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‘Jistis ak Reparasyon pou Tout Viktim Kolera MINUSTAH’: The United Nations and the Right to Health in Haiti

ROSA FREEDMAN and NICOLAS LEMAY-HEB

***Abstract:** The Haiti cholera claims are focused upon the U.N.’s violation of the rights of individuals affected by the cholera outbreak to access a remedy. The U.N.’s absolute immunity from jurisdiction of national courts is counterbalanced by its duty to provide alternative dispute resolution mechanisms for private law claims. The U.N. has not only failed to provide those alternative dispute resolution mechanisms, but has repeatedly stated that it any claims are not receivable so in these circumstances. Here we set out that even if the U.N. is able to shield itself from private law claims by using the cloak of absolute immunity, the U.N. might be held responsible for human rights violations arising from the cholera outbreak in Haiti. This article is concerned with the broader issue of whether the U.N. has violated and continues to violate individuals’ right to health in Haiti.*

***Keywords:** Cholera, Haiti, Health, MINUSTAH, United Nations*

1. Introduction

The outbreak of cholera in Haiti in 2010 has resulted in hundreds of thousands of individuals being denied their human right to health. Under the right to health, states or other entities exercising effective control are bound by the tripartite duties to protect, promote and fulfil individuals’ rights to the highest attainable standard of health.¹ The right gives rise to different obligations, many of which have been violated through cholera being introduced into Haiti for the first time in over a century. There has also been a failure to provide remedies to individuals affected by the outbreak, and failure to prevent further violations by taking adequate steps to contain or eradicate the disease. The question of accountability for those violations remains unresolved.

The U.N. is relying on its absolute immunity from the jurisdiction of national courts to avoid accountability for introducing cholera into Haiti. The U.N. has also failed to set up alternative

¹ Committee on Economic, Social and Cultural Rights, ‘General Comment No 14’, 22nd Session (2000), UN Doc. E/C.12/2000/4

dispute resolution mechanisms² for the cholera victims.³ Recent scholarship has explored and criticised the reliance on absolute immunity,⁴ and practitioners are challenging that immunity through the New York District Court. This article broadens those discussions by applying a rights-based approach to U.N. responsibilities within Haiti. By demonstrating that the U.N. is bound by right to health when acting in Haiti, we shall show that the U.N. is legally bound to take action to remedy the violations resulting from the outbreak.

Since 2004, Haiti has been governed by a hybrid sovereign power shared at various points by different actors including the Multinational Interim Force, the United Nations Stabilization Mission in Haiti (MINUSTAH), the Interim Commission for the Reconstruction of Haiti, and national governments. The questions that arise are: which actors are bound by international human rights laws, what duties they owe, and how have those obligations been breached by the cholera outbreak. This article first explores the situation in Haiti, the different actors involved in governing the country, the introduction and impact of cholera, and the attempts to bring private law claims against the U.N. The article then turns to human rights and international organisations, looking generally at the U.N.'s obligations under international human rights law and the circumstances in which it is bound. The fourth section explores the extent to which the U.N. is bound by international human rights law when acting as a sovereign or hybrid sovereign power within a state. The fifth section sets out the parameters of the right to health and assesses whether the U.N. has violated its obligations under the tripartite duties framework. Finally, the article turns to examine the violations that have occurred and discusses the U.N.'s duties to remedy existing violations and to prevent future abuses.

2. Cholera in Haiti: A Background

The cholera epidemic started in the Artibonite region in October 2010, with the first case of severe diarrhoea on 12 October and the first hospitalisation on 17 October. Prior to that, there had been no recorded cases of cholera in Haiti for over a century.⁵ The population was

² GA Res 22(1), 'Convention on the Privileges and Immunities of the United Nations', 13 February 1946, Section 29.

³ R. Freedman, UN Immunity or Impunity?: A human rights based challenge, (2014) 25 *European Journal of International Law* 1, 239-254

⁴ For example, *id.*

⁵ D. A. Walton & L. C. Ivers, 'Responding to Cholera in Post-Earthquake Haiti', (2011) 364 *New England Journal of Medicine* 3, at 4

therefore immunologically naive and highly susceptible to infection.⁶ Between October and December 2010, approximately 150,000 people had contracted cholera and 3,500 had died; by the end of 2013, more than 8,000 people had died and over 670,000 individuals had been infected, making it one of the most deadly cholera outbreaks in recent history.⁷ It was described by local journalists as the ‘Haitian 9-11’.⁸ Rumours spread that the Nepalese battalion based in Mirebalais in the Artibonite region was responsible for introducing cholera to Haiti. Associate Press journalists witnessed septic tanks overflowing and the smell of excrement at the Nepalese base on 27 October. A dark liquid apparently flowed out of a broken pipe towards Meille River⁹ a tributary to the Artibonite River, which is the nation’s largest and most important river providing water to 1.5 million people. Other rumours mentioned the possible illegal dumping of waste-tank contents next to the river.¹⁰ The Nepalese camp was identified by local inhabitants as the most likely source of the disease, and it is important to note that Nepal suffered cholera outbreaks only weeks before the troops’ deployment.¹¹ Within weeks of the first cases, there were reports of crowds throwing stones at U.N. armoured personnel carriers and of repeated clashes between Haitians and the U.N. peacekeepers, many ending in deaths.¹²

A new Nepalese battalion arrived in Haiti in October 2010 and was deployed to the Mirebalais camp in three waves (9 October 2010, 12 October 2010 and 16 October 2010).¹³ There is still confusion about whether or not the soldiers were tested prior to their deployment, with conflicting reports from different official sources. General Kishore Rana, the Nepalese Army’s chief medical officer, stated that ‘none of the troops exhibited

⁶ Center for Disease Control and Prevention, ‘Cholera Outbreak: Haiti, October 2010’, (2010) 59 *Morbidity and Mortality Weekly Report* 43, at 1411

⁷ A. Dasgupta, R. Banerjee, S. Dasc and S. Basak, ‘Evolutionary perspective on the origin of Haitian cholera outbreak strain’, (2012) 30 *Journal of Biomolecular Structure and Dynamics* 3, at 338

⁸ Interview with Daly Valet, Editor in Chief, *Le Matin newspaper in Port-au-Prince*, Haiti (Feb. 1, 2011)

⁹ M. Stobbe and E. Lederer, ‘UN Worries Its Troops Caused Cholera in Haiti’, *The Associated Press*, 19 November 2010 Nov. 19; J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 228.

¹⁰ F. Tasker and F. Robles, ‘Source of Cholera Outbreak May Never Be Known’, *Miami Herald*, 20 November 2010; J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 229

¹¹ L. Maharjan, ‘Cholera Outbreaks Looms Over Capital’, *The Himalayan Times*, 23 September 2010.

¹² D. Coughlin, ‘WikiLeaks Haiti: US Cables Paint Portrait of Brutal, Ineffectual and Polluting UN Force’, *The Nation*, 6 October 2011; P. Farmer, *Haiti After the Earthquake* (2011), 196; N. Lemay-Hébert, ‘Resistance in the Time of Cholera: The Limits of Stabilization Through Securitisation in Haiti’, (2014) *International Peacekeeping* 21(2) (forthcoming)

¹³ J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 230

symptoms of cholera—so no follow-up tests were done.’¹⁴ That statement was contradicted by the Under-Secretary-General for Peacekeeping Operations, Alain Le Roy, who insisted that all soldiers tested negative for that particular strain.¹⁵ What is clear is that the cholera screening protocols were inadequate to prevent the Haitian epidemic.¹⁶ U.N. protocol requires that troops pass a basic health screening. Symptomatic individuals undergo laboratory tests for infectious diseases but individuals who do not exhibit active symptoms are not tested. However, many of those shedding viable cholera bacteria remain asymptomatic. Furthermore, the South Asian strain of cholera active in Haiti has been shown to cause greater number of asymptomatic cases, to persist longer in the environment, and to exist in higher concentrations in faeces.¹⁷ The problem was not just the lack of appropriate testing: *The Medical Support Manual for United Nations Peacekeeping Operations* does not list cholera and diarrhoea as conditions precluding peacekeeping service, and examination only has to take place within three months of deployment, leaving plenty of time for soldiers to contract the disease.¹⁸

A team of researchers from the University of Maryland led by the renowned microbiologist, Rita Colwell deemed Haiti’s inadequate sewage and sanitation systems (exacerbated by the 2010 earthquake) alongside the deficiencies in the U.N. sanitation standards (which was already an issue in 2008)¹⁹ as a ‘perfect storm’ for the outbreak of a massive cholera epidemic. The researchers conclude that the ‘assignment of attribution remain[s] controversial’.²⁰ The ‘perfect storm’ theory provided a welcome cover for MINUSTAH and the U.N. legal department, both of which used the theory to claim that responsibility for

¹⁴ ‘Haiti cholera outbreak: Nepal troops not tested’, *BBC News*, 8 December 2010, <http://www.bbc.co.uk/news/world-south-asia-11949181>. UN Spokesperson, Vincenzo Pugliese, told an Associated Press journalist that none tested positive because they had never been tested: J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 233

¹⁵ United Nations Department for Public Information, Press Conference by the Under-Secretary-General for Peacekeeping Operations (2010), http://www.un.org/News/briefings/docs/2010/101215_Guest.doc.htm; See also: CNN Wire Staff, ‘UN investigates allegations of cholera source in Haiti’, *CNN*, 28 October 2010.

¹⁶ P. S. Keim, F. M. Aarestrup, G. Shakya, L. B. Price, R. S. Hendriksen, D. M. Engelthaler & T. Pearson, ‘Reply to “South Asia Instead of Nepal May Be the Origin of the Haitian Cholera Outbreak Strain”’, (2011) 2 *MBio* 6, <http://mbio.asm.org/content/2/6/e00245-11.full#ref-5>

¹⁷ P. Farmer, *Haiti After the Earthquake* (2011), 195

¹⁸ J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 233. The UN’s expert panel mentioned a 10-day free period for Nepalese soldiers to visit their families after medical examination was completed. A. Cravioto, C. F. Lanata & D. S. Lantagne & G. Balakrish Nair, Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti 12 (2011).

¹⁹ D. Coughlin, ‘WikiLeaks Haiti: US Cables Paint Portrait of Brutal, Ineffectual and Polluting UN Force’, *The Nation*, 6 October 2011.

²⁰ N. A. Hasan et al., ‘Genomic Diversity of 2010 Haitian Cholera Outbreak Strains’, (2012) 109 *Proceedings of the National Academy of Sciences of the United States of America* 29, www.pnas.org/content/early/2012/06/12/1207359109.full.pdf+html

introducing cholera has not conclusively been attributed to a single source.²¹ However, the ‘perfect storm’ theory has been considered ‘a perfect lie’ by French epidemiologist Renaud Piarroux, who wrote an initial report on the cholera outbreak.²² For Piarroux and his colleagues, all of the scientific evidence demonstrates that the cholera is attributable to the Nepalese contingent travelling from a country experiencing a cholera epidemic, and that faecal contamination of a local stream draining into the Artibonite River initiated the epidemic.²³ Those scientists rebut the claims made by the University of Maryland researchers, and clearly demonstrated that their research ‘provided no evidence to counter that cholera was brought to Haiti by a contingent of Nepalese United Nations peacekeeping troops’.²⁴ Despite the subtle pressure placed on the scientists not to further investigate the outbreak’s cause,²⁵ the link with the South Asian strain has been confirmed by numerous field investigations²⁶ including the U.N.’s Independent Panel of Experts on the Cholera Outbreak in Haiti.²⁷ It is now widely accepted that the cholera outbreak is directly attributable to Nepalese peacekeeping troops. U.N. Special Envoy, Bill Clinton, recognised that U.N. peacekeepers were the proximate cause of cholera in Haiti.²⁸

After the introduction and outbreak the international aid machinery led by the U.N. has failed to take the necessary steps to contain and eradicate cholera in Haiti. Firstly, the U.N.’s World Health Organisation (WHO), amongst other actors, battled against mass vaccination in Haiti, citing cost, logistical challenges and limited vaccine supplies. Vaccination is clearly an option that could have saved lives in the first two years. Instead, the U.N. adopted a ‘wait-and-see’

²¹ Personal interview with MINUSTAH Communications and Public Information Officer, 9 December 2011

²² T. Daniel, ‘Source of Haiti Cholera Bug Goes Under Microscope’, *Associated Press*, 17 July 2012

²³ R. Piarroux, R. Barraï, *et al*, ‘Understanding the Cholera Epidemic, Haiti’ (2011) 17 *Emerging Infectious Diseases* 1161

²⁴ R. R. Frerichs, J. Boncy, *et al*, Source Attribution of 2010 Cholera Epidemic in Haiti, (2012) 109 *Proceedings of the National Academy of Sciences of the United States of America* 47

<http://www.pnas.org/content/109/47/E3208.full>. The world-renowned cholera expert, John Mekalanos stated that there was ‘compelling evidence’ that the cholera strain was inadvertently introduced by Nepalese troops. J. J. Mekalanos, W. Robins, *et al*, ‘Non-01 *Vibrio Cholerae* Unlinked to Cholera in Haiti’, (2012) 109 *Proceedings of the National Academy of Sciences of the United States of America* 47, <http://www.pnas.org/content/109/47/E3206.full>

²⁵ Martin Enserink reported that the passion of cholera experts ‘for traditional shoe-leather epidemiology has been tempered by diplomatic and strategic concerns.’ M. Enserink, ‘Despite Sensitivities, Scientists Seek to Solve Haiti’s Cholera Riddle’, (2011) 28 *Science* 388

²⁶ See, for example, R. R. Frerichs, P. S. Keim, *et al*, ‘Nepalese origin of cholera epidemic in Haiti’, (2012) 18 *Clinical Microbiology and Infection* 158; R. S. Hendriksen, L. B. Price, J. M. Schupp, *et al*. ‘Population Genetics of *Vibrio cholera* from Nepal in 2010: Evidence on the Origin of the Haitian Outbreak’, (2011) 2 *MBio* 4; C. Chin, J. Sorenson, J. B. Harris, W. Robins *et al*., ‘The Origin of the Haitian Cholera Outbreak Strain’, (2010) 364 *New Eng. J. Med.* 1, 33-42

²⁷ The panel found that ‘the strains isolated in Haiti and Nepal during 2009 were a perfect match’. A. Cravioto, C. F. Lanata *et al*, ‘Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti 12, 27 (2011).

²⁸ Clinton: UN Soldier Brought Cholera to Haiti, *Al Jazeera*, 8 March 2012

approach. Within weeks, Haiti's Ministry of Public Health and Population (MSPP), the Pan-American Health Organization (PAHO), CDC, and various U.N. agencies developed a *National Response Strategy against Cholera* to monitor disease trends, detect outbreaks, and characterize the affected population to target relief efforts.²⁹ At the same time, Haitians' distrust of some cholera programs impeded construction of treatment centres and delivery of lifesaving supplies.³⁰ Despite this, some NGOs, including Médecins Sans Frontières (MSF), and some states, including Cuba, worked effectively to provide fluid resuscitation and dealt with up to 80% of cases.³¹ A debate between public health experts swiftly emerged regarding the opportunity for mass vaccination. The 'minimalists', including the WHO, favoured investment in health education and massive distribution of chlorine tablets, while the 'maximalists' argued in favour of using all the tools for preventing its spread, including a vaccination roll-out.³² With no consensus attained in the first years, the minimalist position was implemented *de facto*. Two years after the outbreak, the vaccination campaign was finally implemented and the results so far have been overwhelmingly positive.³³

Secondly, the U.N. failed to invest in a large-scale improvement of Haiti's water and sanitation systems before and immediately after the cholera outbreak, despite the peacekeeping mission's mandate to capacity-build and improve national infrastructure. Mark Schuller from New York City University reported that immediately before the outbreak, 40.5% of camps did not have water and 30.3 % of camps did not have a single toilet. By January 2011, 37.6 % lacked water and 28.5 % remained without a toilet.³⁴ One MSF official stated that 'the inadequate cholera response in Haiti makes for a damning indictment of an international aid system whose architecture has been carefully shaped over the past 15 years',³⁵ especially the cluster system set up by the U.N.'s Office of the Coordinator of Humanitarian Affairs. The only hope of eradicating cholera will be to couple the vaccination

²⁹ P. Santa-Olalla, M. Gayer, *et al.*, 'Implementation of an Alert and Response System In Haiti During the Early Stage of the Response to the Cholera Epidemic', (2013) 89 *American Journal of Tropical Medicine and Hygiene* 4, at 688-697.

³⁰ D. Sontag, 'In Haiti, Global Failures on a Cholera Epidemic', *The New York Times*, 31 March 2012

³¹ P. Farmer, *Haiti After the Earthquake* (2011), 198; D. Sontag, 'In Haiti, Global Failures on a Cholera Epidemic', *The New York Times*, 31 March 2012; J. Biquet, 'Haiti: Between Emergency and Reconstruction', (2013) 5 *International Development Policy* 2

³² Maximalists include the Deputy UN Special Envoy, Paul Farmer, economist Jeffrey Sachs, and various medical researchers: See P. Farmer, *Haiti After the Earthquake* (2011), 198; D. A. Walton and L. C. Ivers, 'Responding to Cholera in Post-Earthquake Haiti', (2011) 364 *New England Journal of Medicine* 3; L. C. Ivers *et al.*, 'Five Complementary Interventions to Slow Cholera: Haiti', (2010) 376 *The Lancet* 2048-2051. Minimalists include the WHO and Pan American Health Organization.

³³ L. C. Ivers, J. E. Teng, *et al.*, 'Use of Oral Cholera Vaccine in Haiti: A Rural Demonstration Project', (2013) 89 *American Journal of Tropical Medicine and Hygiene* 4, at 617-624

³⁴ M. Schuller, *Killing With Kindness: Haiti, International Aid, and NGOs* (2012), 173

³⁵ U. Karunakara, 'Haiti: Where Aid Failed', *The Guardian*, 28 December 2010

campaign with large-scale investments in the water and sanitation system, which the U.N. still has not implemented.³⁶ The U.N. has now agreed on a \$2.2 billion plan to eradicate cholera, but most observers agree that this has occurred too late and remains significantly underfunded.

Not only did the U.N. fail to protect Haitians from the introduction of cholera and to prevent the spread and continued existence of the disease, it has also failed to provide a remedy to individuals affected by the outbreak. Claims and a pending appeal filed in a New York District Court on behalf of 5,000 individuals affected by cholera in Haiti³⁷ allege negligence, gross negligence and/or recklessness by the U.N. and MINUSTAH. The lawsuit states that U.N. actions and failures to act are

‘the direct and proximate cause of the cholera related deaths and serious illnesses in Haiti to date, and of those certain to come. The U.N. did not adequately screen and treat personnel coming to Haiti from cholera stricken regions. It did not adequately maintain its sanitation facilities or safely manage waste disposal. It did not properly conduct water quality testing or maintain testing equipment. It did not take immediate corrective action in response to the cholera outbreak.’³⁸

In February 2013, the U.N. responded to the claims by detailing the financial aid and other resources it has provided to prevent and reduce the spread of cholera. Yet it is clear that U.N. efforts in leading the international aid community’s response to the outbreak have been inadequate, at best. The U.N. has failed to address the substance of the claims – that it was responsible for the cholera and therefore liable to the victims. Instead, the U.N. insists that the claims are ‘not receivable’.³⁹ The U.N. position is that the claims involve review of political and policy matters⁴⁰ and therefore are not private law claims. This essentially bars the claims being heard by U.N. dispute resolution mechanisms. In July 2013, the U.N.

³⁶ International Crisis Group, *Towards a Post-MINUSTAH Haiti: Making an Effective Transition*, Latin America/Caribbean Report N°44 12, 2 August 2012; P. Adams, ‘Haiti prepares for cholera vaccination but concerns remain’, (2012) 379 *The Lancet* 16

³⁷ See, generally, R. Freedman, *UN Immunity or Impunity?: A human rights based challenge*, (2014) 25 *European Journal of International Law* 1, 239-254

³⁸ ‘Petition for Relief’, 3 November 2011, para 57 available at <http://www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>

³⁹ UN Department of Public Information (New York), *Haiti Cholera Victims’ Compensation Claims “Not Receivable” under Immunities and Privileges Convention*, United Nations Tells Their Representatives, UN Doc. SG/SM/14828 (21 February 2013).

⁴⁰ *Id.*

refused a request for compensation filed on behalf of the victims, relying on its absolute immunity from courts' jurisdiction.⁴¹

The claims filed on behalf of the cholera victims focus on compensation for private law claims. Success or otherwise will depend on the extent to which the court places greater emphasis on the principles of U.N. absolute immunity or on the fundamental human rights to access a court and to access a remedy. The lawsuit is concerned with private law and therefore does not address whether the U.N. is bound by obligations under the right to health and whether it has violated human rights with regard to the outbreak. That question goes to the heart of whether and in what circumstances the U.N. may be bound by international human rights law. Those arguments complement the private law claims by demonstrating that the U.N. is bound both to prevent future violations and to remedy those that have already occurred.

3. The United Nations and Human Rights

The issue of whether the U.N. is bound by international human rights law goes beyond discussions about obligations of non-state actors and requires focus on obligations of international organisations. The International Law Commission has provided some work on the responsibility of international organisations, but this does not fully or even adequately address obligations.⁴² Over recent years there has been a growing acceptance that international organisations are bound by international law.⁴³ The European Court of Human Rights (ECtHR) has made clear that it regards the EU as bound by international human rights law.⁴⁴ Others have drawn similar conclusions about international organisations; for example Dannenbaum considers that the U.N. is legally bound by international human rights law.⁴⁵ If that is the case, then U.N. actions regarding the cholera outbreak and subsequent failures to eradicate the disease are in violation of the Organisation's human rights obligations.

⁴¹ Letter from Ban Ki-moon, UN Secretary-General, to Maxine Waters, U.S. Representative for California's 43rd congressional district (July 5, 2013) (available at <http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>)

⁴² G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), 55

⁴³ Cf. H. G. Schermers and N. M. Blokker, *International Institutional Law* (2003), 1002; Reinisch, (2008), at 290.

⁴⁴ E.g. *Beer and Reagan v. Germany*, App. No. 28934/95, 33 Eur. H.R. Rep. 54, 58 (2001); App. No. 28934/95; 33 EHRR (2001) 54, at para. 58; *Waite and Kennedy v. Germany*, App. No. 26083/94, 30 Eur. Ct. H.R. 261 (1999); 30 EHRR (1999) 261.

⁴⁵ See, generally, T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', (2010) 51 *Harvard International Law Journal* 301, 323-327

The U.N. is not party to human rights conventions. Although it is able to ratify some treaties, it is not able to ratify international human rights treaties. However, that does not mean the U.N. can claim that it is not bound by those laws. Where human rights form part of customary international law, they will bind the U.N. Before addressing which laws bind the U.N, we must establish how it is bound. Mégret and Hoffman set out three main ways in which the U.N. is bound: the external conception, the internal conception and the hybrid conception.⁴⁶

The external conception relies on the U.N. having legal personality, a point expressly emphasised by the ICJ in the *Reparations* Advisory Opinion. The Court ruled that the U.N. 'is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality'.⁴⁷ The Court re-emphasised that position in 1980, stating that international organisations 'are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'⁴⁸ International legal personality confers rights and duties under international law. The U.N.'s legal personality is generally accepted to mean that it is bound by customary international law,⁴⁹ which includes those human rights deemed to be customary international law.⁵⁰

Dannenbaum, following the internal conception approach, insists that the U.N. is 'constitutionally mandated to promote the advancement of human rights'⁵¹ owing to the obligations contained within its constituent instrument. The relevant U.N. Charter provisions include its Preamble, as well as Articles 1(3), 55 and 56, all of which require the U.N. to promote, respect or encourage human rights.⁵² Rios and Flaherty, building upon Dannenbaum's work, argue that that Article 56 places a positive duty on U.N. member states

⁴⁶ F. Mégret & F. Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 2, 314

⁴⁷ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) at 179.

⁴⁸ *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73, (Dec. 20) at para 37.

⁴⁹ S. Sheeran & C. Bevilaqua, 'The UN Security Council and International Human Rights Obligations: towards a new theory of constraints and derogations', in *Routledge Handbook of International Human Rights Law* (2013) 371

⁵⁰ T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', (2010) 51 *Harvard International Law Journal* 301, at 323

⁵¹ *Id.* at 324

⁵² *Id.*

to enforce the Charter's human rights obligations 'over and above any other international law',⁵³ a position that has also been emphasised by the European Court of Justice.⁵⁴

The hybrid conception focuses on the obligations of both the U.N. and its member states, reaching the conclusion that the Organisation is bound by a broad range of obligations.⁵⁵ Central to this argument is the idea that states cannot avoid their human rights obligations by using the U.N. as a vehicle by which they are then able to violate rights with impunity.⁵⁶

Regardless of which theoretical framework is adopted, it seems inconceivable that the U.N. is not bound by at least part of international human rights law.⁵⁷ That position has been affirmed by the ICJ in 1970⁵⁸ when it stated that human rights violations are 'a flagrant violation of the purposes and principles of the [UN] Charter'.⁵⁹ The U.N. Human Rights Committee has also insisted that 'there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms'.⁶⁰ As Judge Sir Robert Jennings has stated, in the *Lockerbie* case: 'It is not logically possible [for the U.N.] to claim to represent the power and authority of the law, and at the same time, claim to be above the law.'⁶¹

It then falls to determine which human rights obligations bind the U.N. and what those obligations entail. The starting point is to consider whether the U.N. is bound by the rights contained in the Universal Declaration of Human Rights (UDHR). Although the Declaration is a non-binding document, it is codified in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the U.N. was the facilitator of and driver behind that codification process.

⁵³ See, generally, G. L. Rios & E. P. Flaherty, 'Legal Accountability of International Organization: Challenges and Reforms', (2010) 16 *ILSA Journal of International & Competition Law* 433

⁵⁴ *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Case T-306/01) (Court of First Instance of the European Communities, 21 September 2005), paras 232-234.

⁵⁵ F. Mégret & F. Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 2, 314

⁵⁶ A. Reinisch, 'Securing the Accountability of International Organizations', (2001), 7 *Global Governance* 131, at 137 and 143.

⁵⁷ For further discussion see A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); Reinisch, *id.*; and M. Matheson, *Council Unbound: the growth of UN decision-making on conflict and post-conflict issues after the Cold War* (2006).

⁵⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Res 276 (1970)*, 1971 I.C.J. 12, (Jan. 21) at 16.

⁵⁹ *Id.* at 57

⁶⁰ UN Human Rights Committee, General Comment No. 31 (May 26, 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para 2

⁶¹ *Questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (provisional measures) (Libya v U.K.)* 1992 I.C.J. 114 (Judge Jennings Dissenting Opinion) para 110.

Not all U.N. members are party to both Covenants but all states have accepted the UDHR as part of their membership of the U.N. There is increasing acceptance that many of the rights contained in the UDHR form part of customary international law,⁶² although some commentators go further and insist that the entire Declaration has attained that status.⁶³ Regardless of which position one adopts, the right to health – to which we shall return in Section 5 – can be shown to have the status of customary international law.

The right to health is contained in Article 25 of the UDHR and codified in the ICESCR. Even if we adopt the more conservative approach that only some rights in the Declaration have achieved customary status, it is clear that those include both civil and political rights and economic, social and cultural rights. The ESCR Committee has held that “basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law”.⁶⁴ Schachter insists that basic subsistence rights, which includes the right to health, have achieved customary international law status;⁶⁵ a thesis that Narula has applied to the Right to Food.⁶⁶ That argument segues from the generally-accepted position that subsistence rights are integrally bound together with the right to life, a right that has achieved customary international law status.⁶⁷

Therefore, whether using the external, internal or hybrid conception, and whether arguing that the entire Declaration or just some of the rights contained therein form part of customary international law, the U.N. can be shown to be bound by the right to health. As Mégret and Hoffman have pointed out, the scope of those obligations and the extent to which they bind the U.N. depends on the functions that the U.N. is fulfilling, particularly where it is

⁶² See, for example, Resolution adopted by the International Law Association, reprinted in *International Law Association, Report of the Sixty-Sixth Conference* (International Law Association, 1994), 29; P. Alston, ‘The Universal Declaration at 35: Western and Passé or Alive and Universal’, (1982) 31 *I.C.J. Rev* 60. For a recent critical discussion of the acceptance of the UDHR as customary international law, see J. Von Bernstorff, ‘The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law’, (2008) 19 *European Journal of International Law* 5, 903 at Section 3.

⁶³ For a comprehensive discussion see H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, (1996) 25 *Georgia Journal of International and Comparative Law* 1, 287 at 317-351. Although see also B. Simma and P. Alston ‘The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles’, (1992) 12 *Australian Yearbook of International Law* 82, 102.

⁶⁴ U.N. CESCR, *CESCR Concluding Observations: Israel*, ¶ 31, 13th Sess., U.N. Doc. E/C.12/1/Add.90 (May 23, 2003).

⁶⁵ O. Schachter, ‘International Law in Theory and Practice’, in *International Human Rights in Context: Law, Politics, Morals*, (Steiner & Alston, eds. 2000) 226, at 231

⁶⁶ S. Narula, ‘The Right to Food: Holding Global actors Accountable Under International Law’, 44 *Columbia Journal of Transnational Law* 691 at 780-797

⁶⁷ Human Rights Committee, General Comment 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).para. 10

undertaking acts typically viewed as being of a ‘sovereign’ nature,⁶⁸ and we shall return to this issue in Section 4.

The next question to be determined is in what circumstances the U.N. is bound by international human rights law. In the *Reparations Advisory Opinion*, the ICJ stressed that the U.N. is neither the functional nor legal equivalent of a state, ‘which possess the totality of international rights and duties recognized by international law’, and that the scope of the U.N.’s rights and duties depend on its purposes, functions and practices.⁶⁹ The U.N. fulfils a range of roles. Each body has a different mandate and powers and function, and some are comprised of government delegates and therefore directly bound by the will of states, albeit the ICJ has emphasised that:

‘The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.’⁷⁰

Others U.N. bodies are made up of independent experts, whilst others consist of U.N. employees. Clearly, the actions taken will be governed by human rights obligations in different ways depending on those institutions’ mandates, roles and composition. Field missions that are working ‘on the ground’ within states’ territories will be bound in very different ways than the Human Rights Council, which can only issue non-binding resolutions and decisions. Yet where a body such as the Security Council holds powers that may directly impact upon human rights within a state, questions arise as to whether human rights obligations take priority over the body’s mandate.

Mégret and Hoffman provide a useful analysis of the difference between the U.N. negatively affecting the realisation of human rights or contradicting human rights principles, and actual human rights violations.⁷¹ Using the example of sanctions imposed against Iraq, Mégret and Hoffman distinguish between the impact of sanctions and the cause of that impact. In that situation, the breaches of international law by Saddam Hussein’s regime resulted in the U.N.

⁶⁸ F. Mégret & F. Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 2, 314

⁶⁹ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) at 178-179.

⁷⁰ *On Conditions of Admission of a State into membership of the United Nations*, Advisory Opinion, 1948 I.C.J. 57 (May 28) at 7

⁷¹ F. Mégret & F. Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 2, 314

lawfully using its enforcement powers. The impact upon human rights, then, can be traced to the regime continuing to breach international law despite the sanctions, embargoes or other enforcement powers that impact upon human rights within its territory. In those situations the U.N. exercises its roles and functions from afar, and its actions are in response to grave breaches of international law.

A distinction can be made between those situations when the U.N. acts as an organisation and exercises its functions and powers. and the times when the U.N. acts like a sovereign power within a state's territory.⁷² The distinction becomes clearer when considering the responsibility that member states have for the violations of human rights committed by international organisations. As d'Aspremont explains, where member states control the decision-making of an international organisation they cannot evade responsibility for violations by using the organisation's legal personality as a shield.⁷³ U.N. acts that are overwhelmingly controlled by member states include resolutions, which countries draft, sponsor and vote upon. Member states will then bear responsibility for any breaches of international human rights law that arise from those resolutions.

Some resolutions adopted by member states create a situation in which the U.N. becomes an external actor rather than a forum for member states. It is at this point that the U.N. is bound by international human rights law in relation to its external activities. One example is where a resolution creates a U.N. mission to a state. Such missions are run by the U.N. and it follows that the U.N. is responsible for any human right violations committed by the mission.⁷⁴ There are obvious parallels between that argument and the well-accepted responsibility of the U.N. for private law claims arising from peacekeeping missions. However, the difference between private law claims and human rights violations is who commits the wrongful acts. Private law claims arise from individual or groups of peacekeepers' acts. The peacekeepers are bound by obligations enshrined in Status-of-Forces Agreements and the U.N. has a duty to ensure that there are dispute mechanisms to which claims may be brought. Human rights violations arise from actions of the U.N. and, because it is bound by human rights obligations, the Organisation is responsible for protecting those rights and remedying any violations.

⁷² See, for example, J. Chopra, 'The UN's Kingdom of East Timor' (2000) 42 *Survival* 2, 29

⁷³ J. d'Aspremont, 'Abuse of the Legal Personality of International Organisations and the Responsibility of Member States', (2007) *International Organisations Law Review*, 91-119 at 102

⁷⁴ See, generally, K. Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012)

4. U.N. peacebuilding missions and International Human Rights Law

Since the 1990s the U.N. has increasingly assumed the role of power and authority within so-called weak or failed states. Rather than U.N. missions only being tasked with resolving conflicts, they have engaged in state-building and exercising powers of governance. These are functions of a state and therefore bring with it the responsibilities that a state actor would entail, including protecting and promoting human rights. Where it comes to failed states, Mégret and Hoffman argue, the U.N. takes on the role and functions of a state while its peacekeeping missions engage in statebuilding.⁷⁵ They argue that ‘dramatic changes in the United Nations functions are gradually forcing us to reconceptualise the U.N. human rights role’ and the U.N.’s ability to commit human rights violations.⁷⁶ They insist that when the U.N. takes on state roles and functions, it is bound by human rights obligations in the same manner that a state is bound and will bear the same responsibility for violations. That argument is a logical conclusion to draw where the U.N. mission becomes a pseudo-state within a territory.

Prior to the 2013 ‘human rights due diligence policy’,⁷⁷ the extent to which the U.N. considered its operations to be bound by international human rights law was unclear.⁷⁸ The U.N. Capstone Doctrine (2008) stated that peacekeeping operations ‘should be conducted in full respect of human rights’, that U.N. personnel ‘should act in accordance with international human rights law’ and ‘should strive to ensure that they do not become perpetrators of human rights abuses’, and that those that commit abuses ‘should be held accountable’.⁷⁹ The general requirement was that all U.N. mission members comply with ‘the applicable portions of the Universal Declaration on Human Rights as the fundamental basis of our standards’.⁸⁰

⁷⁵ F. Mégret & F. Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 2,314, at 327-8; J. J. Paust, ‘The UN Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity’, (2010) 51 *Harvard International Law Journal* 1, at 9

⁷⁷ GA-SC, ‘Human rights due diligence policy on United Nations support to non-United Nations security forces’, UN Doc. A/67/775-S/2013/110 (Mar. 5, 2013)

⁷⁸ F. Mégret & F. Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 2,314,

⁷⁹ United Nations Peacekeeping Operations, Principles and Guidelines 60 (Capstone Document) (New York: Department of Peacekeeping Operations 2008)

⁸⁰ ‘We are United Nations Peacekeeping Personnel’ is a brochure given to all new staff members http://www.un.org/en/peacekeeping/documents/un_in.pdf, accessed 6 March 2013 and is also included as an annex to the model ‘Memorandum of Understanding between the United Nations and personnel contributing States’. It specifies that the ‘Government shall ensure that all members of the Government’s national contingent are required to comply with the United Nations standards of conduct’, Letter dated 22 February 2008 from the

The U.N.'s legal counsel accepts that: 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.'⁸¹ The U.N. Secretary-General has also stated that the 'international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations.'⁸² Internal legal advice by the U.N. Office of Legal Affairs in 2009 reaffirmed 'the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law'.⁸³ Security Council resolutions also regularly include references to human rights in mission mandates.⁸⁴

In 2011 the Office for the High Commissioner for Human Rights, the Department of Peacekeeping Operations, the Department of Political Affairs and the Department for Field Support adopted a joint Policy on Human Rights in United Nations Peace Operations and Political Missions, to provide 'operational guidance' to contribute 'to the effective delivery of mandates and more coherent approaches across operations'.⁸⁵ The U.N. also adopted a 'human rights due diligence policy' in 2013⁸⁶ that emphasised the need to ensure human rights across all peacekeeping activities. Although this was adopted after the cholera outbreak, the Secretary-General stressed that the policy 'is based on existing standards and obligations that States have accepted through their membership in the United Nations, through their recognition of standards set out in the Universal Declaration of Human Rights and through their acceptance of obligations under key international instruments.'⁸⁷

Chairman of the 2008 Working Group on Contingent-Owned Equipment to the Chairman of the Fifth Committee, (Jan. 29, 2009) (A/C.5/63/18) Chapter 9, Article 7 bis, 165.

⁸¹ Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division. Quoted in International Law Commission, Report of the ILC, GA Official Records, 56th session, Supplement No. 10, 111, UN Doc. A/59/10 (2004).

⁸² UN Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Rep. of the Secretary-General, para 6, UN Doc. A/51/389 (Sept. 20, 1996).

⁸³ 'UN Told Not to Join Congo Army in Operation', *New York Times*, Dec. 9, 2009, quoting letter dated 1 April 2009.

⁸⁴ See, for example, SC Res 1270 of 22 October 1999 establishing UNAMIL; SC Res 2112 of 30 July 2013; SC Res 2098, of 28 March 2013; SC Res 2113 of 30 July 2013.

⁸⁵ OHCHR/DPKO/DPA/DFS, Policy on Human Rights in United Nations Peace Operations and Political Missions (Sept. 1, 2011). See also, UN Secretary-General, Report of the Secretary-General on the Work of the Organization, UN Doc. A/68/1, para 58 (Aug. 8, 2012).

⁸⁶ GA-SC, 'Human rights due diligence policy on United Nations support to non-United Nations security forces', UN Doc. A/67/775-S/2013/110 (Mar. 5, 2013)

⁸⁷ *Id.*

There are two ways in which U.N. missions function within a state's territory. The U.N. may be mandated to take over the entire administration of a state and undertake all of the necessary roles and functions.⁸⁸ Alternatively, the U.N. may be given some legislative and administrative powers to act in conjunction with local actors.⁸⁹ In situations when a U.N. mission becomes an interim state it will be bound by international human rights law and bear responsibility for violations. In Kosovo and Timor-Leste, the Security Council resolutions establishing the missions clearly set out that the U.N. would be the sole and sovereign power in those states. This meant that the U.N. assumed the role of the state and can be viewed as having sovereign powers within those territories both *de jure* and *de facto*. The U.N. missions also held the international legal personality at least *de facto*, as evidenced through the missions ratifying treaties on behalf of the states, and those ratifications binding successor national governments.

Where the U.N. holds sole power and authority within a state it is accepted that it is bound by international human rights law if it expressly agrees to such terms or if it is bound by existing obligations. In Timor-Leste an early regulation stated that 'all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards'.⁹⁰ In Kosovo, Section 2 of Regulation 1991/1 set out that UNMIK shall comply with international human rights standards when discharging its functions.⁹¹ UNMIK later expressly submitted to existing Council of Europe monitoring mechanisms. The U.N. will also be bound by any human rights treaties to which that country is party, as is the case where a country takes over administration or control of another state.⁹² Neither of those two methods takes into account the U.N.'s existing obligations as an international actor with legal personality. Whether we adopt the internal, external or hybrid conception, when the U.N. exercises external functions – rather than simply acting as a forum for member states – then it bears responsibility for violations directly attributable to its actions. Taking this approach

⁸⁸ SC Res 1244 (1999) establishing the 'United Nations Interim Administration Mission in Kosovo' (UNMIK) mandated UNMIK to perform basic civilian administrative functions, support the reconstruction of key infrastructure, maintain civil law and order, promote human rights, and assure the safe return of all refugees. Similarly, SC Res 1272 establishing 'United Nations Transitional Authority in East Timor' (UNTAET) gave UNTAET overall responsibility for the administration of East Timor including all legislative and executive authority, as well as the administration of justice.

⁸⁹ For example, The United Nations Transitional Authority in Cambodia (UNTAC), the second United Nations Operation in Somalia (UNOSOM II), the United Nations Mission in Bosnia and Herzegovina (UNMIBH) in combination with a United Nations International Police Task Force (IPTF), and the 'United Nations Transitional Administration for Eastern Slavonia' (UNTAES).

⁹⁰ UNTAET Regulation No. 1999/1

⁹¹ S.C. Res. 1244. Art. 11(j) UN Doc. S/RES/1244 (June 11, 1999).

⁹² Human Rights Committee (HRC), General Comment No. 26, 8 December 1997, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, para 4

leads to the conclusion that when the U.N. assumes power within a state, it is bound not only by express terms of reference to international human rights law and to existing obligations within that state but also by the obligations that bind the Organisation.

The ECtHR has relied on the U.N. having international legal personality when determining whether it or its member states are responsible for human rights violations committed by a U.N. mission.⁹³ Citing the ICJ *Reparations* Advisory Opinion, the ECtHR asserted that ‘the U.N. has a legal personality separate from that of its member states’⁹⁴ and therefore was responsible for violations committed by UNMIK.⁹⁵ In *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* the ECtHR found that ‘the impugned acts and omission of KFOR and UNMIK cannot be attributed to the respondent states and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities’⁹⁶ and were ‘in principle, attributable to the U.N.’. The Court reached similar decisions in *Kasumaj v. Greece*,⁹⁷ *Gajić v. Germany*,⁹⁸ *Berić and others v. Bosnia and Herzegovina*,⁹⁹ and the *Mothers of Srebrenica* case.¹⁰⁰

U.N. missions do not always act alone or autonomously – not all peacekeeping missions lead to the U.N. taking on all state roles and functions. Where a U.N. mission shares power with the state government, it is less clear as to who bears responsibility for human rights violations. Regarding Haiti, as has been set out in Section 2, MINUSTAH was not created – and never has assumed the role of – the sole and sovereign power. MINUSTAH was created by Security Council Resolution 1542 (2004) with a mandate that included assisting the Transitional Government to undertake its domestic sovereign functions such as

⁹³ *Behrami and Behrami v. France*, App. No. 71412/01 (2007) and *Saramati v. France, Germany and Norway*, App. No. 78166/01 (2007), paras. 144-152 in which the Court held that ‘UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN’.

⁹⁴ *Id.*, para 144

⁹⁵ See, for example, Caitlin Bell, Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* decision, 42 *New York University Journal of International Law and Politics* 501 (2010)

⁹⁶ *Behrami and Behrami v. France*, App. No. 71412/01 (2007) and *Saramati v. France, Germany and Norway*, App. No. 78166/01 (2007), para 152

⁹⁷ *Kasumaj v. Greece*, App. No. 6974/05 (2007)

⁹⁸ *Gajić v. Germany*, App. No. 31446/02 (2007)

⁹⁹ *Berić and others v. Bosnia and Herzegovina*, App. Nos. 36357/04; 36360/04; 38346/04; 41705/04; 45190/04; 45578/04; 45579/04; 45580/04; 91/05; 97/05; 100/05; 101/05; 1121/05; 1123/05; 1125/05; 1129/05; 1132/05; 1133/05; 1169/05; 1172/05; 1175/05; 1177/05; 1180/05; 1185/05; 20793/05; 25496/05 (2007)

¹⁰⁰ *Mothers of Srebrenica/Netherlands and United Nations*, District Court of the Hague, July 10, 2008, De Rechtspraak BD6795 (Neth.). See also, Asser Institute, Centre for International and European Law, Cases for a full list of the cases, http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956, accessed Mar. 8, 2013

‘ensuring a secure and stable environment; to assist in monitoring, restructuring and reforming the Haitian National Police; to help with comprehensive and sustainable Disarmament, Demobilization and Reintegration (DDR) programmes; to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti; to protect civilians under imminent threat of physical violence; to support the constitutional and political processes; to assist in organizing, monitoring, and carrying out free and fair municipal, parliamentary and presidential elections; to support the Transitional Government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights; and to monitor and report on the human rights situation in the country.’

Although MINUSTAH was not mandated to undertake the role of the state, and thus to assume domestic sovereignty, the U.N.’s role in Haiti required it to exercise authority and control within the country. Although MINUSTAH’s mandate has changed over the years,¹⁰¹ it has continued to exercise varying levels of domestic control and authority in the support provided to the Haitian government. The question, then, is does the U.N. or does the Haitian government – or do both – bear responsibility for human rights violations? On the surface one would say the state is the sovereign power and therefore responsible. But that is too simplistic in situations where the government is the sovereign power *de jure* and the U.N. has *de facto* control.

According to Krasner, whose thesis focuses on the meaning and relevance of ‘sovereignty’ in the contemporary world,¹⁰² we ought to focus on authority and control when examining what occurs within a state. Those tests enable us to determine which actor bears responsibility when there is a hybrid sovereign power within a state. Adopting those tests at the domestic level is logical, because only the entity with authority and control has the power to prevent and to remedy such abuses. This draws parallels with the ‘effective control’ test that has been adopted when considering the extraterritorial scope of application of human rights.¹⁰³ Adopting this approach, the U.N. would bear responsibility for human right violations arising from its actions wherever it has domestic authority and control even if is not acting alone and therefore is not a sole and sovereign power.

¹⁰¹ SC resolutions 1608 (2005), 1702 (2006), 1743 (2007), 1780 (2007), 1840 (2008), 1892 (2009), 1908 (19 January 2010), 1927 (4 June 2010) and 2070 (2012)

¹⁰² S. D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999)

¹⁰³ See, for example, *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011).

As already discussed, MINUSTAH's predecessor, the Multinational Interim Force (MIF), was deployed to stabilize the country in February 2004. That same month, President Aristide was forced to flee Haiti amid political turmoil and violence. With the conflict intensifying between pro-government forces and the opposition, Aristide became increasingly isolated politically. On 29 February 2004 Aristide resigned and left the country.¹⁰⁴ Subsequently, the U.N., the U.S., Canada and the EU were instrumental in forming a government of technocrats, headed by Gérard Latortue, to lead the transition to the 2006 elections. The Security Council originally mandated¹⁰⁵ MINUSTAH to 'build state capacity' by 'extending state authority throughout Haiti' and by 'ensur[ing] a stable and secure environment'.¹⁰⁶

Haiti has long been under significant international influence. After the January 2010 earthquake, commentators asserted that Haiti was turned into a virtual trusteeship through the creation of the Interim Commission for the Reconstruction of Haiti (IHRC)¹⁰⁷ or through logics of humanitarian neo-colonialism.¹⁰⁸ The Haitian Parliament passed a law in April 2010 – a few months prior to the cholera outbreak – giving the IHRC complete authority over the country's governance for 18 months, before effectively dissolving itself.¹⁰⁹ The Commission co-chaired by Haiti's then-prime minister, Jean-Max Bellerive, and the U.N. Special Envoy, Bill Clinton, was composed equally of Haitian and international members and all Commission decisions 'shall be deemed confirmed' unless vetoed by the Haitian president within 10 business days. Robert Fatton Jr. insisted that 'the Commission preserves a legal facade of ultimate Haitian authority, but in reality it clearly places Haiti under a *de facto* trusteeship.'¹¹⁰ In December 2010, the 12 Haitian board members rejected their 'rubber stamp' role, sending a formal letter to the IHRC criticising the governance model that *de facto* excluded them from the most important decisions.¹¹¹ Throughout that time, MINUSTAH remained the only functioning coercive force operating within the country. As a

¹⁰⁴ Aristide claimed to have been abducted by the United States, France and Canada. See: N. Chomsky, P. Farmer & A. Goodman, *Getting Haiti Right This Time* (2004)

¹⁰⁵ S.C. Res. 1542 UN Doc. S/RES/1542 (Apr. 30, 2004)

¹⁰⁶ For an overview of the evolution of MINUSTAH's mandate between 2004 and 2013, see: Nicolas Lemay-Hebert, United Nations Stabilization Mission in Haiti (MINUSTAH) in *Oxford Handbook of United Nations Peacekeeping Operations* (J. A. Koops, N. MacQueen, T. Tardy & P. D. Williams eds., 2014)

¹⁰⁷ R. Fatton Jr., 'Haiti's Unending Crisis of Governance: Food, the Constitution and the Struggle for Power' in J. Heine and A. S. Thompson eds., *Fixing Haiti: MINUSTAH and Beyond* (2011) 41-65

¹⁰⁸ C. Vorbe, 'Earthquake, Humanitarianism and Intervention in Haiti', (2010) 41 *Latin American Studies Association Forum* 3, at 17; J. Podur, *Haiti's New Dictatorship: The Coup, The Earthquake and the UN Occupation* (2012)

¹⁰⁹ Bylaws of the Interim Haiti Recovery Commission, (June 20, 2010), <http://personal.crocodoc.com/yZ0VAW>

¹¹⁰ R. Fatton Jr., 'Haiti's Unending Crisis of Governance: Food, the Constitution and the Struggle for Power' in J. Heine and A. S. Thompson eds., *Fixing Haiti: MINUSTAH and Beyond* (2011) 41-65

¹¹¹ M. Lundahl, *The Political Economy of Disaster* (2013) 256

reminder of U.N. influence over the country, the Haitian president René Préval stated that MINUSTAH – and specifically the head of MINUSTAH, Edmond Mullet – tried to ‘remove him’ from the presidency in November 2010, in an echo of what happened to Aristide in 2004.¹¹²

Following the earthquake on 12 January, the U.N. Security Council passed a resolution increasing MINUSTAH’s overall force levels ‘to support the immediate recovery, reconstruction and stability efforts’, including up to 8,940 troops and up to 3,711 police officers.¹¹³ In June, the Security Council passed another resolution sending further support to MINUSTAH and increasing its mandate.¹¹⁴ Despite references to the sovereignty and territorial integrity of the Haiti government, the resolution increased MINUSTAH’s powers in stabilising and rebuilding the country as well as undertaking state roles and functions. Although *de jure* the government remained in power, *de facto* MINUSTAH held the authority and control. Therefore, using Krasner’s test, the U.N. bears responsibility for any violations that occurred at that time. The next step is to determine whether the cholera outbreak involved any violations of the right to health.

5. The Right to Health

The right to health is a universal right contained within the UDHR,¹¹⁵ the ICESCR,¹¹⁶ as well as other core human rights conventions¹¹⁷ and regional treaties.¹¹⁸ As a long-recognised and universal right, it is one of the many UDHR rights that form part of customary international law. Whether the U.N. is constitutionally bound by human rights obligations, including customary international human rights law, or whether it is bound by obligations stemming

¹¹² C. Porter, ‘Haiti’s René Préval says UN tried to remove him’, *Toronto Star*. 13 May 2013

¹¹³ S.C. Res. 1908 UN Doc. S/RES/1908 para 1 and 2 (Jan. 19, 2010).

¹¹⁴ S.C. Res. 1927 UN Doc. S/RES/1927 (June 4, 2010).

¹¹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc. A/RES/217(III) (Dec. 10, 1948) Art. 25

¹¹⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNT.S. 3, Arts. 12 and 7(b)

¹¹⁷ For example, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, UN Doc. A/6014 (1966), 660 UNT.S. 195 Article 5(e)(iv); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNT.S. 3 Article 12; Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNT.S. 3 Article 24; Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, G.A. Res. 61/106 UN Doc. A/RES/61/106 (Jan. 24, 2007) Article 25.

¹¹⁸ For example, Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 UNT.S. 123 Article 10; Organization of African Unity, The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 58 (1982) Art. 16

from those of its member states, it is clear that when exercising authority and control within a state, the U.N. is bound by the right to health.

The right to the highest attainable standard of health was first enunciated in 1946 in the WHO constitution. As well as being recognised in many international and regional treaties, the right is explicitly or implicitly recognised in many national constitutions. The substance, scope and subjects of the rights are clearly defined, and there exists jurisprudence at the national, regional and international levels¹¹⁹ about the parameters of the obligation and the ways in which the right might be violated.

The right to the highest attainable standard of health cannot be and is not a right to be healthy. The Committee on Economic, Social and Cultural Rights characterises the right to health as ‘a right to the enjoyment of a variety of goods, services and conditions necessary for the realisation of the highest attainable standard of health’.¹²⁰ It encompasses both health care and the underlying determinants of health. The right to health under the ICESCR includes the conditions necessary to lead a healthy life as well as access to adequate healthcare services in case of illness. ICESCR Articles 7 and 12 refer to measures required to ensure healthy working conditions and environments, which makes it clear that the right extends to the protection of health as well as access to healthcare services. In terms of the cholera outbreak and continued existence in Haiti, we are concerned not only with the provision of healthcare services but with the protection of health and the conditions necessary to lead a healthy life.

There are two main methods by which to explore the obligations arising under the right to health: the tripartite duties and the TripleAQ framework. The frameworks serve different purposes, with the former¹²¹ addressing normative content and the latter addressing states’ obligations. The TripleAQ framework focuses on the availability, affordability, accessibility, acceptability and quality of facilities, goods, services and programmes in terms of socio-economic rights, and is useful for determining the normative content of the right to health, in

¹¹⁹ Two of the most famous cases are *Soobramoney v Minister of Health (Kwazulu-Natal)*, Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997 and *Minister of Health and Others v Treatment Action Campaign*, 2002 5 SA 721 (CC). For an exploration of a range of national and regional cases, see A. Hendriks, ‘The Right to Health in National and International Jurisprudence’ (1998), 5 *European Journal of Health Law*, 389.

¹²⁰ CESCR, General Comment No. 14’, para 9, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

¹²¹ The tripartite framework traces its roots to Shue (H. Shue, ‘The Interdependence of Duties’ in Philip Alston and Katarina Tomaševski eds., *The Right to Food* (1984), 83-95), whose approach was modified by Eide, (Eide, ‘Realisation of Social and Economic Rights and the Minimum Threshold Approach’, (1989) 10 *Human Rights Law Journal* 35), who developed the terminology of obligations to respect, protect and fulfil. See, generally, A. Muller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (2013) Ch 4.

terms of the cholera outbreak we are concerned with the U.N.'s duties rather than conceptual clarification of the right to health or its progressive realisation.

The right to health gives rise to states or sovereign powers having tripartite duties: the duty to respect, the duty to protect, and the duty to fulfil.¹²² The duty to respect requires the state or sovereign power to 'abstain from performing, sponsoring or tolerating any practice, policy or legal measure violating the integrity of individuals or infringing upon their freedom to use those material or other resources available to them in ways they find most appropriate to satisfy economic, social and cultural rights'. That obligation requires the state or sovereign power to refrain from interfering with the right to health, and to take all necessary measures to ensure that it does not interfere with the right. Article 12 of the ICESCR is particularly important in terms of the cholera outbreak because it explicitly prohibits polluting the environment in a manner that is harmful to health. The U.N., then, is bound by the obligation not to pollute the environment – which obviously would include tributaries and rivers – and to take the necessary measures to ensure that such pollution does not take place.

The duty to protect requires states or sovereign powers to prevent other actors violating individuals' rights. Using Alexy's balancing theory Fredman insists that states or sovereign powers may only limit that protection where a balance must be struck with the human rights of other actors.¹²³ Obligations include taking measures to redress human rights violations if they occur, and preventing further violations. The duty to protect requires steps to be taken to protect against hazards that interfere with individual's health and with the conditions required to lead a healthy life.

The duty to fulfil requires states or sovereign powers to take positive measures to ensure the full realisation of the right, although there is recognition that fulfilment occurs through progressive realisation. A state or sovereign power must at the very least implement the right's minimum core content. The Committee on Economic, Social and Cultural Rights considers Article 12 to be violated when a state or sovereign power does not ensure a minimum standard of healthcare unless that country can demonstrate that it has invested heavily and sought available international assistance. The minimum core content includes ensuring the existence of water and sanitation services in order to prevent detriment to health.

¹²² See, for example, S. Fredman, *Human Rights Transformed: Positive rights and positive duties* (2009) Ch 3

¹²³ S. Fredman, *Human Rights Transformed: Positive rights and positive duties* (2009), 73-6

The U.N. was performing roles and functions as an external actor in Haiti and exercised authority and control throughout 2010, and therefore it was bound by the tripartite duties. The U.N. clearly has violated all of the tripartite duties. The inadequate screening for cholera that led to the introduction of cholera into Haiti violated of the duty to respect the right to health and to protect Haitians from risks emanating from third parties, here the Nepalese peacekeepers. The poor waste management system at the MINUSTAH camp that allowed the cholera to pollute the main river in Haiti and to spread was in violation of the duties to respect and protect the right to health. The failure to take the necessary steps to eradicate cholera violates the duty to protect – in terms of remedying and preventing future violations – and the duty to fulfil the right to health. The U.N. continues to violate the duty to fulfil by failing to ensuring adequate access to clean and safe water after the pollution of the main river in Haiti.

6. Concluding Observations

The aim of this article has not been to explore the systemic violations of the right to health in Haiti caused by the U.N., but rather to demonstrate that the U.N. was bound by obligations arising under that right and bears responsibility for any violations that occurred. The U.N. exercised authority and control within Haiti at the time of the cholera outbreak. Paust insists that it would be unlawful for the U.N. to order or authorise any human rights violations.¹²⁴ Yet, by failing to provide U.N. peacekeepers with sufficient screenings for cholera, to create and sustain adequate waste management facilities within the MINUSTAH camp, and later to take the steps necessary to eradicate cholera, the U.N. has and continues to authorise human rights violations through negligence and omissions to act. By claiming that those violations stemmed from policy or political matters, the U.N. has not just violated human rights but is claiming that it is able to do so with impunity. That position, clearly, is ‘counterintuitive’¹²⁵ given the U.N.’s human rights obligations.

The problem remains that the U.N. is refusing to take responsibility for the cholera outbreak and continued impact of the disease in Haiti. The U.N. has classified as ‘not receivable’

¹²⁴ J. J. Paust, ‘The UN Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity’, (2010) 51 *Harvard International Law Journal* 1, at 3

¹²⁵ *Id.*, at 9

claims filed on behalf of more than 5,000 victims of cholera.¹²⁶ Those claims are being made under private law, alleging either negligence or gross recklessness in terms of the U.N.'s screening of peacekeeping troops and maintenance of waste management sites at the MINUSTAH camp. The U.N. does not dispute that its peacekeepers brought cholera into Haiti, nor does it seek to absolve itself of blame for the conditions within the peacekeepers' camp. Secretary-General Ban Ki-Moon has once again pointed to the Organisation's absolute immunity from jurisdiction as a bar to individuals bringing claims against the U.N.¹²⁷

The U.N. has relied upon its absolute immunity from jurisdiction of national courts, which is based on Article 105(1) of the Charter of the United Nations¹²⁸ and on Section 2 of the Convention on Privileges and Immunities of the United Nations.¹²⁹ That immunity violates the fundamental rights of individuals to access a court and to seek a remedy and therefore a counter-balance exists through the U.N. being required to provide alternative mechanisms for resolving disputes. Section 29 of the Convention on Privileges and Immunities of the United Nations¹³⁰ and the Model Status of Forces Agreement¹³¹ both mandate that the U.N. set up local claims boards within any peacekeeping operation. Those claims boards are designed for individuals involved in a dispute with the U.N. or its staff. They allow such individuals to realise their rights to access a court and to seek a remedy despite the U.N.'s absolute immunity. Yet the U.N. has refused to set up a local board to hear claims relating to the cholera outbreak. The U.N. insists that the claims concern 'political' or 'policy' matters rather than private law. Owing to this position, a case has now been brought to the New York District Court that is clearly based on human rights— regarding the rights to access a court and to access a remedy – to challenge the U.N.'s absolute immunity.¹³² Although the District Judge upheld U.N. immunity, an appeal is currently pending that seeks to challenge that ruling.

¹²⁶ UN Department of Public Information (New York), Haiti Cholera Victims' Compensation Claims "Not Receivable" under Immunities and Privileges Convention, United Nations Tells Their Representatives, UN Doc. SG/SM/14828 (Feb. 21, 2013).

¹²⁷ Letter from Ban Ki-moon, UN Secretary-General, to Maxine Waters, U.S. Representative for California's 43rd congressional district (July 5, 2013) (available at <http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>)

¹²⁸ UN Charter, art. 105 para. 1.

¹²⁹ G.A. Res. 22(1), Convention on the Privileges and Immunities of the United Nations, UN Doc. A/RES/22(1) 13 February 1946, Section 2.

¹³⁰ *Id.*, Section 29.

¹³¹ GA, 'Model status-of-forces agreement for peace-keeping operations', UN Doc. A/45/594 (1990), Art. 51.

¹³² R. Freedman, 'UN Immunity or Impunity?: A human rights based challenge' (2014) 25 (1) *European Journal of International Law* 239-254

Whether that challenge will be successful remains to be seen. Even if the New York District Court does overturn, on appeal, the U.N.'s absolute immunity, the case still must be heard on its merits. The likelihood is slim of a resolution or remedies in the near future. In the meantime, the impact of the cholera outbreak on individuals' right to health in Haiti is ongoing. What we have demonstrated is that adopting a rights-based approach to the cholera outbreak results in the U.N. being legally bound to remedy the human rights abuses and to take the appropriate measure to contain the epidemic in order that further abuses do not occur. Our approach provides an alternative method for ensuring that the U.N. cannot avoid its responsibilities by using the cloak of absolute immunity from jurisdiction of national courts.