

NOTE

## Holding Peacekeepers Accountable: Haiti and Cholera

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*Accountability for humanitarian actors is a challenging space in international law. Although the different bodies of law states have developed address various actors in various settings, gaps persist. A particularly challenging group to regulate, humanitarian actors often fall outside existing legal frameworks. Humanitarian actors do not fit cleanly into the categories of traditional state or individual actors, and many existing legal instruments shield peacekeepers from liability. This legal framework was created to incentivize states to send forces into situations that desperately needed help, but in practice, UN peacekeepers often commit atrocities and inflict serious harms on civilian populations. Then, victims are blocked from pursuing justice and accountability.*

*In 2010, Haiti suffered a devastating cholera outbreak. Although the source was disputed initially, it quickly became clear that UN troops introduced the disease to the island nation. Thousands of Haitians died, and victims have tried, and failed for years to hold the United Nations accountable. This UN-created cholera outbreak in Haiti illustrates the gap in peacekeeping accountability. This Note explores peacekeeper responsibility for the outbreak and examines the potential applicability of existing bodies of international law. It ultimately concludes that the United Nations can currently exploit gaps to escape justice. Thus, the Note proposes modifying Status of Forces Agreements (SOFAs) to allow host states to assert concurrent jurisdiction over peacekeepers for criminal offenses. Although the solution is not perfect, it aims to narrow the accountability gap and better achieve the goals and purposes of international law.*

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## I. INTRODUCTION

*Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, . . . [a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . . [and] determined to put an end to impunity for the perpetrators of these crimes . . .*

*Rome Statute Preamble*<sup>1</sup>

*Today's ceremony was the last step of a history that had started at the end of the First World War and meant that impunity for the perpetrators of those crimes of international concern was no longer tolerable. It [will] not eliminate all conflicts or bring victims back to life, but [will] bring justice.*

*Cherif Bassiouni*<sup>2</sup>

*[T]hanks to this Court, United Nations credibility has now been further enhanced.*

*Lamberto Dini*<sup>3</sup>

*[People] were wrapping their sick in bedsheets or carrying them on mattresses to hospitals so crowded that patients were lying head to toe on the pavement outside*

. . . .

*Bodies were dumped into open-pit mass graves, their loved ones unable to give them a proper burial, fearing contamination.*<sup>4</sup>

*The UN hasn't taken responsibility for the fact that they brought cholera to Haiti. The United Nations can't have humanity and impunity at the same time.*<sup>5</sup>

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<sup>1</sup> Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 38544.

<sup>2</sup> Press Release, Secretary-General, Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law, U.N. Press Release L/2890 (July 20, 1998).

<sup>3</sup> *Id.*

<sup>4</sup> Jacob Kushner, "It Became Part of Life": How Haiti Curbed Cholera, THE GUARDIAN (Mar. 16, 2020), <https://www.theguardian.com/global-development/2020/mar/16/it-became-part-of-life-how-haiti-curbed-cholera>.

<sup>5</sup> Rashmee Roshan Lall & Ed Pilkington, UN Will Not Compensate Haiti Cholera Victims, Ban Ki-moon Tells President, THE GUARDIAN (Feb. 21, 2013), <https://www.theguardian.com/world/2013/feb/21/un-haiti-cholera-victims-rejects-compensation>.

Haitians will never forget the disastrous year of 2010. The troubles began on January 12, when the island nation was struck by a magnitude 7.0 earthquake that left “220,000 people dead, 300,000 injured and rubble nearly everywhere.”<sup>6</sup> While still dealing with the destruction, health officials confirmed on October 20 that a cholera outbreak was rapidly spreading across the country, overwhelming hospitals and eventually resulting in thousands of deaths.<sup>7</sup> Finally, on November 5, Hurricane Tomas made landfall over the already-battered nation, causing thirty-five deaths and significant flooding.<sup>8</sup> Like the biblical Job, Haitians could only struggle to make sense of the needless and endless suffering.<sup>9</sup>

While the earthquake and hurricane represented instances of extreme misfortune, the cholera outbreak was different. Cholera was not endemic to Haiti, and there had been no cases of the disease in recent memory in the country.<sup>10</sup> Quickly, consensus grew that UN peacekeepers, in Haiti to provide a stabilizing presence and rebuilding, might have brought the disease with them from Nepal and contaminated Haiti’s water supply.<sup>11</sup> It also became apparent that the introduction of the disease to Haiti was not simply an unfortunate accident. The United Nations failed to take any precautions to prevent the import of cholera and maintained substandard sanitation infrastructure in its base camps.<sup>12</sup> It seemed, at first, that in the aftermath of a disastrous year, Haitians had someone to hold accountable. Soon, however, it became clear that victims of the outbreak had no access to accountability mechanisms and would receive no justice.<sup>13</sup>

Accountability for humanitarian actors is a challenging space in international law. The different bodies of international law seek to protect

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6 *The Picture Show, Haiti in Ruins: A Look Back at the 2010 Earthquake*, NPR (Jan. 12, 2020), <https://www.npr.org/sections/pictureshow/2020/01/12/794939899/haiti-in-ruins-a-look-back-at-the-2010-earthquake>.

7 Jordan W. Tappero & Robert V. Tauxe, *Lessons Learned During Public Health Response to Cholera Epidemic in Haiti and the Dominican Republic*, 17 EMERGING INFECTIOUS DISEASES 12, 2087 (2011) (noting that many people died at home after being discharged by “the overwhelmed health care system”); *Cholera in Haiti*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/cholera/haiti/index.html> (last visited Apr. 11, 2020) (documenting that “nearly 10,000” died as a result of the cholera outbreak).

8 Richard Pasch & Todd Kimberlain, *Tropical Cyclone Report: Hurricane Tomas*, NATIONAL HURRICANE CENTER (Mar. 7, 2011).

9 *See Job 3:1–3* (“After this open Job his mouth, and cursed his day. And Job answered and said: Let the day perish wherein I was born . . . .”); *Job 3:24–26* (“For my sighing cometh before I eat, And my groanings are poured out like water. For the thing which I fear cometh upon me, And that which I am afraid of cometh unto me. I am not at ease, neither am I quiet, neither have I rest; But trouble cometh.”).

10 *See infra* Part II.D.

11 *See infra* Part IV.

12 *Id.*

13 *See infra* Part V.

individuals from various harms and provide routes of redress. Humanitarian law regulates the methods and means of warfare in order to prevent unnecessary suffering among combatants and civilians.<sup>14</sup> Human rights law is designed to hold states accountable to their obligation to protect fundamental rights.<sup>15</sup> International criminal law's purposes include, *inter alia*, holding individuals accountable for their culpable acts and the vindication of victim rights.<sup>16</sup> Despite the breadth of these bodies of law, gaps persist, and humanitarian actors often fall outside of these legal frameworks. Humanitarian actors do not fit cleanly into the categories of traditional state or individual actors, and many existing legal instruments shield peacekeepers from liability.<sup>17</sup> Historically, these protections were intended to incentivize states to contribute peacekeepers and to protect the United Nations' ability to intervene in challenging circumstances around the globe.<sup>18</sup> In practice, however, UN peacekeepers often commit atrocities and inflict serious harms on civilian populations, and victims are blocked from pursuing justice and accountability.<sup>19</sup> The UN-created cholera outbreak in Haiti illustrates this gap in peacekeeping accountability.

This Note will explore peacekeeper responsibility for the outbreak, examine the applicability of existing bodies of international law, and conclude that the United Nations can currently exploit gaps to escape justice. Part II discusses the background of the UN presence in Haiti and its role in bringing cholera to the country. Part III establishes that Haiti suffered significant harm as a result of the outbreak and thus requires a remedy. Part IV identifies the United Nations as the source of the outbreak and asserts that it bears legal responsibility for the harm. Part V attempts to apply existing bodies of law to hold the United Nations accountable and concludes that traditional human rights mechanisms have failed, leaving its countless victims without justice. Part VI then finds that humanitarian actors fall within a glaring accountability gap within international law. Finally, Part VII proposes a solution to narrow this gap by modifying Status of Forces Agreements (SOFAs) to allow host states to assert concurrent jurisdiction over peacekeepers for criminal offenses.

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14 ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 259–60 (4th ed. 2019).

15 *International Human Rights Law*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited Apr. 11, 2020).

16 CRYER ET AL., *supra* note 14, at 33–37.

17 *See infra* Part V.

18 *Id.*

19 *See infra* note 224. Sexual abuse is a particularly pervasive and serious problem in the context of peacekeeper forces.

## II. HAITI AND THE CHOLERA OUTBREAK

The cholera outbreak in Haiti came at a time when its population was particularly vulnerable. Its history and recent devastation left the country without infrastructure or systems to absorb or respond to harms, and its relative weakness within the global community left it powerless to pursue recourse in the international arena.<sup>20</sup> This background created a platform for impunity, where the chances of severe harm were amplified and the potential avenues for accountability were limited.

*A. Haiti's History Reflects Long-Term and Pervasive Political and Social Unrest*

Haiti has been unstable and fragile for centuries. The former colony gained independence from France in the early nineteenth century after a slave rebellion,<sup>21</sup> but the financial and intangible costs of the civil war devastated and handicapped the fledgling nation for years.<sup>22</sup> Human losses from the armed conflict, physical destruction of infrastructure, and a crippling reparations scheme left Haiti with a dysfunctional, and often nonexistent, economy.<sup>23</sup> A series of political leaders failed to address these issues, and after another revolution in 1911, the United States occupied the territory for twenty years.<sup>24</sup> Despite the U.S. presence, the subsequent decades included a series of “revolts and coups and dictatorships,” and eventually, Francois “Papa Doc” Duvalier came to power in 1957.<sup>25</sup> Papa Doc and his successor son held power for twenty-eight years, and their time in leadership is recognized as a particularly brutal, repressive, and corrupt period in Haiti’s history.<sup>26</sup>

By the mid-1980s, social unrest had turned violent.<sup>27</sup> Papa Doc’s son, Jean-Claude Duvalier, who had inherited the title of President for Life from

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20 Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *UN Responsibility for the Cholera Outbreak in Haiti*, at ¶ 7, 14 U.N. Doc. A/71/367 (Aug. 26, 2016).

21 Jon Henley, *Haiti: A Long Descent to Hell*, THE GUARDIAN (Jan. 14, 2010), <https://www.theguardian.com/world/2010/jan/14/haiti-history-earthquake-disaster>.

22 *Id.* (“[T]he last five centuries have combined to produce a people so poor, an infrastructure so nonexistent and a state so hopelessly ineffectual that whatever natural disaster chooses to strike next, its impact on the population will be magnified many, many times over.”).

23 *Id.* (describing destruction of plantations and reparations payments to France that were ongoing until 1947).

24 *Id.*

25 *Id.*

26 *Id.* (“Papa Doc and his playboy son and heir, Jean-Claude Duvalier, or Baby Doc, the [militia] and their henchmen killed between 30,000 and 60,000 Haitians, and raped, beat and tortured countless more . . . the Duvaliers were at times embezzling up to 80% of Haiti’s international aid, while the debts they signed up to accounted for 45% of what the country owed [in 2009].”).

27 Randal C. Archibold, *Jean-Claude Duvalier Dies at 63; Ruled Haiti in Father’s Brutal Fashion*, N.Y. TIMES (Oct. 4, 2014), <https://www.nytimes.com/2014/10/05/world/americas/jean-claude-duvalier-haitis-baby-doc-dies-at-63.html>.

his father, was forced to leave power and flee the country in 1986.<sup>28</sup> Four years later, Haiti elected its first democratic leader, Jean-Bertrand Aristide.<sup>29</sup> Peace and stability continued to elude the island nation, however, as Aristide's government was overthrown a year later.<sup>30</sup> A U.S.-led military invasion returned Aristide to power in 1994, but hopes that Aristide would stabilize and democratize Haiti were ultimately unfulfilled.<sup>31</sup> By 2004, corruption and public discontent boiled over, and armed rebellion broke out in parts of the country.<sup>32</sup> Rebel groups, consisting of political opponents and former military members, quickly took control of large swaths of territory and threatened to take the capital.<sup>33</sup> International support for Aristide's government disappeared,<sup>34</sup> and Aristide was forced to resign.<sup>35</sup>

*B. UN Troops Arrived in Haiti in 2004 to Calm Political Instability*

Against this backdrop of political and social unrest, the international community responded in an attempt to bring order. Nations quickly brought "security, aid and administrative personnel" to stabilize the country and prevent further violence.<sup>36</sup> Immediately after Aristide's resignation, the United States deployed Marines to restore order, and Canada sent soldiers to provide airport security and other military assistance.<sup>37</sup> Additionally, the UN Security Council called an emergency session hours after Aristide's resignation and authorized the immediate deployment of a Multinational

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

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

<sup>30</sup> Lydia Polgreen & Tim Weiner, *Haiti's President Forced Out; Marines Sent to Keep Order*, N.Y. TIMES, (Feb. 29, 2004), <https://www.nytimes.com/2004/02/29/international/americas/haitis-president-forced-out-marines-sent-to-keep.html>.

<sup>31</sup> *Id.*

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

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

<sup>34</sup> Christopher Marquis, *France Seeks U.N. Force in Haiti And the Resignation of Aristide*, N.Y. TIMES (Feb. 26, 2004), <https://www.nytimes.com/2004/02/26/world/france-seeks-un-force-in-haiti-and-the-resignation-of-aristide.html> (describing how France and the United States pulled support from Aristide). In fact, some believe the United States orchestrated the rebellion in order to remove Aristide from power. See Jeffrey Sachs, *From His First Day in Office, Bush was Ousting Aristide*, L.A. TIMES (Mar. 4, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-04-oe-sachs4-story.html>.

<sup>35</sup> Polgreen & Weiner, *supra* note 30 (Aristide's resignation letter read, in part, "The constitution is the guarantee of life and peace. It should not be drowned in the Haitian people's blood. This is why tonight, if it is my resignation that will prevent a bloodbath, I agree to go with the hope that there will be life and not death.").

<sup>36</sup> *Id.* (reporting that "[v]iolent clashes between government supporters and armed militants ha[d] left as many as 100 people dead since early [that] month, and widespread looting ha[d] left ports, shops and houses in several cities plundered.").

<sup>37</sup> *Id.*

Interim Force (MIF).<sup>38</sup> The authorization, under Chapter VII of the UN Charter, “mandated the operation to contribute to a secure and stable environment in the country, to facilitate the provision of relief aid to those in need, and to help the Haitian police and the Haitian Coast Guard maintain law and order and protect human rights.”<sup>39</sup>

MIF presence in Haiti was limited to three months, but the Security Council established the United Nations Stabilization Mission in Haiti (MINUSTAH) to succeed the MIF in June 2004.<sup>40</sup> Similar to MIF, the MINUSTAH mandate included “ensuring a secure and stable environment,” “support[ing] the constitutional and political process under way in Haiti,” and “support[ing] the Transitional Government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights.”<sup>41</sup>

*C. The United Nations Increased Its Haitian Peacekeeping Force in Response to the 2010 Earthquake*

The MINUSTAH forces remained in Haiti for years, assisting the government under its mandate. In early 2010, however, the situation in Haiti changed dramatically. On January 12, just before 5:00 p.m. local time, “a magnitude 7.0 earthquake struck the Republic of Haiti, with an epicenter located approximately 25 kilometers south and west of the capital city of Port-au-Prince.”<sup>42</sup> At its epicenter, the earthquake destroyed or critically damaged eighty to ninety percent of buildings and physical infrastructure, and nearby cities and urban areas were also significantly impacted.<sup>43</sup> Estimates of the death toll vary, but most place it between 220,000 and 300,000 lives lost.<sup>44</sup> Additionally, 1.5 million people were initially displaced, and as of September 2017, more than 37,000 displaced people remained.<sup>45</sup> The United Nations’ Post Disaster Needs Assessment estimated the damages at \$7.9 billion, and the Action Plan for National Recovery and

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38 *Security Council Authorizes Three-Month Multinational Interim Force for Haiti*, UN NEWS (Feb. 29, 2004), <https://news.un.org/en/story/2004/02/95652-security-council-authorizes-three-month-multinational-interim-force-haiti>.

39 *Id.*

40 *United Nations Peacekeeping*, MINUSTAH FACT SHEET, <https://peacekeeping.un.org/en/mission/minustah> (last visited Apr. 5, 2020). *See also* S.C. Res. 1542, ¶¶ 1, 7–8 (Apr. 30, 2004).

41 S.C. Res. 1542, ¶¶ 7(I)(a), 7(II)(a), 7(III)(a) (Apr. 30, 2004).

42 Reginald DesRoches et al., *Overview of the 2010 Haiti Earthquake*, 27 EARTHQUAKE SPECTRA at S1 (Oct. 2011), <https://escweb.wr.usgs.gov/share/mooney/142.pdf>.

43 *Id.*

44 CNN Editorial Research, *Haiti Earthquake Fast Facts*, CNN (Jan. 14, 2020), <https://www.cnn.com/2013/12/12/world/haiti-earthquake-fast-facts/index.html>.

45 *Id.*



Development requested \$11.5 billion for rebuilding efforts over the next ten years.<sup>46</sup>

In response to the earthquake's devastation, the UN Secretary-General recommended, and the Security Council endorsed, an increase in MINUSTAH force levels in Haiti.<sup>47</sup> Adopting Resolution 1908 (2010), the Security Council raised troop levels from 6,940 to 8,940 and police components from 2,211 to 3,711.<sup>48</sup> In raising troop levels, the Security Council "recogniz[ed] the dire circumstances and urgent need for a response" and sought to "support the immediate recovery, reconstruction and stability efforts."<sup>49</sup> The Security Council, while increasing troop levels, also recognized that "humanitarian and security emergencies in Haiti would exist for some time to come" and sought to strengthen MINUSTAH to meet the needs of the current situation.<sup>50</sup> In response to the earthquake and the Security Council's subsequent adoption of Resolution 1908, MINUSTAH's presence continued and grew over the following months.<sup>51</sup>

#### *D. Cholera was Detected in Haiti in October 2010*

While Haiti was still reeling from the January earthquake, reports of residents suffering from cholera emerged in mid-October.<sup>52</sup> Prior to these reports, there was no evidence that cholera, an "acute diarrheal infection caused by ingestion of [contaminated] food or water,"<sup>53</sup> had ever been present in Haiti.<sup>54</sup> The disease, widespread in areas of Africa, Asia, and South and Central America,<sup>55</sup> is treatable with aggressive rehydration and antibiotics.<sup>56</sup> If left untreated, however, cholera can kill affected individuals

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46 Office of the Secretary-General's Special Adviser on Community Based Health and Aid Delivery, LESSONS FROM HAITI (2020), [https://www.lessonsfromhaiti.org/download/Report\\_Center/ADSI\\_Earthquake\\_Haiti\\_Key\\_Facts\\_and\\_Lessons\\_Learned\\_January\\_2020.pdf](https://www.lessonsfromhaiti.org/download/Report_Center/ADSI_Earthquake_Haiti_Key_Facts_and_Lessons_Learned_January_2020.pdf).

47 Press Release, Security Council, United Nations, Security Council Boosts Force Levels for Military, Police Components of United Nations Stabilization Mission in Haiti, U.N. Press Release SC/9847 (Jan. 19, 2010), <https://www.un.org/press/en/2010/sc9847.doc.htm>.

48 *Id.*; S.C. Res. 1908 (Jan. 19, 2010).

49 S.C. Res. 1908 ¶ pmb1.1 (Jan. 19, 2010).

50 United Nations Security Council, *supra* note 47.

51 *Id.*

52 *United Nations Peacekeeping*, *supra* note 40.

53 *Cholera*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/fact-sheets/detail/cholera> (last visited Apr. 10, 2020).

54 Alston, *supra* note 20; Deborah Jensen et al., *Cholera in Haiti and Other Caribbean Regions, 19th Century*, 17(11) EMERGING INFECTIOUS DISEASES 2133 (2011).

55 Joseph Lewnard et al., *Strategies to Prevent Cholera Introduction During International Personnel Deployments: A Computational Modeling Analysis Based on the 2010 Outbreak*, PLOS MEDICINE (Jan. 26, 2016), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001947>.

56 *Cholera: Antibiotic Treatment*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/cholera/treatment/antibiotic-treatment.html> (last visited Apr. 11, 2020).

within hours of symptoms appearing.<sup>57</sup> Cholera transmission often occurs in areas in which there is “inadequate access to clean water and sanitation facilities,” and “a humanitarian crisis . . . can increase the risk of cholera transmission.”<sup>58</sup> The Haitian population was particularly susceptible to cholera and its quick spread throughout the country was due to damage to the nation’s infrastructure caused by the earthquake and a complete lack of biological immunity built up from prior exposures.<sup>59</sup>

A tributary of the Artibonite River, the Meille River, was quickly pinpointed as the possible source of the infection.<sup>60</sup> People hypothesized that the tributary had been contaminated with cholera and was dumping the disease into the Artibonite River.<sup>61</sup> The Artibonite River was the nation’s “most important river and a critical source of water for tens of thousands of Haitians who rely on it for drinking, bathing, washing clothes, and irrigation.”<sup>62</sup> Outbreaks along the river quickly appeared, and cholera eventually spread throughout the country.<sup>63</sup> The spread was explosive. “Within two days of the first cases, a hospital 60 miles away was admitting a new cholera patient every 3 ½ minutes.”<sup>64</sup> The United Nations reported in 2016 that 779,212 people in Haiti had become infected with cholera because of the initial outbreak, and 9,145 people had died.<sup>65</sup>

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57 WORLD HEALTH ORGANIZATION, *supra* note 53.

58 *Id.*

59 Yodeline Guillaume et al., *Responding to Cholera in Haiti: Implications for the National Plan to Eliminate Cholera by 2022*, 218(3) J. INFECTIOUS DISEASES S167, S167 (2018).

60 Letter from Leilani Farha (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), Gustavo Gallon (Independent Expert on the Situation of Human Rights in Haiti), Dainius Puras (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), and Catarina de Albuquerque (Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation) to Pedro Medrano (Assistant U.N. Secretary-General) HTI 3/2014 (Sept. 25, 2014).

61 *Id.*

62 *Id.*

63 *Id.*

64 Richard Knox, *After Bringing Cholera to Haiti, U.N. Plans to Get Rid of It*, NPR (Jan. 12, 2013), <https://www.npr.org/sections/health-shots/2013/01/12/169075448/after-bringing-cholera-to-haiti-u-n-plans-to-get-rid-of-it#:~:text=Plans%20to%20Get%20Rid%20of%20It%20%3A%20Shots%20%2D%20Health%20News%20%3A%20NPR&text=Ethics-,After%20Bringing%20Cholera%20to%20Haiti%2C%20U.N.,that%20followed%20in%20its%20wake>.

65 Alston, *supra* note 20, at ¶ 13. See also Francisco J. Luquero et al., *Mortality Rates During Cholera Epidemic, Haiti 2010–2011*, 22 EMERGING INFECTIOUS DISEASES 410 (2016) (finding that the actual mortality rate is likely much higher than reported).

### III. HAITI SUFFERED SIGNIFICANT HARM AS A RESULT OF THE OUTBREAK

Due to the nation's underlying vulnerabilities and the rapid spread of cholera throughout the country, the cholera outbreak's impact on Haiti has been devastating. The outbreak is considered the worst in recent history,<sup>66</sup> and its rapid spread throughout the country has been attributed to poor water and sanitation infrastructure.<sup>67</sup> By the end of 2011, the initial outbreak had resulted in 500,000 infections and 7,000 deaths.<sup>68</sup> By 2012, the infection rate, death toll, and 1.28% mortality rate represented the largest epidemic ever recorded in a single country.<sup>69</sup> The impact did not end there, however. A 2018 report found 819,786 reported cholera cases in Haiti since the 2010 outbreak, with almost 10,000 deaths.<sup>70</sup> Best-case projections predict that the disease will “plague the country for at least another decade.”<sup>71</sup> Others believe that cholera has shifted from an outbreak to an endemic disease in Haiti, meaning that it will now regularly occur.<sup>72</sup>

The outbreak also affected Haitian citizens in other ways. In one study, Haitians framed the outbreak as a “physical multifront assault” and described it using “militaristic disease metaphors such as individuals being ‘attacked’ and localities ‘ravaged.’”<sup>73</sup> Haitians conveyed themes such as suffering, anxiety, and helplessness.<sup>74</sup> In particular, people living in rural areas felt isolated, stigmatized, and vulnerable due to increased infection levels and reliance on untreated water sources.<sup>75</sup> In general, researchers found that, especially in the immediate aftermath of the initial outbreak, the

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66 CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 7.

67 Matt Fisher & Alisha Kramer, *An Epidemic After an Earthquake: The Cholera Outbreak in Haiti, Part 1*, CENTER FOR STRATEGIC & INT'L STUDIES (Mar. 7, 2012), <https://www.csis.org/blogs/smart-global-health/epidemic-after-earthquake-cholera-outbreak-haiti-part-1>.

68 *Id.*

69 Ministry of Public Health and Population, Republic of Haiti, *National Plan for the Elimination of Cholera in Haiti, 2013-2022* (2013).

70 Ministère de la Santé et de la Population, *Statistical Profile of Cholera in the 9th Epidemiological Week of 2019*, <https://mspp.gouv.ht/site/downloads/Profil%20statistique%20Cholera%209SE2019.pdf> (last visited Apr. 10, 2020) (many believe, however, that official numbers understate the actual infection rate and death toll).

71 Celso Perez & Muneer I. Ahmad, *Why the UN Should Take Responsibility for Haiti's Cholera Outbreak*, THE ATLANTIC (Aug. 16, 2013), <https://www.theatlantic.com/health/archive/2013/08/why-the-un-should-take-responsibility-for-haitis-cholera-outbreak/278762/>.

72 Alex Weppelman, *Has Haiti's Cholera Epidemic Become a Permanent Problem?*, THE CONVERSATION (Apr. 11, 2016), <https://theconversation.com/has-haitis-cholera-epidemic-become-a-permanent-problem-55790>.

73 Yodeline Guillaume et al., *“It was a Ravage!”: Lived Experiences of Epidemic Cholera in Rural Haiti*, 4 BMJ GLOBAL HEALTH 1, 1 (2019).

74 *Id.* at 3.

75 *Id.* at 7.

disease caused a “pervasive fear of contamination” leading to “disruptions in daily life and social interactions.”<sup>76</sup>

In addition to the physical and psychological impacts, the nation was forced to restructure and re-tool much of its existing infrastructure. In November 2012, the government issued a National Plan for the Elimination of Cholera in Haiti that sought to revamp its water and sanitation sector and its public health sector.<sup>77</sup> In the plan, the government sought to address areas such as water supply and discharge of wastewater, solid waste management, health care, essential medicines, epidemiological surveillance, health and hygiene promotional campaigns, and food hygiene and micronutrient deficiencies in the population.<sup>78</sup> The cost for implementing the plan over the next decade was estimated at \$2,220,022,500 USD.<sup>79</sup>

#### IV. UN PEACEKEEPERS WERE RESPONSIBLE FOR THE OUTBREAK

Soon after the first reported cholera case, people suspected that the United Nations’ MINUSTAH forces had introduced cholera into the Meille, and as a result, the Artibonite River.<sup>80</sup> Responding to these suspicions, the UN Secretary-General appointed an Independent Panel of Experts to investigate and report on the issue in 2011.<sup>81</sup> While the Panel’s report found 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 cholerae* as a result of human activity,” it also suggested that numerous factors contributed to the spread of the disease.<sup>82</sup> These factors included poor water and sanitation conditions in the country, substandard conditions in medical facilities, and the use river water for drinking and other purposes.<sup>83</sup> Relying on this report, the United Nations claimed for six years that the scientific evidence was “inconclusive” and denied responsibility for the outbreak.<sup>84</sup>

Notably, the same authors clarified a couple of years later that “the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the

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<sup>76</sup> *Id.* at 6.

<sup>77</sup> Ministry of Public Health and Population, *supra* note 69.

<sup>78</sup> *Id.* at 61.

<sup>79</sup> *Id.* at 59.

<sup>80</sup> Letter from Leilani Farha et al., *supra* note 60.

<sup>81</sup> *Id.*

<sup>82</sup> Alejandro Cravioto et al., *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* 29 (2011).

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

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

Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti.”<sup>85</sup> The group further noted that their initial findings had indicated that the outbreak “was almost certainly caused by a poorly constructed sanitation system installed at a rural camp used by several hundred UN troops from Nepal.”<sup>86</sup> The group maintained, however, their position that no one was at fault because they did “not feel that [it] was a deliberate introduction of cholera into Haiti” but was instead an “accidental and unfortunate confluence of events.”<sup>87</sup>

In addition to the clarified findings of the Independent Experts, there is now ample evidence that the peacekeeping forces did, in fact, bring cholera to Haiti and contaminate the nation’s primary water source. First, evidence about the infrastructure at the UN bases in Haiti suggests the presence of significant vulnerabilities for spreading disease. Reports at the time noted that the MINUSTAH base near the Meille River, where many UN peacekeeping troops were housed, generally had “inadequate sanitation and waste management systems insufficient to prevent” waste from leaking into nearby water sources.<sup>88</sup> In fact, a UN report issued a month after the outbreak warned of “a series of alarming problems in several UN peacekeeping bases, including sewage being dumped in the open as well as a lack of toilets and soap.”<sup>89</sup> Presciently, the report also noted that “the poor oversight of contractors carrying out [waste disposal] work has left the mission vulnerable to allegations of disease propagation and environmental contamination.”<sup>90</sup> A later investigation revealed that a waste management company emptied the peacekeepers’ camp waste tanks on October 16 or 17.<sup>91</sup> It was also discovered that “the driver dumped the contents and a large amount of fecal waste entered the local stream and flowed on to the Artibonite River.”<sup>92</sup> Days later, reports of individuals suffering from cholera symptoms surfaced, and on October 22, the government publicly announced an outbreak.<sup>93</sup>

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85 Daniel Lantagne et al., *The Cholera Outbreak in Haiti: Where and How Did It Begin?*, in CHOLERA OUTBREAKS 145, 162 (G. Balakrish Nair & Yoshifumi Takeda eds., 2014).

86 *Id.* at 160.

87 *Id.* at 162.

88 Letter from Leilani Farha et al., *supra* note 60.

89 Joe Sandler & Ed Pilkington, *Leaked UN Report Faults Sanitation at Haiti Bases at Time of Cholera Outbreak*, THE GUARDIAN (Apr. 5, 2016), <https://www.theguardian.com/world/2016/apr/05/leaked-un-report-sanitation-haiti-bases-cholera-outbreak>.

90 *Id.*

91 RALPH R. FRERICH, DEADLY RIVER: CHOLERA AND THE COVER-UP IN POST-EARTHQUAKE HAITI 243 (2016).

92 *Id.*

93 Alston, *supra* note 20, at ¶ 14.

Second, epidemiological evidence supports the finding that the cholera strain originated from the UN forces. A new contingent of UN peacekeeping forces arrived in Haiti on October 8, 2010.<sup>94</sup> Prior to their arrival, the 1,280 personnel members had been training for three months in a cholera-affected area near the Kathmandu Valley in Nepal.<sup>95</sup> Further, the Nepalese-based forces were allowed a 10-day home visit before leaving for Haiti, and many of the peacekeepers likely would have been exposed to an ongoing cholera epidemic in Nepal during that time.<sup>96</sup> Scientific testing later revealed that the Haiti cholera outbreak was caused by a South Asian-type *Vibrio cholerae* pathogenic strain of the disease.<sup>97</sup> That particular strain of cholera was a genetic match to the strain present in Nepal.<sup>98</sup>

Perhaps most problematically, the United Nations failed to take key steps to mitigate the risk of importing peacekeepers from cholera-affected areas into a nation with no exposure immunity and significant infrastructure vulnerabilities. Prior to arrival in Haiti, forces coming from Nepal “were not subjected to a medical examination or stool testing,” did not receive prophylactic antimicrobial drugs, and were not immunized with oral cholera vaccines before deployment.<sup>99</sup> The United Nations failed to implement any of these measures despite the well-known risk that peacekeepers can introduce diseases to host countries.<sup>100</sup> The United Nations’ apparent practice was only to isolate and manage individuals displaying symptoms, despite decades of knowledge that cholera is often transmitted by asymptomatic carriers.<sup>101</sup>

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94 *Id.*

95 *Id.* at ¶ 16.

96 Ralph Frerichs et al., *Nepalese Origin of Cholera Epidemic in Haiti*, 18(6) EUR. SOC’Y CLINICAL MICROBIOLOGY AND INFECTION E158, E159 (2012).

97 *Id.* Letter from Leilani Farha et al., *supra* note 60 (noting that the Haiti strain and the Nepal strain are a genetic match).

98 Letter from Leilani Farha et al., *supra* note 60, at 2.

99 Frerichs et al., *supra* note 96, at E159 (“a Nepalese contingent of UN peacekeepers . . . was exposed to a cholera epidemic in Nepal . . . . Once they returned to their battalion to embark for Haiti, the soldiers were not subjected to a medical examination or stool testing.”); Lewnard, *supra* note 55, at 14 (studying the three interventions and noting that “[p]rior to the outbreak, there were no biomedical interventions in place to prevent its occurrence despite the recognized risk for spread of infectious diseases from military to civilian populations.”).

100 Jean-Paul Chretien et al., *The Importance of Militaries from Developing Countries in Global Infectious Disease Surveillance*, 85 Bull. World Health Organ. 3, 174 (2007) (noting that the movement of peacekeeping units can “allow military forces to carry infectious agents to susceptible civilian populations.”); Robert Steffen, *Immunization of Peacekeeping Forces*, 5(3) EMERGING INFECTIOUS DISEASES 485 (1999) (noting that the U.N. “issues recommendations about needed vaccines” for particular missions but describing that the focus is on protecting the military contingents and not on the host country population).

101 Renaud Piarroux et al., *Understanding the Cholera Epidemic, Haiti*, 17(7) EMERGING INFECTIOUS DISEASES 1161 (2011); Zlatko Bencic & Renuka Sinha, *Cholera Carriers and Circulation of Cholera Vibrios in the Community*, 1(1) INT’L J. EPIDEMIOLOGY 13 (1971).

Studies have demonstrated that if the United Nations had utilized any of the identified pre-deployment interventions, the risk of contaminating the local Haitian population would have been significantly diminished.<sup>102</sup> The use of diagnostic screening to identify and exclude cholera carriers from deployment would have resulted in an approximately 83% reduction in importation probability.<sup>103</sup> Administering prophylactic antimicrobial drugs would have offered a potential 89% reduction in importation probability if taken seven days prior to deployment or 39% reduction if delivered at the time of departure.<sup>104</sup> Immunization could have reduced the risk by up to 60.8%. The benefits of these interventions are particularly glaring when compared to their cost. Diagnostic screening would have cost \$2.54 USD per peacekeeper.<sup>105</sup> Antimicrobial drugs would have cost \$1 USD per peacekeeper, and vaccines would have cost between \$3.70 and \$18.80 USD per peacekeeper.<sup>106</sup> Thus, eradication efforts once projected to cost \$2.2 billion could have been prevented by the implementation of a \$2,000 pre-deployment intervention.<sup>107</sup>

#### V. THE INJURED PARTIES LACK OPTIONS TO PURSUE JUSTICE

In the face of such immense harm, legal systems and international law are designed to provide accountability and assistance. In fact, several legal doctrines exist to provide victims of harm with methods of redress. Haitian victims, however, found themselves unable to access any of these legal remedies and ultimately without any meaningful recourse.

##### *A. Human Rights Law and Private Law Have Failed to Provide Accountability*

In the six years following the cholera outbreak, the United Nations categorically denied responsibility.<sup>108</sup> It also asserted absolute immunity from legal actions, including in all domestic courts, pursuant to the Convention on the Privileges and Immunities of the United Nations.<sup>109</sup> Additionally, the United Nations insisted that its own framework for

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102 Lewnard, *supra* note 55, at 2.

103 *Id.* at 11.

104 *Id.*

105 *Id.* at 14.

106 *Id.*

107 Knox, *supra* note 64; Lewnard, *supra* note 55.

108 Jonathan Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html> (reporting the United Nations' first acknowledgement of its role in the outbreak six years after it occurred).

109 Letter from Leilani Farha et al., *supra* note 60, at 3; Convention on the Privileges and Immunities of the United Nations art. II., sec. 2, Feb. 13, 1946, 1 U.N.T.S. 15.

accepting responsibility for damages caused by activities of peacekeeping forces did not apply.<sup>110</sup>

The United Nations has designed mechanisms to provide compensation to individuals harmed by peacekeepers in the course of their activities. In a 2001 legal opinion, the UN Office of Legal Affairs found that “as an attribute of the international legal and juridical personality of the United Nations, it is established that the Organization is capable of incurring obligations and liabilities of a private law nature.”<sup>111</sup> The opinion cited General Assembly resolutions 41/210 and 52/247, which set liability limits for third party tort claims and “established temporal and financial limitation on its liabilities to third parties resulting or arising from peacekeeping operations,” respectively.<sup>112</sup>

Additionally, the MINUSTAH Status of Forces Agreement references dispute settlement and permits “third party claims for property loss or damage or for personal injury, illness or death arising from or directly attributed to MINUSTAH.”<sup>113</sup> The SOFA goes on that “any dispute or claim of a private-law character . . . to which MINUSTAH or any member thereof is a party . . . shall be settled by a standing claims commission to be established for that purpose.”<sup>114</sup> The Secretary-General has stated that private law claims are “claims for compensation submitted by third parties for personal injury or death . . . incurred as a result of acts committed by members of a UN peace-keeping operation with the ‘mission area’ concerns.”<sup>115</sup> Public law claims, in contrast, are based on “political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly.”<sup>116</sup>

Despite that framework and apparent route to redress, the Haitian cholera victims were denied any relief. In response to a November 2011 petition lodged with MINUSTAH on behalf of cholera victims, the UN Under Secretary-General for Legal Affairs deemed the claims “not receivable pursuant to Section 29 of the 1946 Convention on the Privileges

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110 Alston, *supra* note 20, at ¶ 72–73; *Memorandum from Office of Legal Affairs to the Controller on the Payment of Settlement of Claims*, 2001 U.N. Jurid. Y.B. 381, ¶ 4 U.N. Doc. ST/LEG/SER.C/39. [hereinafter *Memorandum*].

111 *Memorandum*, *supra* note 110, at ¶ 4.

112 *Id.* at ¶ 5; G.A. Res. 41/210, U.N. Doc. A/41/7/Add. 11 (Dec. 11, 1986); G.A. Res. 52/247, U.N. Doc. A/RES/52/247 (June 26, 1998).

113 Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, July 9, 2004, 2271 U.N.T.S. 251, ¶ 54.

114 *Id.* at ¶ 55.

115 Report of the Secretary-General, Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, ¶¶ 15–16, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995).

116 *Id.* at ¶ 23.



and Immunities of the United Nations.”<sup>117</sup> While the Convention requires the United Nations to provide an appropriate settlement mechanism for disputes of a private law character to which it is a party, the United Nations rejected the cholera victims’ claims as public law in character because they “include a review of political and policy matters.”<sup>118</sup>

This position received significant criticism. Philip Alston, the Special Rapporteur on Extreme Poverty and Human Rights, noted that the victims’ petition alleged negligence for failing to screen its forces for cholera, failure to provide adequate sanitation and waste management, failure to test water quality, and failure to take corrective action after cholera was discovered.<sup>119</sup> He further argued that “the claims appear to have all of the characteristics of a private law tort claim” and that “[t]he United Nations has frequently processed claims involving alleged negligence.”<sup>120</sup> The United Nations’ position in denying responsibility closed routes of redress for victims and forced them to look outside traditional mechanisms. After the United Nations’ denial of their claims, victims attempted to sue in the Southern District of New York, but the claims were ultimately dismissed based on the United Nations’ immunity defenses.<sup>121</sup>

Eventually, in response to a forthcoming report from Alston, the United Nations publicly acknowledged its role in the cholera outbreak. The office of the Secretary-General admitted 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.”<sup>122</sup> Ban-Ki-moon, then Secretary-General, also apologized but carefully avoided admitting legal responsibility for the outbreak.<sup>123</sup> Instead, the United Nations promised that a “new response will be presented publicly within the next two months.”<sup>124</sup> Over the following months, the United Nations announced it would create and administer a \$400 million fund to provide assistance to cholera victims.<sup>125</sup> Efforts to raise money for

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117 Letter from Patricia O’Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice and Democracy in Haiti (Feb. 21, 2013), *available at* <https://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>.

118 *Id.*; Convention on the Privileges and Immunities of the United Nations, *supra* note 109; Alston, *supra* note 20, at ¶ 28.

119 Alston, *supra* note 20, at ¶ 34.

120 *Id.*

121 *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015); Alston, *supra* note 20, at ¶ 29.

122 Katz, *supra* note 108.

123 Anastasia Moloney, *U.N. Criticized for Failing on Promise to Help Haiti Cholera Victims*, REUTERS (Apr. 29, 2018), <https://www.reuters.com/article/us-haiti-cholera-rights/un-criticized-for-failing-on-promise-to-help-haiti-cholera-victims-idUSKBN11105G>.

124 Katz, *supra* note 108.

125 Moloney, *supra* note 123.

the fund largely failed, however.<sup>126</sup> In its most current data, the Multi-Partner Trust Fund reports that it has raised \$22,160,770 with approximately one year until the initiative is set to end. With the continued failures of the United Nations to provide meaningful reparations and with domestic courts inaccessible for cases against the United Nations, the victims of the Haitian cholera epidemic have had no opportunity to pursue justice.

*B. Gaps in Criminal Law Frameworks Prevent Application to MINUSTAH Forces*

With the failure of other bodies of law, cholera victims could attempt to pursue alternate methods of accountability. Criminal law, perhaps, could provide such a route. As noted previously, efforts to hold the United Nations accountable and to provide relief to Haiti have focused on human rights law and sometimes private law tort claims.<sup>127</sup> This approach makes sense. Human rights law is designed to identify “fundamental norms” and to establish state obligations to protect those rights.<sup>128</sup> In particular, this body of law protects such rights as the right to the water, sanitation, and health.<sup>129</sup> Additionally, human rights law, in theory, could provide a robust reparations scheme designed to counteract the initial violations. Similarly, private law claims and compensation are designed, at least in part, to provide restitution for harms and to punish wrongdoers.<sup>130</sup> However, both bodies of law have repeatedly failed cholera victims in their pursuit of justice.

Criminal law, perhaps, could provide an alternate route to hold the United Nations and MINUSTAH responsible. Criminal law systems and mechanisms traditionally pursue a variety of goals. These include forward-looking purposes such as rehabilitation, deterrence, and education and backward-looking purposes such as retribution and incapacitation.<sup>131</sup> Criminal law can also serve broader purposes such as vindicating the rights of victims, providing a route for truth-telling and recording history, and facilitating societal reconciliation.<sup>132</sup> Each of these stated goals and purposes could be relevant and desirable to Haitians. Victims, who have struggled for years to be recognized and acknowledged by the United Nations, could have their rights vindicated, could witness punishment inflicted for the harm caused, and could record the United Nations’ responsibility for history.

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<sup>126</sup> *Id.* (reporting that the trust fund had only raised \$8.7 million as of 2018).

<sup>127</sup> *See supra*, Part V.A.

<sup>128</sup> *International Human Rights Law*, *supra* note 15.

<sup>129</sup> Letter from Leilani Farha et al., *supra* note 60, at 7.

<sup>130</sup> RESTATEMENT (SECOND) OF TORTS § 901 (1979).

<sup>131</sup> CRYER, *supra* note 14.

<sup>132</sup> *Id.* at 38–42.

Criminal accountability could also deter future similar conduct by peacekeeping operations, educate the United Nations about the nature and extent of the harm, and provide a means for the international community to reconcile. From a practical perspective, some criminal law systems even allow for restitution and damages for victims.<sup>133</sup>

On its face, criminal law appears to provide an acceptable, if imperfect, route for accountability for the immense harm inflicted on Haiti. In order to apply criminal law, however, the parties must be subject to the jurisdiction of a criminal court.<sup>134</sup> Typically, this consideration can be met in a variety of ways and in a variety of courts.<sup>135</sup> Individuals could face prosecution in domestic courts, and for certain crimes, in international courts or tribunals.<sup>136</sup> For MINUSTAH and the United Nations, however, finding a criminal law forum proves challenging.

### 1. *International Courts and Tribunals*

International criminal law represents a developing body of law within international law, and its overarching purposes and goals align with the outbreak in Haiti in many ways.<sup>137</sup> International criminal law primarily focuses on protecting individuals from “wide-scale atrocities.”<sup>138</sup> It seeks to hold individuals accountable for gross human rights abuses and targets “egregious conduct offending commonly shared values.”<sup>139</sup> Prosecuting MINUSTAH for its actions related to the cholera outbreak would serve those goals. In bringing cholera to Haiti, MINUSTAH potentially violated Haitians’ fundamental human rights to water, sanitation, and health.<sup>140</sup> These alleged violations resulted in over 10,000 deaths and \$2.2 billion in damages.<sup>141</sup> Particularly appalling, MINUSTAH forces committed these violations against the backdrop of Haitian instability and vulnerability caused by the earthquake that had devastated the nation only months earlier.<sup>142</sup> Entering a vulnerable situation in the role of helper and instead

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133 *Id.* at 459–61.

134 *Id.* at 49–68.

135 *Id.*

136 *See generally id.* at 47–68 (explaining the different ways domestic and international courts can assert jurisdiction over individuals for crimes).

137 *See, e.g., Evolution of International Criminal Justice*, INTERNATIONAL CRIMINAL COURT PROJECT, <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Aug. 21, 2021) (describing the developments in establishing international criminal law mechanisms).

138 CRYER, *supra* note 14, at 3.

139 *Id.* at 3–4 (quoting M. Cherif Bassiouni, *International Crimes: The Ratione Materiae of International Criminal Law* in M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 134–35 (3d ed. 2008)).

140 Letter from Leilani Farha et al., *supra* note 60, at 5.

141 *See supra* Part III.

142 CNN Editorial Research, *supra* note 44.

recklessly creating a massive public health disaster certainly seems to “offend[] commonly shared values.”<sup>143</sup>

Despite a potential fulfillment of international criminal law’s purposes in an application to the cholera outbreak, the crimes would need to meet certain legal requirements to gain access to international courts. Historically, international criminal courts have been established in response to and to prosecute particularly grave crimes.<sup>144</sup> The Allies created the Nuremberg and Tokyo and the International Military Tribunals in the aftermath of the Second World War to prosecute conspiracy, crimes against peace, war crimes, and crimes against humanity.<sup>145</sup> The International Criminal Tribunal for the Former Yugoslavia was created to respond to large-scale violations of international law, including sexual offenses and ethnic cleansing.<sup>146</sup> The tribunal had jurisdiction over and sought to punish “war crimes, crimes against humanity and genocide.”<sup>147</sup> The Security Council established the International Criminal Tribunal for Rwanda in reaction to widespread attacks and killings of Tutsis and had jurisdiction over genocide, crimes against humanity, and war crimes.<sup>148</sup> In contrast, no criminal court or tribunal has been created for Haiti, and given the United Nations’ unwillingness to accept responsibility, it is unlikely that one will be established.

Even without a Haitian tribunal, justice for the cholera outbreak could be pursued through the International Criminal Court (ICC). The ICC serves as a permanent court with worldwide geographic jurisdiction.<sup>149</sup> States negotiated and established the Court with the intent to “put an end to impunity for the perpetrators” of the “most serious crimes of concern to the international community.”<sup>150</sup> The Court’s purpose was and is to “guarantee lasting respect for and the enforcement of international justice.”<sup>151</sup> With its broad reach and goal of punishing perpetrators and holding violators to account, the ICC represents an appealing forum for Haitian victims to pursue justice for the cholera outbreak. However, several legal obstacles likely bar the victims from pursuing their claims at the Court.

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143 See CRYER, *supra* note 14, at 3–4.

144 *Id.* at 115–42.

145 *Id.* at 117, 120–21.

146 *Id.* at 127–28.

147 *Id.*

148 *Id.* at 137–38.

149 *Id.* at 144.

150 Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 38544

151 *Id.*

*i. Threshold and Admissibility Issues*

In order to access the ICC, several threshold requirements must be met. The Court's jurisdiction is limited temporally, requires acceptance by a state, and extends only to certain crimes.<sup>152</sup> The situation in Haiti meets many of these requirements. MINUSTAH brought cholera to Haiti after the entry into force of the Rome Statute, so the temporal limitation is met.<sup>153</sup> The actors facing potential prosecution were over eighteen years of age at the time of the offense, meeting that requirement as well.<sup>154</sup>

The ICC also conducts a thorough admissibility evaluation, including whether national proceedings are being genuinely carried out and whether the violations meet a certain gravity threshold.<sup>155</sup> Complementary, the requirement that the ICC defer to national proceedings, is not a genuine issue in the case of MINUSTAH because no national court has conducted investigations or initiated proceedings for the cholera epidemic.<sup>156</sup>

The gravity requirement in Article 17 has been elaborated to require an evaluation of the scale of the crimes, the nature of the crimes, the manner of their commission, and their impact.<sup>157</sup> Collectively, these factors tend to prioritize crimes affecting a large number of victims, crimes involving killing or other attacks on personal autonomy, systematic or cruel crimes, crimes that abuse power or vulnerable victims, and crimes that increase suffering and vulnerability.<sup>158</sup> While it may be a close case, the situation in Haiti could meet these threshold requirements. MINUSTAH's actions affect large numbers of victims, abused their position of power over vulnerable victims by disregarding basic safety precautions, and increased the suffering and vulnerability of a population reeling from earthquake damage.<sup>159</sup> Arguably, the acts also constituted an attack on Haitians' personal autonomy by inflicting physical suffering and pain on those affected.<sup>160</sup>

The final admissibility criteria—the interests of justice—allows the Prosecutor to decline to initiate an investigation if there “are . . . substantial

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152 *See generally id.*

153 *See* CRYER, *supra* note 14, at 150.

154 *Id.*

155 *Id.* at 155–59.

156 *See infra* Part V.B.2.

157 OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 5 (Sept. 14, 2006); OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS ¶¶ 59–66 (Nov. 2013).

158 *See* CRYER, *supra* note 14, at 161.

159 *See supra* Part III.

160 *Cholera*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/cholera/symptoms-causes/syc-20355287> (last visited Aug. 21, 2021) (describing how in severe cases, “the rapid loss of large amounts of fluid and electrolytes can lead to death within hours” and in cases where patients do not receive treatment, people “can die of dehydration and shock hours to days after cholera symptoms first appear.”).

reasons to believe that an investigation would not serve the interests of justice.”<sup>161</sup> Under this prong, the Prosecutor takes into account the “gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime” in determining whether to pursue a case.<sup>162</sup> For Haiti, this again is likely a close case. While the gravity of the crimes was significant in many ways and the perpetrators likely are still young and able to stand for trial, the alleged conduct may not meet the necessary intentionality requirement. By failing to implement precautions in their movement of troops from a cholera-infected area to Haiti and by failing to ensure proper sanitation procedures at the camp, MINUSTAH and UN officials likely only acted recklessly or negligently. As a result, the ICC and the Office of the Prosecutor could reasonably determine that the interests of justice would be better served by focusing on more culpable conduct. A counterbalance to that consideration, however, might be that victims of the outbreak deserve justice and are unable to get it otherwise.

*ii. Jurisdiction Challenges*

Even if the ICC and the Office of the Prosecutor determined that the cholera outbreak met all of the admissibility criteria, the case likely would not qualify as an offense over which the Court has jurisdiction. Largely due to state sovereignty concerns and hesitancy about creating a broad, supranational criminal court, the ICC has jurisdiction over only a small number of crimes.<sup>163</sup> The intent during drafting was to only “codify existing customary law” within the Court’s jurisdiction and thus to alleviate state concerns about overbroad criminal liability.<sup>164</sup> As a result, the only crimes falling within the purview of the ICC are genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>165</sup> In order for the ICC to present a legitimate accountability option for the Haitian cholera victims, the actions of MINUSTAH and the United Nations would need to fall within the definition of one of those crimes.

War crimes, covered in Article 8 of the ICC Statute, criminalize “serious violation[s] of the laws and customs applicable in armed conflict.”<sup>166</sup> Under the Statute, war crimes include “[g]rave breaches of the Geneva

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<sup>161</sup> Rome Statute, art. 53(1)(c).

<sup>162</sup> *Id.* at art. 53(2)(c).

<sup>163</sup> Rome Statute, art. 5 (outlining the court’s jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression).

<sup>164</sup> CRYER, *supra* note 14, at 147 (noting, however, that the Statute at times pressed the boundaries of existing customary law and in other places fell short of customary law prohibitions).

<sup>165</sup> Rome Statute, art. 5.

<sup>166</sup> *Id.* at art. 8; CRYER, *supra* note 14, at 259.

Conventions,” “other serious violations of the laws and customs applicable in international armed conflict,” and in non-international armed conflicts, serious violations of Common Article 3 of the Geneva Conventions and the laws and customs applicable in armed conflicts not of an international character.<sup>167</sup> As a threshold matter, “the essential element for any war crime is the nexus with armed conflict.”<sup>168</sup> Thus, without an armed conflict, there are no war crimes. Because the situation in Haiti did not qualify as either an international armed conflict or a non-international armed conflict, war crimes prohibitions do not apply.

The crime of aggression is similarly inapplicable to the situation in Haiti. Article 8*bis* of the ICC Statute defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations.”<sup>169</sup> On its face, this provision does not cover the actions of MINUSTAH or the United Nations in Haiti, and the ICC cannot claim jurisdiction based on this crime.

Broadly speaking, genocide is the “denial of the right of existence of entire human groups.”<sup>170</sup> Within Article 6 of the Rome Statute, genocide is defined as actions targeted against a “national, ethnical, racial or religious group” with an intent to “destroy, in whole or in part” the group.<sup>171</sup> These acts include “killing members of the group,” “causing serious bodily or mental harm to members of the group,” “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” “imposing measures intended to prevent births within the group,” or “forcibly transferring children of the group to another group.”<sup>172</sup> While MINUSTAH’s actions arguably caused serious bodily and mental harm to members of a national group, other crucial elements of genocide were not met. In particular, genocide is “marked by the subjective *mens rea*” requirement.<sup>173</sup> It requires that the perpetrator acted with a specific intent to destroy the group.<sup>174</sup> Because the failure to implement precautionary and preventative measures was at worst reckless, this *mens rea* standard is likely not met. Thus, the cholera outbreak likely does not qualify as genocide under the Rome Statute.

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167 Rome Statute, art. 8.

168 CRYER, *supra* note 14, at 270.

169 Rome Statute, art. 8*bis*.

170 G.A. Res. 96(1), at 188 (Dec. 11, 1946).

171 Rome Statute, art. 6.

172 *Id.*

173 CRYER, *supra* note 14, at 208.

174 Rome Statute, art. 6.

Crimes against humanity provide the final possible basis for ICC jurisdiction. The Statute defines crimes against humanity as murder, extermination, enslavement, deportation or forcible population transfer, imprisonment or other deprivation of physical liberty, torture, rape or other sexual violations, persecution against a group, enforced disappearances, apartheid, or other inhumane acts of a similar character “when committed as part of a widespread or systematic attack directed against any civilian population.”<sup>175</sup>

The scope and elements of crimes against humanity under the Statute offers a glimmer of hope for Haiti’s cholera victims. Unlike war crimes, it does not require a connection or nexus to armed conflict.<sup>176</sup> Further, Article 7 does not require a discriminatory purpose.<sup>177</sup> Although reckless or negligent disregard of necessary precautions does not appear within the Statute, it arguably could fall under Article 7(k) which finds that “other inhumane acts of a similar character” can qualify as crimes against humanity.<sup>178</sup> While it appears to be a plausible argument, it is likely undermined with the additional requirement that those “other inhumane acts” be committed “intentionally [to] caus[e] great suffering . . . .”<sup>179</sup> No examination or investigation of the facts surrounding the cholera outbreak suggests that MINUSTAH or the United Nations acted with an intent to bring cholera to Haiti.<sup>180</sup> Further, crimes against humanity focus on acts committed “as part of a widespread or systematic attack,” a standard that has been interpreted in the context of other international tribunals to require an organized, large-scale attack.<sup>181</sup> Such a standard is likely not met in the context of Haiti’s cholera epidemic.

The ICC’s *mens rea* requirements for both genocide and crimes against humanity appear to bar the prosecution of crimes committed in the context

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<sup>175</sup> *Id.* art. 7.

<sup>176</sup> CRYER, *supra* note 14, at 231.

<sup>177</sup> *Id.* at 232 (noting that the ICC Statute rejects such a requirement and that the ICTY and ICTR found that customary international law does not support a discriminatory intent requirement).

<sup>178</sup> Rome Statute, art. 7(k).

<sup>179</sup> *Id.*

<sup>180</sup> Cravioto et al., *supra* note 82 (finding that the outbreak was not “due to deliberate action by, a group or individual.”). Although other aspects of the report have been criticized, its finding that the outbreak was unintentional has not been questioned. *See, e.g.*, Alston, *supra* note 20 (questioning the United Nations’ stance on accountability but not questioning the finding that the outbreak was unintentional).

<sup>181</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 461–69 (Int’l Crim. Trib. for Rwanda, Appellate Chamber, June 1, 2001), *aff’g.* No. ICTR 96-4-T, Judgment, (Sept. 2, 1998) (interpreting crimes against humanity in the context of the ICTY statute). *But see* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion & Judgment, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (holding that although “isolated, random acts should not be included in the definition of crimes against humanity . . . [e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”) (citations omitted).



of Haiti's cholera outbreak. This aspect of the ICC's jurisdictional framework reflects the general principle that individuals should only be punished for conduct committed with a blameworthy state of mind.<sup>182</sup> Many legal systems, however, incorporate multiple levels of intent in their criminal systems, and these layers often include penalties for reckless conduct.<sup>183</sup> Often termed *dolus eventualis*, reckless conduct describes a perpetrator who foresees (but does not necessarily desire) possible consequences but nevertheless commits the act.<sup>184</sup> Arguably, the United Nations and MINUSTAH acted with reckless intent by importing peacekeepers from cholera-infected areas without taking proper precautions or ensuring proper sanitation facilities.<sup>185</sup> Despite its criminalization in many legal systems, the Rome Statute does not recognize recklessness as a basis for liability within the ICC's jurisdiction.<sup>186</sup> While the ICC's exclusion of liability for recklessness can be justified by its focus on "the most serious crimes" of concern to the international community,<sup>187</sup> it also results in the international court's inability to hold MINUSTAH accountable for its actions in Haiti.

Because the MINUSTAH's failures that caused the cholera epidemic do not fit into the narrow categories covered in the ICC Statute and because no other international tribunal is available, Haiti's cholera victims likely cannot pursue justice within those forums. No armed conflict was occurring during the relevant timeframe, so war crimes and crimes of aggression do not apply. No evidence gathered to this date suggests that MINUSTAH or the United Nations acted intentionally to spread cholera, so genocide similarly cannot apply. Finally, crimes of aggression may supply a narrow space for application, but the lack of widespread, planned, or systematic attack with an intent to cause harm likely undermines its application as well. As a result, the victims likely need to turn to a different forum.

## 2. Domestic Prosecutions

With international courts and tribunals unable to exercise jurisdiction over MINUSTAH and the United Nations, domestic legal systems could represent an alternative route. In fact, domestic systems have several key advantages over international mechanisms. First, while international courts and tribunals are limited in the range of crimes they can prosecute, domestic

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182 Johan Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 58-59 (2004).

183 See, e.g., Model Penal Code, § 2.02(2)(c) and (d) (AM. LAW INST., 1962).

184 Van der Vyver, *supra* note 182 at 63.

185 See *supra* Part IV.

186 See Rome Statute, art. 30.

187 *Id.* art. 1.

legal systems often include a much broader range of prohibitions in their criminal codes.<sup>188</sup>

Of particular importance to the cholera outbreak, most domestic legal systems recognize recklessness as a punishable mindset under criminal law.<sup>189</sup> The U.S. Model Penal Code, for example, states that

a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct . . . its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.<sup>190</sup>

Most domestic systems apply a similar standard and impose punishment for crimes committed with reckless intent.<sup>191</sup> In the case of MINUSTAH, it could be plausibly argued that the failure to implement basic precautions when moving peacekeepers constituted reckless conduct that disregarded a substantial and unjustifiable risk. Further, it could also be considered reckless to neglect basic sanitation and water treatment infrastructure at the MINUSTAH base camp. As such, domestic systems could apply their recklessness standards, and at the very least, pursue charges against those responsible for MINUSTAH's failures.

The second advantage that domestic systems have over international courts is the ability to assert jurisdiction. In some cases, more than one state can assert jurisdiction over an individual for their criminal acts, so in theory, impunity is less likely. Traditionally, states could enforce domestic laws and exert domestic jurisdiction over individuals under a variety of rationales. The territoriality principle allows states to exercise jurisdiction over actions, events, and individuals on their territory.<sup>192</sup> The nationality, or active nationality, principle allows states to regulate the actions of a state's nationals abroad.<sup>193</sup> States sometimes even assert jurisdiction over crimes committed against their nationals while abroad under the passive personality principle, though the practice is more controversial.<sup>194</sup> The protective

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188 Compare Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544, with 18 U.S.C.

189 Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61(2) INT'L & COMP. L. Q. 325 (2012).

190 Model Penal Code § 2.02(2)(c) (AM. LAW INST. 1962).

191 Finnin, *supra* note 189, at 333–36 (explaining that both common law and civil law systems criminalize some variation of reckless conduct in the commission of a crime).

192 CRYER, *supra* note 14, at 52.

193 *Id.* at 53–54.

194 *Id.* at 55.

principle also allows states to exercise jurisdiction over “extra-territorial activities that threaten State security.”<sup>195</sup> Finally, universal jurisdiction, which can also be controversial in its application, allows states to assert jurisdiction “without reference to the place of perpetration, the nationality of the suspect or victim or any other recognized linking point between the crime and the prosecuting state.”<sup>196</sup> With broader jurisdiction, domestic courts facially provide a more viable alternative for Haitian justice than international courts.

*i. Status of Force Agreements*

With a variety of jurisdiction routes, domestic prosecutions seemingly provide a legitimate route to prosecution of the MINUSTAH and its import of cholera. For UN peacekeeping forces, however, unique considerations apply to domestic prosecution. Status of Forces Agreements, in particular, erect barriers to prosecution of UN peacekeepers in most contexts. SOFAs are “used widely to govern the legal status of forces deployed on foreign soil with the consent of the host State.”<sup>197</sup> UN forces are now generally subject to SOFAs, which are negotiated between the United Nations and the host state, when operating as part of a peacekeeping mission.<sup>198</sup> These agreements regulate “the legal status, privileges, and jurisdictional immunities” of UN personnel while operating in the host state.<sup>199</sup>

The United Nations’ typical practice in these agreements is to include a provision specifying that peacekeepers cannot face criminal liability in the host state.<sup>200</sup> In fact, “as far back as the United Nations Operation in the Congo . . . , [SOFAs] have invariably provided that exclusive criminal and disciplinary jurisdiction over military contingents rests with the TCC . . . .”<sup>201</sup> The UN Model SOFA, which serves as a starting point in negotiations with host states, includes a provision that “[m]ilitary members . . . of the United Nations peacekeeping mission shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [the host country].”<sup>202</sup>

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<sup>195</sup> *Id.* at 56.

<sup>196</sup> *Id.* at 56–57.

<sup>197</sup> Róisín Burke, *Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity*, 16(1) J. CONFLICT & SECURITY L. 63, 65 (2011).

<sup>198</sup> *Id.* at 66 (noting, however, that SOFAs cannot always be negotiated prior to troop deployment if the authorization came from a Security Council Chapter VII resolution or if the governing authority has collapsed in the host state).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 67.

<sup>201</sup> *Id.* at 70.

<sup>202</sup> *Id.* at 71.

*ii. Lack of Accountability in Practice*

The original intent in granting exclusive criminal jurisdiction to troop-contributing countries (TCCs) was two-fold. First, it alleviated the concerns of some TCCs that their troops would be subject to prosecution in systems “lacking adequate judicial guarantees and sufficient human rights standards.”<sup>203</sup> Second, it sought to prevent impunity by clarifying which state should claim jurisdiction in the event of a criminal act by peacekeepers.<sup>204</sup> By providing exclusive jurisdiction, the United Nations intended to encourage TCCs to take responsibility for prosecuting criminal acts, and the Secretary-General in some instances has sought assurances that these states would exercise that jurisdiction if necessary.<sup>205</sup>

Although the intent was to ensure prosecution and accountability in the home state, SOFAs and exclusive criminal liability provisions typically result in the accountability gaps they sought to avoid. In practice, these agreements often mean that peacekeepers will not face prosecution in any forum. TCCs typically do not pursue prosecution for a variety of legal and political reasons. For example, some domestic legal systems do not allow the exercise of extraterritorial jurisdiction over their nationals.<sup>206</sup> Additionally, TCCs may avoid prosecutions for political reasons and for fear of undermining “national support for contributing troops to UN peacekeeping operations.”<sup>207</sup> Further exacerbating the problem is that the United Nations often fails to follow up or pressure TCCs to begin criminal legal processes.<sup>208</sup> TCCs contribute forces to UN missions under memoranda of understanding (MOUs), and these agreements generally obligate TCCs to investigate and punish soldiers for criminal acts.<sup>209</sup> If the TCC fails to investigate, the United Nations retains the power to “initiate its own administrative investigation.”<sup>210</sup> In practice, however, the United Nations and states often ignore these obligations.<sup>211</sup> As a result, victims of criminal acts committed by UN peacekeepers often see perpetrators avoid

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<sup>203</sup> *Id.* at 71.

<sup>204</sup> *Id.* at 71-72.

<sup>205</sup> U.N. Secretary-General, *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Rep. of the Secretary-General*, ¶ 136, U.N. Doc. A/3943 (Oct. 9, 1958).

<sup>206</sup> Rosa Freedman, *UNaccountable: A New Approach to Peacekeepers and Sexual Abuse*, 29(3) EUR. J. INT'L L. 961, 969 (2018).

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

<sup>208</sup> *Id.* at 964.

<sup>209</sup> *Id.* at 972; Special Comm. on Peacekeeping Operations and Its Working Group, Revised Draft Model Memorandum of Understanding, U.N. Doc. A/61/19, Annex, June 11, 2007.

<sup>210</sup> Freedman, *supra* note 206, at 972.

<sup>211</sup> Zsuzsanna Deen-Racsmany, *The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?*, 16(2) J. CONFLICT & SEC. L. 321, 348 (2011).

responsibility. The host state is prohibited from filing charges pursuant to the SOFA, and the TCC avoids filing charges for technical, legal, or political reasons.

Haiti and the cholera outbreak incorporated many of these issues. Aligning with the United Nations' normal practice, the SOFA between Haiti and the United Nations specified that peacekeepers "shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in Haiti."<sup>212</sup> Due to that provision, Haiti had no power to exert jurisdiction over peacekeepers for criminal offenses, and peacekeepers accused of criminal conduct could only face prosecution in their home state. With Haiti unable to pursue criminal charges against the UN peacekeepers and international courts lacking jurisdiction over the alleged crimes, the only criminal accountability options for MINUSTAH were domestic prosecutions in their home states.<sup>213</sup> To date, however, no TCC has commenced an investigation or initiated a prosecution.<sup>214</sup>

## VI. HAITI EXPOSES AN ACCOUNTABILITY GAP IN INTERNATIONAL LAW

With international mechanisms lacking jurisdiction over MINUSTAH's actions, Haiti unable to prosecute under its SOFA, and TCCs unwilling to take action, Haitian victims are left without options to pursue justice. No one has been held accountable for MINUSTAH's reckless actions that brought cholera to hundreds of thousands of Haitian citizens.<sup>215</sup> Few Haitians have or apparently will receive reparations for the damage to the nation and to the victims. Perhaps most problematically, UN peacekeeping missions continue to operate around the world with little incentive to take precautions going forward.<sup>216</sup>

The construction of peacekeeping operations and the legal frameworks surrounding them create a gap in the ability of international law to hold individuals accountable for culpable acts. Human rights law does not cleanly

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<sup>212</sup> Agreement, *supra* note 113, at 261.

<sup>213</sup> *But see supra* Part V.B.1. (describing the inapplicability of the Rome Statute to Haitian peacekeeper offenses).

<sup>214</sup> *See generally*, Alston, *supra* note 54; Louise Ivers & Yodeline Guillaume, *The Price of Peace? Peacekeeping with Impunity Harms Public Health in Haiti*, 97(3) AM. J. TROPICAL MED. & HYGIENE 639 (2017) (noting further that no domestic prosecutions have been initiated for soldiers committing either public health crimes or sexual abuse crimes in Haiti).

<sup>215</sup> Katz, *supra* note 108 (discussing the victims' unsuccessful efforts to pursue accountability in various legal forums).

<sup>216</sup> *But see* Katz, *supra* note 108 (discussing public pressure for the United Nations to admit responsibility).

apply to international humanitarian actors, and human rights mechanisms have failed to pursue recourse in the face of atrocities. Although the ICC could step in to prosecute acts in egregious cases that fall within the war crimes, genocide, and crimes against humanity categories, the criminal space outside of those categories is substantial.<sup>217</sup> Peacekeepers can, and do, commit acts while on missions that fall outside of those narrow buckets and thus cannot be subject to ICC oversight.<sup>218</sup> The territorial state, historically the state most likely to pursue criminal accountability, is powerless under the jurisdiction provisions in SOFAs.<sup>219</sup> TCCs, which do have jurisdiction under those agreements, often fail to investigate or pursue charges for legal and political reasons.<sup>220</sup> The United Nations persistently fails to utilize its available tools to pressure TCCs into investigating and prosecuting crimes committed by their peacekeepers.<sup>221</sup> Under this system, international criminal law, designed to “put an end to impunity for the perpetrators” of “the most serious crimes of concern to the international community,”<sup>222</sup> consistently fails to hold UN peacekeepers accountable for their criminal actions.

#### VII. INCLUDING CONCURRENT JURISDICTION IN UN PEACEKEEPING SOFAS REPRESENTS A WORKABLE SOLUTION

As the situation in Haiti demonstrates, closing this accountability gap is essential to ensuring that individuals are held accountable for their acts and that victims have a route to pursue justice. Scholars have suggested a variety of approaches to achieve this goal. Hybrid courts, which weave together domestic and international judicial elements, have been proposed as an option to prosecute certain peacekeeper crimes.<sup>223</sup> Truth commissions, widely used in Latin America, Central and Eastern Europe, and Africa after Nuremberg but before the establishment of the ICC and other international

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217 See *supra* Part V.B.1.

218 See Freedman, *supra* note 206; Elizabeth Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7(2) WASH. U. GLOB. STUD. L. REV. 185 (2008); Sarah Lyall, *Aid Workers Are Said to Abuse Girls*, N.Y. TIMES (May 9, 2006), <https://www.nytimes.com/2006/05/09/world/africa/aid-workers-are-said-to-abuse-girls.html>.

219 See *supra* Part V.B.2.i.

220 See *supra* Part V.B.2.ii.

221 Freedman, *supra* note 206, at 972–74 (noting that the United Nations is empowered to initiate investigations if a TCC fails to do so, can repatriate soldiers or entire units for inappropriate conduct, and can “name and shame” TCCs that do not pursue criminal processes but that it rarely uses these tools).

222 Rome Statute, pmbi.

223 CRYER, *supra* note 14; Laura Dickinson, *The Promise of Hybrid Courts*, 97(2) AM. J. INT’L L. 295 (2003).

tribunals, have also been proposed by scholars.<sup>224</sup> With some variation, these commissions seek to find the truth and place victims at the center of the process.<sup>225</sup> The fundamental principles of these mechanisms are “truth, transparency, inclusivity, and accountability in the forms of apologies, reparations or other methods.”<sup>226</sup> Finally, some scholars have suggested leaning into a human rights-based approach, with an increased role of the Human Rights Council in enforcing these obligations for UN peacekeepers.<sup>227</sup>

Each of these proposed solutions contains shortcomings, however. Hybrid courts rely on “voluntary arrangements with relevant states” and lack enforcement power.<sup>228</sup> Truth commissions generally can only issue non-binding recommendations and have sometimes been criticized as exploitive of victims.<sup>229</sup> Finally, human rights law presents its own challenges. Haiti, in particular, demonstrates the difficulty in accessing human rights mechanisms and obtaining meaningful reparations.<sup>230</sup> Additionally, the United Nations’ immunity provision can make it particularly challenging to leverage human rights mechanisms when a violator acted under a UN mandate.<sup>231</sup> Notably, despite scholarly interest in and public advocacy for increased accountability of UN peacekeepers, no meaningful reforms have yet made an impact.<sup>232</sup>

#### *A. Domestic Courts Present the Best Option for Peacekeeper Accountability*

While current proposals seek to utilize alternative justice forums, a simpler solution may be available. As discussed, international courts and the ICC in particular are currently unavailable for most peacekeeper crimes.<sup>233</sup> Due to the permanent structure of the Court, the extensive negotiating history and entrenched state positions, and the Court’s resource constraints,

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224 See Freedman, *supra* note 206, at 978–80.

225 *Id.*

226 *Id.* at 978.

227 *Id.* at 980.

228 CRYER, *supra* note 14, at 199–200.

229 *Id.* at 542–46.

230 See *supra* Part V.B.1.

231 CRYER, *supra* note 14, at 542–46. See also Alston, *supra* note 20 (discussing the U.N. position on immunity regarding claims against itself).

232 See Leila Miller, *How We Found Unreported Claims of UN Peacekeeper Abuse*, FRONTLINE (July 24, 2018), <https://www.pbs.org/wgbh/frontline/article/how-we-found-unreported-claims-of-un-peacekeeper-abuse/>; UN: *Stop Sexual Abuse by Peacekeepers*, HUMAN RIGHTS WATCH (Mar. 4, 2016), <https://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers>; Skye Wheeler, *UN Peacekeeping Has a Sexual Abuse Problem*, HUMAN RIGHTS WATCH (Jan. 11, 2020), <https://www.hrw.org/news/2020/01/11/un-peacekeeping-has-sexual-abuse-problem#>.

233 See *supra* Part V.B.1.

it is unlikely that the Court's jurisdictional scope will change or broaden to encompass peacekeeper crimes.<sup>234</sup>

However, domestic legal systems require little or no change in order to prosecute most of these crimes. TCCs often fail to pursue these crimes for complex legal and political reasons,<sup>235</sup> but the territorial state typically has significant incentive to pursue criminal charges. The territorial or host state would experience the same drivers to pursue charges against peacekeepers as it does in traditional criminal justice. In particular, the territorial state would likely want to pursue criminal charges in order to punish wrongdoers, vindicate the rights of victims, and deter future similar conduct.<sup>236</sup> Currently, the only bar from territorial state prosecution is the exclusive jurisdiction for TCCs contained in the SOFAs these states have with the United Nations<sup>237</sup> As a practical matter, altering this jurisdiction approach within these SOFAs is much easier to achieve than enacting other proposed solutions. Although there are political challenges, modifying the United Nations' approach to exclusive jurisdiction may represent the most accessible solution to UN peacekeeper impunity.

#### *B. NATO SOFAs Provide an Alternative Approach*

While UN SOFAs have retained the exclusive TCC jurisdiction, NATO takes a different approach. In developing its SOFA in 1951, NATO departed from exclusive criminal jurisdiction in favor of more restricted immunity.<sup>238</sup> NATO's SOFA grants two distinct forms of jurisdiction—exclusive and concurrent—“depending on whether the act” of a peacekeeper “is a military or criminal offence.”<sup>239</sup> In the case of a military offense, the TCC “retains exclusive jurisdiction.”<sup>240</sup> When a peacekeeper engages in criminal conduct, however, the calculus changes. When the underlying act is criminal under the laws of only the host state, the host state can claim jurisdiction.<sup>241</sup> When the underlying act is criminal under the laws of both the host and sending state, either state can assert jurisdiction.<sup>242</sup> This approach represents a sensible solution to the problem of non-prosecution. TCCs retain large exclusive authority of their troops for military actions but share control over criminal conduct.

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234 See CRYER, *supra* note 14, at 144–48.

235 See *supra* Part V.B.2.ii.

236 CRYER, *supra* note 14, at 30–61.

237 See *supra* Part V.B.2.i.

238 Burke, *supra* note 197, at 76.

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*



The United Nations has not adopted this approach in SOFAs governing peacekeeping operations. This has largely been rationalized by highlighting the differences between NATO troops and UN peacekeepers. NATO's SOFA "was devised to deal with the permanent station of allied forces" and rests on reciprocity.<sup>243</sup> UN forces, in contrast, are often not allied or coordinating with the host state.<sup>244</sup> Further, UN peacekeepers' command and control structures, decentralized disciplinary authority, and international mandate arguably distinguish the forces sufficiently from NATO forces to justify different approaches.<sup>245</sup>

Despite those differences, however, the ineffectiveness of the current UN SOFA jurisdiction approach requires action. Notably, the "legal framework governing UN operations does not seem to have foreseen difficulties with respect to the grant of such absolute immunity from criminal jurisdiction in the host State."<sup>246</sup> It appears that the UN approach intended to address concerns about peacekeeper safety and protection, but it does not reflect a reasoned analysis and evaluation of peacekeeper impunity. As impunity concerns have arisen, the United Nations should re-examine its approach. The NATO SOFA represents a reasonable compromise in the face of realized concerns about peacekeeper criminality and lack of accountability.

*C. United Nations' Current SOFA Alleviates Political Concerns but Should be Modified*

UN peacekeeping operations rely on the contribution of forces from member states. These troops "are first and foremost members of their own national armies and are then seconded to work under the command and control of the UN."<sup>247</sup> Currently, UN missions involve almost 100,000 uniformed personnel from over 120 countries.<sup>248</sup> Member states contribute troops for a variety of reasons including status and power as well as financial incentives.<sup>249</sup> Despite those incentives, states are reluctant to expose their troops to criminal liability in other legal systems.<sup>250</sup> In response to those

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<sup>243</sup> *Id.* at 77.

<sup>244</sup> *Id.* at 78.

<sup>245</sup> *Id.* at 77.

<sup>246</sup> *Id.* at 79.

<sup>247</sup> *Military*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/military> (last visited Apr. 19, 2020).

<sup>248</sup> *Id.*

<sup>249</sup> Freedman, *supra* note 206, at 973.

<sup>250</sup> Burke, *supra* note 197, at 79. See also, Ryan Synovitz, *Explainer: Why Does the U.S. Have It Out for the International Criminal Court?*, RADIOFREEEUROPE (Sept. 11, 2018), <https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court->

concerns and in an attempt to maintain its ability to gather troops when needed, the UN SOFA represents a compromise. The United Nations allows TCCs to retain exclusive jurisdiction over its troops, and the United Nations gets to maintain its source of peacekeeping might.

In spite of this political hurdle, the United Nations should seek to modify its approach to jurisdiction within its SOFAs. First, the current approach has proven disastrous and has allowed serious crimes to go without punishment.<sup>251</sup> Second, NATO's SOFA approach does not allow territorial states to assert jurisdiction over every peacekeeper act. Territorial states can only assert jurisdiction over acts that are criminal under only its law and potentially acts that are criminalized under the law of both the territorial state and sending state.<sup>252</sup> Finally, SOFAs and MOUs that govern the relationships between the United Nations, host states, and TCCs are contractual agreements that can be modified to meet the needs of individual situations.<sup>253</sup> Thus, if a particularly powerful TCC insists on exclusive jurisdiction and the peacekeeping operation depends on its involvement, the SOFA could be modified. The baseline from which the United Nations starts each negotiation, however, should be concurrent jurisdiction. In practice, this may result in the vast majority of agreements retaining the concurrent jurisdiction provision, which would substantially narrow the current accountability gap.

### VIII. CONCLUSION

Under the current international legal framework, UN peacekeepers often operate with impunity for their actions in host states. Human rights law has proven incapable of redressing violation and holding violators accountable. In theory, international criminal law could provide an alternative accountability route. However, the ICC's relatively narrow jurisdiction, the inability of host states to assert jurisdiction over peacekeepers, and the reluctance of TCCs to prosecute their troops for crimes committed on UN missions only adds to this accountability gap. By adopting NATO's approach and allowing concurrent jurisdiction over criminal offenses, the United Nations could respond to the reality that peacekeepers sometimes commit atrocities that result in impunity. Taking this approach would narrow the current accountability gap, better serve the

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/29484529.html (explaining that the U.S. opposition to the ICC hinges on its concern that its military personnel will be subject to biased prosecution without constitutional safeguards).

251 See *supra* note 232 and corresponding text.

252 See *supra* Part VII.B (explaining that host states can still assert jurisdiction over criminal acts committed by peacekeepers when concurrent jurisdiction applies).

253 Burke, *supra* note 197, at 76 (noting that jurisdiction terms vary among SOFAs).

purposes of international law, and allow the United Nations to maintain its credibility around the globe.

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