



# Responding to the Introduction of Cholera to Haiti: Policy Options

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## I. Introduction

The purpose of this paper is to provide concrete options for responses to the introduction of cholera to Haiti, which reflect international law and standards on reparations applicable to the current context. The paper seeks to draw attention to comparative case studies and best practice approaches that may be helpful to those engaged in finding appropriate responses.

REDRESS is an international human rights organisation with a mandate to assist survivors of torture and related international crimes to obtain justice and other forms of reparation for the harm suffered.<sup>1</sup> REDRESS is contributing this analysis on the basis of its expertise in devising and analysing redress mechanisms in a variety of contexts in different parts of the world and its understanding of the range of procedural and other practical challenges associated with developing, agreeing to and implementing complex reparations programmes involving numerous victims and other stakeholders.

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<sup>1</sup> [www.redress.org](http://www.redress.org)

The bulk of the paper explains the principles which should guide the policy and other responses and explains in detail the most crucial aspects of a comprehensive response. Each of these aspects is explained in turn, considering the rationale, the operational challenges and providing where applicable, examples of past practice.

The paper is not intended to serve as a blueprint for a reparations framework. In contrast, the overarching purpose is to assist those engaging in discussions to have a better understanding on the relevant concepts and challenges so that such discussions are as practical as possible. The paper also helps identify certain processual steps, such as how to progress consultations with victims and the wider affected communities on remedies and related justice responses and areas which may warrant further data collection to determine the full extent of economic losses.

## II. Background

A cholera outbreak erupted in Haiti in October 2010. The outbreak was first detected in central Haiti's Artibonite Valley but eventually spread throughout the country. It is understood to have resulted from improper waste management on a United Nations military base where contingents from Nepal serving with the UN Stabilization Mission in Haiti (MINUSTAH) were stationed, that allowed untreated sewage to flow into Haiti's river system. The river system was contaminated with a pathogenic strain of current South Asian type *vibrio cholerae*. The contingents were not tested for cholera (nor was such testing required) prior to deployment, nor was there a system in place of vaccinations, prophylactic antibiotics, or other medical treatments, to prevent the foreseeable transmission of cholera from persons coming to Haiti from cholera-endemic regions such as Nepal.

Data regarding the causes of the cholera outbreak have been scientifically examined and recorded in a number of reports.<sup>2</sup> These reports, when reviewed as a whole, provide a sufficiently clear and convincing picture that a combination of United Nations' actions and inactions were the proximate cause of the epidemic and its' spreading, and this is the operating assumption of this report. However, the UN has not publicly acknowledged its responsibility, nor has the Organization agreed for this matter to be independently adjudicated.

The cholera epidemic has to date led to the deaths of at least 9,000 people and resulted in the sickness of more than 770,000 others.<sup>3</sup> Recent reports suggest that the actual death toll may far exceed the officially recorded mortality, given inadequacies in surveillance systems.<sup>4</sup> A severe lack of clean drinking water and poor sanitation systems makes it difficult to eliminate the disease, and the numbers of persons affected in the country continue to increase.

In Haiti, UN operations are complex with a range of UN agencies, programmes and funds in operation in the country, particularly in the aftermath of the 2010 earthquake. MINUSTAH was established on 1 June 2004 by Security Council resolution 1542 with civilian and military components. The mandate has evolved over time and has a variety of functions including

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<sup>2</sup> These include: A Cravioto, C Lanata, D Lantagne, G Nair, "Final report of the independent panel of experts on the cholera outbreak in Haiti", *New York, NY. United Nations*, 4 May 2011, available at: <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>; RR Frerichs, PS Keim, R Barraix and R Piarroux, "Nepalese origin of cholera epidemic in Haiti" (2012) 18(6) *Clinical Microbiology and Infection*, E158-E163; D Lantagne, G Balakrish Nair, C Lanata and A Cravioto, "The Cholera Outbreak in Haiti: Where and how did it begin?" (2013) 379 *Current Topics in Microbiology and Immunology*, 145-164, available at: <http://www.ijdh.org/wp-content/uploads/2013/07/The-Cholera-Outbreak-in-Haiti-Where-and-How-it-Begin.pdf>

<sup>3</sup> Statistics are available on the website of the Haitian Ministry of Population and Public Health. February 2016 statistics: <http://mspp.gouv.ht/site/downloads/Rapport%20Web%2009.02.2016-Avec-Courbes-departementales.pdf>

<sup>4</sup> FJ Luquero, M Rondy, J Boncy, A Munger, H Mekaoui, E Rymshaw et al, "Mortality rates during cholera epidemic, Haiti, 2010-2011". (2016) 22(3) *Emerging Infectious Diseases* 410, available at: [http://wwwnc.cdc.gov/eid/article/22/3/14-1970\\_article](http://wwwnc.cdc.gov/eid/article/22/3/14-1970_article)

support to disaster relief and recovery, legal and institutional reforms and human rights. MINUSTAH's activities are regulated on the ground in the Status of Forces Agreement agreed between Haiti and the UN,<sup>5</sup> which outlines the legal framework under which MINUSTAH operates, its roles and responsibilities and how to resolve disputes.

Following the outbreak of cholera in Haiti, the UN has taken some humanitarian efforts to quell the spread of the disease and assist victims, in coordination with other actors. For instance, agencies such as UNICEF and the Pan American Health Organization (PAHO) have provided financial, operational and technical assistance to the National Cholera Coordination Unit, hosted by the Ministry of Health. MINUSTAH's Civil Affairs Section supports the implementation of the Government of Haiti's cholera elimination plan through the implementation of Quick Impact Projects and institutional support at the departmental and local level. However, arguably the steps have been inadequate and only a fraction of the funding needed to support the 10-year national plan to eliminate cholera is in place. There appears to be an urgent need for increased resources and to determine what complementary steps should be taken to save the lives of those who continue to contract the disease and to eliminate the spread of the disease (as part of what would be required to restore the situation to the way it was before cholera was introduced to Haiti).

In contrast, some other (in)actions by the UN have been counter-productive to a just and adequate response, including the failure to set up an independent claims commission as required by the Status of Forces Agreement signed with Haiti; the failure to agree to submit the victims' allegations to a bespoke process of independent adjudication or arbitration; and the failure to otherwise settle the claims or provide remedies to the victims. Furthermore, the public denial of responsibility by the United Nations appeared disingenuous to victims and wider Haitian communities in light of the significant scientific evidence which continued to be reported by independent experts, including those commissioned by the UN.

### III. Rationales for a robust response

An adequate and effective response is needed to respond to this tragedy, on legal, policy and humanitarian grounds.

**The UN's legal responsibility is engaged by the introduction of cholera to Haiti.** The UN's introduction of cholera to Haiti caused significant harm with continuing ramifications, and constituted negligence and reckless indifference that engages the UN's legal responsibility. The UN also arguably breached the Status of Forces Agreement between the UN and Haiti insofar as it violated local laws regarding environmental management and failed to adequately cooperate with the Haitian government with respect to sanitation management and control of communicable diseases.<sup>6</sup> The UN also acted inconsistently with the Organization's health, environmental and human rights obligations owed to Haitians. The conduct was carried out by the UN acting in an official capacity and within its overall functions and constituted an internationally wrongful act in accordance with the International Law Commission's draft *Articles on the Responsibility of International Organizations*.<sup>7</sup> In accordance with that text, the commission of an internationally wrongful act gives rise to responsibility and an obligation on the international organization to make full reparation for the injury caused, which includes 'any

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<sup>5</sup> "Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti," (SOFA), 9 July 2004, 2271 UNTS 235.

<sup>6</sup> SOFA, Articles 5, 23.

<sup>7</sup> UN ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, Arts 3 - 5.

damage, whether material or moral, caused by the internationally wrongful act of an international organization'.<sup>8</sup>

The privileges and immunities that the UN possesses do not frame responsibility or the remedial and reparation obligations flowing from such responsibility, they simply place a limitation on the venue where these issues can be determined. The *Convention on the Privileges and Immunities of the United Nations* (CPIUN) requires the UN to establish mechanisms for the settlement of disputes of a private law character or involving officials who benefit from immunities,<sup>9</sup> and the Status of Forces Agreements specify that in the context of peacekeeping, claims for personal injury, illness or death shall be decided by a standing claims commission. Indeed, the UN Legal Counsel has stressed that “[a]s a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities.”<sup>10</sup> But the UN is not only responsible to give a remedy for private law claims. It is responsible to give a remedy for any type of breach which flows naturally from its acts and omissions, particularly when it is operating in a position of power or control, as in a peacekeeping context. The UN must ensure that its immunity does not equate with a lack of responsibility. This is consistent with the approach taken by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.  
The United Nations may be required to bear responsibility for the damage arising from such acts.<sup>11</sup>

Thus, even when the UN is immune from legal process, its obligation to afford reparations as a result of its responsibility remains engaged. As such, and in keeping with the UN’s forays into areas not anticipated at the time of the adoption of the CPIUN, it should put in place appropriate settlement procedures to deal with any matters which may engage its responsibility. Arguably, it must do so in order to ensure its continued ability to carry out its functions faithfully in accordance with the UN Charter.

**Accepting responsibility and affording reparation are appropriate policy responses to the tragedy that would help restore the Organization’s credibility.** The UN should not act outside of the law or be seen to be doing so. To do otherwise would contradict the overall purposes of the Organization in accordance with the UN Charter. It produces the contradictory and unhelpful conundrum whereby the values the UN seeks to instil in others are ones that it does not espouse for itself. This can have the result of de-legitimising the UN and thereby impeding it from achieving the overall goals of its mandate. In Haiti, the UN’s refusal to take responsibility for its role in introducing cholera has undermined MINUSTAH’s credibility with the local population.<sup>12</sup>

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<sup>8</sup> Ibid, Art 31.

<sup>9</sup> *Convention on the Privileges and Immunities of the UN* (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 [CPIUN] Art VIII, s 29.

<sup>10</sup> OLA, “Memorandum from the Office of Legal Affairs to the Controller on the Payment of Settlement of Claims” (2001) UN Jurid YB 381.

<sup>11</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 (Cumaraswamy case) para 66.

<sup>12</sup> International Crisis Group, *Towards a Post-MINUSTAH Haiti: Making an Effective Transition*, Latin Am. & Caribbean R. No. 44, 10-13 (2 Aug 2012) [http://www.crisisgroup.org/~media/Files/latin-america/haiti/044-towards-a-post-minustah-haiti-making-an-effective-transition.pdf](http://www.crisisgroup.org/~/media/Files/latin-america/haiti/044-towards-a-post-minustah-haiti-making-an-effective-transition.pdf).

Increasingly, the imperative of responsibility has been recognised by numerous UN independent experts who have sought to impress upon the Secretary-General the need for action.<sup>13</sup> Five UN human rights mandate-holders have recently stressed that the UN's failure to engage with the claims "undermines the reputation of the United Nations, calls into question the ethical framework within which its peace-keeping forces operate, and challenges the credibility of the Organization as an entity that respects human rights."<sup>14</sup> The UN Independent Expert on Haiti has repeatedly urged that a 'commission for redress should be created, as a matter of urgency, to quantify the harm done, establish compensation, identify responsible parties, halt the epidemic and take other measures in line with the principles adopted by the General Assembly in December 2005.'<sup>15</sup>

**Affording reparation, including by addressing the ongoing water and sanitation issues, is consistent with the UN's humanitarian ethos.** The UN, including its specialised agencies such as the World Health Organization, is often promoting good health and acting and coordinating humanitarian responses in complex emergencies including fast-spreading epidemics, in accordance with its mandate.<sup>16</sup> This corresponds with increasing recognition that access to safe drinking water and sanitation is a human right, to sustain life and health.<sup>17</sup> A comprehensive response to the cholera crisis is therefore consistent with the UN's broader mandate and historical role of leading such initiatives.

## IV. Principles to guide the response

The response to the allegations should be guided by international law and standards which engage the United Nations and which are appropriate in light of the alleged internationally wrongful acts committed and the harms they engendered. There is a wide body of law and standards which should frame the response, including:

i) ***The International Law Commission's draft Articles on the Responsibility of International Organizations***

These were adopted by the ILC in 2011. They set out a general framework of responsibility for international organizations who are responsible for an internationally wrongful act (ie, when conduct consisting of an action or omission is attributable to that organization under

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<sup>13</sup> As the UN Special Rapporteur on Haiti has stated, "the diplomatic difficulties surrounding this issue must be overcome in order to assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided. Some clarifications as to what really happened need to be given and, if necessary, those responsible for the tragedy should be punished, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law mentioned earlier (para. 63). The United Nations should be the first to honour these principles. In this connection, the independent expert endorses the words of his predecessor, who, in his most recent report, noted that "while the independent expert deplores the way that certain organizations have exploited the issue for political ends, he is aware of the need that victims or their families have expressed to know the truth and perhaps even to be given compensation. He recalls that silence is the worst response" (A/HRC/22/65, para. 89)." UN Human Rights Council, "Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón" (7 February 2014) UN Doc A/HRC/25/71, para 77. See also, UN Human Rights Council, Special Rapporteur on adequate housing, Independent Expert on the situation of human rights in Haiti, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the human right to safe drinking water and sanitation, "Joint Allegation Letter to the Secretary-General" (25 September 2014) <[www.scribd.com/doc/261396799/SR-Allegation-Letter-2014](http://www.scribd.com/doc/261396799/SR-Allegation-Letter-2014)>.

<sup>14</sup> Letter from Special Rapporteurs to the Secretary-General, 23 October 2015, available at: <https://www.documentcloud.org/documents/2745778-Haiti-2nd-Rapporteur-Letter-Oct-2015.html>.

<sup>15</sup> Report of the Independent Expert on the situation of human rights in Haiti, UN Doc A/HRC/31/77, 12 February 2016, para 102.

<sup>16</sup> Art 1(3) UN Charter.

<sup>17</sup> See, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) "The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)", UN Doc E/C.12/2002/11 20 January 2003; Commission on Human Rights, "Realization of the right to drinking water and sanitation: Report of the Special Rapporteur, El Hadji Guissé", UN Doc E/CN.4/Sub.2/2005/25, 11 July 2005.

international law and constitutes a breach of an international obligation of that organization).<sup>18</sup> Arguably, the UN committed an internationally wrongful act when it negligently introduced cholera to Haiti in disregard for Haitians' health and lives and by failing to establish a standing claims commission or otherwise resolving the claims in accordance with its obligations under the CPIUN and Status of Forces Agreement with Haiti. Any organisation that is responsible for an internationally wrongful act is automatically obligated, as a direct consequence of the breach, to: **cease that act**, if it is continuing; **offer appropriate assurances and guarantees of non-repetition**, if circumstances so require; and **make full reparation** for the injury caused by the internationally wrongful act which shall take the form of **restitution, compensation and satisfaction, either singly or in combination**. Injury includes **any damage, whether material or moral, caused by the internationally wrongful act of an international organization**.<sup>19</sup> These Articles concentrate on the obligations owed by the responsible international organizations to States or other international organizations who suffer harm. The Articles do not focus on obligations owed directly to injured individuals. However, Article 33(2) makes clear that: "This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization."

ii) **International law and standards regarding the right to a remedy and reparation for breaches of human rights**

Arguably, the UN breached Haitians' rights to life, health, fair trial and an effective remedy, among other potential rights.<sup>20</sup> The UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* provide the clearest iteration of remedies and reparation for all violations of human rights that can be considered to be 'gross',<sup>21</sup> including violations of the right to life. Importantly, such remedies apply not only to extra-judicial executions or other arbitrary deprivations of life; they also apply to instances when there has been a failure to protect and preserve the right to life (positive obligation).<sup>22</sup> Thus, any person

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<sup>18</sup> See Article 4 of the draft Articles, above n. 7.

<sup>19</sup> Ibid, Articles 30, 31, 34.

<sup>20</sup> The independent Human Rights Advisory Panel in Kosovo has occasion to decide a case raising extremely similar issues - a case concerning UNMIK's alleged responsibility for subjecting Roma and other minority groups to lead poisoning as a consequence of housing the communities in a site known to be toxic, and which resulted in numerous deaths and other health consequences. The Advisory Panel determined that UNMIK was responsible for violating the claimant's rights to life, freedom from inhuman or degrading treatment, private and family life, health and the right to an adequate standard of living, prohibition of discrimination, women's rights, children's rights. Breaches to the right to fair trial and an effective remedy were canvassed under other headings. See HRAP, *N.M. and Others v. UNMIK*, Case No. 26/08, OPINION, 26 February 2016.

<sup>21</sup> Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Professor Theo van Boven, the principal author of the Basic Principles and Guidelines, has provided the following comment on the use of the term 'gross': "It remains true, however, that the terms "gross violations" and "serious violations" are not formally defined in international law. It must nonetheless be understood that in customary international law "gross violations" include the types of violations that affect in qualitative and quantitative terms the core rights of human beings, notably the right to life and the right to physical and moral integrity of the human person. It may generally be assumed that the non-exhaustive list of gross violations cited in the above mentioned General Principle 1 of the first version of the Basic Principles and Guidelines falls in this category. But also deliberate, systematic and large-scale violations of economic and social rights may amount to gross violations of human rights and serious violations of international humanitarian law. ... As pointed out, in various stages of the development of the Basic Principles and Guidelines reservations were expressed regarding the limitations to "gross violations" and "serious violations" with the argument that as a general rule all violations of human rights and international humanitarian law entail State Responsibility and corresponding legal consequences. This was generally acknowledged but did not preclude opting for a narrower approach: "gross" and "serious" violations. However, in order to rule out any misunderstanding on the matter, the following phrase was included in article 26 on non-derogation: "- it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law" (italics added)." See, Theo van Boven, "Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines", in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff, 2009) 32-34.

<sup>22</sup> Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs), paras. 152, 155.

or group victim of a violation of the right to life or health, including the right to water, should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.<sup>23</sup>

In particular and most relevant to the case at hand, there is an obligation to provide those who claim to be victims with **equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation**. In addition, the Basic Principles recognise that **victims should be treated with humanity and respect for their dignity and human rights**. This has been interpreted to require a victim-centred approach, in which victims are provided with information and consulted about their views. Due consideration should be given to victims to determine for themselves what forms of reparation are best suited to their situation. Also, there is an obligation to afford **adequate, effective and prompt reparation which should be proportional to the gravity of the violations and the harm suffered**. Reparation should entail as appropriate **restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition**. These different forms should be applied holistically and without tokenism; the goal is to devise reparations to best approximate and respond to the variety of harms suffered. Where a violated right cannot be restored, compensation should be sufficient to remedy all the consequences of the violation that took place, based on a prudent estimate of pecuniary damages and assessment of moral damages on the basis of equity.<sup>24</sup> Even if it is impossible to fully restore the situation of the victims, reparations must seek to approximate the various harms as closely as possible. The Human Rights Committee has noted that, “although compensation may differ from country to country, adequate compensation excludes purely ‘symbolic’ amounts of compensation.”<sup>25</sup> It has also referred to the duty to provide “appropriate” compensation.<sup>26</sup> Typically a variety of forms will be necessary to repair adequately the breach, including compensation and measures of acknowledgment and non-recurrence. Usually, in large-scale cases, victims will have suffered both individually and collectively, and these two separate facets of victimisation should be reflected in awards. The victims’ position – such as a context of poverty, discrimination or marginalisation, which may have contributed to the violation, should be taken into account in determining appropriate forms of reparation. **Reparation should not be discriminatory**.

As the UN Independent Expert on the Situation of Human Rights in Haiti has stated,

the diplomatic difficulties surrounding this issue must be overcome in order to assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided. Some clarifications as to what really happened need to be given and, if necessary, those responsible for the tragedy should be punished, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian

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<sup>23</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2000/4, 11 August 2000, para 59; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, 20 January 2003, para. 55; Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8), vol I: *Resolutions adopted by the Conference*, resolution 1, annex II.

<sup>24</sup> Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Interpretation of the Compensatory Damages Judgment, 17 August 1990, para. 27.

<sup>25</sup> UN Human Rights Committee, *Albert Wilson v the Philippines*, Communication no. 868/1999, UN Doc CCPR/C/79/D/868/199 (2003).

<sup>26</sup> UN Human Rights Committee, *Bozize v Central African Republic*, Communication no. 449/1990, UN Doc CCPR/C/50/D/428/1990 (1994).

Law mentioned earlier (para. 63). **The United Nations should be the first to honour these principles.** (emphasis added)

**iii) Legal and equitable standards applicable to reparation claims involving large numbers of claimants**

In several jurisdictions, a large number of individualized claims will be **aggregated, consolidated or brought by an association on behalf of the group**, when there are a large number of potential claimants making an individualised claim impractical, where there is a common question of law or fact that is central to the validity of and capable of resolving the central issue common to each of the claims, where the claims or defenses of the named plaintiff are typical of those of everyone else in the class and the named plaintiff must fairly and adequately represent the interests of the absent class members. In such cases, the right to individualised treatment is pitted against other considerations; **expediency and efficiency** will reduce processing costs, potentially maximising the funds available for victims. A variety of techniques are used to value mass claims such as **use of claimant profiles or beneficiary categories, presumptions** of harm or of particular facts<sup>27</sup> or that like claims have equal value, **relaxed standards of proof, fixed or lump-sum awards**. Damages are sometimes awarded on the basis of ‘fairness’ or ‘equity’ to reduce the burden on the injured parties to prove with a high degree of specificity the harm suffered. The degree of specificity required and evidence needed to substantiate a claim will depend on the type of damages being claimed. The **cy-près doctrine** has been used to endow beneficiary groups with entitlements where a specified group cannot be found, or has ceased to exist or where collective awards or fixed lump sums are foreseen for a large number of victims, and where the extent of individual harm and suffering within a given category is immaterial.<sup>28</sup>

**iv) The UN’s past practice**

The UN’s past practise is also relevant, however it is important to note that this practise is extremely opaque and its adequacy is contested, and has not been subjected to direct independent judicial scrutiny.<sup>29</sup> As noted above, Status of Forces Agreements, including that signed with Haiti, require the UN to establish a standing claims commission to resolve claims for “personal injury, illness or death arising from or directly attributed to [the peacekeeping operation]”,<sup>30</sup> however, no such commission has ever been established.<sup>31</sup> Instead, local claims review boards have been established in peacekeeping operations and have decided some of such claims.<sup>32</sup> The Office of Legal Affairs also has settled some claims through *ex gratia* payments, negotiations, and arbitrations.<sup>33</sup> However, the General Assembly has put in place

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<sup>27</sup> Inter-American Court of Human Rights, *Aloeboetoe v Suriname*, Judgment on Reparations, 10 September 1993; *Mapiripan v Colombia*, Judgement on Merits, 15 September 2005.

<sup>28</sup> See Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff 2009).

<sup>29</sup> This is because of immunities or other jurisdictional bars. Some regional courts have indirectly considered the propriety of United Nations’ actions in the context of their assessment of State responsibility however it has been outside of the competence of those courts to make findings of liability or reparations against the Organization. See, e.g., Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 (Grand Chamber, 18 July 2013).

<sup>30</sup> Art 51, UNGA, “Model Status-of-forces Agreement for Peace-Keeping Operations” (9 October 1990) UN Doc A/45/594.

<sup>31</sup> UNGA, “Administrative and budgetary aspects of the financing of the United Nations peacekeeping” (21 May 1997) UN Doc. A/51/903, para. 8.

<sup>32</sup> Administrative and Budget Report, UN Doc A/51/389, para. 22.

<sup>33</sup> UNSG, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations*, UN Doc A/C.5/49/65 (24 April 1995).

caps to limit the recoverable amounts,<sup>34</sup> including a cap of \$50,000 except in exceptional circumstances, and subject to requisite approval; a bar on compensation in the event of 'operational necessity'; a bar to compensation for non-economic loss, such as pain and suffering or moral anguish, as well as for punitive or moral damages. The UN has also introduced a temporal limitation into the procedure before local claims review boards whereby claims must be lodged within six months 'from the time the damage was sustained, or from the time the injury was discovered, and in any event not later than one year after the termination of the mandate of the operation.'<sup>35</sup>

Very occasionally, the UN has afforded lump sum settlements for injuries attributed to it in the context of peacekeeping operations.<sup>36</sup> And, when the UN acted as territorial administrator in Kosovo, it established a Human Rights Advisory Panel to hear human rights claims from Kosovars against the UN administration and to determine liability and recommend reparations as appropriate,<sup>37</sup> though to date, aside from several *ex gratia* payments, most recommendations for reparations have not been heeded by the UN.<sup>38</sup>

## V. Policy Options: Crucial aspects of Reparations

### V.1 Compensation for pecuniary and non-pecuniary losses

#### General principles

Compensation is central to the right to an effective remedy, particularly when restoring the victim to the situation *ex-ante* is not possible. Full compensation generally implies monetary payment for physical, mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, and moral damage, and possibly costs required for legal or expert advice.

Compensation is afforded to those who suffered harm as a result of the wrongful act, including their heirs in the case of death of the primary victim(s). Typically, deference will be given to local laws to determine next of kin and beneficiaries of the victims, but particular customary practices may also be taken into account where these diverge from local law.<sup>39</sup>

According to the UN Basic Principles, compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. The recognised categories of damage will depend on the nature of the wrongful act and the types of harm suffered, including the conduct of the wrongdoer.

**Categories of damage** which may be particularly relevant to the Haiti cholera context include:

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<sup>34</sup> UNGA, "Resolution on Third-party liability: temporal and financial limitations" (17 July 1998) UN Doc A/RES/52/247.

<sup>35</sup> UNGA, "Administrative and budgetary aspects of the financing of the United Nations peacekeeping" (21 May 1997) UN Doc A/51/903, para. 20.

<sup>36</sup> UNSG, "Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals" (20 February 1965) (1965) UN Juridical Y 39.

<sup>37</sup> UNMIK, "Administrative Direction 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel" (17 October 2009). HRAP, *N.M. and Others v. UNMIK*, Case No. 26/08, OPINION, 26 February 2016 is a case in point with striking similarities to the issues at play with the introduction of cholera to Haiti. See above, fn 20.

<sup>38</sup> *Balaj and others v UNMIK*, Case no 04/07 (HRAP, 27 February 2015), para 113, also, paras 271-274. See also, HRAP, 'Annual Report' (2014) paras 75-79, [www.unmikonline.org/hrap/Eng/Documents/Annual\\_report\\_2014.pdf](http://www.unmikonline.org/hrap/Eng/Documents/Annual_report_2014.pdf).

<sup>39</sup> Inter-American Court of Human Rights, *Aloeboetoe et al. v. Suriname* (Reparations) Judgment of 10 September 1993, (Ser. C) No. 15 (1994).

- **Death:** Compensation is regularly afforded in wrongful death cases, not only extrajudicial killings but also cases where death is caused by negligence or lack of duty of care.<sup>40</sup> Compensation for wrongful death may be valued using different principles such as life expectancy, the number of dependants, the nature of the wrongful conduct which caused the death.
- **Pecuniary damage:** This includes consequential damages for the expenses of medical and psychological treatment or social services, legal expenses, transportation of victims and their next of kin, funeral and burial services, communication costs, loss of land and possessions. In cases where pecuniary damages are difficult to quantify, because of the circumstances of the case, the situation of the victims or the large numbers of victims, a range of other approaches have been used. Statistical sampling has been used to determine what a 'typical' victim would have lost, and then approximating a standard value on that basis to each victim. A lump sum payment may be awarded or agreed where there is evidence of injury, but the valuation cannot be determined with precision.<sup>41</sup> In other circumstances, material damages have been presumed on the basis of equitable principles.<sup>42</sup>
- **Future harm:** Claims are typically allowed for future consequences that are reasonably certain. Damages will not be recognised when they are too conjectural and speculative to form a sound basis for measurement, but absolute certainty is not required in establishing damage. Compensation has been paid for future medical costs, loss of livelihood, education and social benefits,<sup>43</sup> and loss of nurture and financial support (in the case of dependants). In the absence of clear evidence, sometimes lost earnings have been set based on the projected lifespan and monthly salary, using minimum wages in the State at the time of death.<sup>44</sup>
- **Non-pecuniary or moral damages:** This includes payment for distress, pain and suffering, humiliation and injury to reputation or dignity. The nature of the impugned conduct, and any evidence of psychological or related moral harm should be taken into account.<sup>45</sup> Presumed moral damages have been recognised where distress or anxiety cannot be concretely proven.<sup>46</sup>

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<sup>40</sup> The European Court of Human Rights has found a violation of the right to life and ordered just satisfaction (its version of damages) in a variety of cases concerning negligence or reckless endangerment, such as a methane explosion at a household refuse tip which was operated by a local authority [*Öneryildiz v Turkey* (Grand Chamber), App. no. 48939/99 30 November 2004; For pecuniary damages, the Court awarded USD 2,000 for funeral expenses, an aggregate of EUR 10,000 reflecting the future loss of support by the children who died in the accident, and EUR 1,500 for the loss of moveable goods in the dwelling that was destroyed. To the applicant and his three surviving children the Court awarded EUR 135,000 each by way of non-pecuniary damage]. In the case of *X v. France* considered a related issue in its analysis of a claim brought by a hemophiliac who was infected with HIV-tainted blood during a series of blood transfusions. He claimed that the authorities had been negligent in delaying to introduce regulations to protect the blood supply. In March 1992, the European Court of Human Rights upheld a decision of the Commission that the applicant's rights had been violated. It ruled that, given the precarious state of his health, French authorities should have exercised exceptional diligence to expedite his suit, thus his right to a fair trial was infringed. *X v. France*, Judgment (Merits and Just Satisfaction), App. No 18020/91, 31 March 1992.

<sup>41</sup> *Hornsby v. Greece* App. No. 107/1995/613/701, 1 April 1998, para 19.

<sup>42</sup> Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala* (2004) Series C No. 116, para. 93

<sup>43</sup> Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*, 27 November 1998, Series C No. 42, paras 140, 142.

<sup>44</sup> Inter-American Court of Human Rights, *Neira Alegría et al. Case*, 19 September 1996, Series C No. 29 paras 46-52.

<sup>45</sup> Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras* (Compensatory Damages), 21 July 1989, Series A No. 8, paras 49, 50.

<sup>46</sup> Inter-American Court of Human Rights, *Aloeboetoe et al. v. Suriname* (Reparations) Judgment of 10 September 1993, (Ser. C) No. 15 (1994), paras 71, 76 ; European Court of Human Rights, *König v. Germany*, App. No. 6232/73, 10 March 1980, para 19 ("Although applicants should as a rule quantify their claims, the Court would be failing to pay proper regard to the principle of equity imposed by Article 50 (art. 50) were it not to take into consideration the problems confronting Dr. König in this respect. Accordingly, the Court did not deem it appropriate to have Dr. König called on to plead the exact amount of reparation he was claiming.").

### **Comparative Example: September 11 Victim Compensation Fund**

The United States Congress established the September 11<sup>th</sup> Victim Compensation Fund for 9/11 victims and their families. Kenneth Feinberg served as Special Master to determine compensation amounts. The fund allowed damages for:

- Loss of earnings and employment benefits
- Medical expenses
- Replacement services
- Burial costs
- Loss of business and employment opportunities
- Non-economic losses: losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, society, hedonic damages, injury to reputation, and all other non-pecuniary losses.

The Fund established a minimum payment for each deceased victim and a minimum amount for each dependent and next of kin for pain and suffering.

To calculate compensable income, administrators averaged earnings over three years and adjusted according to average tax rates, value of employer benefits, expected remaining years of workforce participation, victim's share of household expenditures, inflation, and present value.<sup>47</sup>

**Causation:** Damages will be awarded if it can be shown that the harm was caused by the impugned conduct. Once causation is established, the wrongdoer is responsible for all harm that naturally flows from the wrongful act even though it was not foreseen at the time of the misconduct. The degree of proof required to demonstrate a causal link between the harm or loss and the misconduct will typically depend on what is being claimed. In some cases, presumptions or inferences will be used to overcome a lack of evidence which is not the fault of the claimants. But, often, when such routes are used, approximations or equitable principles are employed to determine the compensable amounts. When a claimant asserts a right to compensation for a very particular or unique type of loss that cannot be approximated, such as the loss of a business or a particular asset or property, the standards of proof on causation and harm tend to be more rigorous.

### **Comparative Example: Canadian Reparations Programme for the Indian Residential School System**

Canada's reparations programme for child abuse in the "Indian residential school" system included a fund for ongoing, set payments to any student who had lived at a school and a separate compensation system for students who could prove greater damages. Any former student could receive an initial payment of CAN\$10,000 followed by CAN\$3,000 annually thereafter. Victims of sexual and other serious abuse could seek additional compensation through the Independent Assessment Process (IAP), which required individualised proof of harm. IAP claimants could seek up to CAN\$275,000 beyond the fixed payments afforded to all students.<sup>48</sup>

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<sup>47</sup> See, Martha Chamallas, "The September 11<sup>th</sup> Victim Compensation Fund: Rethinking the Damages Element in Injury Law" 71 (2003) Tenn L Rev 51, 61; Robert M. Ackerman, "The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy", 10 (2005) Harv Negotiation L Rev 135, 150.

<sup>48</sup> *Indian Residential Schools Settlement, Schedule D* (May 2006), [http://www.residentialschoolsettlement.ca/Schedule\\_D-IAP.PDF](http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF).

**Maintaining value:** Compensation awards tend to take into account the impact of inflation and currency fluctuation, particularly when there is a significant delay from the misconduct to the date when the award is issued, or when accounting for future harm.

## Determining the quantum of compensation

Particularly in cases involving large numbers of victims, quantum is determined in accordance with the following steps:

- i) **Determining the classes of beneficiaries and the types of damage for each class to be compensated.** This is not a theoretical exercise, but must be based on an accurate assessment of the different types of harms suffered by the victims. Victims may have particular views about how they understand their suffering and the relative weight they give to different forms of suffering, and these views should be taken into account in determining the different categories of damage. The likely categories of damage have been listed above. The classes of beneficiaries might include: next of kin of persons who died as a result of cholera; persons who contracted cholera but survived; persons whose livelihood was affected by the contamination of the water supply. These too would need to be scrupulously analysed. Media and related reporting may not have captured the full extent of the harms suffered, or may have omitted certain classes of beneficiaries because of their remoteness or situations of marginalisation.

**For example:**

<b>Beneficiary Class:</b>	<b>Next of kin of persons who died of cholera</b>			
<b>Categories of damage:</b>	Death	Pecuniary	Moral damages	Future harm
<b>Examples</b>	- Equitable sum	-burial expenses - hospital and related medical fees - transport costs	-Equitable sum	-based on age of victim; number and age of dependents; minimum wage

<b>Beneficiary Class:</b>	<b>Persons who contracted cholera but survived</b>	
<b>Categories of damage</b>	Pecuniary	Moral damages
<b>Examples</b>	- hospital and related medical fees - transport costs - loss of earnings due to illness	- Equitable sum

<b>Beneficiary Class:</b>	<b>Persons whose livelihood has suffered by contamination of water</b>
<b>Categories of damage:</b>	Pecuniary
<b>Examples:</b>	- loss of income

### **Comparative Example: Chilean Reparations Programme**

In 1992, the Chilean Government established a reparations programme for certain victims of the Pinochet dictatorship or their next of kin, based on a monthly pension payment. The monthly pension was roughly comparative with average household income and was calculated at \$372, variable with inflation.

Pension amounts are allocated among beneficiaries according to a formula:

- 40% to surviving spouse,
- 15% to the parent of any out-of-wedlock children
- 15% to each child (through age 25)
- 30% to the mother or father of the victim (with preference to mother if alive).

This was the formula applied even if the percentages came to more than 100% of the total pension. Certain victims and next of kin also received a one-time payment equal to 12 months of pension payments.<sup>49</sup>

- ii) **Determining the award quantum.** Given the large number of victims, it may be impractical for damages to be individually assessed. As a suitable alternative, statistical sampling may be used to identify what the typical quantum would be for the identified harms. For pecuniary harm and future harm, this would be a relatively straightforward exercise in which a statistically relevant sample is taken of the different beneficiary classes; the sample taken from different age groups, genders, and locations. A typical quantum could be derived on the basis of the actual losses incurred by the sample group, and where precise figures are unavailable, by use of costings for typical expenses, such as burial fees, hospital fees, to the extent to which they are available. Non-pecuniary or other harms could be determined on the basis of equitable criteria using a lump-sum approach, or if deemed appropriate on the basis of victim consultations, taking a collective approach to develop other modalities for compensation, such as community assistance projects.

### **Example: Indicative losses for urban Haitian cholera victims**

A preliminary household survey of urban Haitian cholera victims conducted in 2013 provides one partial statistical sample of actual losses incurred by victims.<sup>50</sup> The study used a random sampling method and selected 3,000 urban households to complete six surveys with a 90.4% response rate. Where households reported a member who was ill or died from cholera, respondents estimated lost wages during the time of illness and answered other questions on household income, educational outcomes, symptoms, medical treatment, and additional expenses due to the illness.

The study provides an indication of typical losses under relevant categories of damage:

- **Medical and rehabilitation expenses:** \$224.13 USD
- **Annual loss of income in case of death:** \$525.56 (Haiti average GNI per capita \$820 USD)
- **Legal and Burial costs:** \$5,610.26

Cholera affected households were also more likely to report other physical and mental health problems, family dysfunction, social and educational discrimination and marginalisation,

<sup>49</sup> See, Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile", in Pablo De Greiff (ed) *The Handbook of Reparations* (OUP, 2008).

<sup>50</sup> Athena R. Kolbe and Keely Brookes, "The Crushing Economic and Social Costs of Cholera: Results from Monthly Surveys of Haitian Households (August 2011-May 2013)" [on file with the author].

symptoms of depression, poor nutrition, food insecurity in the months following illness and lower rates of school attendance, although the economic impact of these issues were not quantified. Cholera affected households also reported paying substantial interest on loans taken out due to the economic burden of cholera.

Further study and a more diverse sample is required to provide a more complete picture of actual losses incurred by cholera victims. However, this 2013 survey is a good indication that it is possible to use a statistical sampling methodology to arrive at a realistic assessment of the main costs incurred.

- iii) A claims process?** A claims or registration process is advisable if there is not already sufficiently reliable information on cholera deaths and related harms. Data such as national hospital records, census records or other data could be used as an initial basis to determine the list of beneficiaries. Additional persons who fall within the beneficiary classes should be provided the opportunity to provide evidence of their right to be included in the list of beneficiaries. This is particularly important given that cholera deaths continue to be reported; the size of the beneficiary class is thus not fixed. It is anticipated that for the second and third beneficiary classes, there will be insufficient data in officially held records and thus, if an individualised compensation process is pursued, persons would need to come forward to demonstrate that they fulfil the criteria of the beneficiary class. A timescale for potential beneficiaries to come forward would need to be determined, and accompanied by context specific outreach. If a claims process was pursued, a body with sufficient independence, neutrality and transparency would need to oversee the process. This could be in the form of an independent Board of Trustees of the financial instrument or trust fund set up to disburse the funds. It would require operational capacity in order to receive and approve claims. This would operate most efficiently if the elements for scrutiny were limited: ‘claimants’ should not need to individually prove harm, but should simply be required to demonstrate that they fall within the beneficiary class. For instance, for the first class, this might comprise the death certificate and/or hospital record demonstrating that the person died of cholera, and proof that the claimant(s) is/are the next of kin.
- iv) Determining the modalities for the distribution of awards:** A variety of methods have been used in mass compensation programmes which must be tailored to the local context, with appropriate measures taken to ensure the confidentiality of personal details and to ensure that payments do not cause unnecessary divisions within communities. Some of these challenges can be met by appropriate community outreach and sensitisation and by involving victims’ communities in determining how to address these issues. In some cases where there is an overriding collective feeling amongst the victim/beneficiary population, victim communities may be asked to submit proposals for collective reparation projects to benefit the entire community. This was done in Peru, where the victim communities were asked to submit proposals for collective reparation projects that would benefit the entire community, with a \$30,000 USD cap. The State left it to the communities themselves to determine the appropriate type of reparation.<sup>51</sup> In some cases, payments could be channelled through claimants’ bank accounts where these exist or to new accounts created specifically for this purpose.<sup>52</sup> But, this would only be feasible if within the

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<sup>51</sup> Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel, “Adverse Consequences of Reparations”, University of Essex, Reparations Unit, Briefing Paper No.6, August 2011, para 33, available at: [https://www.essex.ac.uk/tjn/documents/Paper\\_6\\_Adverse\\_Consequences.pdf](https://www.essex.ac.uk/tjn/documents/Paper_6_Adverse_Consequences.pdf).

<sup>52</sup> For example, in a recent settlement for Mau Mau veterans who suffered torture at the hands of the British colonial regime in Kenya, the settlement funds [approx. \$5,830 USD for each of the 5,228 veterans] were provided by the respondent (the United

local context, there is adequate access to banks to withdraw funds. In other contexts, cheque payments have been made and distributed to beneficiaries; the provider having taken the initiative to make arrangements with a number of banks to ensure that the cheques would be able to be cashed without problem.<sup>53</sup> Sometimes, payments have been distributed through governments or local municipalities, but the feasibility of this option would depend on the trust local communities place in their local municipalities to oversee such a task and the extent to which municipalities are sufficiently willing, resourced and skilled to undertake such a function. The UN Claims Commission distributed payments to States for onward distribution to beneficiaries. In its Decision 18, the UNCC's Governing Council set out the modalities for such payments. It allowed those distributing payments to offset (within strict limits) some of their costs, set maximum allowable timeframes for onward distribution and reporting obligations.<sup>54</sup> Similarly, some claims disbursements have been made by requiring the respondent to establish trust funds(s) through which payments can be made,<sup>55</sup> or through periodic pension-style payments.<sup>56</sup>

## V.2 Victim Rehabilitation

Rehabilitation is recognised as one of the main components of reparation. It is comprised of medical, psychological, social and legal or related services and care<sup>57</sup> and is designed to reverse the effects or reduce the impact of an injury or harm, so that the individuals concerned can become fully functioning and active members of their communities capable of realising their full potentials.<sup>58</sup> Rehabilitation incorporates inter alia, diagnostic procedures, medicines, specialised treatment, hospitalisation, surgeries, trauma counselling, support services, mental health care and legal services. It can be provided as part of a monetary award or in kind (access to services).

Rehabilitation as a form of reparation has been determined in one of two principal ways:

- 1) It has been factored into payments of compensation. This has been done in particular, for compensation for pecuniary losses or out of pocket expenses associated with past expenditures by victims to deal with rehabilitative needs: doctors' appointments, treatment costs including payments for medication, surgeries, stays in hospital and compensation for projected costs associated with long-term or chronic health issues which stem from the initial wrongful act, including both medical and psychological care and treatment.

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Kingdom) to the claimants' law firm in trust for the claimants. The law firm set up individual bank accounts for each victim and transferred their damages in full directly to each account within weeks of the settlement agreement being signed and made public.

<sup>53</sup> This was the approach used by the German Forced Labour Compensation Programme, See, *German Forced Labour Compensation Programme: Holocaust Victim Assets Programme (Swiss Banks) Activity Report July 2000 - December 2001*, paras 30, 31, available at: [https://www.ion.int/jahia/webdav/shared/shared/mainsite/about\\_ion/en/council/83/MCINF248.pdf](https://www.ion.int/jahia/webdav/shared/shared/mainsite/about_ion/en/council/83/MCINF248.pdf).

<sup>54</sup> UNCC, "Distribution of Payments and Transparency", UN Doc. S/AC.26/Dec. 18 (1994); UNCC "Return of Undistributed Funds", UN Doc. S/AC.26/Dec. 48 (1998).

<sup>55</sup> For example, in the *Aloeboetoe* case, the Inter-American Court of Human Rights required Suriname to deposit a specified sum into "Suritrust", a trust bank, which was ordered to set up trust funds for the beneficiaries or their heirs – one for the minor children and another on behalf of adult beneficiaries. *Inter-American Court of Human Rights, Aloeboetoe et al. v. Suriname* (Reparations) Judgment of 10 September 1993, (Ser. C) No. 15 (1994) paras 99, 100.

<sup>56</sup> See, Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile", in Pablo De Greiff (ed) *The Handbook of Reparations* (OUP, 2008).

<sup>57</sup> See, *Basic Principles and Guidelines* (above n. 21), principle 21.

<sup>58</sup> WHO Expert Committee on Medical Rehabilitation, *Second Report, Technical Report Series 419*, (Geneva, 1969), p. 6, referred to in Clara Sandoval Villalba, "Rehabilitation as a Form of Reparation Under International Law", REDRESS, December 2009, pp 8-9.

- 2) Where the victims are numerous and are congregated in specific locales or it is otherwise deemed expedient, projected future costs associated with long-term or chronic health issues are sometimes factored in to collective reparation awards such as: the establishment and/or maintenance of specialist treatment facilities for victims, placing victims on long-term health plans so that payment for future rehabilitation needs are covered. Examples of service provision awards include the *Aloeboetoe Case*, in which the Inter-American Court of Human Rights ordered the reopening of a medical dispensary in a village affected by gross human rights violations.<sup>59</sup> In the case of the *Plan de Sánchez Massacre*, the Inter-American Court ordered the state to award free medical aid and medicine to the victims and to establish a programme of psychological and psychiatric treatment free of cost.<sup>60</sup> Collective projects to support health rehabilitation have formed part of class action negotiated settlements,<sup>61</sup> consent decrees,<sup>62</sup> specialised claims processes and judgments. For instance, the Nuclear Claims Tribunal of the Marshall Islands decided to allocate \$30 million of the Trust Fund which was established, to the Government of the Marshall Islands, to be disbursed over a 15-year period, to pay for technical assistance from the United States Public Health Service and other agencies to help establish a health care system, health care programs and other services to address the consequences of the Nuclear Testing Program. Funds were also set aside for medical surveillance and radiological monitoring activities.<sup>63</sup>

### V.2.1 Rehabilitation Needs

Since cholera in Haiti continues to infect new patients, the most important rehabilitation needs appear to include preventive care such as vaccines, and care for individuals upon contraction of the disease (medication, professional medical treatment and hospital care). Victims who have recovered from the acute symptoms of cholera have also reported long term health impacts, including ongoing pain in limbs, weakness and dizziness, problems with concentration and acute headaches.

Additionally, beyond the costs of medical and associated care, there are psychological impacts that concern the stigma associated with and isolation caused by the disease, and which can have lingering impacts on the victims and their families. In a qualitative study of the impacts of cholera, children from households with a sick family member frequently reported feeling isolated, being teased, excluded from play and peer groups, bullied, and harassed by both adults and children who feared that the non-ill child could accidentally infect others with cholera.<sup>64</sup> The death or prolonged illness of family members were also found to have a profound impact on the post-illness adjustment of the non-ill children in the family.<sup>65</sup>

<sup>59</sup> Case *Aloeboetoe et al v Suriname (Reparations)*, Judgment of 10 September, 1993, Series C No 15, para 96.

<sup>60</sup> Case of *Plan de Sánchez Massacre (Reparations)*, Judgment of 19 November 2004, Series C No 116, paras 106-108, 117. See also, IACtHR, *Barrios Altos v. Peru*, Judgment on Reparations and Costs, 30 November 2001, para. 42; IACtHR, *Children Re-Education Centre v. Paraguay*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 2 September 2004.

<sup>61</sup> For example, Occidental Petroleum made an out-of-court settlement with five Achuar communities in Peru's northern Amazon region. The settlement, for an undisclosed sum, would be placed in a trust fund and be used for health, education and nutrition projects. See, <http://www.theguardian.com/environment/2015/mar/05/indigenous-peruvians-amazon-pollution-settlement-us-oil-occidental>.

<sup>62</sup> E.g., *USA and Commonwealth of Virginia v. Hampton Roads Sanitation District (Consent Decree)* US Dist Ct for the Eastern District of Virginia, 29 September 2009, concerning the agreement to pay a \$900,000 civil penalty and to take corrective actions to reduce alleged sanitary sewer overflows from its collection system and nine sewage treatment plants that have polluted the Chesapeake Bay and its tributaries.

<sup>63</sup> Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, Article II.

<sup>64</sup> Kolbe and Brookes, "The Crushing Economic and Social Costs of Cholera" (above n 50).

<sup>65</sup> *Ibid.*

## V.2.2 What has been done to date

The UN as well as a range of national and international humanitarian actors, have engaged in a number of efforts to strengthen the health response, which could be considered to contribute to collective forms of rehabilitation. As set out by Kolbe and Brookes, “public health interventions have focused on treatment – including free medical clinics throughout the country – and prevention through education campaigns.”<sup>66</sup> For instance, the UN reports having contributed to the maintenance and upgrading of cholera treatment facilities and oral rehydration points, It has also funded the purchase of numerous oral cholera vaccines, rapid diagnosis tests, water purification tablets, soap and medical supplies and equipment to aid with prevention, detection and early interventions.<sup>67</sup>

Preventive and rehabilitative health care and treatment form an integral part of the Haiti Government’s cholera elimination plan, though the effectiveness of the plan’s implementation has been undermined because the financing needed for full implementation has not been achieved.<sup>68</sup> This is further discussed below.

## V.2.3 Summary of options and recommendations

As indicated, rehabilitation as a form of reparation should take into account both pecuniary losses associated with costs for treatment, hospital stays and medications and anticipated pecuniary losses associated with future diagnosed cases. It should also reflect preventive care and services aimed at reducing and ideally eliminating the continued spread of the disease, through better health services, access to prophylaxis and vaccines, and better training and service provision throughout the country. Additional services such as mental health care may also be appropriate.

Where individual compensation payments are made, pecuniary losses connected to rehabilitation should ideally be factored into those payments, whereas preventive care and services may be better approached through support to the Cholera Elimination Plan already in place, which would contribute not only to rehabilitation but also to restituting the water and sanitation infrastructure (see immediately below). Under the guise of its responsibility, the UN would have an obligation to ensure that adequate resources are located and allocated to make good on the plan.<sup>69</sup>

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<sup>66</sup> Id.

<sup>67</sup> See, e.g., UN in Haiti, Haiti Cholera Response Fact Sheet, 2015 (Data From 1 Jan – 31 Dec): [http://www.un.org/News/dh/infocus/haiti/Cholera\\_UN\\_Factsheet\\_Jan\\_Dec\\_2015.pdf](http://www.un.org/News/dh/infocus/haiti/Cholera_UN_Factsheet_Jan_Dec_2015.pdf); UN Fact Sheet: Combatting Cholera in Haiti, January 2014 (updated Feb 2014): [http://www.un.org/News/dh/infocus/haiti/Cholera\\_UN\\_Factsheet\\_24%20Feb\\_2014.pdf](http://www.un.org/News/dh/infocus/haiti/Cholera_UN_Factsheet_24%20Feb_2014.pdf).

<sup>68</sup> UN in Haiti, “United Nations plan to support the implementation of the Government of Haiti’s 2-year plan on cholera elimination”, January 2014: [http://www.un.org/News/dh/infocus/haiti/UN\\_Support\\_Strategy\\_Elimination\\_Cholera%20FEB\\_2014.pdf](http://www.un.org/News/dh/infocus/haiti/UN_Support_Strategy_Elimination_Cholera%20FEB_2014.pdf), p. 3: “On 27 February 2013, the Government of Haiti launched its 10-year National Cholera Elimination Plan and a two-year operational component of the Plan. The 10-year, US\$2.2 billion plan focuses on the long-term elimination of the disease through the large-scale development of public health and sanitation infrastructure. Of this amount, \$448 million is required for the first two years. The lack of sustained funding, however, has dramatically decreased capacity to respond effectively. So far, only half of the \$448 million needed for the next two years has been mobilized, and less than a quarter of the \$40 million required for immediate humanitarian needs have been received.” The plan is available online, at: [http://www.lessonsfromhaiti.org/download/Report\\_Center/nat-plan-cholera-en.pdf](http://www.lessonsfromhaiti.org/download/Report_Center/nat-plan-cholera-en.pdf)

<sup>69</sup> The Transnational Development Clinic (Yale), The Global Health Justice Partnership (Yale) and L’Association Haïtienne de Droit de l’Environnement (AHDEN), “Peacekeeping without Accountability: The United Nations’ Responsibility for the Haitian Cholera Epidemic” [Yale report] p 53: “The Government of Haiti, PAHO, the CDC, and NGOs are the key providers of treatment in the ongoing epidemic; the U.N.—by virtue of having caused the epidemic—bears the responsibility for ensuring the adequacy of the public health response to the outbreak. Most critically, this responsibility requires the U.N. to ensure that both immediate treatment intervention and the MSPP Plan for the long-term elimination of cholera are fully funded. The U.N. and MINUSTAH must also provide any technical and logistical support needed by the key public health actors treating cholera in Haiti.”

## V.3 Restitution – Environmental Remediation to Eliminate Cholera

Restitution – the return of the victim to the status quo ante; the situation which existed prior to the commission of the wrongful act - is understood to be the primary or highest aim of reparation; other forms of reparation become relevant in the common situation where full restitution is not possible, or impractical, or when restitution does not manage to wipe out the consequences of the wrongful action on its own.<sup>70</sup> The Basic Principles and Guidelines list as non-exhaustive examples of restitution, “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>71</sup> In contexts of environmental damage or contamination, remediation efforts can constitute an important form of restitution. Courts often order environmental harm to be cleaned up or the damaged ecosystem returned to a healthy state. In addition to awards of damages to individual litigants, some courts can administer funds for other purposes, such as environmental remediation, medical monitoring of potential injuries, education campaigns. The “polluter pays” principle underscores that the polluter should be charged with the costs of pollution prevention and control measures.<sup>72</sup>

The United Nations Committee on Economic, Social and Cultural Rights for example, has indicated that Mexico was required to “ensure that adequate compensation and/or alternative accommodation and land for cultivation are provided to the indigenous communities and local farmers,” whose land was flooded or otherwise affected by large infrastructure projects.<sup>73</sup> It has also indicated that Chad was under a duty to provide “appropriate systems for ensuring access to drinking water and to adequate sanitation infrastructure” in light of “the serious health risks posed by the contamination of groundwater and rainwater.”<sup>74</sup>

Restitution is especially important where the harm caused is of a continuing character<sup>75</sup> (and thus when successfully implemented also constitutes an important guarantee of non-recurrence) and in the context of the cholera epidemic in Haiti, it is most relevant as a frame to consider reparations for the restoration of safe water and sanitation.

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<sup>70</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2002) 259. This is the approach taken by the PCIJ and ICJ. See, e.g., *Chorzów Factory (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47; See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (n 98); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 460

<sup>71</sup> *Basic Principles and Guidelines* (above n. 21), principle 19.

<sup>72</sup> OECD, Recommendation on the Implementation of the Polluter-Pays Principle, C(74)(223); 1989 Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollutions, C(89)(88) (Final); “Directive 2004/35/Ce of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage”, OJEU L 143/56 30 April 2004, preamble para. 2: “... an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.” See also, “Directive 2004/35/Ce of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage”, OJEU L 143/56 30 April 2004, Annex 11: Remedying of Environmental Damage, para. 1.

<sup>73</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico*, 9 June 2006, UN Doc. E/C.12/MEX/CO/4, para 28.

<sup>74</sup> See also *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chad*, 16 December 2009, UN Doc. E/C.12/TCD/CO/3, para. 348.

<sup>75</sup> For instance, the United Nations Committee on Economic, Social and Cultural Rights, years after the Chernobyl nuclear accident, urged that “special assistance and medical care be further granted to [victims of the Chernobyl accident] and that special measures continue to be taken to clean the environment and to dispose of contaminated objects and consumable items with which people may come into contact.” See *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine*, 28 December 1995, U.N. Doc, E/C.12/1995/15, para. 28.

### V.3.1 Cholera elimination efforts to date

As noted, in 2013 the UN and Government of Haiti jointly launched a 10-year National Cholera Elimination Plan (Elimination Plan) and a two-year operational component of the Plan. The plan, costed at \$2.2 billion dollars over 10 years, includes a range of short and longer-term measures designed to progressively eliminate cholera from Haiti through the installation of adequate water and sanitation infrastructure, targeted cholera transmission prevention, health care management, health promotion and epidemiological surveillance. The UN has stated that supporting the Haitian Government to eliminate cholera is a “key UN priority”<sup>76</sup> and has committed to supporting implementation of the Elimination Plan through a range of humanitarian support plans and initiatives.<sup>77</sup>

However to date the Elimination Plan is severely underfunded and consequently under-implemented.<sup>78</sup> Further, fundraising efforts appear to be dwindling.<sup>79</sup> According to recent research in Bocozel, progress with the implementation of the plan is woefully inadequate.<sup>80</sup> The researchers found that:

Progress has been made in Haiti to reduce cholera morbidity and mortality, but cholera transmission, illness, and death continue to occur on a daily basis. Haiti’s National Plan for the Elimination of Cholera has proposed policies and interventions that incorporate short- and long-term strategies for the improvement of the health and WASH sectors – from distributing water filters and water purification tablets to vaccinating vulnerable communities, and from building public latrines and water systems to strengthening institutions like DINEPA. The success of the plan has and will continue to be limited not only by funding and other resource challenges, but also, intrinsically, by the unaddressed intersecting factors that, though hidden to many in positions of power within and outside of Haiti (particularly those with the means of effecting and implementing policy change), are vital components of the realities that many Haitians face.<sup>81</sup>

### V.3.2 Analysis and recommendations

Given the collective nature of the harm, collective reparation or remediation efforts are appropriate if done with the involvement and input of local communities and would constitute an effective form of restitution. The Cholera Elimination Plan was developed specifically to address the causes and consequences of the introduction to cholera in Haiti, including installing the water and sanitation infrastructure needed to eliminate the epidemic. A strong UN role in funding and implementing the Elimination Plan could be a significant component of meeting the Organization’s obligations to provide remedies to cholera victims. To date however, the UN has arguably not done enough to secure funding for the full implementation of the Elimination Plan, or to independently and transparently evaluate its efforts and capacity to deliver on its objectives.<sup>82</sup>

The Elimination Plan specifies the details of who will do what, and by when, to accomplish the desired outcomes. However thus far, design and implementation lacks a rights based approach;

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<sup>76</sup> ‘United Nations Support Plan for the elimination of the transmission of cholera in Haiti 2014-2015’, January 2014, [http://www.un.org/News/dh/infocus/haiti/UN\\_Support\\_Strategy\\_Elimination\\_Cholera%20FEB\\_2014.pdf](http://www.un.org/News/dh/infocus/haiti/UN_Support_Strategy_Elimination_Cholera%20FEB_2014.pdf).

<sup>77</sup> Ibid. See also, UNICEF, ‘Total Sanitation Campaign in Haiti, July 2014, available at <http://choleraunicef.contentthatmoves.com/>.

<sup>78</sup> Above n. 68. See also, Yale report (above n. 69), pp 54-5.

<sup>79</sup> OCHA, *Humanitarian Bulletin Haiti*, Issue 57, January 2016, p. 4.

<sup>80</sup> V Koski-Karell et al, ‘Haiti’s progress in achieving its 10-year plan to eliminate cholera: hidden sickness cannot be cured’ *Risk Management and Healthcare Policy*, 24 May 2016, available at: <http://www.ijdh.org/wp-content/uploads/2016/05/RMHP-75919-haiti-s-progress-in-achieving-its-10-year-plan-to-eliminate-052416.pdf>.

<sup>81</sup> Ibid, 98.

<sup>82</sup> Above n. 69.

it has not been transparent and the victims and affected communities have had little role in helping ensure successful implementation, and monitoring the implementation. Poverty and remoteness has contributed to their disenfranchisement, and the technical nature of the remediation efforts makes monitoring difficult. When developing the necessary implementation steps is thought to be beyond the expertise of the victims, it would be appropriate to involve third parties in the oversight of monitoring and implementation. In addition, the victims should have scope to take action if they believe implementation is deficient.

## V.4 Satisfaction

Satisfaction is a central component of reparations.<sup>83</sup> According to the UN Basic Principles and Guidelines, satisfaction should include an array of measures linked inter alia, to disclosure of the truth, acknowledgement of wrongdoing and apology, memorialisation, training and sanctions against those responsible.<sup>84</sup> The International Law Commission's Draft articles on the responsibility of international organizations provide a more focused interpretation: "Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization."<sup>85</sup>

### V.4.1 Public apologies

Public apologies are important symbolic forms of reparation that can acknowledge the harm that was caused to victims, underscore that the conduct was wrongful and will not be repeated and affirm the dignity and worth of victims. They are particularly important for victims who may be ostracised in their communities, have had their victimisation ignored or denied or been made to feel that the consequences were somehow their fault. Apologies therefore, by having this vindicating role, can help to restore victims' place in society and assist them to move forward in dignity. Apologies can also restore trust damaged as a result of violations and assist in reconciliation.

The failure of the UN to acknowledge its responsibility and apologise and at the same time its unwillingness to allow the matter to be adjudicated or mediated, appears to have led to a perception amongst affected communities that the UN does not value their lives.<sup>86</sup> This sense of collective injury is aggravated by a perception that the UN is behaving hypocritically by failing to comply with the human rights principles it espouses.

Apology is also relevant in Haiti to counter the stereotypes and stigmas associated with cholera that can be extremely damaging and shameful for victims and lead to them facing rejection and isolation in their communities: that the victims are unclean, unsanitary, uneducated.

Apologies have been used by a number of governments as part of a break with the past or in response to specific incidents.<sup>87</sup> The most effective apologies in this context have been those

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<sup>83</sup> Above n. 21; See also UN ILC, Draft articles on the responsibility of international organizations (above n. 7) Arts 34, 37.

<sup>84</sup> Above n. 21, *ibid.*

<sup>85</sup> UN ILC, Draft articles on the responsibility of international organizations (above n. 7) para. 37.

<sup>86</sup> For instance in a letter writing campaign from cholera victims to members of the UN Security Council, victims expressed that the UN "do not respect us"; "treat us worse than animals"; and reminded the Organization that they are people and that their basic rights as humans should be respected without discrimination. Available at <http://www.ijdh.org/2015/12/topics/health/thousands-of-cholera-victims-write-letters-to-the-un/>.

<sup>87</sup> See, R Carranza et al, "More Than Words: Apologies as a Form of Reparation", International Center for Transitional Justice, December 2015, available at: <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf>.

that are unequivocal and acknowledge the responsibility of the state for violations committed. In 1991 for example Chilean President Patricio Aylwin apologised for human rights abuses committed under the Pinochet regime, expressing that the state was responsible for the actions committed by state agents and institutions and “begging forgiveness” from victims on behalf of the nation.<sup>88</sup> Similarly, Sierra Leonean President Ernest Bai Koroma apologised to Sierra Leonean women after the country’s civil war, apologising as head of state and asking forgiveness for violations committed by the armed forces, and acknowledging that the state had not done enough to protect women during the conflict.<sup>89</sup> Apologies have also tended to be most effective when accompanied by concrete measures, such as compensation, policy changes or prosecution of perpetrators, although there is no necessary link between an apology and an obligation to take such further steps.

International organizations have also issued apologies in response to events where their responsibility has been put in question. However, for the most part, international organisations have refrained from asserting their responsibility; apologies have been framed as a form of regret or sadness for the events that unfolded.<sup>90</sup> The failure to take responsibility can limit the value of the statement which may be interpreted by victims as insincere. In a case concerning lead poisoning in a displaced persons camp in Kosovo, which raises similar issues to the Haiti case, the Human Rights Advisory Panel (a specialised body mandated to assess and make recommendations concerning the UN mission’s compliance with human rights obligations; no similar body exists in Haiti) recommended, *inter alia* that the UN Mission in Kosovo (UNMIK) “publicly acknowledges, including through the media, UNMIK’s failure to comply with applicable human rights standards in response to the adverse health condition caused by lead contamination in the IDP camps and the consequent harms suffered by the complainants, and makes a public apology to them and their families.”<sup>91</sup>

As part of a comprehensive reparations response, the UN could apologise for its role in the introduction of cholera in Haiti and the limited response rate since then. Any apology should be public, broadcast throughout the country and with a written transcript of what was said. It should be offered in a commemorative or symbolic way, in accordance with local culture.

If the UN maintains its contestation of its role, it should allow the matter to be submitted to independent adjudication.

#### V.4.2 Memorialisation

Memorialisation refers to the preservation of memory - of people or events. Memorialisation can take the form of a ceremony of remembrance or commemoration, or a more permanent marker – such as a monument or the preservation of archives. There are countless memorials around the world to commemorate persons who died in wars or conflict, or during other times of sectarian or communal violence.

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<sup>88</sup> *Ibid.*

<sup>89</sup> Statement by his Excellency Dr. Ernest Bai Koroma on International Women’s Day’, 27 March 2010, <http://www.statehouse.gov.sl/index.php/contact/110-statement-by-his-excellency-dr-ernest-bai-koroma-on-international-womens-d-ay-27-march-2010-courtesies>.

<sup>90</sup> See, e.g., Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica, UN Doc A/54/549, 15 November 1999, para. 503; Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, UN Doc S/1999/1257, 15 December 1999; “All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse.” (Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population From Genocide or Mass Slaughter, Press Release, SG/SM/7263 AFR/196, 16 December 1999). See also, D TIAN, “U.S. and NATO Apologies for the Chinese Embassy Bombing: A Categorical Analysis” (2007) 1 International Journal of Communication 1 360, who analyses the various apologies provided in the context of the NATO bombing of the Chinese Embassy in Belgrade.

<sup>91</sup> Human Rights Advisory Panel, *N.M. and Others v. UNMIK*, Case No. 26/08, 26 February 2016, para. 10(a).

Memorials feature in both demands for and determinations of reparations, particularly when the subject matter concerns persons who were killed or disappeared. A regular demand from civil parties at the Extraordinary Chambers in the Courts of Cambodia, was the provision of monuments to commemorate their loved ones. While for procedural reasons, requests for memorials or 'stupas' were not heeded in Case 001, Civil Parties also requested and the Chambers agreed that their names and those of the immediate victims would be included in the final judgment, including a specification as to their connection with the crimes committed at S-21 (the main site of the crimes) and the compilation and publication of all statements of apology made by the convicted person during his trial.<sup>92</sup>

The Inter-American Court of Human Rights has recognised the importance of symbolic forms of reparation such as public commemorations and monuments. Most, though not all, of such orders arose as a result of settlement agreements between the parties which the Court confirmed. The Court has ordered the naming of a street in memory of victims, the inauguration of an educational centre with the names of the victims<sup>93</sup> and the erection of public monuments.<sup>94</sup> The Court has made clear that monuments should be in suitable places, whether of particular meaning to the victims or to garner the most visibility.

Given the inevitable trauma and loss associated with the scale and speed of the cholera deaths, a memorial of some description may be appropriate if this is something that the families of cholera victims wish and if it is done in a way which aligns with Haitian cultural practices. The affected communities should be consulted.

## V.5 Guarantees of non-repetition

Guarantees of non-repetition or non-recurrence are recognised as components of reparation, often among the most important.<sup>95</sup> What will achieve non-recurrence will depend on a range of factors. With respect to the UN's introduction of cholera to Haiti, and the response thereto, three particular issues merit consideration:

### V.5.1 Protocols regarding health and sanitation

The UN Independent Panel of Experts' final report outlined a number of recommendations aimed at prevention of future cholera introduction by MINUSTAH or other peacekeeping operations.<sup>96</sup> In particular, the report recommended that UN personnel receive prophylactic antibiotics, screening for cholera carriage and/or immunization prior to their deployment, and that faecal waste from UN installations be treated on-site.

The precise extent of implementation of these recommendations requires clarification. The UN Secretary-General convened an "integrated Task Force" to examine the recommendations and

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<sup>92</sup> ECCC, Case 001, Judgment, 001/18-07-2007/ECCC/TC, 26 July 2010

<sup>93</sup> IACtHR, *Villagrán Morales v Guatemala* (Street Children), Judgment of 26 May 2001, para. 103; *Trujillo-Oroza v Bolivia*, IACtHR, Judgment of 27 February, 2002 para. 122.

<sup>94</sup> E.g., IACtHR, *Barrios Altos v Peru*, Judgment of 30 November 2001, para 44(f); *"Las Dos Erres" Massacre v Guatemala*, Judgment of 24 November 2009, para 265.. See also, Inter-American Commission on Human Rights, *Villatina Massacre v. Colombia*, Case 11.141, Report No. 105/05, OEA/Ser.L/V/II.124 Doc. 5 (2005), para. 25.

<sup>95</sup> Basic Principles and Guidelines (above n. 21) Principle 23. See also, UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff\*, UN Doc A/HRC/30/42m 7 September 2015, in which the Special Rapporteur elaborates on the main elements of a framework for designing State policies regarding "guarantees of non-recurrence".

<sup>96</sup> Dr A Cravioto et al., "Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti", p. 30, available at: <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>.

ensure “prompt and appropriate follow-up,”<sup>97</sup> however the work or outcomes of the task force were not published. In 2014, a UN Fact Sheet was released that presents follow-up on the Independent Panel recommendations and notes that some recommendations, including on waste management and vaccinations, had been partially adopted. In November 2015, the 3rd Medical Support Manual for United Nations Peacekeeping was released, which makes cholera vaccination mandatory for all peacekeepers being deployed. It contains a training proposal for personnel on cholera prevention and hygiene awareness. It also explicitly identifies cholera as a medical condition precluding participation in peacekeeping operations.<sup>98</sup> It is not clear what policy and operational changes have been made to implement the recommendation to treat faecal waste onsite. The recommendations regarding prophylaxis and screening were rejected without explaining the evidence basis for the rejection.<sup>99</sup>

There is insufficient transparency with respect to what steps are being taken, what steps are not being taken and for what reasons. Accountability requires such transparency; it gives the incentive for change and for non-recurrence. Also, there is insufficient oversight of those steps outside the internal structures of the organisation, which further undermines transparency.

### **V.5.2 Protocols regarding access to remedy**

At present, the UN’s liability for the introduction to cholera in Haiti has not been subject to administrative or judicial scrutiny. Victims’ families had lodged claims for compensation with MINUSTAH and the UN Secretariat in New York. The claims were rejected by the Office of Legal Affairs on the grounds that they would “necessarily require a review of political and policy matters,” and are “not receivable pursuant to Section 29” of the CPIUN.<sup>100</sup> The UN further declined to refer the claims to a standing claims commission as envisioned in the Status of Forces Agreement. This response highlights a broader deficiency in the UN claims framework’s ability to guarantee access to remedies.

As a critical component of non-recurrence of denial of access to justice, the UN must implement the claims commission provision in practice or otherwise establish a fair, independent and transparent alternative dispute mechanism that victims of UN harms will be able to access. In a 1997 review of whether to eliminate the claims commission provision in light of its non-implementation, the UN Secretary-General concluded that “a procedure that involves a neutral third party should be retained in the text of the Status of Forces Agreements as an option for potential claimants” so as not to make the UN “a judge in its own case.”<sup>101</sup>

The ability for the UN to create appropriate settlement mechanisms is permissive in other areas beyond those contemplated by the CPIUN and SOFAs to the extent that mechanisms are understood to be required by virtue of the operational needs of its mandate.<sup>102</sup> This view is consistent with international human rights law and the position taken by the International Court of Justice when deciding on the establishment of the UN Administrative Tribunal: as the

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<sup>97</sup> UNSG, “Secretary-General, Upon Receiving Experts’ Report on Source of Haiti Cholera Outbreak, Announces Intention to Name Follow-up Task Force”, Press Release, SG/SM/13543, 4 May 2011.

<sup>98</sup> Available at: <http://repository.un.org/bitstream/handle/11176/387299/2015.12%20Medical%20Support%20Manual%20for%20UN%20Field%20Missions.pdf?sequence=4&isAllowed=y>. See in particular, pp. 93, 144, 145, 217, 228-232

<sup>99</sup> UN Fact Sheet, “United Nations follow-up to the recommendations of the Independent Panel of Experts on the Cholera Outbreak in Haiti” (undated) <http://www.un.org/News/dh/infocus/haiti/Follow-up-to-Recommendations-of-IPE.pdf>.

<sup>100</sup> *Convention on the Privileges and Immunities of the UN* (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 [CPIUN].

<sup>101</sup> UNGA, “Administrative and budgetary aspects of the financing of the United Nations peacekeeping” (21 May 1997) UN Doc A/51/903.

<sup>102</sup> *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47.

UN enjoyed immunity before national courts, it would be 'hardly consistent' with the goals of the UN and its Charter if it did not provide a legal remedy for staff disputes.<sup>103</sup> The UN *should* put in place appropriate settlement procedures to deal with matters which may engage its responsibility. Arguably, it *must* do so in order to ensure its continued ability to carry out its functions faithfully in accordance with the UN Charter.

### V.5.3 Financial security

It would seem that a motivation to avoid adjudication of the UN's responsibility for the introduction of cholera in Haiti is the costs implications of any damages award. Whilst the financial implications of any finding on liability are potentially significant, this potentiality should not cause a denigration of the rule of law, a foundational principle of the UN. In order to avoid such predicaments in future, the UN should ensure it has adequate insurance in place to underwrite its operations. The UN has relied on worldwide insurance policies to address its exposure to risks of third-party claims in respect of motor vehicle accidents and other incidental private tort claims. These policies should be extended to cover the range of risks the organisation faces.

## VI. Recommended next steps

The following steps should be taken to progress a just and adequate response to the introduction of cholera in Haiti:

The **UN Secretariat** should either:

- accept responsibility or
- refer the question of its role in the Haiti cholera epidemic to an independent adjudicative body.

**UN Member States** should:

- call on the Secretariat to either accept responsibility or allow the question of the UN's role in the Haiti cholera epidemic to be determined by an independent adjudicative body; and
- on an urgent basis, provide funding for the Cholera Elimination Plan.

Once there is an agreement as to responsibility or that matter has been adjudicated, the **next steps to develop a Victim-Centred Reparations Framework** are as follows:

- **Further particularise the harms** caused to key beneficiary groups: i) family members of persons who died; ii) persons who contracted cholera but survived; iii) those who suffered economic losses as a direct result of the epidemic.

Given the numbers of beneficiaries in each class, it would be impracticable to determine the precise harms on an individual basis. As such, one could arrive at a reasonable estimation of the harm suffered by members of each class through statistical sampling, identification of key costs common to the majority of the cases. Or, one could arrive at a figure through a less scientific approach, using general principles of equity to arrive at a reasonable understanding of harm, taking into account the relevant jurisprudence and state practice.

- **Consult with victims groups as to how they understand the harms they suffered and what is most important to them in terms of reparations.** It is important, particularly when there are so many injured individuals, to ensure that they are well-informed about the

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<sup>103</sup> Ibid.

options and limitations of reparations and to achieve agreement between them as to their priorities. Reparations should be designed in a consultative manner in order to empower victims to express views and engage in decision-making about their rights and interests. Victims will be best placed to understand with precision their needs, priorities and the best modalities to implement reparations in their communities. Determine whether there are priorities, whether certain forms of reparation may prove difficult to implement in the local context. Consider with victims whether there is interest to establish a monitoring committee to engage with bodies assigned to implement certain reparative message, such as those identified by the National Cholera Elimination Plan.

- **Commission an independent assessment of the efforts undertaken to date to implement the national cholera elimination plan** and in this respect, efforts to prevent the further spread of the disease (water and sanitation programmes, other prevention schemes) and to rehabilitate victims. The independent assessment should be paid by the UN.<sup>104</sup> Determine with precision what further steps are required and where the gaps may lie and develop and adopt an independent monitoring framework, with victim engagement, to ensure sufficient progress is achieved.
  
- **Secure full funding for the cholera elimination plan and other reparations components.**

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<sup>104</sup> "According to the 'polluter-pays' principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. ... It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring." Directive 2004/35/Ce of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage", OJEU L 143/56 30 April 2004, preamble, para. 18.