

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON RETHINKING THE
ROLE OF ELECTED MEMBERS IN THE UN SECURITY COUNCIL

The Security Council in practice: Haiti, cholera, and the elected members of the United Nations Security Council

Rosa Freedman^{1*} and Nicolas Lemay-Hébert^{2†}

¹University of Reading, Foxhill House, Whiteknights Road, Earley, Reading, RG67BA, United Kingdom Email: r.a.freedman@reading.ac.uk and ²Australian National University, Canberra ACT 0200, Australia Email: nicolas.lemay-hebert@anu.edu.au

Abstract

While the cholera outbreak in Haiti still claims victims every month, it is also the backdrop of one of the biggest legal battles the UN has been engaged in – one for the recognition of harm caused and for reparations for victims of cholera. Having used its immunity to disengage from the issue, the UN finally changed its stance in December 2016 and apologized for the organization's role in the cholera outbreak. This article analyses the role of the elected members of the Security Council – alongside other key stakeholders – in contributing to the UN's change of policy. Based on privileged access to a number of actors in this politico-legal fight, this article argues that elected members of the Security Council have played a crucial role in pushing the UN to 'do the right thing'. This article, along with other contributions to this special issue, sheds a different light on the practices inside the Security Council, demonstrating that elected members are far from being powerless, as most of the literature on the subject tends to assume. They can successfully play a significant role inside the organization when the right conditions permit them to play this role.

Keywords: cholera; Haiti; non-permanent members; Security Council; United Nations

1. Introduction

In December 2016, Ban Ki-moon apologized to the Haitian people for the organization's role in the cholera outbreak in the country that has killed more than 10,000 Haitians to this day. That apology was the first time that he, or the UN, publicly acknowledged its role in bringing cholera to Haiti. The decision to apologize directly to the Haitian people is a first, not just in the context of Haiti, which has gone through a number of scandals involving UN personnel, including cases of sexual exploitation and abuse by UN soldiers and police officers; it is also the first time an acting Secretary-General apologized directly to a population subject to a peace operation,¹ and it is important that Ban Ki-moon did so in Creole, the national language

*Professor Rosa Freedman, Chair in Law, Conflict and Global Development, School of Law, University of Reading.

†Dr. Nicolas Lemay-Hébert, Fellow, Department of International Relations, Coral Bell School of Asia Pacific Affairs, Australian National University.

¹Although it should be noted that apologies have been given previously, but not addressed directly to the populations, for the role the UN played in Rwanda, Srebrenica, and more recently Sri Lanka. In response to the Rwanda Report, the then UN Secretary-General, Kofi Annan, publicly stated that 'on behalf of the United Nations, I acknowledge this failure and express my deep remorse'. He added that 'both reports – my own on Srebrenica, and that of the independent inquiry on

in Haiti. The apology constituted a complete *volte face* in UN policy on Haiti and cholera: until August 2016 the UN had denied any involvement in the cholera outbreak.

This change of policy is the product of a combination of actors and campaigns coming together to push the UN to do 'what is right' for Haiti and for the Haitian people. This article is the first to record the politico-legal fight waged outside of the UN and inside the Security Council, based on the perspective of actors who have contributed directly to that fight for justice. We will focus on the number of initiatives that have contributed to change the UN's position on the cholera issue, including the strategic litigation, parallel initiatives, and debates inside the UN Security Council. In the middle of this, we can find the elected members of the Security Council. In line with this special issue, we will focus particularly on elected members of the Security Council and their crucial role in bringing this issue to the fore in New York. The existing literature focuses on the marginal power of the elected members of the Security Council,² and fails to account for the fluid role of actors inside the Security Council. As David Ambrosetti brilliantly analysed, diplomats at the United Nations Security Council deploy a 'practical sense' when confronted with a crisis, with their priority being the preservation of their decisional positions.³ These positions are never definitely set in stone and are constantly subject to an everyday reproduction of influence. In vying for positions of influence inside the Security Council, diplomatic practices follow less logical reasonings and strategic calculus than being driven by the general narratives that diplomats perceive as legitimate, as well as the likely reception of their position from international and local audiences. When permanent members of the Security Council do not seize themselves of a specific issue (championing or blocking an issue), this opens up possibilities for elected members to fill in the gap and play a position of influence in specific issues. While the P3 (three of the permanent members – France, the UK, and the US – are an informal alliance within the five permanent members) supported, in principle, a political solution to the issue, the potential implications of the legal fight waged in US courts by the Institute for Justice and Democracy in Haiti (IJDH) pushed them to the sidelines. Rather than an instrumentalization of the Security Council by the P3, which we see in so many occasions,⁴ we have witnessed an instrumentalization of the Security Council by the elected members of the Council.

The general view on instrumentalization of the Security Council, especially based on discursive practices inside the organization, implies a (negative) politicization of the Council, or the Council being used for political means or as a political tool. However, the politicization of the Council does not have to be understood negatively. It is a natural extension of the rising authority of the organization,⁵ where views and positions are bitterly contested and disputed

Rwanda – reflect a profound determination to present the truth about these calamities'. United Nations, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population From Genocide or Mass Slaughter, UN Doc. SG/SM/7263/AFR/196 (1999). See also United Nations, Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, UN Doc. S/1999/1257 (1999); United Nations, Report on the Fall of Srebrenica, UN Doc. A54/549 (1999). On Sri Lanka, see UN Internal Review Panel, Report of the Secretary-General's Internal Review Panel on United Nations action in Sri Lanka (2012), at paras. 33, 80; see also the UN Human Rights Up Front Action Plan devised and enacted subsequent to that report.

²B. O'Neill, 'Power and Satisfaction in the United Nations Security Council', (1996) 40 *Journal of Conflict Resolution* 219.

³D. Ambrosetti, *Normes et rivalités diplomatiques à l'ONU. Le Conseil de sécurité en audience* (2009).

⁴See, for instance, J. Ralph and J. Gifkins, 'The Purpose of United Nations Security Council Practice: Contesting Competence Claims in the Normative Context Created by the Responsibility to Protect', (2017) 23 *European Journal of International Relations* 630; R. Adler-Nissen and V. Pouliot, 'Power in Practice: Negotiating the International Intervention in Libya', (2014) 20 *European Journal of International Relations* 889.

⁵M. Zurn, M. Binder and M. Ecker-Ehrhardt, 'International Authority and its Politicization', (2012) 4 *International Theory* 69.

by a growing number of actors. As such, the Security Council is constituted through the (political) everyday practices of actors in its midst. In order to understand the crucial role of elected members of the Security Council in pushing for a resolution of the cholera issue, we will first analyse the UN's initial stance on the issue, and the resistance this position created in Haiti and elsewhere. The narrow focus on legal immunity by the UN, especially by its Department of Legal Affairs, led to a legal challenge by the IJDH and the *Bureau des Avocats Internationaux* (BAI), and a series of parallel diplomatic activities pressuring the UN to change its stance on the issue. This in turn led to a UN Security Council meeting in March 2016, where the cholera issue was particularly debated. In parallel, the UN Special Rapporteur on extreme poverty and human rights, Philip Alston, wrote a very influential report on the cholera issue in August 2016, pressuring the UN to change its stance. Around the same time, the office of Secretary-General Ban Ki-moon acknowledged that the United Nations played a role in the initial outbreak and that a 'significant new set of UN actions' will be needed to respond to the crisis.⁶ The UN Secretary-General issued an official apology a few months later, in December 2016. That apology was delivered as part of a resolution framework that included commitments to contain cholera and to provide remedies in some form.⁷ The apology itself is unlikely to be considered legally as an admission or assumption of responsibility, although this is an issue that needs further research and analysis but it is a key political step to acknowledging the harms caused by the cholera epidemic and to rebuilding the relationship between the UN and communities affected by cholera. While it is impossible to isolate the influence of a specific actor or organization in pushing the UN to change its stance, this article will analyse the diplomatic activities that preceded, happened during, and followed after the UN Security Council meeting in March 2016, looking at how different actors' agendas coalesced to pressure the UN to finally apologize to the Haitian victims and to take specific steps to address the compensation issue. We argue that the role of the elected members of the UN Security Council was clearly instrumental in pushing the issue forward, demonstrating the broad regional support of a different line from the UN than silencing the debate by using its diplomatic immunity.

This article is informed by a practice-based approach, looking at the dynamic analysis of interactions that contributed to change the Secretary-General's approach to the issue. In doing so, and thanks to the unprecedented access from which we benefited, the article traces the agency of actors involved, helping us to understand the specific change of policy that took place in 2016. While most similar articles on Security Council practices are aimed at theory development,⁸ this article's main aim is to bring the complexity of the social interactions to the foreground, enabling us to have a better perspective on the role of elected members of the Security Council in the context of the specific cholera crisis in Haiti. The article relies on semi-directive interviews with political experts operating in think-tanks gravitating around the UN, as well as participant observation with country delegations at the UN. In February–March 2016, we met the diplomatic representations at the UN of Canada, Chile, France, Haiti, Ireland, Liechtenstein, Mexico, New Zealand, Singapore, Sweden, the UK, the US, Uruguay, and Venezuela. This selection of delegations is informed by the need to include a good cross-regional representation of countries interested in Haitian issues in the conversation, including countries currently members of the Security Council or seeking membership of the Security Council. This article also relies on extensive interview material gathered in conversation with the IJDH – the legal representatives of victims of cholera in Haiti.

⁶J. Katz, 'U.N. Admits Role in Cholera Epidemic in Haiti', *The New York Times*, 17 August 2016.

⁷A resolution framework that has not fully been acted upon or implemented at the time of writing.

⁸See Adler-Nissen and Pouliot, *supra* note 4, at 896.

This article is divided into four main sections. Section 2 looks at the literature on practices in the UN Security Council, looking at how a specific strand of the literature has marginalized the role of elected members of the Security Council and how a practice perspective can help nuance this by looking at the Security Council as a lived space, of course dominated by the permanent members, but where the elected members can also play a vital role in pushing specific agendas to the fore. The following sections are informed by the practice perspective to look at how the interplay of actors led to a change inside the organization. Section 3 looks at the initial stance of the UN over the cholera issue, as well as the legal challenge of the IJDH/BAI, constituting the backdrop for a broader political fight to change the UN's stance on the issue. Section 4 looks at the conflation of different actors pushing for a change of the UN's position, including a vocal awareness campaign led by IJDH/BAI, the work of UN Special Rapporteurs, and the Birmingham Initiative which was trying to influence the position of elected members of the Security Council in prevision of the crucial March 2016 Security Council meeting. Section 5 analyses specifically the practices inside the Security Council, focusing on the role of elected members. A specific conflation of factors, including the paralysis of the P3 on this specific issue, enabled elected members to play a key role in bringing the cholera issue to the fore. Finally, we will conclude on the current ramifications of the politico-legal fight for other similar issues.

2. Everyday performance of international practices at the UN Security Council

The practice perspective explores everyday performance of international practices and how these practices help shape world policy outcomes.⁹ It looks at power as vested not in capabilities, but in social relations. As such, it examines the configuration of actors on a specific issue or specific time, understanding the specific power of each actor as relational, intersubjective and social, constituted through interactions with other actors. Practice theory, as such, focuses on the 'enactment of power'¹⁰ and how power is played out on the everyday.

The literature on the Security Council has tended to focus overwhelmingly on veto power, especially in debates on reform of the institution. Moreover, most accounts focus on P3 states, while elected members of the Security Council only constitute the background of studies. In these studies, practices of elected members are understood through their combined capacity to block resolutions.¹¹ Up until 31 December 1965, the Security Council comprised six elected members, but following the demands of states newly admitted to the United Nations, mostly through ongoing processes of decolonization, the General Assembly decided to increase membership of the Security Council through Resolution 1991 (XVIII) of 17 December 1963. Therefore, since 1 January 1966, the Council has included ten non-permanent members. The passage of substantive resolutions requires nine affirmative votes, including the concurring vote of the five members with veto power. In this context, scholars have argued that elected members have only a very small probability of influence.¹² The reform of the Security Council, especially under pressure from the Group of Four (Brazil, Germany, India, and Japan) and the rival 'Uniting for Consensus' states, has focused almost exclusively on permanent seats, with the potential addition of elected members considered only as an afterthought to give more representation to regions such as Latin America

⁹*Ibid.*, at 889.

¹⁰*Ibid.*, at 894.

¹¹See, for instance, E. Voeten, 'Outside Options and the Logic of the Security Council Action', (2001) 95 *American Political Science Review* 845, at 850.

¹²E. Winter, 'Voting and Vetoing', (1996) 90 *American Political Science Review* 813; B. O'Neill, 'Power and Satisfaction in the United Nations Security Council' (1996) 40(2) *Journal of Conflict Resolution* 219; D. Bosco, *Five to Rule Them All: the UN Security Council and the Making of the Modern World* (2009).

and Eastern Europe.¹³ In these accounts, elected members of the UN Security Council wield little actual voting power, and as such are dismissed and overlooked from analyses.

However, we argue here that the Security Council is a lived space, and while it is important to note that with the impossibility of member states to come to a consensus regarding the reform of the Security Council, most of the pressures to change have been managed through less formal means, including the changes to working methods of interpreting the formal rules in new ways. This includes ‘Arria-Formula’ meetings – informal meetings between the Council and other stakeholders (e.g., non-governmental organizations and experts) who normally do not have the right to take the floor. It is also important to note that Security Council elections are bitterly disputed, hence underlining its ‘soft power’ value in the eyes of many member states. Member states wishing to exercise a two-year mandate on the Council launch into finely orchestrated campaigns, mobilizing significant resources.¹⁴

Hence, rather than solely focusing on the material representations of interests, we view the Security Council as a structured social space, where different actors struggle for dominant positions.¹⁵ This struggle is not only one driven exclusively by the permanent members, however ‘powerful’ they may be. This structured social space is composed of many levels of actors,¹⁶ and the practices structuring this space can evolve over time depending on the specific issue at play. Hence, we move beyond the ‘black letter of treaties and charters’¹⁷ to a perspective that takes into account actual practices inside the Council. The value of an elected seat for states goes beyond its material dimension, to encompass the ‘ability to raise points of interest in discussions; to learn about the views of others and about the leanings of the Council on given issues; and to appear at the centre of important things’.¹⁸ It is this dimension that we will highlight.

3. The cholera outbreak and the legal challenge to the UN

3.1 Background

Haiti has been a test case for activism in the UN Security Council since the start of the 1990s. It was the first instance of the Security Council authorizing the use of force to effect the restoration of democracy within a member state through Resolution 940, and the extensive activism of the Security Council in the 1990s has been well documented by David Malone.¹⁹ In this article we focus on one discrete aspect of the UN’s involvement in Haiti, and of the Security Council’s involvement in resolving that issue.

¹³S. Tharoor, ‘Security Council Reform: Past, Present and Future’, (2011) 25 *Ethics and International Affairs* 397; R. Hatto and N. Lemay-Hébert, ‘Le Conseil de Sécurité des Nations Unies: Entre Représentativité et Efficacité’, in G. Devin and B. Badie (eds.), *Le Multilatéralisme: Evolutions et Tendances* (2007), 129

¹⁴M. Albaret et al., ‘Introduction’, in M. Albaret, E. Decaux and N. Lemay-Hébert (eds.), *Les Grandes Résolutions du Conseil de Sécurité des Nations Unies* (2012), xxiii. For concrete examples see D. Malone, ‘Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council’, (2000) 6 *Global Governance* 3; J. Langmore and J. Farrall, ‘Can Elected Members Make a Difference in the UN Security Council? Australia’s Experience in 2013–2014’, (2016) 22 *Global Governance* 59, at 60.

¹⁵R. Adler-Nissen, ‘Symbolic power in European diplomacy: the struggle between national foreign services and the EU’s External Action Service’, (2014) 40 *Review of International Studies* 657, at 659.

¹⁶I. Bode, ‘Reflective practices at the Security Council: Children and armed conflict and the three United Nations’, (2018) 24 *European Journal of International Relations* 293.

¹⁷I. Hurd, ‘Legitimacy, Power, and the Symbolic Life of the UN Security Council’, (2002) 8 *Global Governance* 35, at 35. A good example of a ‘traditional’, legalistic take on practices in the UN Security Council is provided by the *Repertoire of the Practice of the Security Council*, drawing from official documents and available at www.un.org/en/sc/repertoire/index.shtml. It is also useful to note that the *Repertoire* was only available until 2015 at the time of the writing of this article.

¹⁸See Hurd, *supra* note 17, at 42.

¹⁹D. Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990–1997* (1998).

In October 2010 cholera broke out in Haiti for the first time in its recorded history.²⁰ The first infections occurred in the Artibonite region. In the first three months, approximately 150,000 people contracted cholera and 3,500 died. Within three years more than 8,000 people had died and over 670,000 individuals had been infected.²¹ The cause of the infection was traced to a UN peacekeeping base, where raw faecal matter flowed out of a broken pipe towards the Meille River²² a tributary to the Artibonite River – the nation’s largest and most important river providing water to 1.5 million people. A new Nepalese battalion arrived in Haiti in October 2010 and was deployed to the Mirebalais camp.²³ There is still confusion about whether or not the soldiers were tested for cholera prior to their deployment.²⁴ It has become clear, however, that cholera screening protocols were inadequate.²⁵

A team of researchers from the University of Maryland concluded that sanitation conditions in Haiti were a ‘perfect storm’ for the outbreak of a massive cholera epidemic,²⁶ which the UN seized upon to deny responsibility for introducing cholera.²⁷ However, the ‘perfect storm’ theory has been considered ‘a perfect lie’ by French epidemiologist Renaud Piarroux,²⁸ who observed that there was no evidence provided ‘to counter that cholera was brought to Haiti by a contingent of Nepalese United Nations peacekeeping troops’.²⁹ Piarroux and his team insist that all of the scientific evidence demonstrates that the cholera is attributable to the Nepalese contingent and that the epidemic was initiated by faecal contamination of a local stream draining into the Artibonite River.³⁰ The link with the South Asian strain of cholera found in Nepal has been confirmed by numerous field investigations³¹ including the UN’s Independent Panel of Experts on the Cholera Outbreak in Haiti.³² It is now

²⁰D. A. Walton and L. C. Ivers, ‘Responding to Cholera in Post-Earthquake Haiti’, (2011) 364 *New England Journal of Medicine* 3, at 4.

²¹A. Dasgupta et al., ‘Evolutionary perspective on the origin of Haitian cholera outbreak strain’, (2012) 30 *Journal of Biomolecular Structure and Dynamics* 3, at 338.

²²M. Stobbe and E. Lederer, ‘UN Worries Its Troops Caused Cholera in Haiti’, *The Associated Press*, 19 November 2010; J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), 228.

²³See Katz, *ibid.*, at 230.

²⁴‘Haiti cholera outbreak: Nepal troops not tested’, *BBC News*, 8 December 2010, available at 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: see Katz, *supra* note 22, at 233. See also ‘UN investigates allegations of cholera source in Haiti’, *CNN*, 28 October 2010, available at www.cnn.com/2010/WORLD/americas/10/28/haiti.cholera/index.html.

²⁵P. Keim et al., ‘Reply to “South Asia Instead of Nepal May Be the Origin of the Haitian Cholera Outbreak Strain”’, (2011) 2 *MBio* 6, available at mbio.asm.org/content/mbio/2/6/e00245-11.full.pdf.

²⁶N. 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, available at www.pnas.org/content/early/2012/06/12/1207359109.full.pdf+html.

²⁷Personal interview with MINUSTAH Communications and Public Information Officer, 9 December 2011.

²⁸T. Daniel, ‘Source of Haiti Cholera Bug Goes Under Microscope’, *Associated Press*, 17 July 2012.

²⁹R. Frerichs 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, available at 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. Mekalanos 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, available at www.pnas.org/content/109/47/E3206.full.

³⁰R. Piarroux et al., ‘Understanding the Cholera Epidemic, Haiti’, (2011) 17 *Emerging Infectious Diseases* 1161.

³¹See, for example, R. Frerichs et al., ‘Nepalese origin of cholera epidemic in Haiti’, (2012) 18 *Clinical Microbiology and Infection* 158; R. Hendriksen 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 et al., ‘The Origin of the Haitian Cholera Outbreak Strain’, (2010) 364 *New Eng. J. Med.* 1, at 33.

³²The panel found that ‘the strains isolated in Haiti and Nepal during 2009 were a perfect match’. UN Independent Panel of Experts, ‘Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti’, (2011), at 27.

widely accepted that the cholera outbreak was directly attributable to Nepalese peacekeeping troops.³³

After the outbreak of cholera, the UN not only refused to take responsibility for introducing cholera, but also failed to take the necessary steps to contain and eradicate cholera in Haiti. According to a senior UN official with significant field experience in Haiti, the decision not to accept responsibility was based on the context within the country at that time:

Haiti was hanging by a thread at that time, particularly in terms of civil disobedience, and with no functioning police or jails after the earthquake. If the UN had admitted liability it would have been unable to help with all of the other issues going on at that time, so instead the UN said that it was waiting for scientific reports and evidence on cholera.³⁴

He also claimed that:

Many different factors contributed to the difficulty in dealing with the outbreak. First and foremost, the perception of UN being involved led to difficulty in helping possible victims, with staff being stoned and attacked by local populations. The perception of UN involvement meant that many internationals, including those not working for the UN, were kept behind closed doors for their own safety, which meant that supplies did not get through to the people who needed them.³⁵

Amongst the first responders to the cholera victims were staff members from BAI and IJDH.^{36 37} Those linked organizations, based in Port-au-Prince and Boston respectively, are public interest lawyers who work in Haiti to implement human rights and rule of law, alongside their political objective of restoring Jean-Bertrand Aristide as President. When it became clear that the UN was refusing to take responsibility for the outbreak, and was not taking sufficient steps to contain and eradicate the disease, BAI and IJDH began to collect testimonies and stories from cholera victims, their families, and their communities.³⁸ According to Beatrice Lindstrom, an IJDH lawyer working in Haiti at that time, 'we were all waiting for the UN to investigate and respond to cholera; especially when evidence emerged so quickly that the UN was responsible. But nothing happened'.³⁹ She explained that the Haitians with whom they worked 'knew immediately that the UN would not respond justly' and that 'connections were being made between cholera and past grievances against the UN. It was part of the same narrative that instances of abuse were not being responded to in a just way'.⁴⁰ Despite that, IJDH and BAI decided 'to just wait, because the evidence was so clear that we believed that the UN had to respond'.⁴¹ However, by late October the Haitian grassroots and diaspora were asking BAI and IJDH to help with cholera. They initially went to one village for a town hall meeting:

³³Including UN Special Envoy, Bill Clinton, who recognized that UN peacekeepers were the proximate cause of cholera in Haiti. See B. Clinton, 'UN Soldier Brought Cholera to Haiti', *Al Jazeera*, 8 March 2012 available at www.aljazeera.com/news/americas/2012/03/2012384937481848.html.

³⁴*Ibid.*

³⁵*Ibid.*

³⁶www.ijdh.org/2010/01/topics/law-justice/institute-for-justice-democracy-in-haiti-home-67/?cat=1849.

³⁷www.ijdh.org/.

³⁸IJDH, 'Cholera Litigation: Frequently Asked Questions', available at www.ijdh.org/cholera-litigation-frequently-asked-questions/.

³⁹Interview with Beatrice Lindstrom, lawyer for IJDH, New York, 17 June 2015.

⁴⁰*Ibid.*

⁴¹*Ibid.*

We were expecting 15 people to show up, but 300 people had come from all over to tell their stories about cholera and its impact. No-one had come to talk to them from the government or the UN or the NGOs. We were the first ones even to show up.⁴²

Lindstrom and the team from BAI recorded information from everyone who came to that first town hall meeting, as they ‘realised from a humanitarian and accountability perspective that this information needed to be recorded’.⁴³ It soon became apparent to them ‘that the healing process could not occur without accountability and without people’s voices being heard. We were not thinking about legal action, but simply about connecting with communities and giving a voice to survivors’.⁴⁴ However, in January 2011 the UN Secretary-General appointed a panel of experts, and the turning point for IJDH and BAI was when they saw the final report⁴⁵ and ‘realised that the UN would not accept responsibility or be honest about the evidence. We realised that we needed to do something, to find a strategy for getting accountability from the UN’.⁴⁶

The decision to attempt to sue the UN represented a last-gasp attempt to influence the organization to provide remedies or dispute resolution to Haiti’s cholera victims. Almost every legal expert acknowledged that the procedural bars preventing the UN being brought before a national court would not be overturned or circumvented. However, the lawsuit itself brought such strong and sustained publicity that it became pivotal as a piece of strategic litigation that achieved its aims outside of the courtroom. Before turning to the lawsuit as part of the overall advocacy strategy, it is important to understand why the very idea of suing the UN was both radical and unlikely ever to succeed.

3.2 The absolute immunity of the UN in question

The UN may be viewed as a quasi-state in terms of its functions and internal legal systems,⁴⁷ yet it is granted absolute immunity rather than the ‘restrictive’ immunity that is mostly afforded to states nowadays. Of course, international organizations’ immunity can be distinguished from that of states in terms of sources and rationale. State immunity has been an evolving concept, now codified within the 2004 UN Convention on State Immunities, while international organizations’ immunity is usually enshrined within treaties specific to an organization or within its constituent instrument, and usually is based on the UN’s immunities, which were enshrined in 1946. This has restricted the extent to which such immunity can be interpreted or evolve. Absolute immunity was the prevailing theory up until the second half of the twentieth century. As such, when the UN was created it was afforded absolute immunity, which was subsequently enshrined in the 1946 Convention on Privileges and Immunities of the United Nations (CPIUN). Moreover, some would insist that even if that treaty was easy to amend, the UN needs to hold immunity from national courts’ jurisdiction in order to prevent inconsistencies that would occur across different national courts.⁴⁸ Some scholars even have insisted that national courts or tribunals are ‘totally unsuited’ for disputes involving international organizations.⁴⁹

The UN’s immunity is based on the Charter of the United Nations: Article 105(1) sets out that ‘The Organization shall enjoy in the territory of each of its Members such privileges and

⁴²Ibid.

⁴³Ibid.

⁴⁴Ibid.

⁴⁵UN Independent Panel of Experts, *supra* note 32.

⁴⁶Interview with Beatrice Lindstrom, lawyer for IJDH, New York, 17 June 2015.

⁴⁷A. Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’, (2008) 7 *Chinese Journal of International Law* 285.

⁴⁸Cf. *Broadbent v. OAS.*, 628 F.2d 27, 35 (D.C.Cir. 1980).

⁴⁹M. B. Akehurst, *The Law Governing Employment in International Organizations* (1967), 12.

immunities as are necessary for the fulfilment of its purposes.⁵⁰ That provision does not set out absolute immunity,⁵¹ leading some commentators to insist that the UN was intended only to be granted functional immunity,⁵² but it has been interpreted as absolute immunity by states and by courts. A straightforward reading of the Charter indicates that the UN's immunity is restricted by its human rights obligations under Articles 1(3), 55 and 56. Any actions that violate fundamental human rights to access a court and a remedy, and to truth, would contradict the UN's purposes and certainly would not be 'necessary' for their achievement; it appears contradictory, at best, that the UN would hold immunity with regard to such acts. However, when the Charter provisions were elaborated upon in the CPIUN, the immunity was interpreted as being absolute.

Section 2 of the CPIUN establishes that:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.⁵³

Courts generally have interpreted Section 2 as granting absolute immunity to the United Nations.⁵⁴ This approach is based on the UN Charter and the General Convention pre-dating the move to restrictive immunity,⁵⁵ meaning that even if the UN's immunity was conceived of as functional it was codified as absolute. That approach can be seen, for example, in the early case of *Manderlier v. Organisation des Nations Unies et l'Etat Belge*⁵⁶ and subsequently in a range of cases ranging from employment disputes⁵⁷ to damages arising from peacekeeping operations.⁵⁸ Traditional justification for the UN's absolute immunity is that it would be undesirable for national courts to determine the legality of the UN's acts because (i) those courts would have very different interpretations to one another; and (ii) it may be open to prejudice or frivolous actions within some countries.⁵⁹

The wording in Section 2 is unambiguous, yet there remains the key problem that the UN's absolute immunity can and does give rise to violations of individuals' human rights. Even though a potential counterbalance is provided in Section 29 of the CPIUN, which requires the UN to set up alternative dispute resolution mechanisms, courts have ruled that Section 2 is not dependent on Section 29 being implemented. Judges to date have determined that they are bound to grant immunity to the UN,⁶⁰ but judicial comments within some cases demonstrate that this is

⁵⁰UN Charter, Art. 105(1).

⁵¹See, for example, 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.

⁵²A. Reinisch, 'Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947', in United Nations (ed.), *Audiovisual Library of International Law*.

⁵³UN General Assembly Resolution 22(1), 'Convention on the Privileges and Immunities of the United Nations', 13 February 1946, Section 2.

⁵⁴A. Reinisch, *International Organizations Before National Courts* (2000), 332.

⁵⁵G. Rios and E. Flaherty, 'Legal Accountability of International Organization: Challenges and Reforms', (2010) 16 *ILSA Journal of International and Comparative Law* 433, at 437.

⁵⁶*Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangères)*, Brussels Civil Tribunal, 11 May 1966, (1966) *Journal des Tribunaux* 721; (1972) 45 *ILR* 446.

⁵⁷For example, *Radicopoulos v. United Nations Relief and Works Agency*, Egyptian Court, 1957, *Annual Report of the Director of UNWRA*, 13 UN GAOR, Supp. (No.14) 41, UN Doc. A/391 (1958); *Boimah v. United Nations General Assembly*, US District Court EDNY, 24 July 1987, 664 F. Suppl. 69 (EDNY 1987).

⁵⁸For example, *Abdi Hosh Askir v. Boutros Boutros-Ghali*, US District Court, Southern District, New York, 29 July 1996, 933 F. Suppl. 368 (SDNY 1996).

⁵⁹P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), 491.

⁶⁰E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', (2002) 51 *International and Comparative Law Quarterly* 1, at 2.

problematic especially where there are no other avenues for alternative dispute resolution through which an individual may exercise her/his right to access a court and a remedy.⁶¹

3.3 The court cases

As any good lawyer will acknowledge, the courtroom ought to be the last resort in any dispute. After BAI and IJDH had gathered stories and testimonies from cholera-affected communities, they first sought alternative dispute resolution from the UN in line with Section 29 of the CPIUN. The UN, first at the UN Stabilisation Mission in Haiti (MINUSTAH) and later at headquarters in New York, blocked attempts by BAI and IJDH to access alternative dispute resolution mechanisms on behalf of cholera victims.⁶² They were first told that no claims commission had been established for MINUSTAH despite the legal obligations contained within the Status of Forces Agreement signed between Haiti and the UN, which has provisions (Section VIII, 55) on the establishment of Claims Commissions. Eventually the UN Office of Legal Affairs informed them that claims could be filed directly with MINUSTAH but did not provide any information about how to do so.⁶³ In August 2011, after months of research, IJDH found a UN General Assembly Resolution with a claims form attached in the annex. Using that form, 5,000 victims filed claims in November 2011, petitioning for remedies in the form of eradicating cholera, compensation, and a public acknowledgment of wrongdoing.⁶⁴ Although the Office of Legal Affairs acknowledged receipt of the claim form, there was no response from the UN to the cholera victims or their representatives.⁶⁵ The UN's Office of Legal Affairs, according to a senior UN official, is staffed with attorneys who 'act as though the UN is their client'.⁶⁶ Once the claims were filed, UN staff were told not to discuss it on the record, and all political efforts to resolve the claims ceased 'because everything freezes [sic] while the UN was waiting for the case to be resolved'.⁶⁷

It took until February 2013 for the UN to respond, which it did by stating that the claims were 'not receivable pursuant to Section 29 [of the CPIUN]' because the 'consideration of these claims would necessarily include a review of political and policy matters'.⁶⁸ The claimants asked for clarification of the grounds for the UN not receiving the claims, and sought alternative dispute resolution, all of which were refused. In October 2013, the case of *Georges v. United Nations* was filed in the US District Court for the Southern District of New York.⁶⁹ Those claims were filed against the UN, MINUSTAH, the UN Secretary-General, and the former head of MINUSTAH. The claims were filed in New York because the UN is headquartered in that city, and because major decisions about cholera in Haiti were made in those headquarters.⁷⁰ The court case was a class action suit filed on behalf of thousands of victims, something that could not occur in the Haitian court system.⁷¹ Although it was filed in 2013, the UN did not formally respond to the claims. Had it done so, that response would have been used to demonstrate that the UN

⁶¹See, for example, *Abdi Hosh Askir v. Boutros Boutros-Ghali*, *supra* note 58, in which a Somali citizen brought a claim against the UN seeking damages for unlawful possession of property during UN operations in Somalia in April 1992. See also L. D. Johnson, 'Introductory Note to *Brzak v. United Nations* (2d CIR.) and *Mothers of Srebrenica v Netherlands & United Nations* (Neth. App. Ct.)', (2010) 49 *International Legal Materials* 1011, at 1012.

⁶²IJDH, 'Cholera Litigation: Frequently Asked Questions', *supra* note 38.

⁶³*Ibid.*

⁶⁴Interview with Beatrice Lindstrom, lawyer for IJDH, New York, 17 June 2015.

⁶⁵IJDH, 'Cholera Litigation: Frequently Asked Questions', *supra* note 38.

⁶⁶Interview with senior UN official from the Executive Office of the Secretary-General, UN Headquarters, New York, 15 June 2015.

⁶⁷*Ibid.*

⁶⁸UN Secretary-General's Statements and Messages, 'Haiti Cholera Victims' Compensation Claims "Not Receivable" under Immunities and Privileges Convention, United Nations Tells Their Representatives', 21 February 2013, UN Doc. SG/SM/14828, available at www.un.org/press/en/2013/sghsm14828.doc.htm

⁶⁹Class Action Complaint, *Georges v. United Nations*, Docket # 1:13-cv-07146-JPO 65, ¶ 2 (S.D.N.Y. filed Oct. 9, 2013)

⁷⁰IJDH, 'Cholera Litigation: Frequently Asked Questions', *supra* note 38.

⁷¹*Ibid.*

did not hold absolute immunity from being brought before a national court. Instead, the UN asked the US Government, as the UN's host nation, to seek a dismissal of the case. In March 2014, the US Attorney submitted a Statement of Interest that insisted that the UN have absolute immunity in US courts,⁷² a position upheld by Judge Oetken in dismissing the case on 9 January 2015.⁷³ A notice of appeal was filed on 12 February 2015, the oral arguments were heard on 1 March 2016, and on 18 August 2016 the Court upheld the UN's immunity from claims.⁷⁴

The court cases filed were part of a strategic litigation tactic, aimed not only – or even fully – at winning a legal argument, but also at raising the profile and awareness of the plight of the Haiti cholera victims. While the lawyers in the case believed that they may have had a chance of bypassing UN immunity and thus succeeding in the claims being heard by a court,⁷⁵ that was only one part of a strategy designed to place political, legal, and even moral pressure on the UN to remedy the harms that it had caused. During the three years of the court cases and, indeed, the two years prior to the initial claims being filed, many actors and stakeholders became involved with the efforts to place pressure on the UN to provide justice to the cholera victims. It is to those parallel activities that we will now turn, before exploring the subsequent instrumentalization of the Security Council, and the role that it played in securing justice.

4. The political fight for justice

Holding the UN accountable is not a simple matter, or one that can occur quickly or easily, and it relies as much – if not more – on politics as on law. It requires many stakeholders coming together and pursuing separate and interlinked avenues. A key obstacle to finding a political resolution in the early years was that once the initial court case had been filed, the UN and its member states, under instructions from the UN Office for Legal Affairs, refused to discuss a political settlement for fear that it may prejudice or jeopardize the UN's position that it held absolute immunity from the jurisdiction of national courts.⁷⁶ By the time the appeal was filed in 2016 the landscape had changed significantly, with many member states recognizing that there was almost no chance that UN immunity would not be upheld, and with many stakeholders inside and outside of the UN calling for justice for the victims. It is crucial to understand the role of the activities that took place in parallel to the court cases, and to understand the timing of those activities. Most significantly, the UN Secretary-General finished his term in December 2016, and pressure was placed on him to address the stain on his legacy of the failure to provide justice to the cholera victims. Secondly, from 2016 the UN Security Council was engaged in ending the UN stabilization presence in Haiti, and transforming its presence to a rule of law and demilitarized operation. Thirdly, it was clear that if the appeal was not successful that IJDH was unlikely to seek appeal to the US Supreme Court.

The key to resolving the cholera claims were the many different pressure points placed on the UN, including through law, politics, advocacy, and public pressure. In parallel to the strategic litigation there were significant efforts by many stakeholders – some public and some private – to encourage the UN to resolve the dispute. Key amongst those were the activities of UN human rights bodies and independent experts, in particular Philip Alston, academics including those involved with the Birmingham Initiative, and member states (particularly the Elected Members of the

⁷²*Georges v. United Nations*, No. 13-CV-7146 (JPO), (S.D.N.Y. filed Mar. 7, 2014) (Statement of Interest for the U.S. Government).

⁷³*Georges v. United Nations*, 84 F. Supp.3d 246, 2015 WL 129657, at *4 (S.D.N.Y. 2015).

⁷⁴For further discussion on challenges to UN immunity see, for example, R. Freedman, 'UN Immunity or Impunity?: A human rights based challenge', (2014) 25(1) *European Journal of International Law* 239; K. E. Boon, 'The United Nations as good Samaritan: immunity and responsibility', (2015) 16 *Chinese Journal of International Law Int'l* 341

⁷⁵Interview with Brian Concanon, head of IJDH, New York, 16 June 2015.

⁷⁶Interview with senior UN official from the Executive Office of the Secretary-General, UN Headquarters, New York, 15 June 2015.

Security Council and the Group of Friends of Haiti). At the heart of that work was the desire to ensure justice for the survivors, and in parallel to all of that work was public advocacy undertaken by all actors and entities involved with the fight for justice for cholera victims and survivors.

The head of IJDH, Brian Concanon, emphasized that:

The case also enables bringing in a huge network of people including academics, scientists, civil society organisations and others to become actors and advocates on cholera. The IJDH vision of the case is that no-one is independent, everyone is part of a broader connected network and everyone informs the advocacy.⁷⁷

The diplomatic, political and advocacy strategies were undertaken by different actors and stakeholders, with varying levels of formal or informal co-ordination with one another and with the lawyers representing the cholera victims. Key actors included UN independent experts on human rights who placed private and public pressure on the UN Secretary-General, the former UN Office of Legal Affairs staff members who advised IJDH and BAI, academics who wrote *amici* briefs and academic work on the topic, physicians and public health experts, journalists who provided media coverage, and victims who engaged with the UN and member states. Many of the activities of those broad networks are on the public record, including the letters⁷⁸ and reports written by UN independent experts, and the coverage by individual journalists such as Colum Lynch for *Foreign Policy* and Somini Sengupta for *The New York Times*. Other activities remain off the record, particularly where they involved senior members of the UN working for the organization at that time.

4.1 Public awareness

One pressure point on the UN was raising awareness, within the UN and member states and amongst the wider public, of the cholera outbreak, the UN's role, and the failure to provide justice to the victims. Initially little attention was paid to the issue by international media. However, in the two years after the outbreak, scientific analyses,⁷⁹ academic articles,⁸⁰ and policy reports⁸¹ were published that provided key material for advocacy efforts. After the court cases were filed, media interest increased, as did the interest of civil society groups outside of the core organizations working in Haiti or within its diaspora populations. Initially coverage was limited to areas such as Miami where large Haitian diaspora live, Boston where IJDH is based, as well as some articles in New York where the claims were filed and in Washington where there was interest in the US defending the court case. By 2015 media coverage included regular articles in international media such as *Foreign Policy*, *The Guardian*, and *The New York Times*, as well as news channels such as Al-Jazeera, Channel 4, and France24.⁸² Academics, former UN staff members, former diplomats, and civil society groups regularly wrote and spoke out about Haiti and cholera, ensuring greater awareness and sustained attention on the fight for justice. The strategic litigation clearly was key to securing this level of public awareness, as the court cases provided a hook for stakeholders to understand and explore the key issues. Off the record, more than five

⁷⁷Interview with Brian Concanon, head of IJDH, New York, 16 June 2015.

⁷⁸P. Alston, 'Extracting Accountability: Special Rapporteurs and the United Nations' Responsibility for Cholera in Haiti', 20 February 2018, NYU School of Law, Public Law Research Paper No. 18-10, available at ssrn.com/abstract=3125084.

⁷⁹See, for example, R. Piarroux et al., 'Understanding the Cholera Epidemic, Haiti', (2011) 17(7) *Emerging Infectious Diseases* 1161.

⁸⁰See, for example, F. Mégret, 'La responsabilité des Nations Unies au temps du choléra', 2013 *Revue belge de droit international*.

⁸¹See, for example, Centre for Economic and Policy Research, 'MINUSTAH by the Numbers', 8 December 2011, available at cepr.net/blogs/haiti-relief-and-reconstruction-watch/minustah-by-the-numbers.

⁸²For a representative list of media coverage see www.ijdh.org/choleraaccountability/cholera-resources/.

interviewees within the UN spoke of the pressure placed on the Secretary-General by each major news story, in particular those that appeared in *The New York Times*. Awareness was also raised and pressure was exerted by victims telling their stories to the media, to the UN, and to member states. One instrumental example was the letter-writing campaigns organized by IJDH and aimed at the UN and its member states' missions to UN headquarters,⁸³ which many of the states we later met with referenced in their knowledge and understanding of the cholera claims.⁸⁴

4.2 UN independent experts on human rights

UN independent experts on human rights are appointed specific thematic or country mandates for a fixed term. They are unpaid, and conduct their duties part-time with some logistical and research support from the Office of the High Commissioner for Human Rights. Appointed by the Human Rights Council, those experts report to that body and to the General Assembly, and the system of 'Special Procedures'⁸⁵ – the term for all of the mandate holders – is considered the 'crown jewel' of the UN human rights system. Given their expertise and their status within the UN, key mandate holders were able to use their positions to place considerable pressure on the UN, and to raise awareness in UN human rights bodies in Geneva.

On 25 September 2014 four mandate holders with particular interests in the cholera claims wrote to the UN Secretary-General to express concern about the way in which the UN was handling the claims. Those mandate-holders were responsible for (i) housing (Leilani Farha); (ii) Haiti (Gustavo Gallón), (iii) health (Dainius Pūras), and (iv) water and sanitation (Catarina de Albuquerque).⁸⁶ The UN response was sent by Assistant Secretary-General Pedro Medrano, Senior Coordinator for Cholera, in which he set out the UN's legal arguments for not receiving the claims.⁸⁷ That letter was significantly more detailed than any response given by the UN to the cholera victims or their lawyers either prior to or during the litigation.

On 23 October 2015 the four original mandates (three being the same individuals, and the fourth on water and sanitation now being held by Leo Heller), joined by the Special Rapporteur on extreme poverty and human rights, Philip Alston, again wrote to the UN Secretary-General. They expressed concern about victims being denied an effective remedy, and suggested that the UN hold informal consultations.⁸⁸ The UN Deputy Secretary-General Jan Eliasson responded on 25 February 2016, after the appeal had been filed, welcoming the mandate holders' offer 'to engage further on this matter and discuss what further steps the United Nations could take, in keeping with its mandates, to assist the victims of cholera and their communities'.⁸⁹ According to Alston, prior to that letter and to the appeal being filed, on 15 January 2016 'the Secretary-General met at UN Headquarters with the Special Rapporteur on extreme poverty. Two issues were discussed, one of which was the importance of UN engagement in response to the cholera communication'.⁹⁰

The impact of the pressure from the UN independent experts cannot be underestimated and continued after the Security Council meeting in March 2016 during which many member states in that body spoke out for the first time about the need for the UN to address cholera in Haiti. While we will go into that in detail in Section 5, it is crucial to understand that the continued public and private pressure from Philip Alston, Special Rapporteur on extreme poverty and human rights,

⁸³IJDH, 'Cholera Victims' Letters and Translations', available at www.ijdh.org/2015/12/topics/health/cholera-victims-letters-and-translations/.

⁸⁴See Section 5 of this article.

⁸⁵See A. Nolan, R. Freedman and T. Murphy (eds.), *The United Nations Special Procedures System* (2017).

⁸⁶See Alston, *supra* note 78, at 7–14.

⁸⁷See Alston, *ibid.*, at 15–48.

⁸⁸See Alston, *ibid.*, at 49–52.

⁸⁹See Alston, *ibid.*, at 53–64.

⁹⁰See Alston, *supra* note 78.

was instrumental in ensuring that the cholera claims were resolved. He had further meetings with the other mandate holders and with the Secretary-General, in April⁹¹ and June⁹² respectively, and wrote a report for the UN General Assembly that was sent to the Secretary-General on 8 August 2016⁹³ prior to the Appeal Court ruling, which was officially published on 26 August 2016⁹⁴ after the appeal ruling upheld UN immunity. However, the blow to the victims of that Appeal Court ruling was somewhat softened by a front page story on that same day – 18 August 2016 – in *The New York Times* setting out ‘key details’ of the draft report and quoted a spokesman for the Secretary-General as saying in response that ‘over the past year, the U.N. has become convinced that it needs to do much more regarding its own involvement in the initial outbreak and the suffering of those affected by cholera’, and announcing that a ‘new response will be presented’.⁹⁵ The efforts of Alston and other mandate holders had a clear impact, and were crucial aspects of the activities parallel to the strategic litigation that resulted in resolution of the dispute.

4.3 Birmingham Initiative

The Birmingham Initiative was another parallel activity that occurred as part of the global efforts seeking justice for the cholera victims. In 2013 we were approached by IJDH and asked to provide research on a human rights-based challenge to UN immunity from the jurisdiction of national courts.⁹⁶ Together we fused our knowledge of Haiti, peacekeeping, unintended consequences of interventions, the UN, and human rights, to contribute to the activities seeking justice for the cholera victims. Our continued work with IJDH included writing an *amici* brief for the court, publishing and presenting academic work,⁹⁷ writing media articles,⁹⁸ and raising awareness in the public sphere.⁹⁹ In August 2015, before the appeals were filed, we agreed with IJDH to convene an independent expert workshop in Birmingham that would focus on parallel processes to take place while the appeals were filed and heard. Although supported by IJDH, the Birmingham workshop was convened and held independently of that organization.

The timing of the workshop was key because there was a need to provide an alternative political solution for dispute resolution that could be tabled when the appeals were filed. All actors and stakeholders were aware that if the appeals were not successful, which was likely given the procedural bar of UN immunity, there was a short period of time in which to place pressure on the UN Secretary-General before his term came to an end. Attendees included current and former senior UN officials, UN independent experts on human rights, and experts on epidemiology, water and sanitation, humanitarian responses, and transitional justice. Attendees came from all regions of the world, and included individuals from Haiti and from regional allies in neighbouring countries. The workshop aimed to produce a broad resolution framework that might be acceptable to and accepted by all parties, that would take into account the local context, and that might serve as a starting point for political and diplomatic discussions in parallel to the legal processes going

⁹¹See Alston, *ibid.*, at 65–9.

⁹²See Alston, *supra* note 78.

⁹³*Ibid.*

⁹⁴UN General Assembly, ‘Extreme poverty and human rights’, 26 August 2016, UN Doc. A/71/367.

⁹⁵See Alston, *supra* note 78, citing J. M. Katz, ‘U.N. Admits Role in Cholera Epidemic in Haiti’, *New York Times*, 18 August 2016, available at www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html?_r=0.

⁹⁶That report formed the basis for Freedman, ‘UN Immunity or Impunity?: A human rights based challenge’, *supra* note 74.

⁹⁷For example, R. Freedman and N. Lemay-Hébert, ‘Human Rights and UN Immunities’, in T. Ruys et al. (eds.), *Handbook on Immunities in International Law* (2018); R. Freedman and N. Lemay-Hébert, ‘“Jistis ak reparasyon pou tout viktim kolera MINUSTAH”: The United Nations and the Right to Health in Haiti’, 2015 *Leiden Journal of International Law* 507; R. Freedman and N. Lemay-Hébert, ‘Towards an alternative interpretation of UN immunity: A human rights-based approach to the Haiti Cholera Case’, (2015) *QIL-Questions of International Law, Zoom-in* (19), 5.

⁹⁸Including for The Conversation, CNN, Georgetown Journal, and MUNPlanet amongst others.

⁹⁹Including interviews for Al-Jazeera, France24, and Sky News amongst others.

through the New York court system. The workshop, held in December 2015, produced a draft resolution framework (Appendix I) and an executive summary (Appendix II). Broadly, the three parts of that resolution framework were: (i) an apology and an acknowledgment that the UN caused harm, (ii) reparations or remedies for the victims, and (iii) elimination of cholera in Haiti.

In March 2016, soon after the oral arguments were heard by the Appeals Court, a small representative delegation from the Birmingham Initiative visited New York to undertake bilateral diplomatic meetings with states seized with the Haiti cholera situation, and with key UN personnel. The purpose of those meetings was to present the draft resolution framework as a potential starting point for the basis of diplomatic negotiations. That framework represented only the expertise of individuals at the Birmingham workshop, and was used to move the conversations beyond the usual phrasing that ‘something ought to be done’ and towards a discussion of what that something might look like in practice. The timing of the visit was a few weeks before the UN Security Council mid-year review of MINUSTAH, with the aim of ensuring that justice for cholera victims was discussed at that Council session. In all, the delegation met with eight members of the UN Security Council and another seven countries with strong links to Haiti. As a result of those meetings and of other parallel activities, 11 of the 15 Council members raised the issue of cholera during that Council session, and many of those states became central to the efforts to secure justice for the victims.

5. The Security Council and its elected members

5.1 When the P3 decides to take a back seat

One of the sources of power of the permanent members of the Security Council is their ability to chair ‘informal sessions’, where the ‘real work of the Council takes place’.¹⁰⁰ These sessions do not need to be open to elected members, as they are not official meetings, and the work done in these informal meetings structures the official meetings, making them a ‘proforma affair, scripted in these advance informal consultations’.¹⁰¹ This is particularly true in the case of Haiti, with dynamics within the Security Council regarding Haiti illustrating the dominance of its five permanent members, and the importance of the US within that group.¹⁰² According to former Canadian Ambassador to the UN, David Malone, ‘non-permanent members influence the course of events, often by participating in Groups of Friends, but theirs are not the key voices’.¹⁰³ The key voices tend to be the P3, and especially the US in the case of Haiti. However, in a rather unusual configuration, none of the permanent members were willing to take the lead on the cholera issue in 2016. In bilateral meetings with France, the UK, and the US, different reasons were set out for each country neither supporting nor blocking resolution of the Haiti Cholera Claims. This allowed space for the elected members to take the lead in calling for a political resolution and for justice without being blocked by the permanent members or losing political capital with those states.

The US remained largely silent on this issue because, as the host nation to the UN headquarters, it was tasked with defending UN immunity from the jurisdiction of its New York courts. Hence, the main focus of the American delegation was on the court cases, and on the potential precedents any recognition of liability could create for other cases of ‘unintended consequences’ of peacekeeping operations. The reticence of the American delegation, usually in the leading seat regarding Haitian issues, was clearly the crucial factor in opening up political space for other actors – first and foremost the elected members of the Security Council and other member states – to play a role in the settlement of the cholera issue. France, with its history in Haiti, was unwilling to speak out

¹⁰⁰See Hurd, *supra* note 17, at 43.

¹⁰¹*Ibid.*

¹⁰²D. Malone, ‘Haiti and the International Community: A Case Study’, (1997) 39 *Survival* 126, at 126. The role of the US as ‘penholders’ have been recognized by other P3 countries in private interviews.

¹⁰³*Ibid.*, at 138.

on behalf of the need for compensations of victims of cholera – which may have led to entangling the issue with slave-reparations to the country. This happened in the context of the first formal visit of a French President to Haiti, in May 2015, which put the ‘independence debt’ of Haiti back in the news.¹⁰⁴ Finally, the UK has little, if any, interest in Haiti as a former-Francophone colony halfway across the world. The UK was similarly worried about the legal liability of the organization, as well as the potential precedent this would set.

Russia and China paid little interest to Haiti or to the cholera victims, with both countries opposed to human rights being brought into the body’s work, and with their attention focused firmly on ensuring that resolutions on Syria were blocked or even not tabled during those years. Russia did pay attention to Haiti in the past, but more to ensure that the Security Council would reciprocate, seeking endorsement for other peacekeeping operations in countries ‘of interest’ for Russia (including Georgia or Tajikistan in the 1990s).¹⁰⁵ China traditionally saw Haiti through the prism of its tensions with Taiwan.

5.2 The battle for predominance by elected members of the Security Council and the Group of Friends of Haiti

When the ‘powerful states’ do not use the Security Council to either pass or block resolutions, it ‘creates an opening for weaker agents to appropriate and manipulate the meaning of the symbols’.¹⁰⁶ The elected members can then act as agents of ‘discursive power’, understood as the ability to promote and impose concepts as the basis of preferred policies. Of course, the extent to which those actions may lead to legally binding Security Council action relies upon the permanent members, which was not tested in this case. As Langmore and Farrall argue, ‘the litmus test of effectiveness for elected members is whether and how they are able to adapt to the constraints and make the most of their limited opportunities to promote their desired outcomes’.¹⁰⁷ Elected members of the Security Council clearly passed the test in our case, seizing the opportunity offered by the P3 silence, hence demonstrating that strategic and innovative non-members can contribute to and influence UN Security Council outcomes in a variety of ways.¹⁰⁸ Each state has its own agenda, and it is interesting to note how these agendas played out in the context of the Haitian issue.

Of the elected members of the Security Council, key allies for the initiative included Venezuela, a country that credits Haiti with creating the environment in which it and other nearby states became free from colonial rule. Indeed, until the recent economic crisis in Venezuela, it provided significant economic support for Haiti. Venezuela is also a member of the Group of Friends of Haiti. Venezuela played a key role in the process, liaising with other Latin American member states and playing a key role in raising the issue at the Council.

Outside of the Security Council membership, other states took a keen interest in the initiative and used their political capital to encourage elected members to champion the cause. This is especially true for the Group of Friends of the UN Secretary-General for Haiti (hereafter referred to as ‘The Group of Friends’), a particularly dynamic group influencing governance in the Security Council. In 1995, Boutros Boutros-Ghali explained that ‘a new concept, that of “Friends of the Secretary-General” ... means that, while the UN peacekeepers are on the ground, intense

¹⁰⁴See, for instance, ‘Hollande promises to pay “moral debt” to former colony Haiti’, *Guardian*, 13 May 2015, available at www.theguardian.com/world/2015/may/13/hollande-haiti-visit-france-former-colony.

¹⁰⁵See Malone, *supra* note 102, at 138.

¹⁰⁶See Hurd, *supra* note 17, at 36.

¹⁰⁷See Langmore and Farrall, *supra* note 14, at 63.

¹⁰⁸J. Farrall and J. Prantl, ‘Leveraging diplomatic power and influence on the UN Security Council: the case of Australia’, (2016) 70 *Australian Journal of International Relations* 601, at 602.

diplomatic efforts continue with many parties to a conflict in order to reach a political settlement'.¹⁰⁹ After the military coup that ousted Jean-Bertrand Aristide in 1991, the Group of Friends was established approximately in January 1993¹¹⁰ with four states with long-standing economic and other ties with Haiti as members: France, Canada and the US, along with Venezuela.¹¹¹ These four countries were to form a loose alliance in support of democracy in Haiti. When the United Nations re-engaged in Haiti in 2004, a larger core group – including many troop-contributing countries from Latin America – was formed even as the Friends of Haiti drove the decision-making in the Security Council.¹¹² The Group of Friends of Haiti has steered the Haiti issue in the Security Council since 1993.¹¹³

Uruguay at that time chaired the Group of Friends of Haiti, and was a member of the Security Council. Canada, which closely supported Uruguay's role in the Group of Friends, alongside Brazil and Mexico who play key roles in that Group, were not members of the Security Council but were key allies to many states sitting at the Council. Uruguay was very keen on the idea of including questions on the cholera issue in the Security Council debates, and was pleased to co-ordinate with other Latin American states, including Mexico, Chile, Venezuela, or Brazil. Chileans were also very supportive of the initiative, noting how the cholera issue 'changed their approach to peacekeeping'.¹¹⁴ Canada also felt it was a cause that was 'worth pursuing' and an important initiative and played a key role in promoting a political resolution of the issue.¹¹⁵ Mexico was particularly keen in taking the initiative forward, and played a key role with Canada in bringing the discussion forward in the absence of P3 involvement by liaising with other Latin American states. In the case of Mexico, the regional rivalry with Brazil was certainly clear, particularly with Brazil's key contribution to MINUSTAH and its use as a springboard for regional and international legitimacy. While Mexico was very vocal in its support of the issue, its mid-term position remained somewhat unclear, especially whether its support for pushing the issue forward was simply a reflection of the rivalry for influence in the region.

Sweden has very few ties with Haiti, but also became an instrumental actor in this initiative largely owing to personal connections,¹¹⁶ and especially because of their connection with Deputy Secretary-General Jan Eliasson, a key player in UN politics. While Haiti was not a Swedish priority, reputational damage to the UN was. As such, and tying this issue with other unintended consequences of peacekeeping such as sexual exploitation and abuse by peacekeepers, the Swedish representation wanted to make sure that 'the UN did the right thing' in this context.¹¹⁷ The Haitian delegation was lacking direction at the time, after the annulment of the October 2015

¹⁰⁹United Nations, 'SG's statement at Institute of International Affairs, New Zealand, DPI Press Release' (1995) UN Doc. SG/SM/5624, 1 May. For an overview of the influence of informal groups of states see J. Prantl, 'Informal Groups of States and the UN Security Council', (2005) 59 *International Organization* 559; J. Prantl, *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* (2006).

¹¹⁰J. Prantl and J. E. Krasno, 'Informal Groups of Member States', in J. E. Krasno (ed.), *The United Nations: Confronting the Challenges of a Global Society* (2004), 342.

¹¹¹See Malone, *supra* note 102, at 127.

¹¹²T. Whitfield, *Working with Groups of Friends* (2010), 43. The Group of Friends now includes Argentina, Brazil, Canada, Chile, Colombia, France, Guatemala, Peru, the United States, Uruguay, and Venezuela.

¹¹³See Malone, *supra* note 102, at 140. Confirmed by Deputy Permanent Representative of France at the UN, Alexis Lamek, in a personal interview, 29 February 2016, New York.

¹¹⁴Interview with Fernando Guzman, 3 March 2016, New York.

¹¹⁵Interview with Canadian Ambassador Michael Grant, 29 February 2016, New York. The Ambassador was speaking on a personal level.

¹¹⁶One very active member of the Birmingham Initiative was Kristen Thelin, a Swedish national and former international judge of the ICTY.

¹¹⁷Interview with Olof Skoog, Permanent Representative of Sweden at the UN, 29 February 2016, New York.

Presidential ballot. Hence, the Haitian Ambassador was not able to take instructions from Port-au-Prince, but nevertheless was highly receptive of the initiative and supported a political resolution of the issue.¹¹⁸

5.3 The Security Council mid-year review of MINUSTAH: From a humanitarian to a human rights issue

At the March 2016 UN Security Council mid-year review of MINUSTAH, the cholera issue, and even the issue of the source of the epidemic and the need for a new approach, was distinctly raised. The meeting, as is the case for all review meetings of peace operations, was meant to provide a contact point between the Secretary-General and his representative in Haiti, and Council members over the performance of the mission and challenges faced on the ground. The most important issue raised by all parties was the stalled electoral process at the time, but mentions of cholera did not go unnoticed. Most Council members raised the issue along the traditional line of the humanitarian challenge posed by cholera, which is how cholera has been discussed at the UN Security Council in previous meetings, but some elected members did raise the cholera issue as a human rights issue. This was a pivotal moment in relation to Haiti and cholera, as it represented the first time that states had publicly called for the UN to ensure justice for the victims. Rather than this issue being raised by stakeholders outside of the UN or by the UN's independent human rights experts, its member states were breaking the years of silence on cholera, and sending a clear message to the Secretary-General and his team. The need for a new approach was carried loud and clear by specific elected members, as permanent members decided to frame the cholera issue as a humanitarian issue.

Interestingly enough, the Security Council Report published ahead of the March meeting,¹¹⁹ considered by a former diplomat who operated at the Security Council as a 'highly valuable reservoir of virtual institutional memory on which the E10 diplomats (and probably those from the P5) repeatedly draw',¹²⁰ did not forecast any discussion on a new approach to deal with the cholera issue in its briefing, or on compensation and reparation to victims, with only a brief mention in the report of the humanitarian challenge posed by the illness. The Special Representative of the Secretary-General, Ms. Sandra Honoré, opened up the March meeting with her briefing of the situation of the country, in which there was not a single mention of the cholera issue. She also presented, as it is the tradition, the Secretary-General's Report on Haiti, which only included references to cholera as a humanitarian issue – looking at prevention and containment of the illness, but without mentioning the political issue of reparation and compensation to victims. The framing of cholera as a humanitarian issue was also shared by P5 states at the meeting. The representative of the United Kingdom mentioned 'that terrible disease is a scar on Haitian citizens. After all that they have been through, they cannot afford to fact that further assault on their lives and livelihoods'.¹²¹ The framing of cholera as a humanitarian issue was also shared by the French delegation, mentioning that 'we must do more as an international community to eradicate cholera in Haiti once and for all'.¹²² The representative of the Russian Federation also mentioned his concern for 'the unstable situation that has resulted from cholera'.¹²³ without getting into specifics, and the American and Chinese representatives did not raise the cholera issue. The framing of cholera as a humanitarian issue was also shared by certain non-permanent members and other invited states in their formal statements, including Brazil, Chile, Colombia, Egypt, Guatemala,

¹¹⁸Interview with Haitian Ambassador, Denis Régis, 2 March 2016, New York.

¹¹⁹www.securitycouncilreport.org/monthly-forecast/2016-03/haiti_9.php; see also www.whatsinblue.org/2016/03/council-debate-on-haiti.php.

¹²⁰See Langmore and Farral, *supra* note 14, at 70.

¹²¹United Nations Security Council, The Question Concerning Haiti, UN Doc. S/PV.7651, 17 March 2016, at 11.

¹²²*Ibid.*, at 14.

¹²³*Ibid.*, at 11.

Haiti, Mexico, Peru (on behalf of the Group of Friends), Saint Vincent and the Grenadines (on behalf of CARICOM), Ukraine, and Uruguay.

However, other non-permanent members raised the issue of cholera through a human rights lens and the need for a new approach from the UN. In the formal statements, the clearest message came from the representative of Malaysia, who said that:

We would encourage greater engagement by the Secretariat with those [cholera] victims, particularly on the issue of possible remedies and compensations, where appropriate. It is important for the continuing credibility of and respect for the United Nations as a whole that the Secretary-General exercise and demonstrate leadership on this issue, including by responding to the letter of allegations from the Human Rights Council special procedures.¹²⁴

The representative of New Zealand also mentioned that:

The United Nations must continue to support those affected in Haiti and take appropriate action to help close that chapter and ensure that the new Government is not left alone to address the ongoing consequences and political legacy of the outbreak.¹²⁵

The representative of Venezuela further mentioned that ‘the grave human impact of the emergence and spread of cholera since 2010 cannot be ignored’.¹²⁶

Soon after the Security Council session, a delegation from the Organization of American States visited Haiti, and cholera was high on their list of discussion points, and many of those countries continued to be seized of the issue of how to provide justice for cholera victims. Alongside those efforts, many states raised the issue at the UN Human Rights Council during the March 2016 session, partly in response to the report of the Independent Expert on Haiti who repeated his recommendations on resolving the cholera claims,¹²⁷ but also because they had been briefed by their missions in New York. After the Secretary-General introduced his new approach to cholera in Haiti, most importantly underlining the political question behind the issue, the next semi-annual review of MINUSTAH at the Security Council saw a number of representations discussing the political nature of the issue. As the representative of Uruguay mentioned:

We welcomed with great satisfaction the new United Nations approach to cholera, and in our capacity as Chair of the Group of Friends of Haiti, we coordinated the efforts towards the adoption of General Assembly resolution 71/161, which welcomed that new approach. Today, we also welcome the references to cholera contained in the report of the Secretary-General, in particular the reference to the certain political role for the new mission, in complement to the efforts of the United Nations country team.¹²⁸

6. Conclusion: What happened next

The role of the elected members of the Security Council alongside other key stakeholders at that pivotal period of time was clearly instrumental in the UN changing its policy and approach to the cholera victims. It remains impossible to separate and isolate the influence of the elected members of the Security Council from other parallel activities – including the role of the UN Special Rapporteurs or the global advocacy campaign at that time. However, the UN Security

¹²⁴*Ibid.*, at 16.

¹²⁵*Ibid.*, at 6.

¹²⁶*Ibid.*, at 9.

¹²⁷UN General Assembly, ‘Extreme poverty and human rights’, 26 August 2016, UN Doc. A/71/367.

¹²⁸United Nations Security Council, The Question Concerning Haiti, UN Doc. S/PV.7920, 11 April 2017, at 4–5.

Council's mid-year review of MINUSTAH was clearly a very important diplomatic moment, with a number of states voicing their support for a different approach to the cholera issue. The meeting worked as a catalyst for pushing the agenda forward, underlining the fact that a broad number of regions represented at the Security Council favoured a different approach for the UN than hiding behind diplomatic immunity.

However, despite the UN Secretary-General appointing a task force on cholera in September 2016, and his apology to cholera victims at the end of that year, to date the UN has not provided remedies to the victims, and it has not contained cholera in Haiti. The UN agreed on a US\$2.2 billion plan to eradicate cholera, but this occurred too late and remains significantly underfunded. There are many factors underpinning these failures, ranging from lack of funding from member states, a retreat from multilateralism by the US, a new Secretary-General who is not seized of this matter, and ongoing instability and development needs in Haiti. Regardless of those factors, the fact remains that nearly eight years after cholera first broke out in Haiti, victims are still waiting for justice. As one cholera victim told us in 2017:

I am not asking for much, all I want is some money to replace the goats I had to sell to take my sick child to hospital. Without those goats I cannot afford to educate that child. Apologies do not cure diseases.