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International responsibility of international organisations for non-compliance with their obligations – A case-study on the role of the UN in the 2010s cholera outbreak in Haiti

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Secção I

Investigação Científica*

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International responsibility of international organisations for non-compliance with their obligations – A case-study on the role of the UN in the 2010s cholera outbreak in Haiti

Responsabilidade internacional das organizações internacionais pelo não-cumprimento das suas obrigações – Um caso de estudo sobre o papel das Nações Unidas no surto de cólera no Haiti na década de 2010

Ana Costa PEREIRA[1]

ABSTRACT: The international responsibility of international organisations concerning sanitary crises is a relatively new and very complex subject. In the context of epidemics and pandemics, it is especially difficult to assess the two preconditions for the international responsibility of international organisations: attribution of conduct to the organisation and that the conduct constitutes the breach of an obligation under international law.

As the World Health Organization is criticised for allegedly failing to comply with its mandate/obligations with regards to its response to the coronavirus disease (COVID-19) pandemic, this paper revisits a high-profile profile precedent where the role of an international organisation in spreading (or failing to prevent the spread of) an infectious disease was raised – that of the United Nations Stabilization Mission in Haiti (MINUSTAH), a peacekeeping operation that became associated with having introduced cholera in Haiti in October 2010.

The vastly debated and well-documented role of the United Nations in the 2010s cholera outbreak in Haiti offers a good case-study on the international responsibility of international organisations for non-compliance with their obligations, including with regards to preventing and mitigating the spread of communicable diseases.

KEYWORDS: International responsibility; international organisations; United Nations; sanitary crises; human rights; immunity.

RESUMO: A responsabilidade internacional das organizações internacionais em relação a crises sanitárias é uma matéria relativamente nova e muito complexa. No contexto de epidemias e pandemias, é especialmente difícil avaliar os dois pré-

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requisitos da responsabilidade internacional das organizações internacionais: a atribuição da conduta à organização e que a conduta constitua a violação de uma obrigação de Direito Internacional.
Numa altura em que a Organização Mundial de Saúde é criticada por alegadamente ter falhado no cumprimento do seu mandato/obrigações em relação à sua resposta à pandemia da doença do coronavírus (COVID-19), este artigo revisita um antecedente célebre no qual o papel de uma organização na propagação (ou na incapacidade para prevenir a propagação) de uma doença infeciosa foi suscitado – o da Missão das Nações Unidas para a Estabilização no Haiti (MINUSTAH), uma operação de manutenção de paz que ficou associada à introdução da cólera no Haiti em outubro de 2010.
O muito debatido e bem-documentado papel das Nações Unidas no surto de cólera no Haiti oferece um bom caso de estudo sobre a responsabilidade das organizações internacionais pelo não-cumprimento das suas obrigações, incluindo no que respeita à prevenção e mitigação da propagação de doenças transmissíveis.
PALAVRAS-CHAVE: Responsabilidade internacional; organizações internacionais; Nações Unidas; crises sanitárias; direitos humanos; imunidade.

Introduction

The international responsibility of international organisations concerning sanitary crises is a relatively new and very complex subject. Indeed, the context of epidemics and pandemics is an especially difficult one for practitioners and scholars to assess the two essential elements of an internationally wrongful act of an international organisation: attribution of conduct to the organisation and that the conduct constitutes the breach of an obligation under international law.

The most obvious subject of attention in this topic is the World Health Organization (WHO), a specialised agency of the United Nations (UN) and a

large and highly decentralised, norm-setting organisation with a complex agenda on both communicable and non-communicable diseases[2].

As stated in the preamble to the WHO Constitution, *"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."*. The Constitution of the WHO is thus based on the idea that health is a fundamental right of human beings and that there is an international obligation to implement the right of health for all[3].

Interpretating the WHO Constitution together with applicable UN law, policy and practice and general international law, can point to an existing international responsibility – and in some respects an obligation – of the WHO to promote human rights and health[4].

When a regional or global health incident enjoys a large-scale media and academic coverage, it tends to draw criticism of States and international organisations and to reignite the debate on the international responsibility of international organisations with regards to preventing, containing, and mitigating the effects of sanitary crises. The response of the WHO to the ongoing coronavirus disease (COVID-19) pandemic is no exception.

On the contrary, and as had happened during the 2014-2016 Ebola Outbreak in West Africa (considered by the WHO itself as the largest and most complex Ebola outbreak since the virus was first discovered in 1976 – but in which the response by the WHO was deemed as too slow and inefficient[5]), with regards to this pandemic the WHO has been criticised for allegedly failing to comply with its mandate/obligations – for example, under the WHO Constitution.

Yet, due to the normative and policy architecture of the WHO concerning its structure and competences, the organisation is mostly deprived of operational competences[6] – a fact that cripples an effective and efficient action by the WHO whenever confronted with rapidly-spreading communicable

[2] MEISTERHANS, Nadja, "The World Health Organization in Crisis—Lessons to be Learned Beyond the Ebola Outbreak", *The Chinese Journal of Global Governance*, No. 2, 2016, pages 4 and 5.
[3] *Ibidem*, page 4.
[4] ONZIVU, William, "(Re)Invigorating the World Health Organization's Governance of Health Rights: Repositing an Evolving Legal mandate, Challenges and Prospects", *African Journal of Legal Studies*, No. 4, 2011, page 256.
[5] MEISTERHANS, Nadja, "The World Health Organization in Crisis…", page 1.
[6] *Ibidem*, page 6.

diseases. The WHO therefore deeply depends on the contributions and on the operational capacity of States and other international actors to exercise its mandate – a fact that should be kept in mind when discussing its responsibility for a failure to pursue that very same mandate, especially in what concerns epidemics and pandemics. Moreover, an increasing general loss of trust in UN institutions and the rise of new actors, financing mechanisms and programs in global health since the 1990s have contributed to marginalise the WHO[7].

Against this background and aiming at better understanding the international responsibility of international organisations in relation to a sanitary crisis, this paper will analyse a high-profile precedent where the role of an international organisation in spreading (or failing to prevent the spread of) an infectious disease was raised – that of the United Nations Stabilization Mission in Haiti (MINUSTAH), a peacekeeping operation that became associated with having introduced cholera in Haiti in October 2010.

The example of MINUSTAH offers a good case-study on the international responsibility of international organisations for non-compliance with their obligations with regards to preventing and mitigating the spread of communicable diseases. This is not only because it is good example to study the responsibility of international organisations in general, but also because it is a rare, well-documented example of international responsibility of international organisations in relation to a sanitary crisis.

The case-study will depart from two guiding questions, based on the preconditions of the international responsibility of international organisations: (1) "Why/ how could this cholera outbreak be attributed to the UN?" and (2) "Why/how could the conduct by the UN translate a wrongful act under international law?".

In seeking to answer those questions, the paper will be structured in two main sections. It will firstly address basic concepts on the international responsibility of international organisations, moving then to the case-study itself – in which the facts and applicable international law for a possible case of UN responsibility in the Haitian cholera outbreak will be described and commented on.

[7] *Ibidem*, pages 8 and 9.

In drawing conclusions, the paper will offer a brief overview of the main challenges in holding international organisations accountable for violations of international law in sanitary crises and allude to the recommendations that have been put forward in literature and jurisprudence.

1. The bare essentials of the international responsibility of international organisations

Having international legal personality, international organisations are the subjects of rights and obligations under international law. Consequently – and as has been recognised in international practice for a long time (especially since the establishment of the UN and its specialised agencies[8]) – international organisations can be responsible to other international legal persons.

Indeed, international organisations *"(…) have a certain amount of control over persons and enter into treaties, agreements and other relations with other international persons which could give rise to international obligations generating responsibility in the appropriate circumstances."*[9].

However, the norms applicable to the international responsibility of international organisations are not yet very well developed and lack detail – in line with the general tendency of the law of international organisations, which is fundamentally conservative, more prone to protecting the organisations than to efficiently regulating their activities and helping solve substantial problems[10].

To ease the understanding of a possible arguments for the international responsibility of the UN in the Haitian case-study in the following section, one may concentrate on two important advisory opinions of the International Court of Justice (ICJ), and on the *Draft articles on the responsibility of international organizations* (hereinafter simply referred to as "the Draft Articles") – adopted by the International Law Commission (ILC) at its sixty-third session, in 2011, and

[8] AMERASINGHE, C.F., "An Assessment of the ILC's Articles on the Responsibility of International Organizations", in RAGAZZI, Maurizio, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie,* Koninklijke Brill NV, Leiden, The Netherlands, 2013, page 71.

[9] *Ibidem, cit.,* page 71.

[10] SPAGNOLO, Andrea, "(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility", *Global Jurist*, Vol 1, Issue 1, 2018, 20170025, page 13.

submitted to the General Assembly as a part of the ICL's report covering the work of that session.

As for the advisory opinions of the ICJ, let us mention the Advisory Opinion of 20 December 1980 on the "Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt" and the Advisory Opinion of 29 April 1999 on the "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights".

In paragraph 37 of the 1980 Advisory Opinion, the ICJ stated that *""International organizations 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."*. The ICJ also specifically referred to the existence of obligations in customary international law for international organisations in this Advisory Opinion[11]. To adequately interpret the concept of "general rules of international law" mentioned by the ICJ, one should also consider the practice of the international organisation as a source of obligations.

The 1999 Advisory Opinion is another interpretative benchmark useful for understanding the Haitian case-study ahead, notably because the ICJ stated, in paragraph 66, that *"(…) the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the UN or by its agents acting in their official capacity"*. This is an important remark: the question of assessing whether an international organisation enjoys immunity from the jurisdiction of domestic courts is not directly relevant to know whether that organisation incurs international responsibility.

Moving on to the Draft Articles, it should be underlined that these final outcome of a 10-year work by the ICL was the object of a criticism that reflects some of the major concerns voiced by Governments and international organisations during the work of the ILC on this topic – *i.e.* the scarcity of available practice, the perceived overreliance by the Commission on the 2001 articles on State responsibility (notwithstanding important differences in the functions, competences and purposes of States and international

[11] AMERASINGHE, C.F., "An Assessment of the ILC's Articles …", page 72.

organisations), and the doubts with regard to the appropriateness of specific issues such as countermeasures against international organizations[12].

In fact, in paragraph 5 of its General Commentary to the Draft Articles, the ILC itself admitted[13] that one of the primary difficulties in elaborating rules concerning the responsibility of international organisations had been the *"limited availability of pertinent practice"* (mainly since that practice had developed only very recently). Therefore, according to the ILC, its work on the topic was primarily an exercise in the progressive development of international law, in contrast with the corresponding exercise on the topic of State responsibility – which *"could be regarded as representing codification"*.

Nonetheless, criticism has not relegated the Draft Articles to obscurity – as testified by debates at the Sixth Committee (Legal) of the General Assembly of the UN and by the many times the Draft Articles have been referred to in national and international jurisprudence since their adoption in 2011[14].

The Draft Articles identify when conduct is attributable to an international organisation (rather than to a State or to a private individual), address the circumstances under which violations might be excused and specify the consequences of said responsibility[15].

Draft Article 3 determines that every internationally wrongful act of an international organisation *"entails the international responsibility of that organization"*.

Draft Article 4 states that an internationally wrongful conduct of an international organisation is an act or an omission attributable to the organisation under international law and that constitutes a breach of an international obligation of that organisation. The Draft Articles do not specify

[12] BURCI, Gian Luca and FEINÄUGLE, Clemens, "The ILC's Articles Seen from a WHO Perspective", in RAGAZZI, Maurizio, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*. Koninklijke Brill NV, Leiden, The Netherlands, 2013, page 177.

[13] INTERNATIONAL LAW COMMISSION, "Draft articles on the responsibility of international organizations, with commentaries", *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, Chapter V, page 46.

[14] See, for example, the many reports of the Secretary-General of the UN on the responsibility of international organisations, including comments and information received from Governments and international organisations (the latest of which is contained in document A/75/282, of August 3, 2020) and compilations of decisions of international courts and tribunals (the latest of which is contained in document A/75/80, of April 24, 2020).

[15] DAUGIRDAS, Kristina, "Reputation and the Responsibility of International Organizations", *European Journal of International Law*, Volume 25, No. 4, 2014, page 992.

which acts or omissions would be in violation of international law, as they address only 'secondary rules' of international law[16].

In short, there are two preconditions for the international responsibility of international organisations: the attribution of the conduct to the organisation and that the conduct constitutes the breach of an obligation under international law.

As illustrated by the Haitian-cholera case-study ahead, sanitary crises are characterised by factors that add to the (already high) level of complexity and uncertainty in the assessment of those preconditions.

Those factors include particular challenges in determining the source of an outbreak of a rapidly spreadable communicable disease (with consequences in the assessment of the attribution precondition) and in assessing which international obligations a given international organisation may have breached when failing to prevent, contain and mitigate the effects of said outbreak.

2. A case for UN responsibility in the Haitian cholera outbreak?

• The 2010s cholera outbreak in Haiti

In January 2010, Haiti was hit by a devastating earthquake. The earthquake caused over 200,000 deaths and left homeless more than two million people, further compromising the socioeconomical structure in the country, which was already very weakened by years of political, social and economic instability[17].

MINUSTAH was a peacekeeping mission who had been present in Haiti for the previous six years, following Security Council Resolution 1542 (2004) – which deployed 6,700 military personnel and 1,622 police. The mandate of MINUSTAH was a wide and robust one even among peacekeeping operations, focusing on maintaining peace and security, reporting and monitoring human rights violations and abuses, and supporting democratic governance[18].

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[16] *Ibidem*, page 994.

[17] GARCIN, Melina, "The Haitian Cholera Victims' Complaints Against the United Nations", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, Vol.75, Issue 3, page 673.

[18] BHAT, Neha, "Responsibility in the Time of Cholera: Liability of International Organisations for Wrongful Conduct", page 15. Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213613> (last access December 12, 2020).

Following the 2010 earthquake, the Security Council adopted Resolution 1908 (2010), heeding a recommendation made by the Secretary-General to increase the overall force levels of MINUSTAH (military personnel by 2,240 and police personnel by 2,089) and to expand its mandate to support the immediate recovery, reconstruction and stability efforts[19].

By the end of October 2010, the Haiti National Public Health Laboratory confirmed a first cholera case and, a few days later, the Centers for Disease Control and Prevention (CDC) identified the bacteria strain that was causing the outbreak as being similar to a cholera strain found in South Asia[20]. One of the contingents that had been called to reinforce MINUSTAH numbers was Nepalese and soon there were reports of a waste disposal, a sanitation system, linked to one of the main fresh water sources nearby that contingent's camp.

Meanwhile, the disease spread very quickly in Haiti, building on the consequences of the January earthquake – *e.g.* displacement of persons, damage to infrastructure, lack of safe water and lack of adequate sanitation facilities[21] – and ravaging a country where cholera had not been documented for nearly century[22] (and where, consequently, the population lacked immunity to the disease[23]).

By November 2010, there were cholera cases in all of Haiti. With rumours circulating as to the alleged source of the outbreak being a MINUSTAH camp, public outcry and resentment against MINUSTAH became worse. It was nothing new (as there had been prior allegations of serious human rights violations by peacekeepers[24]), but violent protests became a concern to the UN and the Haitian authorities.

For months, the UN, the WHO, and the CDC resisted conducting investigations to identify the source of the cholera outbreak[25], indicating that all focus should be on mitigating the consequences of the outbreak.

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[19] *Idem*.
[20] DAUGIRDAS, Kristina, "Reputation and the Responsibility…", page 1001.
[21] BHAT, Neha, "Responsibility in the Time of Cholera…", page 20.
[22] CRAVIOTO, Alejandro *et al.*, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, May 2011, page 8. Available at IJDH: <https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_525.pdf> (last access December 12, 2020).
[23] *Ibidem*, page 29.
[24] BHAT, Neha, "Responsibility in the Time of Cholera…", page 16.
[25] *Ibidem*, page 22.

However, public outcry in Haiti and around the world pressed UN Secretary-General Ban Ki-moon into appointing an Independent Panel of Experts to investigate the source of the cholera outbreak in January 2011[26].

Although the Independent Panel of Experts on the Cholera Outbreak in Haiti did not explicitly identify MINUSTAH as the source[27], it concluded that sanitation conditions in one of MINUSTAH's camps – the one occupied by a majority of the Nepalese contingent – were insufficient to prevent contamination of the Meye Tributary System of the Artibonite River. In fact, the Final Report of the Independent Panel of Experts concluded that *"(…) the evidence overwhelmingly supports the conclusion that the source of the Haiti cholera outbreak was due to contamination of the Meye Tributary of the Artibonite River with a pathogenic strain of current South Asian type Vibrio cholorae as a result of human activity*"[28]. This Independent Panel of Experts never pinpointed the source of the cholera outbreak and concluded that the source was no longer relevant to controlling the outbreak – recommending instead that efforts be channelled into implementing measures preventing the disease from becoming endemic[29]. Still, two years later, the four members of the Independent Panel of Experts published a study noting that the Nepali peacekeepers had *"most likely"* been the source of the outbreak[30].

Haitian authorities did not criticise MINUSTAH nor the UN with regards to the cholera epidemic (easily due to the dependence of Haiti on UN financial and institutional aid and support). Even so, in 2013, Haitian Prime Minister Laurent Lamothe alluded to a 'moral responsibility' of the UN for the outbreak, saying that *"While we continue to believe that the United Nations has a moral responsibility in this epidemic, it nevertheless remains true that the UN remains supportive of the efforts of the Government and various national and international agencies involved to eradicate this scourge*"[31].

In 2016, Secretary-General Ban Ki-moon addressed the People of Haiti in a very carefully-worded apology for the 'role' of the UN in the cholera outbreak –

[26] *Idem.*
[27] DAUGIRDAS, Kristina, "Reputation and the Responsibility…", page 1001.
[28] CRAVIOTO, Alejandro *et al.*, *Final Report…, cit.,* page 29.
[29] *Idem*.
[30] BHAT, Neha, "Responsibility in the Time of Cholera…", page 23.
[31] *Ibidem*, page 24.

underlying the lack of effective response to the disease, rather than its source: *"We simply did not do enough with regard to the cholera outbreak and its spread in Haiti. We are profoundly sorry for our role."*. This was far from enough to silence harsh criticism of the UN for the way in which the organisation has somehow 'shielded' itself in its immunity to avoid answering for its alleged part on the outbreak, including in cases brought before United States courts by surviving victims of the outbreak and families of victims – as will be discussed ahead. The UN has also repeatedly resisted establishing dispute settlement mechanisms.

The cholera outbreak lasted nine years, causing over 820,000 cases and nearly 10,000 deaths in Haiti alone[32] (having also spread to other States in the region) and further impairing the stabilisation and development of the country.

The response of the UN to the cholera outbreak and to its far-reaching consequences has been criticised even by UN human rights monitoring organs. In April 2020, a joint letter[33] calling for an urgent step-up of the measures to fulfil the UN pledge to support the victims of the Haiti cholera outbreak (the 2016 UN New Approach to Cholera in Haiti) was sent to Secretary-General António Guterres, signed by a group of independent UN human rights experts – the Special Rapporteur on extreme poverty and human rights (Philip Alston), the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (E. Tendayi Achiume), the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (Leilani Farha), the Special Rapporteur on the human rights to water and sanitation (Léo Heller), the Independent Expert on human rights and international solidarity (Obiora C. Okafor), the Special Rapporteur on the right to physical and mental health (Dainius Pūras), the five members of the Working Group of experts on people of African descent (Ahmed Reid), the Independent Expert on the promotion of a democratic and equitable international order (Livingstone

[32] PAN AMERICAN HEALTH ORGANIZATION (PAHO), "Haiti reaches one-year free of Cholera", Press Release of January 23, 2020. Available at<https://www.paho.org/hq/index.php?option=com_content&view=article&id=15684:haiti-reaches-one-year-free-of-cholera&Itemid=1926&lang=en> (last accessed December 12, 2020).

[33] The joint letter is available at website of the Office of the Hight Commissioner for Human Rights: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25228> (last accessed December 12, 2020).

Sewanyana), Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (Baskut Tuncak) and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (Fabián Salvioli).

In the joint letter, the Special Rapporteurs requested the observations of the Secretary General on seven issues – including *"up-to-date information on the funding gap"*, the reason why adequate remedy to victims had still not been provided and *"the timeline for future actions, public reporting and planned expenditures"*. The letter highlights *"(...) the continued denial of effective remedies to the victims of the 2010 cholera outbreak in Haiti."*.

The Secretary-General replied to this joint letter in June 2020, stressing how the activities and funding of the UN for the development and stabilisation in Haiti had obtained positive developments but making no explicit reference to the effective remedy issue (and discreetly directing the Special Rapporteurs to the Office of the Special Envoy)[34].

- **Attribution of conduct to the UN**

Why/ how could a wrongful conduct relating to Haitian 2010s cholera outbreak be attributed to the UN?

According to Draft Article 6 (1), the conduct of an organ/agent of an international organisation in the performance of functions is considered an act of the organisation under international law, regardless of the position of said organ/agent in respect of the organisation.

Assuming that the source of the outbreak was the Nepalese contingent of MINUSTAH, or at least accepting (as declared by Secretary-General Ban Ki-moon in 2016) that MINUSTAH failed to 'do enough' to stop the spreading of the disease, this certainly could be a case for UN responsibility.

It is necessary to reflect on the concrete legal relationship between MINUSTAH (and its members) and the UN, so as to conclude whether the UN exercised an effective control. As understood in the jurisprudence of the

[34] This reply is available at the website of the Office of the Hight Commissioner for Human Rights: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35379> (last accessed December 12, 2020).

European Court of Human Rights (ECtHR) – for example, in the 2007 decision on the admissibility of the applications in the *Behrami and Behrami v. France* and the *Saramati v. France, Germany and Norway* case, as well as in the 2011 judgement of *Al-Jedda v. the United Kingdom* case – wrongful acts by UN peacekeepers can only be attributed to the UN alone/rather than to UN Member States contributing troops when the Security Council exercises 'ultimate authority and control' over those troops.

If we accept, as argued in certain studies[35], that Security Council Resolution 1542 (2004) explicitly states that the UN holds exclusive operational control over MINUSTAH, and MINUSTAH being a subsidiary organ of the UN for the purposes of responsibility, the case will pass a 'ultimate authority and control' test.

Nepal, as the State contributing a contingent allegedly infected with cholera, could also be responsible (as it retained limited disciplinary and criminal jurisdiction over those troops[36]), but it is clear that the operational control in issues of camp management and in the actions and omissions of members of the contingent in Haiti would necessarily go to MINUSTAH, and thus, to the UN.

Subsequently, admitting that actions and omissions of members of MINUSTAH relating to the cholera outbreak are attributable to the UN, the UN is obliged to make full reparation for the damage caused by that wrongful conduct – as seen in the first section of this paper.

- **Breach of an obligation under international law**

Why/how could the conduct by the UN in the 2010s cholera outbreak in Haiti translate a wrongful act under international law?

There are several international obligations that the UN may have breached in allegedly inadvertently bringing cholera to Haiti (for example in failing to screen contingents for communicable diseases ahead of their entry in Haiti), in failing to prevent the outbreak or properly mitigate its consequences (including solving deficiencies in the waste disposal system of a MINUSTAH camp leading

[35] GARCIN, Melina, "The Haitian Cholera Victims' Complaints…", page 694.
[36] BHAT, Neha, "Responsibility in the Time of Cholera…", page 39.

to contamination of water in the area that should have been prevented by the UN and known by the UN, 'not doing enough' to contain the outbreak) and even in not providing effective remedy to the victims of the outbreak where applicable.

The UN may have violated the mandate of MINUSTAH under Security Council Resolution 1542 (2004), in violating its duty to support the Transitional Government of Haiti in maintaining a secure and stable environment, as well as in assisting it in the promotion and protection of human rights. This includes ensuring individual accountability for human rights violations and abuses and delivering effective remedy for victims of those violations and abuse where applicable.

The UN may have violated the Convention on the Privileges and Immunities of the United Nations of 1946 (hereinafter "the 1946 Convention"), whose Section 29 requires the UN to *"make provision for appropriate modes of settlement"* of *"disputes of a private law character"* and disputes involving *"any official of the United Nations who by reason of his official position enjoys immunity"*. It should be noted that Section 29 only requires the UN to implement adequate mechanisms of dispute settlement – not necessarily a court[37]. The UN has invoked immunity when brought before United States (US) courts – but failed to provide other appropriate means of dispute settlement. Additionally, the UN has always argued that the cholera claims are not a private law dispute which would require settlement according to the UN's own procedures; the UN maintains that consideration of the claims would instead *"include a review of political and policy matters"*, which renders the claims not-receivable pursuant to Section 29[38]. Hence, there is an overriding issue for qualifying the (private or public) nature of the cholera-claims disputes – a difficult task, considering that it would require research into documents and practice which is largely internal to the UN and not easily accessible[39].

[37] MÉGRET, Frédéric, "Responsabilité des Nations Unies Aux Temps du Choléra", *Revue Belge de Droit International*, Vol. 46, No. 1, 2013, page 186, Éditions Bruylant, Brussells.

[38] TAYLOR, Kate Nancy, "Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak", *Netherlands Yearbook of International Law*, 2014, page 161.

[39] MÉGRET, Frédéric, "Responsabilité des Nations Unies …", page 166.

The UN may have violated its Status of Forces Agreement with Haiti (SOFA), for example *(i)* by failing to cooperate with Haitian authorities in the control of a communicable disease (an obligation under article 23 of the SOFA) and *(ii)* by failing to establish a standing claims commission under article 55 of the SOFA – a contractual obligation similarly incumbent on the UN in all its peacekeeping missions[40]. In accordance with article 55 of the SOFA, such standing claims commission would settle *"third-party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to MINUSTAH"*.

The UN may have violated obligations under the Charter of the UN[41] – for example, Article 1(3) and Article 55(c) – and under customary international law to provide an effective remedy for violation of international law.

Finally, the UN may have violated obligations under international human rights law and even *jus cogens*. The non-governmental organization Institute for Justice and Democracy in Haiti (IJDH) has suggested that the UN are required to make reparations to the victims of cholera for violations of international human rights law, and more notably for the violation of the right to life, the right to health, the right to livelihood and the right to safe drinking water[42]. The right to effective remedy has also been continuedly disregarded, as pointed out by UN special rapporteurs (see section 2.1).

- **An accountability/remedy gap? The dividing line between immunity and impunity**

Although there may be elements paving the way for legal and factual grounds that may make the UN to be accountable for the 2010s cholera outbreak in Haiti, it is unlikely we will see the UN found guilty in court. Bearing in mind that the dependence of Haiti on the UN jeopardises the willingness of that State to seek reparation from the UN, individuals and communities are left on their own in seeking remedy.

Even if the two preconditions to a UN responsibility in the 2010s Haitian cholera outbreak are met, an outstanding question remains: how to hold the UN

[40] TAYLOR, Kate Nancy, "Shifting Demands in International…", page 169.
[41] GARCIN, Melina, "The Haitian Cholera Victims' Complaints…", page 691.
[42] MÉGRET, Frédéric, "Responsabilité des Nations Unies …", page 174.

responsible and obtain due reparation for the victims and their families as applicable, when the organisation resists establishing dispute settlement mechanisms and given that the UN enjoys immunity from jurisdiction.

Left without effective remedy, several victims of the cholera outbreak turned to the United States (US) Southern District Court of New York in 2013, filing a class action complaint in which they contested the immunity of the UN. The class action complaint was brought by Delama Georges *et al.*, supported by two non-governmental organisations – the Institute for Justice and Democracy in Haiti (IJDH), the *Bureau des Advocats Internationaux* (BAI) – and KKWT law firm[43]. In *Delama Georges, et al. v. United Nations*, the plaintiffs argued the UN could not exercise its immunity under the 1946 Convention because the organisation had failed to create a dispute resolution mechanism, as was its obligation. The District Court dismissed the case for lack of subject matter jurisdiction, due to the absolute immunity of the UN: according to the court, the (absolute) immunity of the UN could only be set aside if the UN expressly waived it. The US Court of Appeals for the Second Circuit later confirmed that obligation of the UN to provide a dispute resolution mechanism is not a condition precedent to its immunity under the Convention.

A very similar case, *LaVenture v. United Nations*, is now pending before the US Supreme Court.

This approach by US courts has been reproached, as it considered only one source of international obligations binding on the US (the 1946 Convention), disregarding obligations under international human rights law.[44]

In opposition, the ECtHR has, in the *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* cases, stated that an international organisation enjoys immunity before domestic courts only if it provides an alternative means of dispute settlement for individuals seeking redress against it.[45] In fact, *"Granting absolute immunity to the UN in the case of the Haitian cholera victims, a situation where the UN does not provide for an alternative dispute settlement mechanism, would be clearly disproportionate."*[46]

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[43] HOLLENBERG, Stephan, "Immunity of the UN in the Case of Haitian Cholera Victims", *Journal of International Peacekeeping*, No. 19, 2015, Page 121.
[44] HOLLENBERG, Stephan, "Immunity of the UN in the Case…", page 121.
[45] GARCIN, Melina, "The Haitian Cholera Victims' Complaints…", page 692.
[46] HOLLENBERG, Stephan, "Immunity of the UN in the Case…", *cit.,* page 141.

As noted by the ICJ in the 1999 Advisory Opinion referred to in the previous section of this paper, immunity from jurisdiction does not mean that an international organisation is or is not responsible under international law for a given conduct – it means only that the path to obtain compensation for the alleged damage is a specific one, other than a legal process before the courts of a given State.

International legal literature has advanced several options for closing the accountability/remedy gap in cases where the immunity from jurisdiction of an international organisation seems to preclude victims from obtaining effective remedy. Among the recommendations has been the creation of mechanisms and organs at the UN such as an ombudsman to whom persons could refer to human rights violations by the UN[47] – the UN already has an 'organizational ombudsman' within the UN internal justice system, tasked with helping UN staff solving workplace conflicts –, a Standing Inspection Panel (based on the World Bank Inspection Panel, a complaints-mechanism for people and communities allegedly affected by a World Bank-funded project) or a Human Rights Advisory Panel[48].

But should this international organisation not be inclined to consider those options, could there be a principle in international law under which the immunity of the UN could be put aside in case of serious human rights violations such as the Haitian cholera-crisis might qualify as? A human-rights-based approach to the classical doctrine of the absolute immunity of the UN has been gaining traction in literature and jurisprudence throughout the years.

If the arguments contained in the Dissenting Opinion of Judge Cançado Trindade in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case are to apply to international organisations, *jus cogens* must stand above the prerogative/privilege of immunity *"(…) with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity."* (paragraph 299 of the Dissenting Opinion).

As stated in paragraphs 301 and 306 of that Dissenting Opinion, *"State immunities cannot be considered in the void, they constitute a matter which is ineluctably linked to the facts which give origin to a contentious case."* and

[47] MÉGRET, Frédéric, "Responsabilité des Nations Unies …", page 188.
[48] GARCIN, Melina, "The Haitian Cholera Victims' Complaints…", pages 701 and 702.

"Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of jus cogens, that cannot simply be removed or thrown into oblivion by reliance on State immunity. (…) International crimes perpetrated by States are not acts jure gestionis*, nor acts* jure imperii*; they are crimes,* delicta imperii*, for which there is no immunity.".*

As a result of this interpretation, the tension between the immunity from jurisdiction of an international organisation and the right of access to justice – according to Judge Cançado Trindade the realisation of justice being, in itself, a form of reparation to the victims (see paragraph 310 of that Dissenting Opinion) – should be resolved in favour of the latter, particularly in cases of international crimes.

- **Conclusions and recommendations**

The norms applicable to the international responsibility of international organisations are not yet very well developed and lack detail. Even so, as subjects of international law, international organisations are bound by obligations incumbent upon them under a number of sources of law and they are responsible for the breach of those obligations.

There are two preconditions for the international responsibility of international organisations: the attribution of the conduct to the organisation and that the conduct constitutes the breach of an obligation under international law.

The Haitian-cholera case-study shows that sanitary crises are characterised by factors that add to the (already high) level of complexity and uncertainty in the assessment of those two preconditions – including challenges in determining the source of an outbreak of a rapidly spreadable communicable disease and in assessing which international obligations a given international organisation may have breached in failing to prevent, contain and mitigate the effects of that outbreak.

The case-study also illustrates that another daunting challenge is that of the immunity from jurisdiction enjoyed by international organisations: unless waived by the organisation itself, it may seriously impair the enjoyment of human rights.

Immunity from jurisdiction does presume nor refutes that an international organisation is responsible under international law for a given conduct. Instead, it determines that the path to obtain compensation for the alleged damage is other than a legal process before the courts of a given State.

International legal literature has advanced several options for closing the accountability/remedy gap where the immunity from jurisdiction of an international organisation seems to preclude victims from obtaining effective remedy.

The classical doctrine of the UN enjoying an absolute immunity from jurisdiction even when confronted with serious violations of international law has been debated in literature and in international courts, with strong voices advocating for a human-rights-based approach – and UN special rapporteurs themselves have admitted that the UN response to human rights violations in Haiti has been insufficient.

The Haitian case-study demonstrates that individuals and communities affected by a sanitary crisis whose source and/or effects may be attributed to an international organisation face great difficulties in holding that organisation accountable, especially where they cannot count on the support of the State of their nationality or of the State where the breaches of international law have occurred.

This raises an interesting point, against the background of the current COVID-19 pandemic. The responsibility of international organisations with regards to their missions of implementing both their mandate and obligations under international human rights law (*maxime,* the right to health) cannot be dissociated from a responsibility of States to effectively support them in that mission. Undeniably, States have a responsibility under international human rights law to support international institutions realising the human rights agenda[49].

There have also been calls for developing international individual criminal responsibility in relation to sanitary crises, which could be important for persons in positions of authority within a State or an international organisation. One such suggestion is that of including grave violations of the International Health

[49] MEISTERHANS, Nadja, "The World Health Organization in Crisis…", page 26.

Regulations of 2005 in the list of crimes against humanity punishable by the Rome Statute of the International Criminal Court. Some authors argue that *"(...) adding this crime to the list would send an unequivocal message to the world that withholding information on matters of serious international public health importance is in direct defiance of international norms and the ideals upon which they are constructed."*[50]

International law and international organisations can make a crucial positive difference in tackling transboundary challenges such as sanitary crises. Like with many transnational and/or hybrid threats, epidemics and pandemics call for preventive measures and a coordinated response from States, international organisations, and other relevant actors.

Notwithstanding the need for cross-sectorial, multi-stakeholder and multidisciplinary engagement in global health, if there is one thing that sanitary crises such as the Ebola 2014-2016 outbreak, the Haitian 2010s cholera outbreak and the COVID-19 pandemic have proved to the international community is that there is an urgent need for reinforcing and adequately financing an effective and operations-driven global health actor, with a clear, consensual, and strong mandate anchored in international law.

There is a need for *"a strong commitment of the international community to re-build the WHO as a global health authority on the base of a human rights account"*[51] and also for rethinking *"the global health agenda as an essential element of international obligations"*[52]. Therefore, a reform of the WHO, focused on strengthening it from an operational and financial point of view, is paramount in allowing the organisation to pursue its purpose under its Constitution and to effectively deliver on its mandate as the global health authority *par excellence*.

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[50] KAMEN, Justin, "Prosecuting the Pandemic: Strengthening International Public Health Law", *Eyes on the ICC*, Vol. 5, No. 1, 2008-2009, *cit.*, page 183.

[51] MEISTERHANS, Nadja, "The World Health Organization in Crisis…", page 17.

[52] *Ibidem*, page 25.

topic in the international conference "Pandemic and International Responsibility", which was held online and at the *Universidade Portucalense* on October 30, 2020.

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References

AMERASINGHE, C.F., "An Assessment of the ILC's Articles on the Responsibility of International Organizations", in RAGAZZI, Maurizio, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie,* Koninklijke Brill NV, Leiden, The Netherlands, 2013, pages 71-78.

BHAT, Neha, "Responsibility in the Time of Cholera: Liability of International Organisations for Wrongful Conduct". Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213613> (last access December 12, 2020).

BURCI, Gian Luca and FEINÄUGLE, Clemens, "The ILC's Articles Seen from a WHO Perspective", in RAGAZZI, Maurizio, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Koninklijke Brill NV, Leiden, The Netherlands, 2013, pages 177-188.

CRAVIOTO, Alejandro *et al.*, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, May 2011. Available at IJDH: <https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_525.pdf> (last access December 12, 2020).

DAUGIRDAS, Kristina, "Reputation and the Responsibility of International Organizations", *European Journal of International Law*, Volume 25, No. 4, 2014, pages 991-1018.

GARCIN, Melina, "The Haitian Cholera Victims' Complaints Against the United Nations", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, Vol. 75, Issue 3, pages 672-705.

HOLLENBERG, Stephan, "Immunity of the UN in the Case of Haitian Cholera Victims", *Journal of International Peacekeeping*, No. 19, 2015, pages 118-141.

INTERNATIONAL LAW COMMISSION, "Draft articles on the responsibility of international organizations, with commentaries", *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, Chapter V, pages 39-105.

KAMEN, Justin, "Prosecuting the Pandemic: Strengthening International Public Health Law", *Eyes on the ICC*, Vol. 5, No. 1, 2008-2009, pages 159-184.

MEISTERHANS, Nadja, "The World Health Organization in Crisis – Lessons to be Learned Beyond the Ebola Outbreak", *The Chinese Journal of Global Governance,* No. 2, 2016, pages 1-29.

MÉGRET, Frédéric, "Responsabilité des Nations Unies Aux Temps du Choléra", *Revue Belge de Droit International*, Vol. 46, No. 1, 2013, pages 161-189, Éditions Bruylant, Brussells.

PAN AMERICAN HEALTH ORGANIZATION (PAHO), "Haiti reaches one-year free of Cholera", Press Release of January 23, 2020. Available at<https://www.paho.org/hq/index.php?option=com_content&view=article&id=15684:haiti-reaches-one-year-free-of-cholera&Itemid=1926&lang=en> (last accessed December 12, 2020).

ONZIVU, William, "(Re)Invigorating the World Health Organization's Governance of Health Rights: Repositing an Evolving Legal mandate, Challenges and Prospects", *African Journal of Legal Studies*, No. 4, 2011, pages 225-256.

SPAGNOLO, Andrea, "(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility", *Global Jurist*, Vol 1, Issue 1, 2018, 20170025, pages 1-18.

TAYLOR, Kate Nancy, "Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak", *Netherlands Yearbook of International Law*, 2014, pages 157-195.

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