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United Nations Peacekeepers: Unchecked and Unaccountable

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UNITED NATIONS PEACEKEEPERS: UNCHECKED AND UNACCOUNTABLE

Benjamin Horwitz*

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I. Introduction

Abraham Lincoln said, "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."¹ President Lincoln spoke with regard to a nascent nation whose continued existence and eventual success were – at least in part – dependent on the perceived legitimacy of its governing bodies.

Lincoln's words hold true today, with regard to government as well as international organizations. Although the United States of America and the United Nations are fundamentally distinct in character, size, influence and other features, their legitimacy remains integral to both.

This comment examines the immunity of United Nations peacekeepers through a comparison of the legal recourse available to those affected by two recent significant water crises: the cholera outbreak in Haiti and the contamination of public drinking water in Flint, Michigan. The legal recourse available to victims of conduct of government and international organizations is fraught with historical ramifications and hurdles for individuals. For example, in the United States, there is a long history of sovereign immunity to protect the function of government. Similarly, member nations have long afforded the United Nations vast legal protections.

This comment explores the apparent justifications for such immunities, and assesses the real, limited value in continuing those policies. Immunity is theoretically necessary for the routine function of the United Nations and American government; however, in practice, blanket immunities propagate the unequal,

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¹ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1223-24 (2001).

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unethical and inhumane application of law. The following comparison and analysis revolve around the concepts of the absolute and functional immunity of the United Nations in Haiti and sovereign immunity with regard to government actors and entities in Flint, Michigan.

The United Nations is predicated upon helping states, regions and people in need, and “promoting and encouraging respect for human rights and for fundamental freedoms for all.”² Among the mechanisms available to the United Nations in affecting such ideals, peacekeeping operations are an essential instrument in pursuing the goals of the organization on missions around the world. Such operations, and the peacekeepers involved, are considered to be “subsidiary organs of the General Assembly or the Security Council.”³⁴⁵ Moreover, United Nations peacekeepers are referred to either by explicit designation or by function.⁶

While the fundamental goals of the United Nations peacekeeping missions are benevolent and altruistic, there have been multiple allegations of human rights violations by United Nations peacekeepers. Although the possibility of human rights violations by an organization centered on the pursuit of human rights seems self-defeating and wrong, it also raises questions concerning the accountability of the United Nations. The International Court of Justice (“ICJ”) is the highest judicial body within the United Nations.⁷ The ICJ only hears disputes between members states, and may issue advisory opinions regarding issues that internal UN organs and agencies raise.⁸ Even with regard to member states, ICJ jurisdiction relies upon the agreement by each party to “abide by the [ICJ’s] jurisdiction.” *Id.* Accountability of the UN itself, however, is a different matter. Courts around the world have resisted finding the United Nations or its agents responsible.⁹

² U.N. Charter art. 1, para. 3.

³ Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 77 (1997).

⁴ See generally UNITED NATIONS, GENERAL ASSEMBLY OF THE UNITED NATIONS, www.un.org/en/ga (last visited Nov. 3, 2017) (The United Nations General Assembly is “one of the six main organs of the United Nations, the only one in which all Member States (193) have equal representation.” The United Nations General Assembly addresses a variety of issues, including “development, peace and security, [and] international law”).

⁵ See generally UNITED NATIONS, THE SECURITY COUNCIL, www.un.org/en/sc (last visited Nov. 3, 2017) (The Security Council is a 15-member body whose task is to determine “the existence of a threat to the peace or an act of aggression” in carrying out its duty of maintaining “international peace and security”).

⁶ See *Brzak v. United Nations*, 597 F.3d 107, 113 (2010).

⁷ GLOBAL POLICY FORUM, <https://www.globalpolicy.org/international-justice/the-international-court-of-justice.html> (last visited Nov. 3, 2017).

⁸ INTERNATIONAL COURT OF JUSTICE: HOW THE COURT WORKS, <http://www.icj-cij.org/en/how-the-court-works> (last visited Nov. 3, 2017).

⁹ See, e.g., HR [Supreme Court of the Neth.] 13-04-2012, NJ 2014, 262 m.nt. (Mothers of Srebrenica Assoc./Netherlands); see also Nicole Winfield, *UN Failed Rwanda*, Associated Press (Dec. 16, 1999), reprinted in GLOBAL POL’Y F., <https://www.globalpolicy.org/component/content/article/201-rwanda/39240.html>.

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Sovereign immunity is also well-entrenched with regard to the liability of the United States, and, since the mid-nineteenth century, well-settled law indicates that “the United States may not be sued without its consent.”¹⁰ While “there is no consensus that absolute jurisdictional immunity is necessary,”¹¹ sovereign immunity is not a constitutional violation within the United States.¹² Various legal immunities have long been a part of the American system of government and “are firmly embedded in American law.”¹³ However, in the words of Justice Oliver Wendell Holmes, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹⁴

II. Background

A. United Nations: A History of Immunity

The United Nations’ functional and absolute immunity are fundamental to understanding the consequences of the United Nations’ actions around the world. During its existence, the United Nations has adopted several agreements impacting its own immunity. Such documents include the Convention on the Privileges and Immunities of the United Nations (“CPIUN”), International Organizations Immunities Act and the United Nations’ Model Status of Force Agreement.

The United Nations General Assembly adopted the CPIUN in 1946, shortly after the establishment of the United Nations.¹⁵ As a result, the United Nations – a new, groundbreaking international alliance at the time – received broad immunity.¹⁶ According to the Convention, the United Nations “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”¹⁷ Almost from inception, the United Nations possessed “de facto ‘absolute’ immunity.”^{18,19} However, this immunity was somewhat mitigated by a provision appearing later in the document.²⁰ The provi-

¹⁰ Charles Alan Wright, Arthur R. Miller, et al., *Jurisdiction Over Actions Against the United States—The Sovereign Immunity Problem*, 14 FED. PRAC. & PROC. JURIS. § 3654 (4th ed.) (last updated April 2017).

¹¹ Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 YALE L.J. 1167, 1183 (1982).

¹² *Brzak v. United Nations*, 597 F.3d 107, 114 (2010).

¹³ *Id.*

¹⁴ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

¹⁵ August Reinisch, *Convention on the Privileges and Immunities of the United Nations: Convention on the Privileges and Immunities of the Specialized Agencies, the Specialized Agencies*, http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf, 2 (2009).

¹⁶ *Id.*

¹⁷ *Id.* at 1-2 (acknowledging that the CPIUN occurred at a time when “the privileges and immunities of international organizations was largely uncharted territory”).

¹⁸ *Id.*

¹⁹ Absolute immunity is “a complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.” *Absolute Immunity*, Black’s Law Dictionary (10th ed. 2014).

²⁰ Reinisch, *supra* note 15, at 2.

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sion required the United Nations to “make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. . .”.²¹

The United Nations’ alleged effort to provide an avenue to settlement notably appears in a document that sets forth potential legal consequences when the United Nations enters a nation in its peacekeeping capacity.²² That document is called a Status of Force Agreement, or “SOFA.”²³ It is a permutation of the United Nations’ Model Status of Force Agreement that: “provides for the establishment of a standing claims commission in order to settle disputes of a private law character over which the local courts have no jurisdiction due to the immunity of the United Nations.”²⁴

Furthermore, the United Nations has acknowledged its dual role of allowing private citizens’ claims in civil cases while recognizing the United Nations’ immunity.²⁵ In practice, however, no such claims commission has been created in the history of the United Nations.²⁶ The burden of this reality falls squarely on vulnerable individuals in unstable regions of the world. Those regions are the most likely to warrant United Nations presence in the first place. The likelihood of achieving legal recourse in the nation’s legal system is even lower, so when there is no recourse against the United Nations, there is no recourse at all.

Within the United States, Congress has passed legislation that is significant with regard to the immunity of international organizations. Such legislation includes the IOIA of 1945 and the Foreign Sovereign Immunities Act (“FSIA”) of 1976.²⁷ The main purpose of the IOIA was to grant international organizations – like the United Nations – “privileges and immunities of a governmental nature.”²⁸ The FSIA enabled the judicial branch to make determinations of immunity for international organizations, rather than the executive branch.²⁹ According to the FSIA, foreign nations and international organizations were subject to limited liability – depending on the applicability of certain carve-outs – where they

²¹ *Id.*

²² Jan Wouters & Pierre Schmitt, *Challenging Acts of Other United Nations’ Organs, Subsidiary Organs and Officials* 31 (Leuven Center for Global Governance Studies, Working Paper No. 49, 2010), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp49.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 30 (asserting that “in civil cases, the uniform practice is to maintain immunity, while offering in accord with Section 29 of the General Convention, alternative means of dispute settlement”).

²⁶ *Id.*

²⁷ See Kevin M. Whiteley, *Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts*, 7 WASH. U. GLOBAL STUD. L. REV. 619 (citing H.R. Rep. No. 79-1203, at 946 (1945), reprinted in 1945 U.S. Code Cong. Serv. 946) (2008).

²⁸ *Id.* at 626.

²⁹ *Id.* at 625.

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previously had not been so vulnerable.³⁰ However, the FSIA did not narrow the immunity that the United Nations maintains under the IOIA.³¹

Additionally, in the United States, necessity further justifies the immunity of international organizations.³² This theory is called the “‘functional necessity’ test of international immunities.”³³ Accordingly, immunity for international organizations is essential for a body to strive toward its mission. Thus, the United Nations retains its “independence from national control.”³⁴

B. Expansion of United Nations’ Immunity

In addition to organizational protection from legal recourse, there is further insulation from liability for actors and agents of the United Nations.³⁵ This iteration of defense appears in the form of “functional immunity,” meaning that “all members of a peacekeeping operation are immune from legal process for acts performed by them in their official capacities.”³⁶

Consequently, the United Nations and those who act on its behalf exist behind a shield of multiple layers of legal immunity. In reality, the immunity exists unless and until it is waived.³⁷ As illustrated by various inquiries into the ethics of United Nations actions, it appears unlikely that the organization would voluntarily expose itself to liability by taking responsibility for its conduct.

Alarming, courts have expanded the protection afforded to the United Nations to other actors as well, including to military forces serving as part of a United Nations campaign. In *Mothers of Srebrenica et al. v. State of the Netherlands and the United Nations*, the Dutch Supreme Court held that the Netherlands was not liable for a genocide occurring while an ethnic and religious minority was under the protection of the United Nations security forces and the Netherlands military personnel.^{38,39} The court reasoned that the Netherlands escaped liability because it acted as part of the United Nations Protection Force

³⁰ Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004); Whiteley, *supra* note 27, at 658 (Kevin M. Whiteley concluded, “Long gone are the days when international organizations were minor participants in global politics in need of protection from member states. Today these organizations, especially the United Nations, have accumulated immense wealth and wield vast amounts of power. Under such conditions, the lack of absolute immunity appears neither to threaten the existence of the organization nor its functionality”).

³¹ Brzak, *supra* note 12, at 112.

³² *Jurisdictional Immunities*, *supra* note 11, at 1181.

³³ *Id.*

³⁴ *Id.*

³⁵ Code Blue, *Fact Sheet: Privileges and Immunities of the United Nations* (2015), <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/immunity>.

³⁶ *Id.*

³⁷ Reinisch, *supra* note 15, at 2.

³⁸ Wouters & Schmitt, *supra* note 22, at 8.

³⁹ In 1995, a Dutch military unit under the control of the United Nations oversaw an ethnic group – the Srebrenica enclave – in eastern Bosnia. HR 13 April 2012, NJ 2014, 262 m.nt., *Mothers of Srebrenica*, at 3. The unit failed to protect the group, and 8,000 people from the enclave were subsequently killed in a genocide. *Id.* In response, families of those killed in Srebrenica alleged that the victims were killed as a result of the inaction of United Nations peacekeepers. *Id.* In the lawsuit that followed in the Nether-

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(“UNPROFOR”), which – as an arm of the United Nations – had default absolute immunity.⁴⁰ Similarly, in *N.K. v. Austria*, an Austrian court dismissed the plaintiff’s claim alleging property damage.⁴¹ The court held that the defendant, an Austrian soldier, was “acting as an organ of the United Nations and not of Austria.”⁴² Therefore, Austria was protected under the growing umbrella of the United Nations immunity.

C. The Role of the United Nations in Haiti’s Cholera Outbreak

Located just six hundred and eighty nine (689) miles from Miami, Florida, Haiti has a per capita gross domestic product that is over seventy-five (75) times smaller than that of the United States.⁴³ It has a population of nearly eleven (11) million people.⁴⁴ According to the World Health Organization (“WHO”), the life expectancy in Haiti is almost sixteen (16) years shorter than in the United States.⁴⁵ The United Nations’ current mission in Haiti is its seventh in the small island nation, which is the most for any nation on earth.⁴⁶

Peacekeeping missions have been a staple of the United Nations, and there have been seventy-one (71) since the organization was created in 1945.⁴⁷ United Nations peacekeeping missions are necessarily aimed at helping regions and populations that are vulnerable, due to poverty, war or natural disaster and in need of support that local government and infrastructure cannot provide.

The current United Nations’ mission in Haiti (“MINUSTAH”) began in 2004.⁴⁸ The mission was active on January 12, 2010, when an earthquake devastated Haiti.⁴⁹ In response to the earthquake, the United Nations increased resources to the MINUSTAH mission, including additional peacekeepers.⁵⁰ As a part of this augmented effort, a group of peacekeepers traveled to Haiti from

lands, the Supreme Court of the Netherlands ruled that the United Nations retained its immunity, regardless of the gravity of the claims. *Id.* at 12.

⁴⁰ *Id.*

⁴¹ *Id.* at 20.

⁴² *Id.* at 21.

⁴³ Statistics Times, *List of Countries by Projected GDP per Capita* (June 7, 2017), <http://statisticstimes.com/economy/countries-by-projected-gdp-capita.php>.

⁴⁴ *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html>.

⁴⁵ World Health Org., *Life Expectancy at Birth (years), 2000-2015*, http://gamapserv.who.int/gho/interactive_charts/mbd/life_expectancy/atlas.html (last visited Jan. 1, 2017).

⁴⁶ Thomas G. Bode, *Cholera in Haiti: United Nations Immunity and Accountability*, 47 *Geo. J. Int’l L.* 759, 761-62 (2016).

⁴⁷ UNITED NATIONS, *United Nations Peacekeeping*, <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml> (last visited Nov. 4, 2017).

⁴⁸ The mission is called the United Nations Stabilization Mission in Haiti, or “MINUSTAH.” *MINUSTAH: United Nations Stabilization Mission in Haiti*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/minustah/> (last visited Jan. 8, 2017).

⁴⁹ Bode, *supra* note 46, at 762 (On January 12, 2010, a 7.0 magnitude earthquake caused devastating damage to Haiti. As a result, 217,000 people perished, and another 300,000 were injured. Two hundred fifty thousand residences and thirty thousand businesses were also destroyed).

⁵⁰ Bode, *supra* note 46, at 765.

Nepal.⁵¹ Coincidentally, there had been a cholera epidemic at that time in Nepal.⁵² One of the unintended consequences of their presence was the contamination of local water with cholera, which was subsequently transmitted to the local people.

Despite being a developing nation with limited socioeconomic status, Haiti had no history of cholera prior to 2010.⁵³ Until then, Haiti had managed to avoid a cholera outbreak due partially to the government's awareness of its vulnerability and partially because of Haiti's lagging economy through which Haiti had less international trade than other Caribbean nations.⁵⁴ Despite three cholera epidemics in the Caribbean in the 19th century, research by the Center for Disease Control found no evidence of cholera in Haiti during that time.⁵⁵

However, in 2010, the arrival of cholera with United Nations peacekeepers was catastrophic. The United Nations has estimated that the arrival of cholera led to approximately four thousand, five hundred (4,500) deaths and illness in three hundred thousand (300,000) people in Haiti, and it "continues to cause infections and death" there.⁵⁶ While economic torpor had once insulated Haiti, when cholera finally did arrive, the outbreak was worse because of "simultaneous water and sanitation and health care system deficiencies."⁵⁷

Determining the culpability for the cholera epidemic in Haiti languished in comparison to the rapid pace at which cholera devastated hundreds of thousands of Haitians.⁵⁸ An "independent panel of experts"⁵⁹ sought to determine the source of the outbreak. The panel concluded that the cholera was caused by human activity and the cholera in Haiti was the same strain of cholera that was found in the South Asian strain.⁶⁰ While the panel developed the possible connection between the United Nations Peacekeepers who arrived from Nepal – in South Asia – and cholera in Haiti, the experts' ultimately found that "the Haiti

⁵¹ *Id.* at 764-65.

⁵² *Id.*

⁵³ Deborah Jenson et al., *Cholera in Haiti and Other Caribbean Regions, 19th Century*, 17 (11) EMERGING INFECTIOUS DISEASES 2130, 2130 (2011).

⁵⁴ *Id.* at 2133-34.

⁵⁵ *Id.* at 2133.

⁵⁶ Dr. Alejandro Cravioto et al., *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, 3, UNITED NATIONS, <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> (last visited Jan. 8, 2017).

⁵⁷ *Id.* at 4.

⁵⁸ According to a 2011 United Nations press release, the Secretary-General communicated the need to determine the source of the Haiti cholera outbreak as early as December 17, 2010. United Nations, *Press Release: Deeply Concerned from Outset by Cholera Outbreak in Haiti, Secretary-General Appoints Independent Expert Panel*, <http://www.un.org/press/en/2016/sgsm17705.doc.htm> (last visited Oct. 29, 2016). According to the release, "determining the source of the cholera outbreak is important for both the United Nations and the people of Haiti." *Id.* The release further explains that the United Nations will cooperate completely in the investigation of an independent group, appearing to recognize the importance of transparency and credibility in the investigation. *Id.* Although it is honorable to support such a fact-finding expedition to stem the scourge of cholera, it also appears that the United Nations sought to maintain – or achieve – reputation of benevolence and credibility with regards to its investigation. *Id.*

⁵⁹ See Cravioto, *supra* note 56.

⁶⁰ Cravioto, *supra* note 56, at 29.

cholera outbreak was caused by the confluence of circumstances. . . and was not the fault or, or the deliberate action of, a group or individual.”⁶¹

D. The Role of Local Government in the Contamination of Flint’s Drinking Water

The potential for contamination of drinking water in Flint, Michigan has long existed as the leaching of the municipality’s lead water pipes demonstrate.⁶² Furthermore, city officials operated the Flint Water Treatment Plant on a mere quarterly basis from 1967 to 2014, likely with little inspection as it served as a backup water treatment plant during that time.⁶³ However, steps immediately precipitating such contamination began in 2014 in response to the nation’s economic crisis which had particularly acute effects in Flint.⁶⁴ At that time, Michigan Governor Rick Snyder placed an Emergency Manager in charge of the operations of the city of Flint.⁶⁵ As part of cost-cutting measures, the Emergency Manager – a non-elected individual – and other state officials switched the source of Flint’s drinking water from Lake Huron to the Flint River.⁶⁶ The results have been catastrophic for local residents.

A group of Virginia Tech researchers conducted a study of lead levels in Flint’s water in the summer of 2015.⁶⁷ The study contained analysis from two hundred and seventy one (271) homes in Flint.⁶⁸ The study revealed that the 90th percentile for lead concentration in the city – an important metric for city officials – was over five times higher than the United States Environmental Protection Agency’s (“EPA”) recommended limit.⁶⁹ Additionally, investigators discovered that some homes had lead levels in the water that qualified as “toxic waste” according to the EPA, as well as lead levels in the water of one residence that was almost eight hundred (800) times the recommended limit.⁷⁰

Investigations into the Flint water contamination revealed that in 2011, independent consultants for the city determined that keeping or making the Flint water system safe would require fifty million dollars (\$50,000,000) in improve-

⁶¹ *Id.*

⁶² FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 16 (2016).

⁶³ *Id.* at 15.

⁶⁴ Complaint at 2, Concerned Pastors for Social Action v. Khouri, 2016 WL 319206 (E.D. Mich.) (No. 16-10277).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Christopher Ingraham, *This Is How Toxic Flint’s Water Really Is*, THE WASH. POST (Jan. 15, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/01/15/this-is-how-toxic-flints-water-really-is/?utm_term=.2a441192d84c.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

ments.⁷¹ However, it appears that city and state officials did not pursue such regulatory measures.⁷²

In a report analyzing the causation of the contamination of drinking water in Flint, an independent task force reported that “primary responsibility for the crisis in Flint, Mich. lies with a state environmental agency called the Michigan Department of Environmental Quality.”⁷³ The task force also found that the Michigan Department of Health and Human Services had data indicating that the water was contaminated, and failed to adequately act to protect Flint’s residents.⁷⁴ The Michigan Safe Drinking Water Act (M.C.L.A. § 325.1005 et seq.) and the federal Safe Drinking Water Act (42 U.S.C.A. § 300 et seq.) provide the statutory guidelines to which governmental bodies – at least in theory – are required to adhere. Despite numerous layers of statutory protection regarding the quality of drinking water, safe drinking water is not guaranteed.

The reality of an American city depriving its citizens of potable drinking water has, justifiably, been shocking to many people.⁷⁵ While disputes continue with regard to other natural and man-made resources – like oil rights, for example – it seems unconscionable for water, as a basic necessity, to be expendable. According to the federal Safe Drinking Water Act, local governments are required to provide safe drinking water “by testing the water for harmful contaminants and treating the water to control for those pollutants.”⁷⁶

III. Discussion

Sovereign immunity has long been an important governmental protection against liability.⁷⁷ Among the justifications for sovereign immunity are tradition, the protection of government treasuries and the “existence of adequate alternative remedies.”⁷⁸ While sovereign immunity has been firmly entrenched in governments around the world – and in the United States, in particular – it seems contradictory based on the American tenet that “government and government officials can do wrong and must be held accountable.”⁷⁹ Sovereign immunity has even been criticized as an “anachronistic relic”⁸⁰ whose continued existence rests

⁷¹ *Concerned Pastors for Social Action v. Khouri*, 194 F. Supp. 3d 589, 595, 602 (E.D. Mich. 2016).

⁷² *Id.*

⁷³ Merrit Kennedy, *Independent Investigators: State Officials Mostly To Blame For Flint Water Crisis*, NPR (Mar. 23, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/23/471585633/independent-investigators-state-officials-mostly-to-blame-for-flint-water-crisis>.

⁷⁴ *Id.*

⁷⁵ Jean Ross, *The Crisis in Flint is About More than Poisoned Water*, FORD FOUNDATION (Feb. 2, 2016), <https://www.fordfoundation.org/ideas/equals-change-blog/posts/the-crisis-in-flint-is-about-more-than-poisoned-water/>.

⁷⁶ Rita Ann Cicero, *In Flint, Lawsuits Over Drinking Water Contamination Start Trickling In*, 33 No. 26 WL J. TOXIC TORTS 4, Feb. 12, 2016, at 1, 2.

⁷⁷ See Chemerinsky, *supra* note 1, at 1216.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1202.

⁸⁰ *Id.* at 1201.

on the premise that “protecting the government treasury is more important than the benefits of liability in terms of ensuring compensation and deterrence.”⁸¹

Various constitutional scholars have been unable to find a basis for sovereign immunity in the Constitution of the United States, and have even found it to be “inconsistent with three fundamental constitutional principles: the supremacy of the Constitution and federal laws; the accountability of government; and due process of law.”⁸² Such shortcomings suggest that governmental entities ought not to be so shielded by a theory that contradicts the very foundation of democracy.

Sovereign immunity is the legal turning point for the calamities in Haiti and Flint, Michigan. This powerful immunity distinguishes the defendants – government entities in Flint and the United Nations in Haiti – from private actors. Private actors whose actions lead to the same results would likely face enormous legal consequences. But sovereign immunity seems to serve as an insurmountable hurdle in the instant cases.

With regard to United Nations’ accountability, legal scholars have asserted that the court’s decision in *Georges v. United Nations* was correct in terms of its interpretation of the law and consistency with prior holdings.⁸³ In *Georges*, the court held that the United Nations’ failure to enact remedial measures by which injured parties could seek recourse against the United Nations – as mandated by the CPIUN – did not waive the United Nations’ immunity.⁸⁴ Furthermore, the Second Circuit recognized its holding in *Georges* to be consistent with its previous decisions, maintaining that “purported inadequacies of the United Nations’ dispute resolution mechanism did not result in a waiver of absolute immunity from suit.”⁸⁵

Such an argument is difficult to dispute given the vast protections that courts around the world have afforded governments and their agents in the past. However, the more worthwhile and necessary discussion revolves around the very policies upon which centuries of sovereign immunity is based. Although the application of a law may be correct in terms of how that law is written or intended, such application does nothing further to justify the law, just as a term cannot be used in its own definition. Therefore, the decision to maintain United Nations and United Nations peacekeeper immunity may be considered “good policy” only insofar as it extends decades of unethical and unjust jurisprudence.⁸⁶ Courts and policymakers prioritize the fiscal health of the United Nations over the ethical duties to the individuals that the United Nations was created to serve.

Flint’s victims of contaminated water face similarly narrow avenues for recourse, with an important exception being the liability of the municipality of Flint. The Flint Water Advisory Task Force reached damning conclusions about the causes of and responsibility for the lead contamination in the report it

⁸¹ *Id.* at 1217.

⁸² *Id.* at 1210.

⁸³ Bode, *supra* note 46, at 780.

⁸⁴ *Georges v. United Nations*, 834 F.3d 88, 97 (2nd Cir. 2016).

⁸⁵ *Id.* at n.48.

⁸⁶ Bode, *supra* note 46, at 781.

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presented an important report to the Governor of Michigan.⁸⁷ The Task Force ultimately asserted that “the Flint water crisis is a clear case of environmental injustice.”⁸⁸ As the United Nations has – in theory – the duty of creating a system of legal and financial recourse for victims, the Task Force also recommended specific steps that various governmental entities should take to fix the problems it created and ameliorate the burden on the citizens of Flint.⁸⁹

In both scenarios, though thousands of miles apart, there seems to be a striking similarity. Rather than holding governments, international organizations and their agents to account for the errors in their conduct, the legal systems merely encourage the such bodies to “do the right thing.” State and federal statutes, as well as international treaties and agreements, exist in theory to protect public health and public safety. If the result of such a system were actual government action and relief to those victimized by governmental action or negligence, such a framework would be sufficient. In reality, however, relief is slow and insufficient, if existent at all.

IV. Analysis

Legal action has been limited with respect to both the crises in Haiti and Flint. In *Georges v. United Nations*, a class of plaintiffs and their decedents filed a class action suit against United Nations for the illnesses and death caused by cholera in Haiti.⁹⁰ The United States Court of Appeals (Second Circuit) ruled in 2016 for the United Nations.⁹¹ Following the United Nations’ argument for absolute immunity based on Section 29 of the CPIUN, the court dismissed the case for lack of subject matter jurisdiction based on immunity.⁹² Before the case was decided, the United States executive branch submitted a statement of interest to the court, and “took the position that defendants are ‘immune from legal process and suit’ pursuant to the United Nations Charter.”⁹³⁹⁴

The United Nations offered a late, meaningless apology in December of 2016.⁹⁵ While expressing “moral responsibility” and “deep regret”, Secretary-

⁸⁷ See FLINT WATER ADVISORY TASK FORCE, FINAL REPORT (2016).

⁸⁸ *Id.* at 54.

⁸⁹ *Id.*

⁹⁰ *Georges v. United Nations*, 834 F.3d 88, 98 (2nd Cir. 2016).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Alejandra Salmeron Alfaro, *JASTA: Impact on the Principle of Sovereign Immunity*, 37 MICH. J. INT’L L. (2016) (amending the Foreign Sovereign Immunities Act (FSIA), Justice Against Sponsors of Terrorism Act (JASTA) amended the Foreign Sovereign Immunities Act (FSIA) opening the door to private parties seeking legal action against foreign governments. Justification for this legislation was formally based on the efforts of American families of victims of the terrorist attacks on September 11, 2001, it appears to introduce the analogue of foreign individuals having standing to bring suit against the United States – or potentially other international organizations in courts in the United States – in the future).

⁹⁵ Somini Sengupta, *U.N. Apologizes for Role in Haiti’s 2010 Cholera Outbreak*, NY TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html>.

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General Ban Ki-moon did not assume legal responsibility on behalf of the United Nations.⁹⁶ According to *The New York Times*, “the group that represents the victims, the Institute for Justice and Democracy in Haiti, has said it has not yet decided on whether to take the matter to the United States Supreme Court to seek compensation.”⁹⁷ However, based on the response of American courts in the past, and their apparent aversion to assigning liability to the United Nations, it is unlikely to amount to legal accountability even if a case is filed with the Supreme Court of the United States.

Although less open-and-shut than legal proceedings for Haiti’s victims of U.N.-caused water contamination, legal recourse in Flint, Michigan also appears limited.⁹⁸ The most prominent lawsuit filed with regard to the water crisis in Flint was *Concerned Pastors for Social Action v. Khouri* (2016 WL 319206 (E.D. Mich.)), a civil action filed in the United States District Court in the Eastern District of Michigan. In *Concerned Pastors for Social Action v. Khouri*, three organizations and an individual brought a lawsuit on behalf of the residents of Flint, Michigan with regard to the water contamination.⁹⁹ The court ruled that – although the 11th Amendment gives general immunity to officials from suit in federal court – “a plaintiff can avoid this sovereign immunity bar by suing for injunctive or declaratory relief, rather than monetary relief.”¹⁰⁰ Moreover, the court ruled that “the state defendants have exerted a level of control to bring them within the scope of the Safe Drinking Water Act’s requirements.”¹⁰¹

In March of 2017, a federal judge in Michigan approved a settlement in the *Khouri* case in which “the state of Michigan has agreed to spend up to \$97 million for new water lines in the city of Flint.”¹⁰² According to the settlement, Michigan will provide funding for related health programs until March 2021.¹⁰³ To date, this is the largest remedial expenditure related to the water crisis in Flint.¹⁰⁴

While financial recovery appears to remain limited for potential plaintiffs in Flint, developments in other federal jurisdictions may prove fruitful in future litigation. For example, in a North Carolina water contamination case, a federal district court judge denied the government’s motion to dismiss the plaintiff’s Federal Tort Claims Act case, despite the government’s predication of its motion on sovereign immunity.¹⁰⁵ In *Jones*, the government argued that it retained sover-

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Jenson, *supra* note 53; Concerned Pastors, *supra* note 71 at 595, 602.

⁹⁹ *Supra* note 71, at 593.

¹⁰⁰ *Id.* at 604.

¹⁰¹ *Id.* at 606.

¹⁰² Merrit Kennedy, *Judge Approves \$97 Million Settlement To Replace Flint’s Water Lines*, NPR (Mar. 28, 2017, 2:10PM), <http://www.npr.org/sections/thetwo-way/2017/03/28/521786192/judge-approves-97-million-settlement-to-replace-flints-water-lines>.

¹⁰³ *Id.*

¹⁰⁴ See *Guertin v. Michigan*, 2017 WL 2418007 (E.D. Mich. 2017); *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017); *Mich. Dept. of Env’tl. Quality v. City of Flint*, 2017 WL 4641897 (E.D. Mich. 2017).

¹⁰⁵ *Jones v. U.S.*, 691 F. Supp. 2d 639, 643 (E.D. N.C. 2010).

eign immunity under the Federal Tort Claims Act because the water contamination related merely to its discretionary functions.¹⁰⁶ Nevertheless, the court held that the government already had notice of the contamination when the plaintiff lived on the government's property, and that the plaintiff's complaint was timely filed within a standard of reasonable diligence in becoming aware of the injury.¹⁰⁷ Therefore, the court permitted the plaintiff's to proceed under the Federal Tort Claims Act.¹⁰⁸

The availability of legal remedies available in response to the government's contamination of drinking water in the United States depends on two variables; (i) the type of relief the plaintiffs seek and (ii) the level of government opposing the claim.¹⁰⁹ In *Concerned Pastors v. Khouri*, the Flint plaintiffs did not seek compensatory damages.¹¹⁰ Rather, the plaintiffs are sought "equitable relief to mitigate the health and medical risks resulting from the defendants' violations."¹¹¹

While it is very difficult to attain monetary relief from state and federal government in the United States, municipal governments are not protected by sovereign immunity.¹¹² Therefore, municipal governments remain susceptible to legal recourse even when the state government is not.¹¹³ Gil Seinfeld, a law professor at the University of Michigan, has maintained that there is established legal theory for Flint plaintiffs to seek – and win – damages from the city of Flint.¹¹⁴

Furthermore, a municipality is subject to ever broader liability when it expands the scope of its activities: "A municipality acting in a private or proprietary capacity, in contrast to a governmental capacity, could be subject to tort liability under the same rules that apply to private persons or corporations."¹¹⁵ In *S.A.B. Enterprises, Inc. v. Village of Athens*, a New York appellate court found that "supplying water through lines to local customers" was proprietary and thus subjected it to potential tort liability.¹¹⁶ Even more broadly, the Pennsylvania Supreme Court has held that a municipal water authority is liable when a dangerous water condition "created a foreseeable risk. . . and that the local agency had actual notice or could reasonably be charged with notice. . . of the dangerous

¹⁰⁶ *Marine's Spouse Can Sue U.S. Over Tainted Drinking Water*, 28 No. 3 WL J. TOXIC TORTS 2, 1 (Mar. 24, 2010).

¹⁰⁷ Jones, *supra* note 105, at 642.

¹⁰⁸ *Id.* at 643.

¹⁰⁹ See Chemerinsky, *supra* note 1; see also Amber Phillips, *Criminal charges were just filed in Flint. But suing over the water crisis remains very difficult.*, THE WASH. POST (Apr. 20, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/why-it-will-be-very-difficult-for-flint-residents-to-sue-the-state-of-michigan-for-money/?utm_term=.611c6a76a743.

¹¹⁰ Cicero, *supra* note 76, at 1.

¹¹¹ Concerned Pastors, *supra* note 71, at 597.

¹¹² Phillips, *supra* note 109.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Anthony J. Bellia, Jr., *Lead Poisoning in Children: A Proposed Legislative Solution to Municipal Liability for Furnishing Lead-Contaminated Water*, 68 NOTRE DAME L. REV. 399, 410 (1992).

¹¹⁶ *Id.* at 411.

condition.”¹¹⁷ Therefore, the threshold after which municipal governments may be held liable seems to provide recourse for government-caused local water contamination.

However, based on the severity and breadth of the water contamination in Flint, plaintiffs are also pursuing action against the state, which has the potential to provide more substantial relief.¹¹⁸ The plaintiffs’ theory is that “the state denied citizens their basic constitutional rights by piping them water poisoned by lead for 18 months.”¹¹⁹

V. Proposal

The United Nations needs to create real remedial mechanisms and delineate specifically how it will be responsible under humanitarian law. The shortcomings in recourse available to individuals under the influence of United Nations missions is twofold. First, it undermines the very goals of human rights and equality upon which the United Nations was founded. Second, it delegitimizes the United Nations as a benevolent force in the world.

The similarities between the populations of Flint, Michigan and Haiti are striking, especially concerning their standing within their respective regions. They are both economically feeble. They are surrounded by regions, cities or countries that hold far more economic and political clout. Their populations are comprised of a majority that is non-white. Both seem restrained to the nadir of their socioeconomic and political existence. Legal recourse for both of these imperiled populations is challenging to attain, at best.

However, a significant distinction between the cases of water contamination in Haiti and Flint is the public perception and public relations campaign with regard to each crisis. Although neither case has adequately remedied the problem in those respective regions, the situation in Flint appears to have garnered a more fervent public response.

In comparison to Flint, the public relations campaign with regard to the cholera crisis in Haiti represents uncharted territory as there is no precedent for the establishment of “international victim relief funds.” Such efforts have taken hold in the United States in past decades in certain circumstances. For example, compensation plans were organized for the families of those injured or killed during the terrorist attacks of September 11, 2001 as well as for victims and their families who had been affected by the explosion of the oil rig Deepwater Horizon in the Gulf of Mexico in 2010.

Despite the differences in public perception between the water crises of Haiti and Flint, there is a shocking causal connection between the actions of American government and the United Nations and subsequent severe health problems and deaths of innocent citizens. The totality of the damage is not yet quantifiable. Yet the nature of the discourse that has followed appears to revolve not around the

¹¹⁷ *Id.*

¹¹⁸ Phillips, *supra* note 109.

¹¹⁹ *Id.*

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merits of the victims' claims. Rather, it revolves around the legal framework now serving hurdle to achieving hope, equality and justice. In these tragic circumstances, it is the simple, ethical response – as Wayne State law professor Noah Hall posits – that seems to have gotten lost in the debate:

“The state is better off accepting responsibility and moving the focus to how are we going to fix this, compensate the victims and prevent future damage from happening. The worst strategy is for the state to fight – the state shouldn't be spending its resources fighting residents who are seeking compensation for the harm they suffered. It should facilitate them getting compensation.”

In the United States, it seems contradictory that an arm of government in a democracy – empowered by the people of that democracy – would be able to do harm without consequence. It is especially incomprehensible that a lack of accountability exists in a litigious society, where private citizens must answer for actions far less damaging than those of public officials in Flint. It is confusing that there can be such a dearth of culpability in a nation that prides itself in many regards as promoting a meritocracy.

VI. Conclusion

Two-thousand five hundred and fifteen days after the 2010 earthquake in Haiti that precipitated support from the United Nations and led to peacekeepers devastating Haiti with cholera, the United Nations apologized.¹²⁰ United Nations Secretary-General Ban Ki-moon apologized in three different languages.¹²¹ However, the United Nations carefully sculpted its apology so as not to assume any legal responsibility.¹²² During those twenty-five hundred days, the death toll has risen to an estimated ten thousand (10,000) people.¹²³ The response to the outbreak is long underway, but it is merely an effort to restore Haiti and its people to their status before the United Nations intervention. The United Nations claims it is close to having the amount necessary to fund repairs to Haiti's water and sanitation system and to being able to provide cholera treatment for Haitians. However, as of December 1, 2016, the United Nations had raised only five hundred thousand (\$500,000) – or 0.25% – of its pledge to provide Haitians with “material compensation.”¹²⁴ In August 2017, a New York federal judge dismissed the only remaining class action lawsuit regarding water contamination in Haiti against the United Nations.¹²⁵

¹²⁰ Somini Sengupta, *U.N. Apologizes for Role in Haiti's 2010 Cholera Outbreak*, THE NEW YORK TIMES, <http://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html> (Dec. 1, 2016).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Rick Gladstone, *Court Dismisses Remaining Lawsuit Against U.N. on Haiti Cholera*, THE NEW YORK TIMES, https://www.nytimes.com/2017/08/24/world/americas/haiti-cholera-lawsuit-united-nations.html?_r=0 (last visited Nov. 3, 2017).

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The devastation that the United Nations unleashed in Haiti cannot be excused as a coincidental effect of humanitarian aid. To allow such an excuse is to annihilate any semblance of a legal duty that the United Nations holds. Compared to the plight of those affected by water contamination in Flint, the effects in Haiti have been more immediate in terms of the score of deaths of people in Haiti. While residents in Flint are at risk for brain damage and other health problems, thousands of Haitians are already dead. However, both scenarios will likely have longstanding, deleterious impact on local populations. Despite major humanitarian efforts to support Haiti, and a nearly-hundred million dollar settlement for the residents of Flint, the full depth of devastation in both cases has yet to be realized. An equitable or just outcome appears unattainable within the current legal framework. Both crises should cause moral outrage and warrant much more than government resistance and meaningless apologies aimed at reviving a deteriorating public image.