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UN AND INTERNATIONAL ORGANISATION LIABILITY

The UN's liability for civilian harms: lessons from cholera in Haiti

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Summary

The United Nations enjoys broad immunity from suit, but has well-established legal obligations to compensate civilians harmed by its tortious conduct. Yet, it took years of advocacy – from the streets of Port-au-Prince to legal action in New York – to persuade the UN to redress harms it caused by recklessly introducing cholera to Haiti. Recently, the UN has recognised a moral, but not legal, duty to victims. This gap between the UN's liability on paper and its practice violates victims' right to a remedy, and undermines the UN's own credibility in promoting the rule of law and human rights.

Introduction

A number of widely publicised scandals have recently revealed failures by the UN to remedy civilians harmed by its peacekeeping operations. In particular, the UN's response to its reckless introduction of a massive cholera outbreak in Haiti has exposed a stark divide between the scope of the organisation's liability on paper and its compliance in practice. This accountability gap denies victims of UN harms the remedies they are entitled to under human rights law and the UN's legal frameworks, and undermines the UN's own moral standing as a promoter of rule of law. As the UN devises a new approach to cholera in Haiti, it still has an opportunity to rectify this – but doing so will require providing victims with justice, not charity.

The UN's responsibility for cholera in Haiti

Cholera erupted in Haiti in October 2010 for the first time in Haiti's history.¹ The outbreak was quickly traced to a UN peacekeeping base, which had just received a new deployment of peacekeepers from Nepal.

Following UN protocol, the peacekeepers were not screened for cholera prior to deployment, despite cholera being endemic in Nepal.²

A panel of experts appointed by the UN found that the UN base recklessly managed its waste, creating a high risk of environmental contamination.³ Broken pipes discharged wastewater from the base directly into a nearby tributary, and untreated human waste was dumped in uncovered pits that often overflowed into the adjacent waterway.⁴ Cholera-contaminated waste entered the tributary, which feeds into Haiti's largest river that tens of thousands rely on for drinking, bathing and farming. From there, the disease spread like wildfire across the entire country.

Cholera is easily preventable with clean water and treatable through rehydration interventions. Yet, faced with severe under-resourcing, the Haitian health system and humanitarian actors scrambled to respond. At the height of the epidemic, cholera was infecting one person every minute.⁵ Families watched their loved ones succumb to the disease and die within hours. Over the past seven years, at least 9,600 people have died and over 800,000 have been sickened.⁶ While the infection rate has dropped significantly in recent years, the epidemic continues to date.

UN's liability for tortious conduct

The tortious conduct that resulted in the outbreak of cholera in Haiti squarely engages the UN's liability to individuals. Under the Convention on Privileges and Immunities of the United Nations (CPIUN), the UN is obligated to 'provide for appropriate modes of settlement' of private law claims against it.⁷ Such claims are defined to include third-party claims for personal injury, illness or death attributable to peacekeeping operations.⁸ The Status of

Forces Agreements between the UN and peacekeeping host countries, including Haiti, requires that claims not amicably settled through the UN's internal claims processes be decided by an independent standing claims commission.⁹ In the context of the UN's broad immunity from national courts, these requirements safeguard civilians' ability to access remedies, a fundamental human right recognised in major human rights instruments.¹⁰

Despite these legal obligations and the overwhelming evidence establishing responsibility, the UN refused to address claims filed by cholera victims. In November 2011, Haitian human rights organisation *Bureau des Avocats Internationaux* (BAI) and its US partner, the Institute for Justice & Democracy in Haiti (IJDH), filed claims on behalf of 5,000 victims seeking remedies consisting of:

1. investments in water and sanitation infrastructure to combat the epidemic;
2. just compensation; and
3. a public apology.¹¹

After 13 months, the UN summarily dismissed the claims as 'not receivable' because 'consideration of these claims would necessarily include a review of political and policy matters'.¹² The UN refused to provide further explanation, and denied the claimants' request for referral to a claims commission on the circular grounds that such referrals are unmerited for claims that are not receivable.¹³

Legal commentators, including the UN's own former lawyers, have widely rejected this response as arbitrary and non-compliant with its legal obligations. For example, Bruce Rashkow, former Director of the UN's General Legal Division, commented that, 'as the head of the UN legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation was utilized in regard to such claims'.¹⁴

The UN's response also revealed a serious accountability gap with global implications. A team of legal scholars at Yale University found that the UN has never established the requisite claims commission, despite having signed some 32 agreements mandating it.¹⁵ There is, therefore, no body with jurisdiction to review unilateral decisions by the UN to reject claims in the peacekeeping context. The BAI and IJDH challenged the UN's denial of remedies in US federal court, arguing that its refusal to receive the claims placed it in breach of the agreements that

grant it immunity. But the court sided with the UN, holding that immunity is absolute and unaffected by any purported breach of the organisation's reciprocal duties.¹⁶ Thus, victims were left without any formal channel to seek remedies.

This outcome spurred global outcry and deeply undermined the UN's credibility, in Haiti and beyond. Media outlets around the world criticised the response with headlines like 'UN hypocrisy in Haiti', 'Double standards', and 'In Haiti, the UN's behavior is a far cry from being the conscience of the world'.¹⁷ The UN spokesperson in Haiti reported that she 'can't mention the [M]ission without someone asking her about cholera or the cases of abuse', and noted that 'it is the opposite of why we are here, to defend the highest values and ideals and this is killing our credibility worldwide'.¹⁸

The wide-ranging criticisms culminated in a report by the UN Special Rapporteur on Extreme Poverty & Human Rights, Philip Alston, where he summarised the situation as follows:

'The legal position of the United Nations to date has involved denial of legal responsibility for the outbreak, rejection of all claims for compensation, a refusal to establish the procedure required to resolve such private law matters, and entirely unjustified suggestions that the Organization's absolute immunity from suit would be jeopardized by adopting a different approach. The existing approach is morally unconscionable, legally indefensible and politically self-defeating. It is also entirely unnecessary.'¹⁹

The report was sent to the UN Secretariat, and leaked to the media in August 2016. In the context of intense and mounting pressure, it constituted the final admonition that finally spurred the UN to change course.

The UN's new approach

On 1 December 2016, the Secretary-General presented a public apology to the Haitian people at the General Assembly. In Haiti, victims gathered to watch a livestream, breaking into spontaneous applause in response. The Secretary-General also launched a 'New UN Approach to Cholera in Haiti', a \$400m plan to (1) intensify efforts to treat, control and eradicate cholera; and (2) deliver 'a package of material assistance and support to those Haitians most directly affected by cholera, centered on the victims and their

families and communities'.²⁰ The latter is intended to signify a 'concrete and sincere expression of the Organization's regret'.²¹

This response was a historic breakthrough in the struggle for justice for victims, and marked a major shift in the UN's position. Significantly, however, the UN's new response was carefully framed outside the context of its legal responsibilities. The Secretary-General's apology stopped short of acknowledging legal responsibility or even explicit factual responsibility for having introduced cholera, instead stating that the UN 'simply did not do enough with regard to the cholera outbreak and its spread in Haiti' and was 'profoundly sorry for [its] role'.²² Similarly, the UN's report on the New Approach, while acknowledging that the cholera crisis had become a 'stain on the Organization's reputation', used the language of 'moral duty'.²³ UN representatives stressed that the organisation's legal position had not changed.

The UN's elision was criticised by many observers, including Philip Alston who, in an open letter to the Deputy Secretary-General, noted:

'[A] crucial element is missing... The package needs to be rooted in a legal framework that enables the United Nations to respect its obligations in this case, to act in accordance with the rule of law, to demonstrate that it is prepared to be held accountable, and to emerge from the shame of its previous policy on Haiti with both credit and credibility.'

Limitations of the non-liability approach

In the six months since the launch of the New Approach, several repercussions of the UN's ambiguous position have emerged: a lack of basis for ensuring adequate funding of the New Approach, and a slide towards a charity-based model that fails to respect victims' right to a remedy and reparation. As a result, the UN continues to be subject to criticisms that it is disregarding its obligations to victims.

Funding

In order to finance the New Approach, the UN established a voluntary trust fund and has asked for donations from Member States. To date, only three per cent of the \$400m needed has been raised.²⁴ Most recently, a proposal to redirect \$40.5m left over in the Haiti peacekeeping mission budget has

been met with resistance by large donor countries.²⁵ Ironically, given the causes of the outbreak, countries opposed reportedly argue that the cholera response is not relevant to peacekeeping.

This funding quagmire could be avoided if the UN admitted legal liability. The General Assembly is under a legal obligation to pay for the organisation's liabilities through its operational budget, and thus Member States would have to contribute to the New Approach in accordance with their assessed contributions to the budget at large, as a matter of course.²⁶ This would remove the optional and unpredictable nature of funding, and lessen political influence by large donors who resist alternative funding options that would result in a larger burden on their governments.

By contrast, the current situation has seriously undermined the UN's ability to respond to the ongoing cholera epidemic, let alone implement the remedial elements of the New Approach. In May 2017, the Secretary-General warned that hard-earned progress in controlling the epidemic would reverse unless the UN secured additional funds immediately.²⁷ Because of the dire need to put resources towards the humanitarian response, the funding shortfall threatens to doom the promised victim assistance package in particular. The UN has repeatedly stated that, in the absence of full funding, cholera control will be prioritised over remedies.

Substituting charity for justice

Under the UN's third-party peacekeeping liability framework, the organisation is responsible for compensating individuals for economic loss, including medical and rehabilitation expenses, loss of earnings, loss of financial support, transport expenses, medical care, legal and burial expenses.²⁸ Consistently with this obligation, victims of cholera have for years sought compensation for the harms they have suffered. Such compensation would help remedy the devastating impacts of cholera. Victims speak of going into debt to pay for funerals or transport to get to medical care, of selling their land or livestock because of costs incurred from cholera and the loss of breadwinners, and of how cholera has deepened their poverty and left them vulnerable even years later.

When the UN announced the New Approach, it appeared to, at least in part, recognise the need for victim compensation.

The plan envisages two potential approaches to 'victim assistance': (1) community projects in those communities most affected by cholera; and/or (2) payments to the families of those who died of cholera. In October 2016, the UN Special Adviser to the Secretary-General for the cholera response stated that a mixed approach could be contemplated, where half of the \$200m sought for remedial assistance 'could be spent on communities, with the remaining \$100 million paid to families of victims... allow[ing] for payments of some \$10,000 per family'.²⁹ Defending the UN's refusal to formally accept legal liability, the Deputy Secretary-General noted that the UN hoped the New Approach 'will in practice be the same as models some of the lawyers are suggesting'.³⁰

Haitian cholera victims have responded to this proposal by expressing a preference for individual compensation over community projects, emphasising the devastating economic consequences of cholera on their households and the need for modest but direct financial assistance to help them get back on their feet.³¹ They also express deep scepticism that community projects can adequately redress their harms, especially against the history of weak aid accountability in Haiti, and the inability of geographically centralised projects to benefit victims in remote areas, who were often most affected.

Despite this, the UN is increasingly abandoning individual compensation as an option. In his report to the General Assembly, outgoing Secretary-General Ban identified a number of concerns regarding the feasibility of individual compensation, including how to identify and verify victims, but committed to further assessing 'the individual approach', including through consultations with victims.³² To date, no such consultations have taken place and there has been no further analysis of a way forward on compensation. Secretary-General Guterres has instead opted to move forward on piloting community projects, relegating victims to have a say only in what types of projects would benefit their communities.³³ Recent UN statements have failed to even mention compensation as an option.

Opting to substitute community projects for the compensation mandated in the UN's liability framework does not appear to be limited to Haiti. The UN also recently announced that, in defiance of recommendations issued by its Human Rights Advisory Panel set up to adjudicate human rights claims against the UN Mission in

Kosovo (UNMIK), it would establish a similar voluntary trust fund to Haiti, which would fund community projects in affected communities.³⁴

Conclusion

The UN's reluctance to admit legal liability has potentially far-reaching consequences for ensuring that victims of UN harms have access to effective remedies. As noted by Philip Alston, the UN's handling of the Haiti case at best establishes a problematic precedent that victims must rely on public pressure and shaming of the UN to secure remedies, rather than a predictable and accessible claims process.³⁵ It also undermines the moral legitimacy that the UN needs to be an effective promoter of the rule of law. As rule of law expert Jeremy Waldron admonished, 'UN officials should not be surprised if, as things progress along these lines, other countries become increasingly reluctant to accept lectures from its officials and agencies on the importance of the Rule of Law'.³⁶

It is not too late for the UN to formally admit legal liability for cholera, and address victim compensation in this context. At a bare minimum, it must ensure that the New Approach fulfils victims' right to a remedy in practice, consistent with the UN's liability framework and human rights law. Anything else will spur continued criticism that the UN, even when finally trying to right its wrongs, still puts charity over justice, ignores victims' needs and rights, and disregards its own legal duties.

Notes

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- 5 Yale Report, 1.
- 6 Ministère de la Santé Publique et de la Population (MSP), *Rapport du Réseau National de Surveillance, Sites Cholera* (29 April 2017), <http://mspp.gouv.ht/site/downloads/Profil%20statistique%20Cholera%2017eme%20SE%202017.pdf>.
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- s 29, 13 February 1946, 21 UST 1418, 1 UNTS 15.
- 8 See, eg, 'Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims', 2001 UN Jurid YB 381, 381; UN Secretary-General, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations*, (24 April 1995) S15 UN Doc A/C.5/49/65.
 - 9 See, eg, Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, ss 54–55, UN-Haiti, 9 July 2004 ('Third-party claims for... personal injury, illness or death arising from or directly attributed to MINUSTAH... which cannot be settled through the internal procedures of the United Nations shall be settled... by a standing claims commission to be established for that purpose'); see also Model Status of Forces Agreement for Peacekeeping Operations, (October 1990) UN Doc A/45/594 S51.
 - 10 See, eg, Universal Declaration of Human Rights, GA Res 217A (III) (10 December 1948) Ar UN Doc A/RES/217(III) Art 8 ('Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'); International Covenant on Civil and Political Rights, GA Res 2200(XXI) A (16 December 1966), UN Doc A/RES/2200 (XXI) A Art 2; International Convention on the Elimination of all Forms of Racial Discrimination, GA Res 2106 (XX) (21 December 1965) UN Doc A/RES/2106 (XX) Art 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46 (10 December 1984), UN Doc A/RES/39/46 Art 14; and Convention on the Rights of the Child, GA Res 44/25 (20 November 1989), UN Doc A/RES/44/25 Art 39.
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 - 12 Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (21 February 2013), www.ijdh.org/wp-content/uploads/2011/11/UN-Dismissal-2013-02-21.pdf accessed 22 August 2017.
 - 13 Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (7 May 2013), www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf accessed 22 August 2017.
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 - 16 *Georges v United Nations* (2d Cir 2015).
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 - 22 'UNGA Secretary-General's Remarks to the General Assembly on a New Approach to Cholera in Haiti', (1 December 2016), www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address accessed 22 August 2017.
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 - 27 'UNGA Report by the Secretary-General: New Approach to Cholera in Haiti', (3 May 2017) UN Doc A/71/895, s 24.
 - 28 Third-Party Liability: Temporal and Financial Limitations, GA Res 52/247, (17 July 1998) UN Doc A/RES/52/247.
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 - 30 Jason Beaubien, 'Linked to Haiti Cholera Outbreak, U.N. Considers Paying Millions in Compensation' *NPR* (25 October 2016), www.npr.org/sections/goatsandso/da/2016/10/25/499294332/u-n-considers-400-million-plan-to-address-cholera-in-haiti accessed 22 August 2017.
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