

**The 2014 Raoul Wallenberg Lecture in Human Rights at the Faculty of Law, McGill University
delivered by Stephen Lewis, Professor of Practice in Global Governance at the Institute for the
Study of International Development, McGill University
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Allow me to begin in somewhat unorthodox fashion. I fully intended, and still intend to relate this lecture to the use of the principle of immunity in international affairs, and to the inevitable human rights implications. I had originally planned to focus on the end of immunity for sexual violence committed by United Nations Peacekeepers. That's a theme dear to the heart of AIDS-Free World, and a theme that we explored with a number of Canadian and international experts in a week-long workshop convened here at McGill a month ago, under the auspices of the Institute for the Study of International Development. Indeed, Frédéric Mégret, of this distinguished Law School was one of the expert participants.

But something happened on that designated road to immunity. I read extensively about Haiti and cholera and the UN use of immunity to avoid responsibility, and at the workshop I had been fortunate enough to talk with Beatrice Lindstrom of the Institute for Justice and Democracy in Haiti, and the more I learned, the more agitated I became. The subject wasn't unfamiliar to me; I had touched on it publicly in the past. But the details left me reeling. The upshot is that if I don't disgorge my views this evening on Haiti, cholera, immunity and the UN, I shall have an intellectual melt-down.

There is of course a caveat. This is a Law School. I'm not a lawyer ... in fact, I dropped out of two eminent law schools in the course of a hapless academic career. I'm going to try to reconnoiter some legal issues as best I can; I simply ask you to let the milk of human kindness flow through your veins in the event of any excruciating errors or aberrations.

On Thursday morning, October 23rd, 10:00 am, I sat in the United States District Court, Southern District of New York—the magnificent Thurgood Marshall Federal Judiciary building—along with my co-Director and Deputy Director from AIDS-Free World. We were there to witness a significant moment in legal history: for the first time, the United Nations' responsibility for the cholera epidemic in Haiti was being debated in a court of law.

The background is both uncontested and appalling in equal measure. In October of 2010, a short nine months after the horrendous earthquake, an epidemic of cholera burst upon Haiti. Within days and weeks, the numbers of deaths and the astronomic numbers of those who fell ill amounted to a staggering compilation of human misery.

If I may provide an unsettling analogy, the extent of the tragedy of cholera exceeded the current tragedy of Ebola. Since the 2010 outbreak, there have been a total of 706,862 cases and 8,584 deaths. Even in 2014, there are a thousand new cases per month.

In his remarkable, recently-published book, *How Human Rights Can Build Haiti*, Fran Quigley provides this description:

“In both its origins and its effects, cholera is a decidedly foul disease. The process starts when feces-contaminated water carries the bacterium *Vibrio cholera*. The resulting infection causes acute watery diarrhea in the afflicted, thereby spreading its pathogen with ruthless, disgusting proficiency. Left untreated, the diarrhea caused by cholera quickly drains the body and can cause death within hours. Extremely virulent, and with a short incubation period of two hours to five days, cholera moves quickly. In scholarly articles and white papers describing the course of cholera in Haiti, academic and scientific terminology invariably gives way to the adjective ‘explosive’. The term is used to describe both the disease outbreak and the debilitating diarrhea suffered by its victims.”

The court proceedings were straightforward, dealing with a class action filed in October, 2013. To use the words of the presiding judge at the outset: “Plaintiffs allege that the United Nations and entities affiliated with the United Nations caused a cholera epidemic, beginning in October of 2010, in Haiti, and they bring claims for negligence and related claims against the United Nations and associated entities and individuals of the United Nations. They have sought to serve those entities, the defendants.” (The entities the judge refers to are the UN Peacekeepers).

He continued: “The United Nations defendants have resisted service, and we are here for oral argument really on just the issue of whether this Court should deem service to have been made and the related issue of whether the action should be dismissed ... on the ground of United Nations immunity; that is, under the applicable legal governing authorities, whether the United Nations and the other defendants are immune both from service and from the lawsuit itself.”

I shall not torture you extensively with endless quotes reflecting my legal naïveté. But please bear with me as I attempt to convey the issues and the arguments.

The counsel for the plaintiffs was Beatrice Lindstrom of the Institute for Justice and Democracy in Haiti. She was supported by Brian Concannon, who actually heads the Institute. Beatrice Lindstrom proved an impressive and formidable lawyer.

Allow me to digress for a moment. The Institute for Justice and Democracy in Haiti, and its Haitian-based partner called BAI, Bureau des Avocats Internationaux, headed by Mario Joseph, have been the two leading advocacy organizations attempting to extract justice from the United Nations. They’ve been at it, never daunted, for years. To read about them and their work is to read about organizations of uncompromising principle with an unswerving commitment to human rights. They draw upon the support of tremendous numbers of Haitian citizens. That support is built on a bedrock of trust.

Digression complete.

To this novice observer, the case hinged on two arguments. There is a UN Convention on Privileges and Immunities that dates back to 1946. Article 2, Section 2 reads: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”

It clearly had not waived its immunity in this case.

Juxtaposed with Article 2 is Article 8, entitled “Settlement of Disputes.” Section 29 under this article, reads: “The United Nations shall 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; b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

In simplest terms—and terms which, on the face of it, seemed to engage the attention of the judge—Beatrice Lindstrom argued that since the United Nations was completely unresponsive to Section 29—modes of settlement had never been offered—it had so completely breached the contractual understanding of the Convention that immunity was forfeit.

Apart from the fact that Section 29 uses the verb “shall,” there is also the supportive application of what is called the Status of Forces Agreement (SOFA) with the country where the Peacekeepers are to be stationed, or the Host Country as it is formally known. Thus you have the “Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti.”

In 2004, lasting to the present day, and just extended to October, 2015, the United Nations established the UN Stabilization Mission in Haiti, known by the acronym ‘MINUSTAH.’

Paragraph 54 of the SOFA reads: “Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributable to MINUSTAH ... which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement.”

And what does paragraph 55 say? Quote: “ ... any dispute or claim of a private law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction ... shall be settled by a standing claims commission to be established for that purpose.”

In a nutshell, Beatrice Lindstrom argued that the combination of Section 29 of the Convention and Paragraph 55 of the SOFA acted as a condition precedent to Section 2 of the Convention before immunity could prevail. Both Beatrice and the judge seemed to like framing the Convention as a contract that had been conclusively breached. If, as the claimants contended, the United Nations was responsible for the cholera, and neither section 29 nor paragraph 55 was ever employed, then the claimants had a right to launch their suit. In principle, the immunity provision of the Convention would be over-ridden. It simply would not trigger.

The lawyer, nominally for the defendants, strenuously disagreed. Ellen Blain, Assistant United States Attorney, also an obviously accomplished lawyer, put the case. She was categorical. Section 2, the immunity clause of the Convention was in no way subject to Section 29. They were entirely separate. There was no condition precedent; there was no relationship whatsoever. Therefore paragraph 55 of the SOFA also did not apply; there was no point to a standing claims commission.

She insisted that the immunity provision was all-encompassing and absolute in every instance, the only exception being a waiving of immunity, and immunity had not been waived. Case closed. Immunity was not eviscerated (Ms. Blain kept on using the verb eviscerate ... I always thought that meant the removal of organs, as in disemboweling. That definition actually appeals to me. I'd like to eviscerate immunity in the case of Haiti. Mind you, let me urgently add at this point that there are of course other worthy reasons for diplomatic immunity to obtain: it's just that it's obscene in the present instance).

I don't want anyone to think that I've done justice to the legal arguments as they were rolled out in court. There were many authorities quoted, many arcane judicial precedents invoked. What I've tried to do is to provide a sense of the heart of the dispute. I should add that the judge is still deliberating; the judgement is not yet rendered.

There were two additional and fascinating aspects of Ms. Blain's presentation. The first is that she's a United States Attorney. As a States Party to the Convention on Privileges and Immunities, the United States has every right to be present, to intervene, to act for the defendants (the defendants described as the United Nations et al). But there is an important nuance here. The United States on several occasions refused to take a position on whether or not the UN was responsible for the cholera or whether or not the UN had an obligation to initiate a standing claims commission. The United States was effectively speaking in its 'personal capacity', not wanting to be seen to defend the behavior of the United Nations, but very much wanting to defend the principle of immunity as enshrined in the Convention.

But where, then, was the United Nations itself?

Clearly a careful strategy is in play. The United Nations refuses to be associated with any challenge to its immunity, the challenge based on cholera in Haiti being by far the most ominous. Under no circumstances, therefore, will United Nations' lawyers find themselves in a court of law adjudicating immunity. Finally, we now know what the UN Office of Legal Affairs does with its time: it hones the art of evasion.

But the true revelation in the argument of Ms. Blain came right at the end of her brief rebuttal. She said—allow me to quote directly—“... finally, this case and the repercussions stemming from the Court's ruling today is not narrowly limited. It would create and open up a huge set of claims to the United Nations. Private parties around the world would be able to sue the United Nations for ... perceived violations and breaches of the treaty.”

There you have it: the money reason behind the defense of immunity. Alas, these days the United Nations doesn't need any encouragement to do something fundamentally dishonourable, but if its ardour ever flagged at the level of the Secretary-General, the United States is there to dictate terms. Both the UN and the US are running scared at the possibility of incurring costs; it should be remembered that as the wealthiest country in the world, the United States is the largest contributor to the UN, and any costs that are levied against the UN would necessarily be applied most significantly to the United States. The fact that this self-protective impulse is pursued over the bodies of 8,584 Haitians is apparently of no account. The fact that billions of dollars are

available at a moment's notice to bomb ISIL targets, does not mean that a fraction of that cost is ever available to compensate the victims of UN negligence.

Those are, admittedly, harsh words. I offer them advisedly. I'm a multilateralist. I've spent the majority of my working life directly or indirectly involved with the United Nations. When legitimate, I'll defend it to the teeth. When illegitimate, I shall not hold back.

There are few things, in the last decade of the United Nations, more illegitimate, more reprehensible, more despicable than the United Nations scurrying for cover behind the tattered, discredited banner of immunity when applied to the cholera tragedy in Haiti.

As I understand it, from my own reading and conversation, this is a summary of the facts: a summary that's not meant to be exhaustive in any sense:

Between October 8 and October 14, 2010, a Nepalese contingent of peacekeeping troops arrived in Haiti. Despite the fact that Nepal had experienced a cholera episode in the months prior to their departure, the testing of the troops left out all who were asymptomatic, missing many who were carrying the disease. Upon their arrival in Haiti, they set up camp in rural Mirebalais, near a tributary that feeds into the Artibonite River, Haiti's primary source for the drinking and washing proclivities of the nation. The sanitation arrangements were appalling, and human waste found its way into the river; in fact, human waste was actually seen being trucked into the river. Within days of the arrival of the troops, cholera was identified at several area hospitals. The scourge had begun. There had been no previous evidence of cholera in Haiti for well more than a hundred years.

As the country descended into cholera chaos, the search for the source began. It became immediately clear to the leading activists how the cholera had originated, and they submitted a petition of over five thousand names, seeking compensation, to the UN in November of 2011. Fifteen months later, in February of 2013, the UN deigned to reply with a response so putrid, so arrogant, so absurd that you wonder how in God's name they could get away with it.

They simply said it was "not receivable" under Section 29 of the Convention because a review of the claims would require a review of "political and policy matters."

What the devil does that mean? It's sheer, nonsensical bafflegab. It's a linguistic construction designed to convey absolutely nothing. It's the smart-alecky language of bureaucratic omniscience. As I stand here delivering this lecture, I'm imagining to myself people whose mouths are warped into a perpetual sneering contempt.

There is no longer the slightest doubt about the Nepalese Peacekeepers as the origin of the cholera. Not a scintilla of doubt. There have been at least ten expert academic and scientific studies proving that Nepal brought cholera to Haiti.

For a while, the United Nations rested its resistance on a report in 2011 from a committee of four experts, appointed by the Secretary-General to investigate the source, who identified and

acknowledged all the obvious, irrefutable links in the chain of infection, but couldn't bring themselves to tell the truth. So they fudged the findings and concluded that a number of factors must have caused the cholera, the Nepalese soldiers being only one of those factors.

However, just one year later, the co-author of the report reversed herself, saying "We now know that the strain of cholera in Haiti is an exact match for the strain of cholera in Nepal." New evidence had emerged, indicating that "the most likely source of the introduction of cholera into Haiti was someone infected with the Nepal strain of cholera and associated with the United Nations Mirebalais camp."

Gone was the last mask in the UN's masquerade.

Of course, many prominent people knew that the UN's defense was both phony and untenable. Quite simply—why am I gilding the lily?—the defense was a lie, and the defenders continue to lie. They were called out by *The Economist*, *The New York Times*, the *Washington Post*: Fran Quigley in his book quotes the Pakistani representative on the Security Council demanding a UN apology, and calling for the UN "to do whatever is necessary to making this situation right." According to Quigley, the French representative on the Security Council said of the cholera crisis "We can regret it, but we cannot ignore it." The former head of the Department of Peacekeeping Operations, Jean-Marie Guéhenno said that the UN "must come clean on cholera." Even Bill Clinton, the UN Special Envoy for Haiti said that MINUSTAH was—and I quote—the "proximate cause of the cholera epidemic."

The Independent Expert on the Situation of Human Rights in Haiti, appointed by the Human Rights Council, denounced the UN's response ... that was in 2012; his successor, writing in February of this year, said "... the diplomatic difficulties surrounding this issue must be overcome in order to assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided."

"Full reparation for damages": that must have induced traumatic apoplexy on the 38th floor (the celestial confines of the Secretary-General). But the Independent expert went further: "If necessary," he said, "those responsible for the tragedy should be punished in accordance with ... International Human Rights and Humanitarian Law" ... at the sound of those words the traumatic apoplexy probably morphed into cardiac arrest.

In fact there's an interesting sidebar here. The nominal boss of the Independent Experts was the UN High Commissioner for Human Rights, at the time Navi Pillay of South Africa. At the height of controversy, she was quoted as saying that she "stands by the call that ... those who suffered as a result of that cholera be provided with compensation."

Ironically, at that very moment, I was about to do a CBC interview on cholera, so I immediately put in a call to Navi Pillay (whom I knew; not long before we were on a Panel together in Geneva). She was allegedly unavailable. Finally, we reached her personal assistant. On December 4th, 2013, at 10:02am, my Executive Assistant, who conveys messages with impeccable perfection, wrote me an e-mail as follows: "I just received a call from the personal Assistant to the High Commissioner. She

conveyed the following message: The High Commissioner sends her greetings. However, she will not be able to speak with you on the subject of Haiti. She's happy to speak to you about issues of human rights, but a conversation about Haiti needs to be dealt with by the Executive Office of the Secretary-General."

Navi Pillay told the truth. She was the United Nations High Commissioner for Human Rights. She was muzzled by the bureaucratic hierarchy. The paranoia and prevarication of the UN had silenced even the most senior official in the UN Human Rights establishment.

The appalling truth about the behaviour (I should really use the word malfeasance) of the UN was, and continues to be its refusal at every step of the way to institute the standing claims commission mandated in paragraph 55 of the Status of Forces Agreement, flowing logically from section 29 of the Convention.

There have been a total of 32 of these agreements, that is to say, Status of Forces Agreements, where a standing claims commission could have been launched. Not once did that happen. In the shady rumour mills of the UN it is said that perhaps those claims were resolved internally, but because there's virtually no transparency whatsoever, we'll never know. Freedom of information is not a concept embraced by the UN Secretariat. Secrecy is the biblical watchword.

The entire sordid saga of Haiti and cholera is a dreadful commentary on the United Nations. It's almost too painful for words. Here you have the world's most exalted organization, whose mantra is human rights, democracy and the rule of law. Every element of the mantra has been betrayed. The human rights of the dead and afflicted were dismembered from the outset; democracy in the quest for justice does not exist; and the rule of law, as enshrined in Conventions and agreements is flouted at every turn.

Does the United Nations leadership not understand the massive loss of confidence and loss of reputation that flow from these betrayals? I used to be Canada's Ambassador to the United Nations. I was such an apologist for multilateralism that people made fun of me: they would say is he Canada's Ambassador to the United Nations or the United Nations' Ambassador to Canada? No longer. The stance on Haiti is so ugly that the UN should feel no relief from an incessant drumroll of criticism.

I would want to plead with the senior leadership of the UN to reverse their policy on cholera ... apologize, abandon the insistence on immunity, settle the claims. But I know that no one is listening or will listen. The strategy is naked: drag things out as long as possible, shift the focus to long-term water and sanitation reform, hope against desperate hope that the issue will disappear into the ether of public indifference. So a truly powerful response, running alongside the route through the courts, is to name and shame those responsible, and to keep the pressure on in unrelenting fashion.

The most awkward component of that pressure, of that naming and shaming is the Secretary-General himself. He runs the risk of bringing significant disrepute upon his office and his personal reputation. He runs the risk of a legacy permanently scarred by the record on Haiti and cholera.

The Secretary-General of the UN visited Haiti in July of this year. During his visit, he said that the United Nations bears a “moral duty” to help to end cholera in Haiti. To be sure, Ban Ki-moon didn’t say that the UN was responsible for bringing cholera to Haiti, but the use of the phrase “moral duty” was highly evocative and inevitably implied in the minds of his audience that the UN was responsible. The phrase appeared in news stories around the world.

And if there was any doubt about the meaning, it was eschewed in what came thereafter.

In a church on Haiti’s central Plateau, the Secretary-General, accompanied by his wife, is quoted as saying “This is a necessary pilgrimage for me. I have come here to grieve with you. As a father and grandfather, and as a mother and grandmother, we feel tremendous anguish at the pain you have had to endure.”

Does Ban Ki-moon not understand the import of those words? Does he not understand what his Haitian listeners would legitimately draw from those words? Has this become a carefully constructed use of language parsed by lawyers dancing on the head of the proverbial pin?

Am I aggravated and angry? Yes, I am. The UN is responsible for this mess, this desperate human predicament. You don’t use the wiles of diplomacy to share anguish while pretending no responsibility. The advice being given to the Secretary-General is morally bankrupt.

Prior to his departure, he’s quoted in a *Miami Herald* story: “Regardless what the legal implication may be, as the Secretary-General of the UN and as a person I feel very sad.” Regardless of what the legal implication may be? Every word the SG utters on cholera has a legal implication, and I have to say that if this case ever fully gets before the courts, those words will strangle the UN’s argument.

Let me return to July. In the presence of the media, Ban Ki-moon told the Haitian people: “I know this epidemic has caused much anger and fear. I know that an unacceptable number of people are still affected by the disease. I am here today with my wife to tell you that I share your pain.” Would that the pain turns into testimony.

As recently as last month, October 9th to be precise, there was a kind of multilateral fund-raiser for Haiti at the World Bank. The Bank, which is part of the United Nations, pledged \$50 million towards the latest plan to construct and reconstruct a clean water and sewage system for all of Haiti (it’s impossible to keep track of the number of plans that have been recycled). This plan requires \$2.2 billion over ten years. Despite an energetic effort to round up funding, the proceeds so far amount to 10% of the total. You would think, under the circumstances, that the UN would make this a cause célèbre.

At the meeting on October 9th, the Secretary-General repeated his old refrain, ad nauseam: “We are here to express our strong solidarity and our support, our continuing support, for the Haitian people and government in their fight against cholera ... I had an emotional visit to Haiti in July, when I heard first-hand how cholera has affected families ... my heart ached at the losses that so

many thousands of people have had to suffer and die ... I had been meeting many people in many different places, but meeting the families of victims was one of my most moving.”

Everything, all those words, all those heartfelt expressions of empathy and agony, but never the admission of responsibility. The Secretary-General is allowing an extraordinary manipulation of his integrity.

Let me speak very personally. For four years, as the Deputy Executive-Director at UNICEF, one of my responsibilities was damage control. I learned that the best damage control was the truth. When, for example, we found out that UNICEF was substantially responsible for the drilling of wells in Bangladesh that turned out to have arsenic in the water, causing severe illness, I went to Bangladesh and in a public meeting took responsibility. After that, when we entered into a program of helping children in the afflicted families, then marking the wells that were dangerous and drilling new ones, we were taken much more seriously. People trusted us.

You don't need the brains of a global strategist to tell you exactly what's going on in the corridors of the 38th floor of the UN Secretariat. Everyone, without exception, in the Secretary-General's coterie knows the UN is responsible for the cholera catastrophe in Haiti. They admit it to each other without so much as a qualm.

They're trapped by the United States that doesn't want even a whisper of compensation to enter the controversy (one wonders where President Obama is in this picture). They're frantically trying to figure out what they can get away with ... and they're terribly worried about the public perception. They know that at some point they'll be forced to capitulate. The question is can they take the risk of some court at some stage opening the floodgates, or can they find a compromise in advance? Should they, for example, strike a standing claims commission and swallow the decision?

The one thing we can collectively not permit is to allow the issue to go away. Every conceivable opportunity should be used to drive home the reality that in the case of Haiti and cholera, the United Nations has abandoned human rights, has spurned the rule of law, and has rendered democratic principles a travesty.

If I were Secretary-General, I'd have a hard time sleeping at night.