supra* note 48.

<sup>53</sup> *Id.*

yield any results. The victims' first plan of recourse was to petition the MINUSTAH's Claims Unit and the U.N. Headquarters shortly after the Independent Panel report was released.<sup>54</sup> On November 3, 2011, lead lawyers Mario Joseph and Brian Cocannon Jr., from the Bureau des Avocats Internationau ("BAI") and the Institute for Justice & Democracy in Haiti ("IJDH"), filed the petition on behalf of over 5,000 victims of the cholera outbreak and referenced the findings of the Independent Panel report to prove the element of causation.<sup>55</sup> The petition argued that the U.N. had jurisdiction over the claims of the victims as mandated by the SOFA between Haiti and the U.N. under Article VII, ¶ 54 and Article VIII, ¶ 55, and as such had the ability to hear the claims.<sup>56</sup> The excerpt from the SOFA between Haiti and the U.N. reads as follows,

Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement . . . .

Except as provided in paragraph 57, any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present

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<sup>54</sup> *Petition from the Institute for Justice & Democracy in Haiti to the U.N. Chief Claims Unit and the Office of the United Nations Secretary-General*, INST. FOR JUST. & DEMOCRACY IN HAITI (Nov. 3, 2011), <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> [hereinafter *Petition*].

<sup>55</sup> *Id.* at 1, 8–12.

<sup>56</sup> *Id.* at 16; Agreement Concerning the Status of the United Nations Operation in Haiti, U.N.-Haiti, July 9, 2009, 2271 U.N.T.S. 251, 261–62 <http://ijdh.org/wordpress/wp-content/uploads/2011/11/4-Status-of-Forces-Agreement-1.pdf> [hereinafter *Agreement*].

Agreement shall be settled by a standing claims commission to be established for that purpose.<sup>57</sup>

With the Petition filed in accordance with the statute of limitations, the Petitioners requested that a standing claims commission be created to hear their claims and provide reparations.<sup>58</sup> It was alleged in the Petition that the U.N. was liable for negligence, gross negligence, and recklessness as a result of the poor sanitation construction of the MINUSTAH camp and the U.N.'s lack of response.<sup>59</sup> The failed response, therefore, violated Haitian civil, criminal, and constitutional law as mandated by the SOFA, as well as the rights afforded to the Petitioners under international human rights law.<sup>60</sup>

Based on these allegations, the Petitioners entreated the U.N. to fairly and impartially adjudicate the claims through the creation of a commission and to provide compensation for both the Petitioners and other victims not listed in the petition.<sup>61</sup> Unfortunately for the Petitioners, their claims and requests for relief fell on deaf ears. After fifteen months of evaluation without a response, a letter was written to Mr. Concannon from Patricia O'Brien, the Legal Counsel of the Secretary-General for Legal Affairs.<sup>62</sup> The two-page document, dated February 12, 2013, mostly detailed the many acts of charity bestowed upon Haiti through U.N. efforts to control the spread of cholera, but never admitted the fact that the U.N. was responsible for the spread of the disease.<sup>63</sup> Yet, in only a single paragraph comprised of two sentences did the U.N. directly respond to the claims actually submitted.<sup>64</sup> Within the letter, O'Brien uses Section 29 of

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<sup>57</sup> Agreement, *supra* note 56, at 261–62.

<sup>58</sup> Petition, *supra* note 54, at 17. It may be noted that prior to the claimants' petition, no standing claims commission had ever been established in spite. Freedman, *supra* note 4, at 247.

<sup>59</sup> Petition, *supra* note 54, at 18–25.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 33–36.

<sup>62</sup> Letter from the Patricia O'Brien, Legal Counsel of the Sec'y-Gen. for Legal Affairs, to Brian Concannon, Esq., Director, Institute for Justice & Democracy in Haiti (Feb. 21, 2013), <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> [hereinafter Letter].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

the Convention on the Privileges and Immunities of the United Nations to justify why the claims of the Haitian victims were not receivable.<sup>65</sup> Per that section,

[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>66</sup>

This section was intended to counterbalance the absolute immunity enjoyed by the U.N. and its subsidiaries.<sup>67</sup> However, the U.N. found the claims of the Haitian victims to be contrary to Section 29's requirement that disputes arise out of a private nature.<sup>68</sup> Instead, the U.N. found that the "claims would necessarily include a review of political and policy matters," making the dispute one of public law rather than private.<sup>69</sup>

The U.N. never further explained why it labeled the claims as public law.<sup>70</sup> The letter did not provide a definition as to what is and what is not considered public versus private law in the context of international or domestic affairs, and neither does the General Convention.<sup>71</sup> Though there does not seem to be an international consensus on a definition, Black's Law dictionary defines public law as "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together."<sup>72</sup> Therefore, because the alleged tortious actions arose out of the execution of the SOFA between the

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<sup>65</sup> *Id.*

<sup>66</sup> Privileges and Immunities Convention, *supra* note 7, art. 8, § 29.

<sup>67</sup> See Kristen Boon, *U.N. Flatly Rejects Haiti Cholera Claim*, OPINIO JURIS (Feb. 22, 2013, 1:35 AM), <http://opiniojuris.org/2013/02/22/U.N.-flatly-rejects-haiti-cholera-claim/>.

<sup>68</sup> See Privileges and Immunities Convention, *supra* note 7, art. 8, § 29.

<sup>69</sup> Letter, *supra* note 62, at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; see also Privileges and Immunities Convention, *supra* note 7.

<sup>72</sup> *Public Law*, BLACK'S LAW DICTIONARY (5th pocket ed. 1996).

state of Haiti and the U.N., it is possible that the Petition and its claims are partly public.<sup>73</sup>

However, it also seems that many aspects of the petition describe the kind of dispute seen in private law. Contrary to public law, private law is defined as “[t]he body of law dealing with private persons and their property and relationships.”<sup>74</sup> One important observation is that the state of Haiti was not listed as a petitioner.<sup>75</sup> In fact, Haiti deliberately removed itself from the dispute between its citizens and the U.N.<sup>76</sup> Given the definition of public law, the question remains as to how a legal dispute can be deemed public if the state itself does not intervene or have a stake in the outcome.<sup>77</sup> The claim is one of negligence, a quintessential tort, and has been brought forth by private individuals who seek relief in the form of monetary damages, which is comparable to United States citizens who file suit against major corporations.<sup>78</sup> The claim, filed by the Petitioners against the U.N., seems to have no impact on the operations of Haiti or on how the U.N. conducts itself within other parts of the world.

Nevertheless, the petition was rejected without adequate explanation. The sting of rejection was followed by the realization that the dismissal left the claimants with no venue to bring a legal case since, as already discussed, a standing claims commission was never put into place.<sup>79</sup> The U.N.’s rejection of the Petition cannot be appealed, leaving only the option of suing in a national court, to which, of course, the U.N. could and would simply assert its absolute immunity given to it by the General Convention.<sup>80</sup> Though a losing battle, the victims had no other choice but to bring their case to a national court.

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<sup>73</sup> See Boon, *supra* note 67 (addressing the distinction between public and private law claims).

<sup>74</sup> *Private Law*, BLACK’S LAW DICTIONARY (5th pocket ed. 1996).

<sup>75</sup> *Petition*, *supra* note 54, at 1.

<sup>76</sup> Boon, *supra* note 67.

<sup>77</sup> *Id.*

<sup>78</sup> *Petition*, *supra* note 54, at 1.

<sup>79</sup> Boon, *supra* note 67.

<sup>80</sup> *Id.*

B. *Legal Case Brought in the United States: Georges v. United Nations*

After the U.N.'s rejection of their Petition, victims of the cholera epidemic decided to file a federal complaint in New York.<sup>81</sup> According to the IJDH, the claim was purposefully brought in the United States instead of in Haiti.<sup>82</sup> One major reason cited was Haiti's lack of a class action mechanism within the court system, which led the legal team to believe that the Haitian court system may have lacked the resources necessary to host such a large-scale legal case.<sup>83</sup> Also, some Plaintiffs within the class, as well as two individual Defendants, were United States citizens and residents.<sup>84</sup> Some of those American citizens had lost family members to cholera or became victims themselves.<sup>85</sup> Finally, doubts regarding the impartiality of Haiti's judiciary also played a role in the decision to bring the case to the United States.<sup>86</sup>

On October 9, 2013, BAI and IJDH along with the law firm Kurzban, Kurzban, Weinger, Tetzelli & Pratt ("KKWT") filed a class action suit against the U.N., MINUSTAH, Secretary-General Ban Ki-Moon and Assistant Secretary-General Mulet.<sup>87</sup> The Complaint contained a myriad of allegations.<sup>88</sup> Chief amongst the allegations were, similar to the Petition, negligence on the part of the Defendants, as well as a breach of contract stemming from the U.N.'s unwillingness to create a standing claims commission as agreed upon in the SOFA between the U.N. and Haiti.<sup>89</sup> In addition to the Complaint, the Plaintiffs also submitted a request that the court affirm that proper service had been made to the U.N. and other Defendants,

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<sup>81</sup> *Cholera Litigation FAQ*, INST. FOR JUST. & DEMOCRACY IN HAITI <http://www.ijdh.org/wp-content/uploads/2018/05/IJDH-Cholera-FAQ-page-May-2018.pdf>, (last visited Dec. 22, 2017); see also *Cholera Accountability*, INST. FOR JUST. & DEMOCRACY IN HAITI, <http://www.ijdh.org/choleraaccountability/> (last visited Dec. 22, 2017).

<sup>82</sup> *Cholera Litigation FAQ*, *supra* note 81.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Complaint at 1, *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015) (No. 13 Civ. 7146), <http://www.ijdh.org/wp-content/uploads/2013/10/Georges-v.-United-Nations-Complaint.pdf> [hereinafter *Complaint*].

<sup>88</sup> *Complaint*, *supra* note 87, at 52–65.

<sup>89</sup> *Id.*

or that an alternative means of service be provided along with the adequate time to do so.<sup>90</sup>

In response to the Complaint, the U.N. chose not to formally respond and, instead, had the United States government seek a dismissal on its behalf.<sup>91</sup> The United States Department of Justice submitted a Statement of Interest on March 7, 2014.<sup>92</sup> Within the Statement, the U.S. recognized its duty as host nation to the U.N. to bear the responsibility of representing the U.N.<sup>93</sup> The United States brought to the court's attention that the U.N. enjoys absolute immunity and more importantly, that it never expressly waived such immunity.<sup>94</sup> According to the U.N. Charter,

The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes . . . Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.<sup>95</sup>

Section 2 of the General Convention further augments this immunity by explaining that “[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.”<sup>96</sup>

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<sup>90</sup> Plaintiffs' Memorandum of Law in Support of Motion for Affirmation that Service of Complaint has Been Made at 5, *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015) (No. 13 Civ. 7146), <http://www.ijdh.org/wp-content/uploads/2014/12/5-Memorandum-of-law-in-support-of-motion-for-affirmation-that-service-has-been-made.pdf> [hereinafter Plaintiffs' Memorandum]; Statement of Interest for U.S. Department of Justice at 1, *Georges*, 84 F. Supp. 3d 246 (No. 13 Civ. 7146), <https://www.state.gov/documents/organization/244540.pdf> [hereinafter Statement of Interest]; cf. Petition, *supra* note 54, at 1, 16, 18–20.

<sup>91</sup> *Cholera Accountability*, *supra* note 81.

<sup>92</sup> Statement of Interest, *supra* note 90, at 2; see 28 U.S.C. § 517 (2012).

<sup>93</sup> Statement of Interest, *supra* note 90, at 2.

<sup>94</sup> *Id.* at 3–5.

<sup>95</sup> U.N. Charter art. 105 ¶ 1–2.

<sup>96</sup> Privileges and Immunities Convention, *supra* note 7, art. 2, § 2.



As such, though it was admitted that the U.N. and MINUSTAH failed to erect the standing claims commission, the United States argued that the U.N.'s immunity still applied.<sup>97</sup> Furthermore, the United States Department of Justice argued that the individual Defendants, Secretary-General Ban ki-Moon and Assistant Secretary-General Mulet, also had the protection of immunity under the same clauses.<sup>98</sup> With all of the Defendants being immune, the United States contended that the Plaintiffs' attempted service was, for lack of a better term, useless.<sup>99</sup> Also within the General Convention is the condition that a service of legal process can be done in the headquarters district only with the approval of the Secretary-General, and because no approval was given, the Plaintiffs had not formally served the Defendants.<sup>100</sup>

With the filing of both Complaint and Response, the district court held oral arguments on October 23, 2014.<sup>101</sup> The major dispute during oral argument revolved around whether failure to comply with Section 29 of the General Convention by providing an alternative means of settlement constituted a waiver of the U.N.'s immunity.<sup>102</sup>

The biggest hurdle the court asked the Plaintiffs to overcome was that of *Brzak v. United Nations*.<sup>103</sup> *Brzak* was a Second Circuit decision that dismissed the Plaintiff's suit against the U.N. due to a lack of subject matter jurisdiction.<sup>104</sup> In *Brzak*, the plaintiff argued that the failure of the U.N. to provide an adequate means of settlement indicates a waiver of immunity.<sup>105</sup> In the opinion, however, the Second Circuit found that the General Convention makes it absolutely clear that the U.N. enjoys immunity unless *expressly* waived under Section 2.<sup>106</sup> To allow the plaintiff's argument to stand would

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<sup>97</sup> Statement of Interest, *supra* note 90, at 5–6.

<sup>98</sup> *Id.* at 7.

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.* at 8; Privileges and Immunities Convention, *supra* note 7, art. III, § 9(a).

<sup>101</sup> Oral Argument at 1, *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015) (No. 13 Civ. 7146), [http://www.ijdh.org/wp-content/uploads/2014/10/Oral-Argument\\_Cholera-Case-10.23.pdf](http://www.ijdh.org/wp-content/uploads/2014/10/Oral-Argument_Cholera-Case-10.23.pdf).

<sup>102</sup> *Id.* at 4–5.

<sup>103</sup> *Id.* at 7; *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010).

<sup>104</sup> *Brzak*, 597 F.3d at 111–12.

<sup>105</sup> *Id.* at 112.

<sup>106</sup> *Id.*

essentially remove the word “expressly” from the General Convention.<sup>107</sup> Finally, the court concluded that the United States’s ratification of the General Convention meant that the Convention was not only binding on the United States as a matter of international law, but that its self-executing ability meant that it had domestic legal effect as well.<sup>108</sup>

To circumvent the decision in *Brzak*, the Plaintiffs argued that the legal question they brought was one of first impression.<sup>109</sup> The Plaintiffs contended that they were not arguing the legal question of waiver, but instead were arguing that a breach of contract had occurred, particularly a breach of Section 29.<sup>110</sup> The Plaintiffs interpreted *Brzak* as not addressing the legal question of a breach of the General Convention’s other provisions. Rather, the Plaintiffs argued that a breach of Section 29 made the existence of a waiver question null and void because it rendered immunity completely gone and, therefore, eliminated the question of whether a waiver occurred.<sup>111</sup> According to the Plaintiffs, Section 29 was a condition precedent to Section 2 of the General Convention, and by breaching Section 29, the Defendants could no longer enjoy the benefit of the bargain, the benefit being immunity.<sup>112</sup>

The Plaintiffs also pointed to both the language of the text and the drafting history to argue that Section 29 and Section 2 of the General Convention should be read together.<sup>113</sup> Section 29 uses the word “shall” when speaking of creating a mechanism by which settlements can be reached.<sup>114</sup> In addition, notes from the drafting committee of the General Convention display a concern by the committee that if the U.N. were to be shielded from legal action in courts, then an alternative means of settlement must be created.<sup>115</sup>

The court agreed with the United States Department of Justice and found that Plaintiffs’ argument fell short in overcoming the

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<sup>107</sup> *Id.*; Privileges and Immunities Convention, *supra* note 7, at art. II, § 2.

<sup>108</sup> *Brzak*, 597 F.3d at 111.

<sup>109</sup> Oral Argument, *supra* note 101, at 8.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 9.

<sup>113</sup> *Id.* at 9–11.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

broad language of *Brzak*.<sup>116</sup> In a decision dated January 5, 2015, the district court concluded that *Brzak*'s holding was binding on the Plaintiffs' case and, as such, encompassed the argument of a provision of the General Convention being breached.<sup>117</sup> The court held that all Defendants enjoyed absolute immunity because Section 29 did not act as a condition precedent to the immunity granted in Section 2.<sup>118</sup> As a result, the Plaintiffs' request for the court to affirm proper service was denied for mootness.<sup>119</sup>

On appeal, the Plaintiffs alleged that the district court erred in its holding and that its application of the General Convention to dismiss their claims violated their right of access to the federal courts under constitutional law.<sup>120</sup> On August 18, 2016, the Second Circuit upheld the district court's finding that Section 29 did not act as a condition precedent and that the U.N. and all its members still enjoyed absolute immunity.<sup>121</sup> In regard to whether the dismissal was a violation of the right to access the courts, the Second Circuit concluded that the Plaintiffs' argument did nothing more "than question why immunities in general should exist."<sup>122</sup> To allow for such an argument would call into question not just U.N. immunity, but other immunities such as judicial, prosecutorial, and legislative immunity.<sup>123</sup> Finally, the Second Circuit found no need to go into the merits of the Plaintiffs' first impression argument concerning the issue of a material breach of a provision within the General Convention.<sup>124</sup> Instead, the Second Circuit found that the Plaintiffs lacked standing to even bring such an argument as it was decided in a previous decision, *United States v. Garavito-Garcia*, that "individuals have no standing to challenge violations of international treaties in the absence of protest by the sovereign involved."<sup>125</sup>

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<sup>116</sup> *Georges v. United Nations*, 84 F. Supp. 3d 246, 251 (S.D.N.Y. 2015).

<sup>117</sup> *Id.* at 248–51.

<sup>118</sup> *Id.* at 249, 251.

<sup>119</sup> *Id.* at 251.

<sup>120</sup> *Georges v. United Nations*, 834 F.3d 88, 91 (2d Cir. 2016).

<sup>121</sup> *Id.* at 88.

<sup>122</sup> *Id.* at 98.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 97.

<sup>125</sup> *Id.* at 97 n.51; *United States v. Garavito-Garcia*, 827 F.3d 242, 246–47 (2d Cir. 2016).

The Second Circuit's decision seemed to extinguish the last hope left for the victims of the cholera outbreak in Haiti. The legal counsel for the victims gave the impression that they knew the chances of the United States Supreme Court granting cert, and then reversing the Second Circuit's decision, were less than slim—as suggested by the fact that the Plaintiffs failed to file cert. It seemed the U.N. recognized this as well, as it was the very next day that the organization finally made its public announcement accepting responsibility for the outbreak.<sup>126</sup>

### III. THE AFTERTHOUGHTS

It has been eight years since the cholera outbreak in Haiti began, and while the legal battle for justice in the United States has almost certainly come to an end, the suffering from the cholera epidemic in Haiti has not. All too common is the image of an invalid man being carried in a wheelbarrow to the nearest run-down medical facility, in the desperate hope of being treated for a disease that could be easily treated in a developed country that had the adequate resources needed.<sup>127</sup> At this juncture, it is imperative to tell a few personal stories of the victims because, as its placement within the latter half of this Note foreshadows, the stories of Haitian victims are either an afterthought or completely forgotten.

Monsieur Fritznel Paul was a father of two with a wife and five siblings.<sup>128</sup> On October 1, 2012, while working in the fields, Paul fell victim to an onslaught of symptoms associated with the infection of cholera, including vomiting and diarrhea.<sup>129</sup> The dehydration was so severe that he no longer had the strength to stand, let alone

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<sup>126</sup> See Katz, *supra* note 18.

<sup>127</sup> *Cholera Epidemic Continues to Claim Lives in Haiti*, GUARDIAN (Nov. 23, 2010, 12:00 PM), <https://www.theguardian.com/global-development/gallery/2010/nov/23/haiti-cholera-outbreak> [hereinafter *Cholera Epidemic Continues*]. “No one should get cholera, and no one who gets it should die. The cure is astoundingly simple: clean water and rehydrating salts, given intravenously if necessary, can swiftly bring a person back from the edge of death. The long-term solution, clean water and sewage systems, is straightforward.” Editorial Board, Opinion, *Haiti in the Shadow of Cholera*, N.Y. TIMES (Apr. 23, 2014), <https://www.nytimes.com/2014/04/24/opinion/haiti-in-the-shadow-of-cholera.html> [hereinafter *Haiti in the Shadow of Cholera*].

<sup>128</sup> Complaint, *supra* note 87, at 45–46, ¶¶ 195–205.

<sup>129</sup> *Id.*

walk.<sup>130</sup> Paul's family was informed that he was suffering from cholera after being treated with oral rehydration solutions at a hospital in Mirebalais.<sup>131</sup> Every member of Paul's family depended on river water from the Artibonite River to support various aspects of their lives, including drinking and washing.<sup>132</sup> Within seven days, during which he continuously suffered from vomiting, Paul died at the age of 34.<sup>133</sup> He left behind his mother, five siblings, wife, and two young daughters.<sup>134</sup> His family was afflicted not only with grief, but also by the debts they incurred to pay for Paul's funeral and medical expenses.<sup>135</sup> This debt led to Paul's eleven-year-old daughter being pulled out of school because the family could no longer pay for her tuition.<sup>136</sup>

The story of Delis Georges, a United States resident, began as a pleasant one, as he and his wife visited Haiti to see their daughter Yanick Georges.<sup>137</sup> During their stay in rural Ba de Saint-Anne, Georges' wife contracted cholera and had to be physically carried on the backs of her loved ones to the local treatment center.<sup>138</sup> After his wife lost consciousness, Georges himself began to experience the telling symptoms of the cholera infection and died, while his wife, lying in a wooden cot just down the hall, remained unconscious for another three days.<sup>139</sup> For fear of contracting the disease, Georges' daughter and other children were not permitted to see him just before and after his death.<sup>140</sup> All they could do was scrape enough money together to buy a coffin for their father's body.<sup>141</sup> The coffin was sealed for burial before his children ever got the chance to say goodbye.<sup>142</sup> Georges' wife recovered after the death

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 47–49, ¶¶ 214–26.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

of her husband, but was not immediately told of his death for fear of the shock being too much for her weakened body.<sup>143</sup>

In addition to these stories, there are the letters sent to the U.N. every day as a reminder of the continuing misery that the victims experience.<sup>144</sup> Politès Rozye wrote the following to the U.N. following his battle with cholera:

I caught cholera from drinking untreated water because my family does not have enough money to buy treated water. When I caught the sickness I lost control of my body. I could not stop vomiting or having diarrhea, which made me very dehydrated, and I wished I was dead.<sup>145</sup>

Twenty-seven-year-old Saintume Julienne was affected with cholera in February 2012. Her letter detailed her experience battling cholera while pregnant:

I salute you in the name of Jesus in heaven. I had diarrhea, vomiting, aches all over and I was 8 months pregnant. I was in danger and my husband had to borrow a motorcycle to take me to the hospital in Mirebalais. When I got there the doctor put me on IV treatment. I spent 6 days at the hospital and later, with the grace of God, I gave birth.<sup>146</sup>

Finally, there is the photograph of Elisa Osman.<sup>147</sup> In it she is being propped up from behind with the help of Nurse Stacy Brown in a Samaritan's Purse cholera treatment facility.<sup>148</sup> The extra aid was needed so that Osman could breastfeed her child, as she was too weak to hold her newborn baby because of the effects of contracting cholera.<sup>149</sup> If only the reader could see the image itself.

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<sup>143</sup> *Id.*

<sup>144</sup> Nancy Young, *Haitian Letters Remind the UN of Cholera Victims' Sadness*, PASSBLUE (Dec. 13, 2015), <http://www.passblue.com/2015/12/13/haitian-letters-remind-the-U.N.-of-cholera-victims-sadness/>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Cholera Epidemic Continues*, *supra* note 127.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

It is these stories that remind us that human suffering in Haiti is even more pervasive now than it was when the cholera outbreak first occurred. The epidemic has only worsened, and cholera is now considered endemic to Haiti.<sup>150</sup> It is now being reported that, in a more recent ten-year plan proposed by then U.N. Secretary-General Ban Ki-moon, an estimated \$2 billion is necessary to completely eradicate cholera in Haiti.<sup>151</sup> However, at current donation levels, the U.N. estimated it would take forty years to eliminate the disease.<sup>152</sup>

#### IV. BRINGING THE HAITIAN CHOLERA CRISIS TO THE INTERNATIONAL STAGE

As discussed, the strategy of holding the U.N. accountable based on a breach of contract theory is not yielding any results.<sup>153</sup> Without a change in strategy, conditions in Haiti will likely only persist.<sup>154</sup> The U.N.'s actions in Haiti and lack of response to the cholera epidemic need to be addressed. Its refusal to do so led to the first time the U.N.'s special rapporteurs have criticized the agency, stating that its mediocre and "clearly insufficient" response to the issue "challenges the credibility of the [U.N.] as an entity that respects human rights."<sup>155</sup> The problem faced by the victims in Haiti is not just a Haitian problem, but a human one. Informed by this perspective, Part IV argues for a shift towards a more human-rights based approach to addressing the cholera epidemic in Haiti.

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<sup>150</sup> Richard Knox, *Why the U.N. is Being Sued over Haiti's Cholera Epidemic*, NPR (Mar. 21, 2016, 11:27 AM), <https://www.npr.org/sections/goatsandsoda/2016/03/21/471256913/why-the-u-n-is-being-sued-over-haitis-cholera-epidemic> [hereinafter *Why the U.N. is Being Sued*].

<sup>151</sup> Richard Knox, *5 Years After Haiti's Earthquake, Where Did the \$13.5 Billion Go?*, NPR (Jan. 12, 2015, 11:06 AM), <https://www.npr.org/sections/goatsandsoda/2015/01/12/376138864/5-years-after-haiti-searhquake-why-aren-t-things-better> [hereinafter *5 Years After*].

<sup>152</sup> *Id.*

<sup>153</sup> *See supra* Part II.

<sup>154</sup> *See 5 Years After, supra* note 151.

<sup>155</sup> *Why the U.N. is Being Sued, supra* note 150; Letter from Special Rapporteurs to Ban Ki-Moon, Sec'y-Gen. of the United Nations at 1–2, U.N. Doc. A/HRC/31/79 (Oct. 23, 2015), [https://spdb.ohchr.org/hrdb/31st/public\\_-\\_OL\\_Other\\_%287.2015%29.pdf](https://spdb.ohchr.org/hrdb/31st/public_-_OL_Other_%287.2015%29.pdf) [hereinafter Letter from Special Rapporteurs].

A. *Shifting to a More Human-Rights-Based Approach to Challenge U.N. Absolute Immunity*

The international organization claiming absolute immunity is the same organization that, on December 10, 1948, made history with the creation of the Universal Declaration of Human Rights (“UDHR”) by the General Assembly.<sup>156</sup> Though not binding law, the UDHR was, for the first time, an international effort to establish that “fundamental human rights . . . [are] universally protected.”<sup>157</sup> It consists of thirty articles that detail the individual rights inherent to every human and has been translated into over 500 languages.<sup>158</sup> Followed by the UDHR were the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>159</sup> Both are multilateral treaties adopted by the U.N. General Assembly and put into force on March 23, 1976, and January 3, 1976, respectively.<sup>160</sup> They are also both binding commitments by those member states that have signed and ratified the conventions into domestic law.<sup>161</sup> The ICCPR binds parties to uphold and respect civil and political rights, such as the right to be free of cruel and unusual punishment and the right to free speech.<sup>162</sup> Such rights pertain to an individual’s ability to participate in the civil and political life of the society and state without discrimination or repression. The ICESCR, conversely, commits parties to aspire to respect human rights that are usually found to

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<sup>156</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) [hereinafter UDHR].

<sup>157</sup> *Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.UN.org/en/universal-declaration-human-rights/> (last visited Oct. 5, 2018).

<sup>158</sup> UDHR, *supra* note 156.

<sup>159</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 51, Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights, art. 29, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>160</sup> International Covenant on Civil and Political Rights, *supra* note 159; International Covenant on Economic, Social, and Cultural Rights, *supra* note 159.

<sup>161</sup> *See* International Covenant on Civil and Political Rights, *supra* note 159; International Covenant on Economic, Social, and Cultural Rights, *supra* note 159.

<sup>162</sup> International Covenant on Civil and Political Rights, *supra* note 159, art. 2, 7, 19.



affect the domestic sphere of individuals, such as the right to an adequate standard of living and healthcare.<sup>163</sup> Together, these three bodies of work—the UDHR, ICCPR, ICESCR, and the two Optional Protocols—are known as the International Bill of Human Rights that nation states refer to when dealing with violations of human rights.<sup>164</sup> Many would say what happened in Haiti was a clear violation of human rights.<sup>165</sup>

While the battle to circumvent U.N. absolute immunity through a breach of contract argument seems to be a losing one, using a human-rights based argument may give victims the opportunity they have been searching for. There is a growing consensus that “international organizations are bound by international law.”<sup>166</sup> The logic behind this is that it would be unjust for member states, who individually are held accountable for human rights violations, to come together to form a union that is then not held accountable for human rights violations.<sup>167</sup>

For example, the European Court of Human Rights has presided over a number of cases about whether to enforce absolute immunity for the European Union in light of human rights violations and the resulting lack of alternative mechanisms to address such human rights violations.<sup>168</sup> One of the most illuminating cases is *Siedler v. Western European Union*.<sup>169</sup> The case arose when a terminated em-

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<sup>163</sup> International Covenant on Economic, Social, and Cultural Rights, *supra* note 159, art. 2, 11.

<sup>164</sup> *Fact Sheet No. 2 (rev. 1), The International Bill of Human Rights*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited Oct. 5, 2018).

<sup>165</sup> See, e.g., Letter from Special Rapporteurs, *supra* note 155, at 1–3.

<sup>166</sup> Freedman, *supra* note 4, at 250.

<sup>167</sup> See 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 Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT’L L.J. 113, 138 (2010).

<sup>168</sup> Freedman, *supra* note 4, at 250–51; see, e.g., *Beer and Regan v. Ger.*, 33 Eur. Ct. H.R. 54 (1999); *Waite and Kennedy v. Ger.*, 30 Eur. Ct. H.R. 261 (1999).

<sup>169</sup> *Siedler v. W. Eur. Union*, Brussels Lab. Court of App., *Journal des Tribunaux* [JT] 617 (2004), ILDC 53 (BE 2003). For both the original French text and a report on the case in English, see *Siedler v Western European Union*, OXFORD PUB. INT’L. L., <http://opil.ouplaw.com/view/10.1093/law:ildc/53be03.case.1/law-ildc-53be03> (last visited Oct. 5, 2018) [hereinafter *Siedler Translation*].

ployee of the Western European Union (“WEU”) was awarded compensation by an internal appeals commission of the WEU.<sup>170</sup> When the employee learned she was entitled to a higher compensation package according to Belgian Labour legislation, the employee filed suit against WEU before the Labour Tribunal of Brussels.<sup>171</sup> When the Labour Tribunal awarded the employee with a higher package, the WEU appealed, arguing that the tribunal violated the organization’s immunity of jurisdiction.<sup>172</sup> The appeals court affirmed the Labor Tribunal and held,

Because the internal procedure concerning the settlement of administrative disputes within the WEU did not offer the guarantees inherent to a fair and equitable legal process, the limitation on the access to the normal courts by virtue of the organization’s jurisdictional immunity, was incompatible with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[.]<sup>173</sup>

Thus, the previous judgment by the Labour Tribunal was affirmed.<sup>174</sup>

The possibility that the U.N. could be held accountable for human rights violations despite having immunity, like the WEU, is encouraging, but unlikely. The biggest concern for those favoring absolute immunity, which the Second Circuit echoed in the *Georges* opinion, is the argument of efficiency: to tear apart the veil of absolute immunity would inevitably open the floodgates of lawsuits from individuals seeking relief for the various acts of the U.N. or its hundreds of thousands of peacekeeping troops, which would hinder the U.N.’s ability to realize its mission of peace.<sup>175</sup>

However, though the U.N. is a much larger organization and has a much broader reach around the world than the WEU, even those

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<sup>170</sup> *Siedler Translation, supra* note 169.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Fleck *supra* note 5, at 621; *Why the U.N. Is Being Sued, supra* note 150.

within the U.N. seem to discount this “slippery slope” argument.<sup>176</sup> In a letter to the Office of the High Commissioner on Human Rights, five special rapporteurs appointed by the U.N. specifically addressed the U.N.’s response to the cholera outbreak in Haiti.<sup>177</sup> The rapporteurs recognized the U.N.’s tendency to use Section 29 to foreclose the possibility of receiving claims, even though Section 29 was originally intended to provide victims with a venue to bring forth claims so as to promote due process.<sup>178</sup> In response to commentators defending the U.N.’s application of Section 29, the rapporteurs stated:

In a variety of situations the United Nations has managed to devise innovative solutions that have sought to achieve just outcomes that accord with its human rights commitments and these have not, despite fears expressed at the time, led to an unmanageable opening of the floodgates that are so often invoked to prevent new approaches being shaped.<sup>179</sup>

Along with Section 29, Article 2 of the ICCPR ensures that any individual whose human rights have been violated “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>180</sup> The only reason victims of the cholera outbreak sought to legally overcome the U.N.’s immunity is that the U.N. failed to provide a standing claims commission, even though Section 29 of the SOFA between Haiti and the U.N. required one.<sup>181</sup> If the U.N. were to provide for an alternative mechanism to settle disputes, then challenges to the U.N.’s absolute immunity would likely be few and far between.

Another, more complicated issue is the age-old question of blame. The U.N.’s use of peacekeeping forces, who have distinct

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<sup>176</sup> Letter from Special Rapporteurs, *supra* note 155, at 2.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 2–3

<sup>180</sup> International Covenant on Civil and Political Rights, *supra* note 159, art. 2.

<sup>181</sup> See Petition, *supra* note 54, at 16, ¶¶ 66–68; Complaint, *supra* note 87, at 64, ¶¶ 1–5.

legal status, makes it difficult to ascertain who bears the responsibility when a human rights violation occurs. Forces from various member states remain under the exclusive authority of the U.N. during their period of deployment in furtherance of U.N. peace missions, and yet these same forces are still in the service of and owe allegiance to their respective states.<sup>182</sup> The question then becomes, if peacekeeping troops violate human rights, is it the U.N. or the member state who provided the troops that should be held liable for the violations? Furthermore, if the U.N. is found responsible, do all member states contribute to compensate victims, or only the member state that sent the culpable troops?

Tom Dannenbaum, who “insists that the U.N. is also legally bound by international human rights law,” dealt with this very issue by creating a new liability framework reinterpreting the principle of “effective control” to apportion responsibility.<sup>183</sup> This principle within the human rights regime holds that international human rights law can be applied to states acting outside of their own territory and exerting their control over other specific individuals.<sup>184</sup> Dannebaum applies this principle to the actions of peacekeeping forces.<sup>185</sup> He divides these actions into five different categories, each category having a different entity—either the U.N., member state, or the peacekeeper himself—exerting control.<sup>186</sup> The following three categories are included: (1) peacekeepers who violate human rights through an act beyond the scope of their U.N. authority; (2) peacekeepers who commit violations under the authorization of a U.N. commander or superior within the Security Council; and (3) peacekeepers whose actions, carried out under the orders of the U.N., would not only violate human rights, but would rise to the level of a war crime.<sup>187</sup> Based on which entity is exerting “effective control,”

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<sup>182</sup> MOSHE HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARDS THIRD PARTIES: SOME BASIC PRINCIPLES* 66 (1995).

<sup>183</sup> Freedman, *supra* note 4, at 251; *see also* Dannenbaum, *supra* note 167, at 114.

<sup>184</sup> Dannenbaum, *supra* note 167, at 130.

<sup>185</sup> *Id.* at 114.

<sup>186</sup> *See generally id.* at 158–83 (outlining the author’s proposed five-category approach for “attributing liability for the human rights abuses of peacekeepers”).

<sup>187</sup> *Id.* at 117.

one could determine whether the U.N., member state, or peace-keeper himself is held to be accountable for the violation and responsible for compensation.<sup>188</sup>

Despite the difficulty of answering who is to blame and for how much, nation states still seem to be willing to question the U.N.'s absolute immunity when the lack of access to courts and/or due process becomes an issue.<sup>189</sup> Similar to the court in *Georges*, several other national courts have adjudicated cases against the U.N. using similar constitutional arguments about the lack of access to courts and, thus, courts have upheld U.N. immunity.<sup>190</sup> But those courts have consistently noted the incompatibility between U.N. absolute immunity and international human rights.<sup>191</sup> They desire to protect an individual's ability to have a venue to seek a remedy.<sup>192</sup>

If international courts are willing to hold smaller international organizations responsible for human rights violations, then it stands to reason that an individual may be able to bring a human-rights-based claim to overcome U.N. absolute immunity. The victims of the cholera outbreak have pleaded with the U.N. in vain to erect a standing claims commission and have exhausted their options within the United States legal system.<sup>193</sup> It is time to try something new, and the cholera outbreak in Haiti is the perfect case to try such an experiment in the human rights realm.

#### B. *The Opportunity Exists, but Where Should This Opportunity Be Seized?*

Using a human-rights-based argument to challenge the U.N.'s immunity is one option.<sup>194</sup> The next question is, in which forum should the victims of the cholera outbreak bring such a case? The choice of a forum could be the difference between the U.N.'s immunity acting as an impediment and the U.N. being found guilty of violating a human right in an official and public capacity. As this is a novel issue, it is difficult to predict with certainty which forums

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<sup>188</sup> See *id.* at 158.

<sup>189</sup> Freedman, *supra* note 4, at 252–53.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See *Georges v. United Nations*, 834 F.3d 88, 91 (2d Cir. 2016); *Georges v. United Nations*, 84 F. Supp. 3d 246, 251 (S.D.N.Y. 2015).

<sup>194</sup> See Freedman, *supra* note 4, 253.

provide the best opportunity for success. There are, however, clues as to which forum is probably best, based on the structure and procedures of each. I suggest that the Human Rights Council is the best option for the Haitian victims to obtain a favorable opinion against the U.N. Obtaining a favorable judgment, or at the very least presenting the merits of the case in a formal setting, plays a role in a long-term chain of events that can benefit not only the Haitian victims, but also the entire human rights regime.

One option, although not ideal, would be for the victims to bring their human-rights-based case back to the federal court in New York. Because some of the victims were United States residents, they have jurisdiction to bring a claim in United States federal court.<sup>195</sup> In *Brzak*, discussed earlier, the Second Circuit Court of Appeals made it clear that the U.N. enjoys absolute immunity at all times unless it expressly waives immunity.<sup>196</sup> The broad language of the case foreclosed the victim's initial breach of contract argument.<sup>197</sup>

While the human-rights-based argument of a lack of access to courts may provide a novel reinterpretation of the General Convention, the victims would still have an issue with standing. As of today, the government of Haiti still has not indicated whether it would pursue action against the U.N. Thus, *United States v. Garavito-Garcia*, which prevents individuals from challenging violations to international treaties, would still prevent the victims from challenging the U.N.'s immunity.<sup>198</sup> Unless the Haitian government were to involve itself in the cholera dispute, it is very likely that the United States federal court would dismiss the case once again and uphold U.N. immunity, thereby adding to the precedent that the U.N.'s immunity is unbreakable.

A second option is to bring the case to the International Criminal Court ("ICC"), a forum in which it would be difficult for the victims to obtain a favorable judgment. The ICC has jurisdiction to prosecute individuals for the international crimes of genocide, crimes

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<sup>195</sup> See Complaint, *supra* note 87, at 3, ¶ 9.

<sup>196</sup> *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010).

<sup>197</sup> *Id.* at 111, 114.

<sup>198</sup> *United States v. Garavito-Garcia*, 827 F.3d 242, 246–47 (2d Cir. 2016).

against humanity, and war crimes.<sup>199</sup> The ICC can exercise its jurisdiction only when existing national judicial remedies have been exhausted or when it is referred a case by the United Nations Security Council.<sup>200</sup> Though the ICC inevitably deals with human rights violations, its focus is on criminal cases.<sup>201</sup> While thousands of deaths have resulted from the cholera epidemic and the cause can be traced to the U.N., one could hardly argue that the actions of the peacekeepers in Haiti rise to the same level of malicious intent of other individuals who commit war crimes that the ICC usually hears. In other words, there is no evidence that the carelessness of the peacekeepers in failing to maintain sewage or properly respond to the resulting cholera outbreak rises to the level of criminal conduct necessary to be heard by the ICC.

A third option is to file a complaint with the International Court of Justice (“ICJ”), the main judicial organ of the U.N.<sup>202</sup> The ICJ oversees and settles disputes submitted to it by states, which are known as contentious cases.<sup>203</sup> It also renders advisory opinions on legal questions referred to it by authorized U.N. organs and specialized agencies.<sup>204</sup> The ICJ can render legally binding decisions in contentious cases. Because only states may be parties to a contentious case,<sup>205</sup> Haiti would have to become involved in the cholera dispute. Further, international organizations like the U.N. cannot appear before the court in contentious cases.<sup>206</sup> Finally, even if Haiti became involved and the ICJ makes the unlikely decision that the U.N. is a state, the decisions are only legally binding if both state parties agree to the court’s jurisdiction.<sup>207</sup> Considering the six-year wait for the U.N. to finally admit to its role in the cholera outbreak,

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<sup>199</sup> *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Oct. 5, 2018).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *The Court*, INT’L CT. OF JUST., <http://www.icj-cij.org/en/court> (last visited Oct. 5, 2018).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Contentious Jurisdiction*, INT’L CT. OF JUST., <http://www.icj-cij.org/en/contentious-jurisdiction> (last visited Oct. 5, 2018).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

the idea that it would then submit to the ICJ's jurisdiction seems far-fetched.

Due to the inherent procedural problems of other venues and forums for this unique situation, the Human Rights Council provides the most likely avenue for the claims of Haitian victims to be heard, and for the victims to win a favorable opinion. The Human Rights Council is an inter-governmental body within the U.N. and was created in March of 2006 through a U.N. resolution.<sup>208</sup> The Council is responsible for promoting and protecting human rights around the world and is composed of forty-seven seats filled by member states elected for three-year terms.<sup>209</sup>

The Council established a complaint procedure through a U.N. resolution on June 18, 2007.<sup>210</sup> It allows individuals and organizations to bring forth claims of human rights and fundamental freedoms violations "occurring in any part of the world and under any circumstances."<sup>211</sup> Because it allows individuals to bring forth claims, Haitian cholera victims would not have to depend on the state of Haiti to bring a claim of its own.<sup>212</sup> Though it is the norm that complaints brought to the Council are against nation states, nothing in the U.N. resolution that created the complaints procedure explicitly prevents individuals from bringing a claim against an international organization such as the U.N.<sup>213</sup> Furthermore, the Council's review of human rights violations does not require that states or international organizations ratify or agree to the jurisdiction of any particular human rights treaty.<sup>214</sup>

Complaint review and examination are done by two different groups under the Human Rights Council—the Working Group on

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<sup>208</sup> *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx> (last visited Oct. 5, 2018); *see also* G.A. Res. 60/251 (Mar. 15, 2006).

<sup>209</sup> *Id.*

<sup>210</sup> G.A. Res. 60/251 (Mar. 15, 2006).

<sup>211</sup> *Human Rights Council Complaint Procedure*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (last visited Oct. 5, 2018).

<sup>212</sup> *Human Rights Council Complaint Procedure: Frequently Asked Questions*, UNITED NATIONS HUM. RTS. COUNCIL <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx> [hereinafter *Frequently Asked Questions*].

<sup>213</sup> Human Rights Council Res. 5/1, U.N. Doc. A/62/53, at 48 (June 18, 2007).

<sup>214</sup> *Frequently Asked Questions*, *supra* note 212.



Communications and the Working Group on Situations.<sup>215</sup> The two groups are responsible for communicating with the state or organization in question about human rights violations and working towards a resolution.<sup>216</sup> If the two groups find a persistent pattern of violations and bring it to the attention of the Council, then the Council may take the matter into formal consideration.<sup>217</sup> Though the procedure is usually confidential, there are circumstances in which the Council has made public the human rights violations and the entity responsible.<sup>218</sup>

If the Human Rights Council were to take up the matter and make public that human rights violations occurred as a result of U.N. actions, that simple act could have a profound impact. That the Council's conclusion carries no legal consequences is unfortunate; but, there are still benefits to be gleaned. The Haitian victims' success in obtaining a formal and public opinion from a prominent human rights international body would be the first step to overcoming the idea that the U.N.'s immunity is absolute and could lead to future binding decisions.

The same theories used to describe the normalization of human rights during a time when the phrase "human rights" was a novel idea, can perhaps be applied to the normalizing of U.N. accountability. Students familiar with human rights regimes are likely also familiar with the fundamental models of norm internalization.<sup>219</sup> In 1998, Katherine Sikkink and Margaret Keck co-authored a revolutionary book entitled "Activists Beyond Borders."<sup>220</sup> In this book, the authors examine and detail the role of transnational advocacy networks in domestic and international politics.<sup>221</sup>

Based on months of observation and study, Sikkink and Keck noticed a recurring pattern between activists and nation states who commit human rights violations, coining the phrase the "boomerang

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See Erik Voeten, *Norms, Power, and Human Rights*, 16 INT'L STUDIES REV. 303, 303 (2014) (reviewing MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998)) (discussing the progress in the field of human rights studies heralded by the publication of Keck & Sikkink's book).

<sup>220</sup> KECK & SIKKINK, *supra* note 219.

<sup>221</sup> See *id.* at 1–38.

model.”<sup>222</sup> The boomerang model applies where individuals in a given country are unsuccessful in persuading the government to change its behavior and cease its violation of some kind of human right.<sup>223</sup> As a result, activist groups organize and call on the help of other activist groups in foreign nations.<sup>224</sup> These other groups, which now have become a transnational advocacy network, begin to exert pressure on their own governments to name and shame the government that is committing the human right violation.<sup>225</sup> Now that there is international pressure, that government is more likely to change its behavior and cease the violation of a human right.<sup>226</sup>

A great example of this model was the campaign to stop deforestation in the Brazilian Amazon, which originated within the country itself and then became the focus of activist groups in different parts of the world.<sup>227</sup> A network of activists from all over the world successfully used what Keck and Sikkink called “information politics.”<sup>228</sup> The activists gathered and disseminated pertinent information to local residents to incentivize them to take an interest in land development.<sup>229</sup> Then, through the use of accountability politics, the activists pressured the World Bank to create policies for sustainable development.<sup>230</sup>

Sikkink then went on, with the help of Martha Finnemore, to build upon the boomerang model and develop the concept of the norm life cycle.<sup>231</sup> Activists become what Sikkink and Finnemore call norm entrepreneurs, and as such, have the conviction that something must be done when they witness a human rights abuse.<sup>232</sup>

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<sup>222</sup> *See id.* at 12–13.

<sup>223</sup> *Id.* at 12.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 13.

<sup>226</sup> *See id.*

<sup>227</sup> *Id.* at 137–47.

<sup>228</sup> *See id.* at 45, 137–40.

<sup>229</sup> *Id.* at 140–44.

<sup>230</sup> *Id.* at 147.

<sup>231</sup> Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895 (1998).

<sup>232</sup> *Id.* at 896–99.

Norm entrepreneurs are usually motivated by altruism and empathy.<sup>233</sup> These norm entrepreneurs use existing organizations to create norm platforms and campaigns.<sup>234</sup>

This first stage is called norm emergence.<sup>235</sup> After these norms emerge, the next stage known as norm cascade occurs when international organizations begin to promote such norms in the hopes of reaching a broader audience.<sup>236</sup> Take, for example, the promotion of the UDHR after widespread human rights abuses during World War II. Then, states begin to adopt these norms due to the pressure exerted by these international organizations and to enhance their own domestic legitimacy even if there is no domestic pressure for them to do so.<sup>237</sup>

The final stage is norm internalization.<sup>238</sup> Over time nation states and the citizens within them begin to internalize these norms.<sup>239</sup> The norms become codified with domestic law and become so commonplace that to imagine a world without such a norm would be difficult.<sup>240</sup> For example, the norm of the woman's right to vote is now so internalized that many women born in the modern age could hardly imagine a world where they were not allowed to vote.<sup>241</sup> Yet, such a thing did not exist in the past and only came about through the work of advocacy groups and norm emergence.

The beginning of a norm life cycle is already being witnessed in terms of U.N. absolute immunity following the cholera outbreak in Haiti. Norm entrepreneurs, who witnessed what it meant for victims of human rights abuses by U.N. peacekeepers to not have access to a court because of U.N. absolute immunity, have already emerged challenging the U.N.'s absolute immunity.<sup>242</sup> Organizations like the Institute for Justice and Democracy in Haiti have begun to promote

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<sup>233</sup> *Id.* at 896.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 902.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 904.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* at 895.

<sup>242</sup> *See, e.g.,* *Georges v. United Nations*, 834 F.3d 88, 91 (2d Cir. 2016); *Georges v. United Nations*, 84 F. Supp. 3d 246, 251 (S.D.N.Y. 2015); *see also* Freedman, *supra* note 4, at 250–53 (discussing cases that are chipping away at the concept of absolute immunity).

the idea that the U.N. should not enjoy absolute immunity if it fails to provide for an alternative mechanism to settle disputes.<sup>243</sup> For these reasons, an official opinion from the Human Rights Council stating that a human rights violation has occurred in Haiti, and that the U.N. itself is responsible, would be significant despite the fact that the opinion would have no direct legal consequences. Rather, the opinion would attack the legitimacy of the U.N.'s immunity and hopefully initiate widespread pressures similar to those that arose from the Brazilian government's attempts to deforest the Amazon.<sup>244</sup>

Just as in stage two of Sikkink's norm life cycle, where states begin to adopt norms to gain legitimacy, the U.N. might begin to adopt the norm of a modified immunity in order to maintain its credibility.<sup>245</sup> In the same letter submitted to the U.N. High Commissioner, the special rapporteurs stated:

The effective denial of the fundamental right of the victims of cholera to justice and to an effective remedy is difficult to reconcile with the United Nations' commitment to 'promote and encourage respect for human rights'. We thus believe that the nonreceivability approach undermines the reputation of the United Nations, calls into question the ethical framework within which its peace-keeping forces operate, and challenges the credibility of the Organization as an entity that respects human rights.<sup>246</sup>

An opinion from the Human Rights Council could lead to the changed behavior of the U.N. as well as influence nation states to really consider modifying the U.N.'s immunity protection. Ideally, that norm will become internalized and codified in both international and domestic law over the course of coming years. For Haitian victims now, an opinion from the Human Rights Council recognizing a human rights violation could reinvigorate the campaign to help stop the spread of cholera and to compensate the victims.

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<sup>243</sup> See, e.g., *Georges*, 834 F.3d at 91; *Georges*, 84 F. Supp. 3d at 251.

<sup>244</sup> See KECK & SIKKINK, *supra* note 219, at 137-47.

<sup>245</sup> See Finnemore & Sikkink, *supra* note 231, 902-04.

<sup>246</sup> Letter from Special Rapporteurs, *supra* note 155, at 2.

## CONCLUSION

The ideas proposed in Part IV of this Note are novel and untested. Yet, they provide a sliver of hope for not just the victims of the cholera outbreak in Haiti, but for victims from all over the world who suffer abuses from the U.N. and its peacekeeping forces. The realm of human rights is still a complex web that is ever-growing and ever-changing, allowing for the opportunity to test new approaches to solve old problems. Of these proposed solutions, an opinion by the Human Rights Council condemning the U.N.'s actions in Haiti and questioning the value of U.N. immunity seems the most realistic and potentially most impactful. Though the idea of utilizing a human rights-based approach to solve the issue of U.N. absolute immunity is an option, the U.N.'s reluctance to acknowledge its shortcomings suggests that such an option will take years, if not decades, to develop and effect change within the U.N. Therefore, it is also important to be aware of and implement more pragmatic practices that will protect the rights of victims in the short-term, such as advocating for and ensuring the establishment of alternative dispute resolution mechanisms when conducting peacekeeping operations.

The most ideal policy would be for states to negotiate SOFAs that include an express waiver agreement. The inclusion of express waiver agreements would not only tackle the issue of immunity being dealt with in this Note, but also allow for the discussion of the actual merits of human rights abuse cases. While smaller steps like amended SOFAs are a start, major policy changes are needed to combat the U.N.'s ability to escape the consequences of its actions. Tens of thousands of deaths in Haiti are attributable to the U.N.'s reluctance to take responsibility for its actions in the cholera outbreak. To prevent future tragedies, the international community must pick up where organizations like the Institute for Justice in Haiti left off and question whether the U.N. deserves to enjoy absolute immunity. Because the U.N. has found that it is morally just to shame nation states into compliance in the past, it is only fair that the international community now return the favor, lest the U.N. plans to continue living in a glass house.