

SYMPOSIUM ON WHAT CAN INTERNATIONAL LAW REPAIR?

THE HAITI CHOLERA CLAIMS: FROM SYMBOLIC TO MATERIAL REPARATIONS

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Introduction

In this essay, we will use the Haiti Cholera case study to explore how the victims and the socioeconomic turns are increasingly pivotal in the field of reparations as part of transitional justice. On December 1, 2016, UN Secretary General Ban Ki-moon apologized for the cholera epidemic in Haiti, an illness which arrived with Nepalese peacekeepers deployed after the 2010 earthquake. After years of silence and denial from the UN, the UN finally established a “New Approach to Cholera in Haiti,” promising material assistance and support to the victims through a “victim-centered approach.” The essay builds on our previous matrix used to clarify the debate made of two separate dimensions: the focus of reparations—collective versus individual—and the means of reparations—symbolic versus material.¹ Based on fieldwork conducted in March 2017 in the communities most affected by the cholera outbreak, we demonstrate how the tensions between reparations offered by the UN (with a preference for collective symbolic reparations) and the reparations demanded by the victims (individual material reparations) can help explain why reparations were not fully (at best) successful in providing justice for the Haiti cholera victims and hopefully inform practice in this area for other UN trust funds and victims’ rights mechanisms. The first section discusses the specifics of the cholera crisis in Haiti and the subsequent Haiti Cholera Claims, including the sudden change of position by the UN in 2016 and the nature of reparations included in the New Approach to Cholera in Haiti. The second section looks at the reparations debate and the preferences expressed by the affected communities in Haiti. The third section puts the Haiti Cholera Claims in perspective, discussing the *Kosovo Lead Poisoning* case and the *Mothers of Srebrenica* case, both third party cases involving a UN peacekeeping presence like the Haiti Cholera Claims. Finally, the last section looks at the ramifications of the Haiti Cholera Claims and how reparations debates need to take into account wider structural factors impacting the development of third world countries.

The Haiti Cholera Claims

The launch of a class action in 2013 seeking reparations for cholera victims in Haiti can rightly be described as a watershed moment in the discussion of accountability of international organizations. The claims against the

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¹ See, e.g., Rosa Freedman, Nicolas Lemay-Hébert & Louis Monroy-Santander, *Seeking Justice for the Victims of Cholera in Haiti: Framing the Reparations Debate Through Transitional Justice*, 43 HUM. RTS. Q. 567 (2021); Nicolas Lemay-Hébert & Rosa Freedman, *Appraising the Socio-economic Turn in Reparations: Transitional Justice for Cholera Victims in Haiti*, 15 INT’L J. TRANSITIONAL JUST. 533 (2021).

UN, United Nations Stabilisation Mission in Haiti (MINUSTAH), and two UN officials were filed in the U.S. District Court for the Southern District of New York,² and sought to hold them accountable for bringing cholera into Haiti for the first time in the country's recorded history.³ Since then, "accountability demands have become increasingly hard to shut out."⁴

In 2010, the UN brought cholera into Haiti through a series of policy and procedural errors that had a devastating impact. Peacekeepers from a country where cholera was endemic were not adequately screened for the disease prior to deployment. The base to which they were deployed did not have proper sanitation facilities, resulting in raw fecal waste flowing into the nearby stream that fed a tributary leading into the Artibonite River, the largest in the country and one that supplies water for drinking, cooking, and washing to many Haitians. The initial outbreak was not contained, despite many opportunities for the UN to do so. In the aftermath, tens of thousands of Haitians were dead, and many hundreds of thousands more were sickened, all from what has long been a preventable and curable disease.

The UN not only failed to address the cholera crisis, but it took six years to accept responsibility for the epidemic, and the organization still has not fully provided the material reparations needed to compensate victims or contain and eradicate the disease.⁵ It was only after public pressure through law—attempts to bring legal claims against the UN, for the purposes of drawing media and civil society attention to the issue—that there was sufficient political pressure for the symbolic (almost) apology from the then-UN secretary general and the promises (not fully upheld) of material reparations.⁶

The Haiti Cholera Claims was a class action lawsuit brought on behalf of thousands of cholera victims. The United Nations headquarters are in New York; therefore the claims were filed in the New York District Court. However, it was clear from the outset that the Court would be bound by the Convention on the Privileges and Immunities of the United Nations (CPIUN),⁷ which provides a procedural bar to any court's jurisdiction to hear cases involving the UN without a specific waiver of immunity.⁸ Indeed, the case was dismissed on this basis.⁹ But bringing this case nonetheless secured attention to the plight of the cholera victims.

"Haiti fatigue"¹⁰ combined with the UN's refusal to even discuss the cholera epidemic, had blocked those claimants from achieving justice. The court case changed that. It ought to be of no surprise to scholars of post-colonialism¹¹ that Haiti led the way in seeking to use lawfare—which we define as gaining public attention

² Kristen E. Boon, *Haiti Cholera Battle Against UN Moves to US Court*, OPINIO JURIS (Sept. 10, 2013).

³ David A. Walton & Louise C. Ivers, *Responding to Cholera in Post-Earthquake Haiti*, 364 NEW ENG. J. MED. 3, 4 (2011).

⁴ Kristen Boon & Frédéric Mégret, *New Approaches to the Accountability of International Organizations*, 16 INT'L ORG. L. REV. 1, 7 (2019); see also Rosa Freedman & Nicolas Lemay-Hébert, *Between a Rock and a Hard Place: Immunities of the United Nations and Human Rights*, in CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

⁵ Freedman, Lemay-Hébert & Monroy-Santander, *supra* note 1.

⁶ Rosa Freedman & Nicolas Lemay-Hébert, *Jistis ak reparasyon pou tout viktim kolera MINUSTAH: The United Nations and the Right to Health in Haiti*, 28 LEIDEN J. INT'L L. 507 (2015).

⁷ GA Res. 22(1), *Convention on the Privileges and Immunities of the United Nations* (Feb. 13, 1946).

⁸ *Id.*, Sec. 2.

⁹ *Georges v. United Nations*, No. 15-455-cv (2d Cir. 2016).

¹⁰ Between 1965 and 1995, Haiti has received the equivalent of four Marshall plans per year (as a percentage of aid to GDP). After the outpouring of aid following the 2010 earthquake, and given the limited achievements of the aid on the ground, there is a growing difficulty amongst the international community to bring donor countries to substantially contribute to efforts in Haiti. Nicolas Lemay-Hébert & Stéphane Pallage, *Aide Internationale et Développement en Haïti: Bilan et Perspective*, 1 HAITI PERSPEC. 13 (2012).

¹¹ As discussed in Section 2.

through court cases and thus encouraging public pressure for justice, broadly understood¹²—to demand reparations for harms caused by international interventions and neo-imperialism.

Reparations for the Cholera Epidemic in Haiti

The human right to access a court and remedies in international law reflects the necessity to deliver reparations to victims of serious violations.¹³ Recent claims mirror wider claims for reparations against former colonial powers. In the third-party claims, we see a call for both socio-material and symbolic reparations, but only the symbolic side of reparations are ever truly met, and even then, that is not always the case.

Given the history of Haiti, this approach was almost to be expected. The country was the first in that region to be colonized, with the Indigenous population all but wiped out by the colonizers from Spain and then France. It was the first slave colony in the Western Hemisphere to overthrow its slave masters, paying a large price for becoming the first Black sovereign republic. Haiti had to pay France over many decades for the freedom of its own people whom it had liberated from slavery. And that crippling debt has left the country as one of the least developed, most fragile, and open-to-corruption countries in the world.¹⁴ Beyond that, the mere existence of Haiti is a reminder to former imperialist states of the evils of empires and the lasting inequalities caused by failures to remedy historical harms. This goes some way to explaining the centuries of international interference in Haitian domestic politics, the denial of democratic freedom to the people of Haiti, and the many forms of international interventions designed and implemented to prevent the country from exercising fully its rights of self-determination.

The UN was forced to confront the scientific evidence that the rare strain of cholera brought to Haiti by Nepalese peacekeepers could be found in Nepal.¹⁵ The failures to implement adequate screening policies, to ensure sanitary conditions on peacekeeping bases, to contain and eradicate cholera from the outset, and to vaccinate the population were among the many ways the UN failed in its responsibilities toward the Haitian cholera victims.¹⁶ The legal arguments made by those advocating for the cholera victims ranged from human rights law (to access a court and a remedy, and to truth) to compensation schemes. But the main impact of the case was to force the UN to discuss and take forward justice and reparations for the cholera outbreak and its resulting impact on victims and on the country.

The eventual outcome of those discussions was a political settlement that was a compromise fudge between the varied and various opinions of the victims, survivors, communities, civil society, and government actors.¹⁷ We have conducted fieldwork in cholera-affected communities in Haiti.¹⁸ We followed a team of local lawyers from the *Bureau des Avocats Internationaux* (BAI) in March 2017 who were meeting local support groups for cholera

¹² Nicolas Lemay-Hébert & Rosa Freedman, *Contention, Lawfare and the Normalization of Dissent: How the UN Silenced the Campaign for Accountability in Haiti*, in *THE CAPTURE OF CRITICAL VOICES: HOW INTERNATIONAL INSTITUTIONS CO-OPT PROTEST MOVEMENTS* (Olivier Nay ed., forthcoming).

¹³ Luke Moffett, *Transitional Justice and Reparations: Remedying the Past?*, in *RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE* (Cheryl Lawther, Luke Moffett & Dob Jacobs eds., 2d ed. 2017).

¹⁴ *The Root of Haiti's Misery: Reparations to Enslavers*, N.Y. TIMES (May 20, 2022).

¹⁵ Renaud Piarroux et al., *Understanding the Cholera Epidemic, Haiti*, 17 EMERGING INFECTIOUS DISEASES 1161 (2011).

¹⁶ Alejandro Cravioto, Claudio F. Lanata, Daniele S. Lantagne & G. Balakrish Nair, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (May 3, 2011).

¹⁷ See, e.g., Rosa Freedman & Nicolas Lemay-Hébert, *The Security Council in Practice: Haiti, Cholera, and the Elected Members of the United Nations Security Council*, 33 LEIDEN J. INT'L L. 157 (2020).

¹⁸ Lemay-Hébert & Freedman, *supra* note 1.

victims and discussing possible compensation avenues with these communities. Discussions focused on symbolic and material remedies, including individual and communal socioeconomic reparations.¹⁹ For example, our empirical research uncovered key differences between those who simply wanted a small sum of money to cover the expenses during the pandemic and those who wanted community health clinics to be built to deal with any future crises. There were those who strongly advocated for individual reparations for those affected by cholera, while others emphasized that many of those who died were not registered with death certificates owing to the cost of doing so—instead buried without knowledge or records by or from the state.²⁰

These are all key aspects of thinking about reparations within lesser developed economies, fragile states, and those countries most affected by the harms caused by colonialism and slavery. What we learned as researchers is that the voice of local communities is central to design reparation models that go to the heart of the main socio-legal issues and that the context is always central to all discussions about single-issue matters that arise.

Other Third Party Claims

The Haiti cholera claims brought attention to the need for reparations for single-issue abuses and harms stemming from (often-failed) international interventions and neo-imperialism. They paved the way for other similar lawfare movements for justice. For example, in *NM v. UNMIK*,²¹ the Human Rights Advisory Panel concluded that the UN Mission in Kosovo had breached the rights of members of minority groups by placing them in an internally displaced persons camp located in a heavily polluted former industrial area where they suffered from lead poisoning. What is also known as the *Kosovo Lead Poisoning* case involves the Roma, Ashkali, and Egyptian minorities of Kosovo, forced from their homes in Mitrovica after the Kosovo war. Between 1999 and 2003, the UN resettled about six hundred of them in camps contaminated from nearby mines in the Trepča mines complex. Approximately half were children under the age of fourteen, and random testing indicated that all children under the age of six had life-threatening levels of lead in their blood. In 2016, in response to a complaint submitted by 138 individuals from these communities, the UN Human Rights Advisory Panel found that UNMIK had violated people's rights to life and health and recommended that the UN apologize and pay individual compensation. The UN has, however, only created a voluntary trust fund for community assistance projects—described by the special rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Baskut Tuncak, as “inoperative and fundamentally flawed . . . which will neither provide justice nor the necessary elements of an effective remedy for the victims.”²²

In the *Mothers of Srebrenica* case,²³ family members of individuals who died during the Bosnian War (when the UN was supposed to protect them in a safe haven) have demanded compensation from the United Nations and the Kingdom of the Netherlands, alleging that both are responsible for the failure to prevent the genocide at Srebrenica. The court cases have revolved around the absolute immunity of the UN but also the legal responsibility of the Dutch state in protecting individuals. While the Dutch courts upheld the UN's absolute

¹⁹ Freedman, Lemay-Hébert & Monroy-Santander, *supra* note 1.

²⁰ Lemay-Hébert & Freedman, *supra* note 1, at 547–51; ROSA FREEDMAN, NICOLAS LEMAY-HÉBERT & SIOBHAN WILLS, *THE LAW AND PRACTICE OF PEACEKEEPING* 66–88 (2021).

²¹ *N.M. and Others v. UNMIK*, Case No. 26/08, Opinion (UN Interim Administration Mission to Kosovo Feb. 26, 2016).

²² Baskut Tuncak, Special Rapporteur on Toxics and Human Rights, *The Human Rights to an Effective Remedy: The Case for Lead-Contaminated Housing in Kosovo*, 71–73, UN Doc. A/HRC/45/CRP.10 (Sept. 4, 2020).

²³ *Stichting Mothers of Srebrenica and Others v. Netherlands and United Nations*, Final Appeal judgment, LJN: BW1999, ILDC 1760 (NL 2012) (Eur. Ct. Hum. Rts. Apr. 13, 2012).

immunity, it is nevertheless increasingly contested (as was also made clear in the Haiti cholera claims) that focus on the responsibility of an individual state is sorely lacking where it comes to other cases.

These third-party claims focus on international organizations rather than on the colonial countries that caused the global inequalities and crises in the first place. While those countries may choose to voluntarily donate funds to support remedies and reparations, these are seen as charity or aid rather than legal obligations to compensate for the broader harms caused by imperialism and slavery. Each of those claims, and other similar ones, seek remedies for single-issue matters arising from international interventions. And of course, those interventions are understood as directly relating to fragility caused by colonialism and often replicating imperialism in a more modern manner. What such third-party claims cannot do is address the structural and systemic damage caused by colonialism and by the refusal of former colonial countries to remedy those historic injustices and right those historic wrongs. And nowhere is this more apparent than in Haiti.

Lessons Learned from the Haiti Cholera Claims

Reparations can be understood as a process with the purpose of “relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.”²⁴ All forms of reparations were considered for the Haiti cholera claims, but many were disregarded or not implemented. Symbolic reparations generally include apologies to victims—either directly in communities or more publicly—ceremonies, performances, or memorialization. Socio-material reparations involve, first and foremost, either cash transfers or financial compensations directly to victims, but may more generally include development and community projects. This latter dimension—collective material reparations—is not accepted by all as sufficient, with some not seeing it as an effective remedy either in law or practice. As noted by fourteen UN mandate holders in the case of Haiti and cholera, “compensation is ordinarily a central component of the right to an effective remedy, and development projects are simply not a replacement for reparations.”²⁵ This is also the main finding we took away from our own fieldwork in Haiti, interviewing families of victims of the cholera outbreak of 2010.²⁶ Of course, the typology of material and symbolic reparations does not mean that the two types of reparations do not overlap in specific instances. The material means of reparations can translate into symbolic forms of reparations for instance, or symbolic reparations may shape how the material conditions of human existence are rendered intelligible.

The UN offered both symbolic and material reparations to Haiti after sustained public pressure through law and politics. The apology, delivered by then UN Secretary General Ban Ki-moon in French and Creole, was the beginning of the symbolic reparations. During our fieldwork we saw the video footage played to community groups in the countryside most affected by cholera, and the importance of that apology to many—but not all—individuals on the ground. The material reparations, however, were less easily forthcoming. First, individual compensation was ruled out, and then the community remedies were not fully acted upon or finished. And UN efforts to contain and eradicate cholera have been woefully underfunded and therefore a failure. This has resulted in the disease now being endemic in Haiti. Outbreaks have been recorded in 2022, 2023, and most recently in March of this year, and the deaths these caused, highlight the very real human cost of the failure of safeguarding against harms which can be prevented by screening processes. The failure to provide and implement reparations also leaves an open wound in Haiti which will need to be addressed before healing can begin.

²⁴ Roman David & Susanne Choi Yuk-ping, *Victims on Transitional Justice: Lessons From the Reparation of Human Rights Abuses in the Czech Republic*, 27 HUM. RTS. Q. 392, 393 (2005).

²⁵ UN Press Release, *UN Inaction Denies Justice for Haiti Cholera Victims, Say UN Experts* (Apr. 30, 2020).

²⁶ Lemay-Hébert & Freedman, *supra* note 1.