

Mandate of the Special Rapporteur on extreme poverty and human rights

5 October 2016

Dear Deputy Secretary-General,

I am writing in response to your letter of 19 August 2016 concerning the United Nations new approach to the issue of responsibility for the cholera epidemic in Haiti.

As you know, I consider the steps that have been taken in recent weeks by the Secretary-General and yourself to be extremely important and very welcome. The comments made by the Secretary-General both in his speech to the General Assembly on 20 September 2016 and in his meeting with President Obama on the same day clearly indicate a willingness to address the question of the United Nations' responsibility in a way that has been absent until now.

I especially welcome the assurance in your letter to me that:

“the United Nations approach to cholera in Haiti must include, as a central focus, the victims of the disease and their families. [The Secretary-General] intends, therefore, to develop a package that would provide material assistance and support to those Haitians directly affected by cholera.”

The Secretary-General spoke in similar terms to the General Assembly when he stated that “[w]e are developing a set of measures to assist the persons most directly affected, and we are redoubling our efforts to build strong systems for water supply, sanitation and health ...”.

It is also very encouraging to learn of the extensive efforts being coordinated by Assistant Secretary-General David Nabarro to explore additional sources of funding and to identify the elements to be addressed in a new package of assistance to Haiti. He has recently indicated that \$181 million will be mobilized to reinvigorate the emergency response and at least the same amount again will go to the victims' families.¹ Once finalized, this mobilization of an additional \$360 million or more will represent an immense achievement.

¹ “UN Rolls Out Aid Package for Cholera-Hit Haiti”, September 29, 2016, available at <http://www.france24.com/en/20160929-un-rolls-out-aid-package-cholera-hit-haiti>

Mr. Jan Eliasson,
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But a crucial element is missing from the overall package that is needed both to address the injustice that has been done and to ensure that the United Nations acts in a principled manner consistent with its international legal obligations. The package needs to be rooted in a legal framework that enables the United Nations to respect its obligations in this case, to act in accordance with the rule of law, to demonstrate that it is prepared to be held accountable, and to emerge from the shame of its previous policy on Haiti with both credit and credibility.

There are two main legal approaches available, both of which comprehensively uphold the Organization's immunity from suit in national courts. The first approach involves accepting that the actions of the United Nations in Haiti gave rise to a legitimate private law claim on the part of those who died or were made ill as a result of the Organization's negligent behaviour. This claim would be dealt with as required by the Convention on Privileges and Immunities through the establishment by the United Nations itself of an appropriate mode of settlement. In practice, this would require the Organization to do much the same as it has already indicated it will do through the other elements of the new package. It would also signal that future claims will be dealt with in a similarly principled manner and that the United Nations will accept that it is accountable, albeit in the limited range of situations in which its operations have caused serious harm that can be addressed as matters of private law such as tort or contract.

The second approach involves comprehensively denying that obligations of any sort arise from the role of the United Nations in bringing cholera to Haiti, even to the point of denying that any process for settling the dispute is needed, and instead proceeding on the basis that the new package is essentially an act of charity on the part of the Organization. In concrete terms, this means that no meaningful apology can be issued (since UN lawyers apparently fear this might carry legal significance), that no legal process is established, that no payments made can be considered as compensation or reparations since that terminology might also have legal significance, and that the best that can be hoped for is a form of voluntary (*ex gratia*) payments combined with an evasive official statement of regret.

Only the first approach provides a way forward that is consistent with the United Nations' cherished principles of respect for the rule of law and human rights, with its desire to be seen as a principled, accountable and responsible partner in peacekeeping, and with its legitimate concern to protect its legal immunity.

It will be a travesty of justice if, having moved so far in such a short time, the United Nations finds itself at the last moment unable to accept the principle of accountability, the avoidance of which has motivated the long years of total denial, and if it is similarly unable to embrace the principle of respect for the rights of victims to compensation as opposed to charitable payments.

It is clear, however, that there is very strong resistance within the Organization, driven by the position adopted by the Office of Legal Affairs (OLA), which has so far comprehensively blocked the consideration of the option for accountability. Because the issue is of such great importance, both to OLA and to those who believe that the advice of the Office is erroneous and leads to impunity, it is instructive to examine how the matter has been dealt with to date in procedural terms and then to consider the merits of the arguments that seem to underlie the position advocated by OLA.

Procedural dimensions of the role played by OLA

At every stage, OLA advice has been the central factor which has shaped the Organization's approach to the question of its responsibility for bringing cholera to Haiti. Its advice seems to have been of particular relevance at two different stages.

The first stage involved the drafting of several sentences inserted into a letter of a more general nature written in February 2013 to the Director of the Institute for Justice and Democracy in Haiti, and subsequently slightly elaborated upon in letters to the Special Procedures mandate-holders. In these few lines of analysis the Under-Secretary-General for Legal Affairs simply asserted that since examination of the claims for compensation would require the consideration of "political and policy matters" they were therefore "unreceivable." I have explained in my report (A/71/367, paras. 28-37) why this conclusion is justified neither by the facts nor by the relevant law and practice. But here I want to draw attention to the process through which this legal advice was drawn up, and the secrecy that has followed. In a public lecture given in 2013, a former United Nations Assistant Secretary-General for Legal Affairs and highly respected international law expert, had this to say:

If ever a case cried out for the application of a concept of accountability in international law this is it.

...

Whether, in its internal deliberations, the UN's legal or moral responsibility was discussed and whether possible remedies of accountability were canvassed is difficult to say. A complete veil of silence has been drawn over this issue to the point that no official will discuss the matter on or off the record. There is, however, anecdotal information to the effect that an initial opinion agreed to by the peacekeeping and legal departments found that an obligation existed under Section 29 [of the Convention on Privileges and Immunities] but that it was rejected at the highest level, presumably for political reasons. Consequently a second opinion was ordered and was in fact prepared by outside American counsel. It was this opinion that formed the basis, such as it is, for the February 2013 letter. As we have seen this contains no legal reasoning.²

The 'veil of silence' persists until this day. I have asked senior officials of the United Nations who have been involved in discussions of the issue whether they have seen a copy of any legal opinion on the matter. The answer has always been in the negative. I have not spoken with anyone who has acknowledged seeing such an opinion and despite the fact that the relevant position is consistently cited by senior officials and has effectively determined the approach adopted, there is no evidence in the public domain for assuming that any detailed or reasoned legal opinion has ever actually been drawn up. Even if it exists, it is surely entirely unacceptable for a matter of such major importance not just to the people of Haiti but to the United Nations itself to be determined on the basis of advice, the content of which continues to remain entirely secret. This determined lack of any transparency runs counter to all that the Organization purports to stand for and to the most elementary principles of good governance and the rule of law.

² Ralph, Zacklin, "Accountability and International Law," Address to the 21st Annual Conference of the Australian and New Zealand Society of International Law, Canberra, 5 July 2013.

The second stage of OLA's role has been its reported continuing insistence, despite the Organization's major change of direction in August 2016, that the United Nations must neither accept that this is a private law claim that requires it to provide an appropriate mode of settlement nor take any steps that would imply legal responsibility in this case. In the view of OLA it seems to follow that no meaningful apology can be issued, and that terms such as compensation or reparations cannot be used to describe any payment that might be made to victims since either of these steps might be understood as implying legal responsibility. I address below the substance of these arguments, but for present purposes the key point is that once again the Office has never made public the relevant advice, and none of its officials has ever sought to elaborate upon or explain publicly the legal reasoning involved. The result is that the proposed new package of measures is severely constrained by an undisclosed analysis that, despite its secrecy, has shaped the entire contour of the discussions.

Before looking at the legal arguments that seem to be relevant, it may be recalled that ever since its first public statement on this issue in February 2013 and at least until my draft report to the General Assembly was leaked in August 2016, OLA consistently based its arguments upon the contention that it was unclear whether or not cholera was brought to Haiti by United Nations peacekeepers. In support of this position, OLA systematically invoked the unsubstantiated arguments presented in 2011 by the panel of independent experts, despite the self-evident weaknesses and contradictions of that part of the panel's report and of its members' subsequent retraction, and despite the growing mountain of evidence pointing incontestably to the responsibility of the United Nations. The announcement in August 2016 by the United Nations that a new approach was to be adopted would be inexplicable if it were not premised upon recognition of the fact that the old approach of denying factual responsibility is no longer tenable. But it seems that this change in the official position has not led to any comparable revision of the legal analysis. Indeed, it is not clear if OLA still defends and relies upon the old position or not.

The substance of OLA's legal position

Since there is no available legal opinion, no significant official explanation of the policy, no public attempt to justify the approach, and no assessment of its consequences for future claims, it is difficult to know exactly what the arguments are for insisting that no responsibility or accountability can or should be accepted in this case.

What is known from the scant official record is that on 21 February 2013, claims made on behalf of cholera victims were deemed "not receivable pursuant to Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations". Although that section requires the United Nations to provide for appropriate modes of settlement of disputes of a private law character, these claims were excluded because it was said that their consideration "would necessarily include a review of political and policy matters". A challenge to this 'finding' was rejected without further explanation and a request for a follow up meeting was rebuffed.

This 'finding' has drawn no support from legal commentators. Contrary to OLA's assertion, the Haiti claims in fact have all of the characteristics of a private law tort claim and are directly comparable to many claims processed by the Organization in

the past, although the affected population is notably larger. The sole reason cited for rejecting the claims is that they raise “political or policy matters,” but these matters are never specified and OLA has not sought to reconcile this assessment with the detailed legal advice provided to the General Assembly in 1995 which would require a very different result. Again, contrary to OLA’s assertion, the duties owed by the United Nations are directly analogous to those owed by a company or private property owner to ensure adequate waste management and to take adequate precautions to prevent spreading diseases, and can thus be dealt with entirely without prejudice to the Organization’s legal immunity.

Moreover, OLA’s approach is inconsistent with longstanding practice. It has long been accepted that the United Nations can incur obligations and liabilities of a private law nature. And the Organization has long recognized its international responsibility for damages caused by the activities of its forces within this framework. As a result, many such claims have been made and settled, albeit on a confidential basis.

Given the lack of justification for the assertion of non-receivability, as well as indications given to me in recent weeks by officials acting in accordance with the instructions of OLA, it would seem that the real reason for the approach adopted is the fear that any acceptance of responsibility would potentially jeopardize the immunity of the United Nations in relation to this case or future lawsuits. In other words, officials perceive a risk that the Organization might be sued and believe that a meaningful apology on the part of the Secretary-General, or the provision of compensation payments to the victims, must be avoided for fear that they could be used to challenge its claim to immunity.

An assessment of the validity of these concerns requires an evaluation of the likelihood that the legal immunity of the United Nations could really be at risk if responsibility under Section 29 of the Convention were to be accepted in this case, or if an apology was issued or compensation paid. Article II of the Convention on Privileges and Immunities provides that the United Nations “shall enjoy immunity from every form of legal process” unless it decides to expressly waive its immunity. In August 2016 the United States Court of Appeals resoundingly upheld the claim of immunity brought on behalf of the United Nations and unanimously dismissed the case brought by the Haitian victims. The time in which an appeal could be lodged has almost expired and there is in any case no prospect that the United States Supreme Court would agree to hear an appeal given the strength of the lower court’s opinion and the overwhelming weight of existing precedent. In my report I suggested that the only real risk that this immunity could be challenged in courts in other countries would be if the United Nations insists on refusing to abide by the obligation that is specifically imposed upon it in Section 29 of the Convention to provide a mode of settlement in private law cases of this nature. In other words, in my view, the approach currently being insisted upon by the OLA is, ironically, the only real threat to the long-term sustainability of the United Nations’ legal immunity. If the OLA sees other threats, the burden should surely be on its shoulders to spell out what it considers these might be.

There is almost always some element of residual uncertainty in the legal positions adopted by large organizations in relation to complex issues, in the sense that there can be no absolute guarantees that an apparently watertight legal position will not be subject to a challenge of some sort. But to elevate an almost entirely hypothetical

and speculative concern that there might someday somewhere be a legal challenge to a level at which it trumps an otherwise compelling case for respecting international legal obligations is surely unconscionable. It is impunity masquerading as legal prudence.

The result of OLA's approach is that UN peacekeepers not only enjoy absolute immunity, as they rightly should under international law, but also that they enjoy absolute non-accountability, which is an unprincipled, unacceptable and unsustainable approach. OLA is effectively defending impunity, rather than immunity.

In addition, if the existing approach is maintained it would set a precedent for any future legal claims for compensation resulting from egregious conduct by the United Nations of the type that occurred in Haiti to be rejected. Instead, future claimants would be condemned to going through the same long drawn out process required in the Haiti case of needing to mobilize sufficient outrage in the international community as to provoke the United Nations to offer to make a charitable payment to the victims. In other words, the OLA approach would represent a major step back from long established practice and would lock in a new principle that the United Nations does not and will not accept claims for private law wrongs directly attributable to its peacekeeping and other operations, despite the explicit provision for doing so contained in the Convention on Privileges and Immunities. In practice, the United Nations is, without ever acknowledging it, adopting a two-tier approach under which it will accept small-scale claims (such as motor accidents) but will avoid claims involving larger-scale harms or where a significant number of persons are involved. This cannot be justified under the Convention and creates immense difficulty in drawing the line.

Explaining the position

Given the total lack of transparency, those concerned are driven to speculate as to the reasons underlying the OLA position, and it seems important to do so if there is to be the possibility of bringing about change.

The first seems to be the approach taken by the United States of America. It has a particular interest in this issue not only because of its role in relation to its close neighbour, Haiti, but also because it is the principal contributor to the overall United Nations peacekeeping budget.

Large numbers of congressional representatives have pressed the US Government to "utilize its leadership position to stress the importance of UN accountability," and on 20 September 2016 Senators Markey, Rubio, Menendez, and Leahy wrote to the Secretary-General calling for "a public apology" and "a transparent and comprehensive plan, consistent with the requirements for the settlement of disputes of a private law nature enshrined in Section 29 of Article VIII of the Convention on Privileges and Immunities of the United Nations."

As with the legal position of the United Nations, the United States has never publicly stated its legal position on this matter. I have made a number of requests for clarification of the position but none has been provided. Responses by United States officials to Congressional inquiries have carefully avoided all reference to the legal responsibility of the United Nations, and have not provided any indication of the Government's legal position. It has, however, been consistently suggested to me by a

range of persons that the position eventually adopted by the Under-Secretary-General for Legal Affairs in 2013 was consistent with views strongly pressed within the Organization at the time by the United States.

As far as can be ascertained, the position of the State Department's lawyers seems to be that the United Nations must follow the advice generally given to negligent drivers and dishonest corporations being sued in the United States' legal system which is to never, ever, accept legal responsibility when it can be avoided. Instead, the advice is to seek a settlement that resolves the immediate situation but does not make any concession on matters of principle. "We accept neither responsibility nor liability in this matter, but we have agreed to make a payment of one billion dollars to the Federal Treasury."

It is difficult to reconcile this approach with President Obama's statement to the General Assembly on 20 September 2016 that "binding ourselves to international rules over the long term ... enhances our security," or with the position expressed by the four United States Senators on 20 September 2016 calling for a settlement based on Section 29 of the Convention.

The problem with transposing assumptions relevant to the United States legal system is that the United Nations operates in a radically different context. Its reputation for compliance with the rule of law and international law, including human rights, is part of its *raison d'être*. In both the 1946 Convention and in its practice the United Nations has accepted responsibility for the private acts of its peacekeepers in recognition of the fact that as a creature established by international law it needs to respect it itself. The significance of this is clear from the UN's recent experience with respect to sexual assault allegations against peacekeepers. And unlike United States' corporations or government agencies, the United Nations enjoys absolute legal immunity from suit in national courts under the 1946 Convention. Since it does not therefore bargain under the shadow of litigation as do most of those working within the US legal system, insistence that it should never accept legal responsibility under international law is both misplaced and inappropriate. Instead, the UN stands to lose immeasurably in reputational terms if it simply denies responsibility when it is demonstrably liable, as is so clearly the case in Haiti.

To the extent that the United States' Government's preference for handling this case has influenced the otherwise difficult-to-explain posture of OLA, this is ironic given the fact that since 1942, the US Foreign Claims Act has required the United States Government to promptly settle meritorious claims of exactly the sort that have arisen in Haiti. That legislation explicitly states the reason for adopting such an approach: "to promote and to maintain friendly relations" with the States in whose territories it is operating. It is especially puzzling therefore if the United States is taking the position that the United Nations should not adopt this very same approach.

A second explanation for OLA's position that has been suggested to me is that granting a legal remedy to the Haitians would open the floodgates to endless claims from the Central African Republic or South Sudan or elsewhere. But the only remedies the United Nations can provide, under the terms of the 1946 Convention, relate to private law matters such as contract, property or tort. As far as is publicly known, there are relatively few such claims. If this is not the case, and there are in fact a significant

number of such claims, this is surely a matter that should be made public to enable Member States and others to better assess the position of OLA. It is surely better to establish a principled and manageable way of dealing with these than to force the United Nations to deny all such claims, thereby refusing to be held accountable and bringing widespread opprobrium upon itself.

A third explanation is that any willingness to be accountable in relation to Haiti will lead to massive payouts either in this or in later cases. Again, this is not the case since it is the United Nations itself that determines the size of any payout, and there is no appeal to any court from such a determination. The Haiti case is the perfect illustration. While claimants in the failed US litigation sought over \$40b, the claim is likely to be resolved through the payment of as little as \$200m.

The United Nations leadership and its Member States do have a viable and principled alternative to the present course. The UN can follow the procedure clearly laid out in the Convention on Privileges and Immunities and provide an appropriate mode of settlement for the victims' claims. This would not create a new precedent, it would not in any way jeopardize the Organization's immunity, it would not lead to any higher financial settlement than has already been proposed, it would not open any floodgates of future claims for crimes such as sexual abuse by peacekeepers since these are not private law matters, and it would enable the United Nations to live up to its international legal obligations as well as its commitment to the rule of law, human rights, transparency, and accountability.

The second option is to accept the lawyers' view that all conceivable legal risks should be avoided, no matter how attenuated, speculative, and unlikely they might be. This option involves the rejection of legal responsibility even in cases in which the law and longstanding precedent would demand it. The result represents the rejection of accountability and the embrace not just of immunity, which is indeed vital, but also of impunity, which is supposed to be contrary to everything for which the Organization stands.

Sadly, there is a substantial risk that the Organization will choose a different course and continue to reject any accountability for resolving these claims. This would in my view be a lamentable outcome that is inconsistent with the rule of law, contrary to human rights, and undermines the principles and credibility of the Organization. It could, however, be easily avoided if the political will were present.

While recognizing the immense progress that you and the Secretary-General have brought about on this issue in recent weeks, my hope is that the United Nations will choose the first course. To that end, I would be grateful for any information you could provide in response to the following questions:

1. Would the Secretary-General make public the legal advice provided by the OLA in relation to its potential responsibility for the introduction of cholera in Haiti? If not, can it at least be made available to Member States?
2. What exactly are the "political and policy matters" that are said by OLA to have been raised by the claim lodged in 2011 and which apparently prevented it being

‘received’ by the United Nations as a private law claim requiring the application of Section 29 of the Convention?

3. Has the legal advice been revised or updated in recent weeks to take account of what now seems to be the Organization’s acceptance of its central role in relation to the arrival of cholera in Haiti in 2010?
4. Does the United Nations consider that there are unacceptable legal risks to offering an unqualified apology? If so, what are those risks?
5. Is it the case that the United Nations considers that payments to the families of victims of cholera in Haiti can only be made on an ex gratia basis, since to make them in the form of ‘compensation’ or ‘reparations’ would necessarily imply legal responsibility and must thus be avoided?

I would be very grateful for a reply by 12 October 2016. I recognize that this is a short period of time but the matter is urgent for many reasons and a response by then would assist me in determining whether or not to make public the concerns expressed in this letter.

Please accept, Deputy-Secretary-General, the assurance of my highest consideration.

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