

Reputation and Accountability

Another Look at the United Nations' Response to the Cholera Epidemic in Haiti

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Abstract

The cholera outbreak in Haiti offers a useful case study of reputation as a disciplinarian of international organizations. On the one hand, UN officials and member states alike have emphasized the need to repair the organization's damaged reputation. On the other hand, the UN secretariat declined to take certain steps that might have averted—or at least mitigated—that reputational damage in the first place. This contribution argues that the United Nations' response to cholera in Haiti showcases some important limitations and complications of reputation as a disciplinarian. Reputation will function as a less effective disciplinarian of organizations in the context of uncertainty about the facts or about what the law requires. Notably, international organizations have some capacity to perpetuate factual uncertainty through their control over key sources of information. Reputation will also serve as a less effective disciplinarian when organizations have multiple audiences that are not evaluating the organization against the same standards.

Keywords

United Nations – reputation – accountability – ICJ advisory opinion

1 Introduction

Absent a contractual relationship, individuals who have been harmed by the acts or omissions of international organizations rarely have access to institutions

to hear their claims.¹ National courts are generally unavailable because of organizations' immunities. The list of alternative accountability mechanisms is quite familiar to scholars of international organizations in part because it is rather short.² Such accountability mechanisms must be deliberately designed, adopted, and implemented.

By contrast, no deliberate effort is required to have a reputation. Like individuals, organizations have reputations whether they want them or not.³ A good reputation can confer significant advantages—while a bad reputation can impose significant costs. For this reason, reputation can be a powerful motivator and disciplinarian. Understanding when and how reputation serves as an effective disciplinarian of international organizations—and when and why it does not—is especially important given the dearth of legal mechanisms for holding international organizations accountable. As one scholar has put it, if reputation can function as an accountability mechanism, “it may take some of the sting out demands for legal responsibility”.⁴ The converse is also true: to the extent that reputation fails to function as an effective disciplinarian, the need for formal institutions becomes more urgent.⁵

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- 1 The employees of international organizations are usually able to turn to specialised administrative tribunals. Private individuals (or firms) that contract with international organizations may negotiate waivers that provide for dispute settlement.
 - 2 That list includes the World Bank Inspection Panel and similar mechanisms at other international financial institutions ('IFIs'), which allow individuals who've been harmed by an IFI-funded project to challenge the IFI's compliance with its own internal rules; the Ombudsperson for the ISIS and Al-Qaida Security Council sanctions regime, which allows individuals and entities that are subject to sanctions to challenge the appropriateness of their continued listing; and the Kosovo Human Rights Advisory Panel, which was available to hear complaints that the UN administration in Kosovo had violated its human rights obligations.
 - 3 A reputation is the aggregate set of beliefs that such observers hold about that organization. Anyone who observes what an organization does and develops and articulates a judgment about the organization's conduct helps to shape the organization's reputation. See Daniel E Carpenter, *Reputation and Power* (Princeton University Press, 2010) 18, 26.
 - 4 Ian Johnstone, 'Do International Organizations Have Reputations?' (2010) 7 *International Organizations Law Review* 235, 239 (“If reputation does function as an accountability mechanism, then that may take some of the sting out of the demands for legal responsibility while also providing a framework for analysing institutional design and reform”); Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29, 37 (“[R]eputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them”).
 - 5 To be sure, these are not exclusive alternatives. Reputation also works in conjunction with legal mechanisms and helps to explain compliance with those mechanisms. See below n 117.

Along some important dimensions, the cholera outbreak in Haiti is a best-case scenario for reputation as a disciplinarian. Reputation only works if people are paying attention. Because of the work of journalists, NGOs, epidemiologists, UN special rapporteurs, and scholars, this tragedy has garnered significant and sustained attention since the first cholera case in 2010. This attention has been overwhelmingly negative: there is no doubt that the United Nations' handling of the cholera outbreak has seriously damaged the organization's reputation.⁶

UN officials and member states alike have insisted that they want to repair that damage. In December 2016, former Secretary-General Ban Ki-moon announced a New Approach to cholera in Haiti. Ban apologized to the Haitian people, saying “[w]e simply did not do enough with regard to the cholera outbreak and its spread in Haiti.”⁷ He did not address UN peacekeepers' role in causing the epidemic, and did not acknowledge that the organization had any legal obligations in connection with the outbreak. He did, however, cite a “moral responsibility to act.”⁸ Specifically, Ban proposed a USD 400 million, two-track approach. Track One would involve renewed efforts to eliminate cholera in Haiti by improving access to treatment and water and sanitation systems across the board.⁹ Track Two would focus on “those Haitians most directly affected by cholera, their families and communities,” and would reflect “a concrete expression of the regret of our Organization for the suffering so many Haitians have endured.”¹⁰

Notably, Ban invoked the United Nations' reputation three times in his written report introducing the New Approach and twice in his remarks before the

6 For summaries of reactions from these actors, see Philip Alston, *Report of the Special Rapporteur on Extreme Poverty*, UN Doc A/71/367 (26 August 2016) 38–43; Kristina Daugirdas, ‘Reputation and the Responsibility of International Organizations’ (2014) 25 *European Journal of International Law* 991. For a more recent example of such negative attention, see Bret Stephens, ‘John Bolton Is Right About the U.N.’ *The New York Times* (online), 23 March 2018 <<https://www.nytimes.com/2018/03/23/opinion/john-bolton-un-united-nations.html>>.

7 *Secretary-General's Remarks to the General Assembly on a New Approach to Address Cholera in Haiti* (Press Release, 1 December 2016) <<https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>> (‘1 December Remarks’).

8 Ibid.

9 *Report by the Secretary-General, A New Approach to Cholera in Haiti*, UN Doc A/71/620 (25 November 2016) (‘New Approach Report’).

10 1 December Remarks, above n 7.

General Assembly.¹¹ Both resolutions that the General Assembly has adopted so far regarding the New Approach reference “the impact of the cholera epidemic on the reputation of the United Nations in Haiti and globally”.¹² Representatives of individual states have repeatedly invoked the organization’s reputation in their interventions at meetings of the General Assembly and the Security Council.¹³

And yet, developments since 2010 reveal serious limitations of reputation as a disciplinarian, even in this best-case scenario. To the extent reputational concerns motivated a course correction they did so slowly and unevenly. By the time Ban announced the New Approach, the death toll from cholera in Haiti exceeded 9,000.¹⁴ Haitians are still falling sick with cholera—and still dying of it. In addition to coming too late, the New Approach can be criticized for doing too little. The New Approach has not yet delivered much on the ground, mainly because to date, contributions to the trust fund for the New Approach

11 Ibid; New Approach Report, above n 9, 3 (“The cholera outbreak became a stain on the Organization’s reputation”); Ibid, 4 (“The United Nations should seize this opportunity to address this tragedy, which has also had a negative effect on its reputation and global mission”); Ibid, 14 (“To proceed [with community outreach and consultation about projects the UN might fund] in the absence of such assurance [of adequate funding to implement the projects] would create expectations that, if not met, would undermine the new approach by the United Nations and the spirit in which it has been made and further damage the reputation of the Organization”); see also United Nations, *Deputy Secretary-General’s Remarks to the General Assembly on Haiti* (14 June 2017) <<https://www.un.org/sg/en/content/dsg/statement/2017-06-14/deputy-secretary-generals-remarks-general-assembly-haiti-prepared>> (“Now the United Nations must demonstrate its commitment to implementation of the New Approach or risk dissipating that goodwill, needlessly heightening the suffering of the people of Haiti and incurring further reputational damage to the Organization”); *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti* (16 March 2017) UN Doc S/2017/223, para 48 (acknowledging that the “outbreak of cholera in the country has had a negative impact on the country’s development and on the public perception of MINUSTAH”).

12 *The new United Nations approach to cholera in Haiti*, UN Doc A/Res/71/161 (13 January 2017); *The new United Nations approach to cholera in Haiti*, UN Doc A/Res/71/161 B (13 July 2017).

13 See, eg *Provisional verbatim record of the UNGA’s 91st plenary meeting*, UN Doc A/71/PV.91 (13 July 2017) (comment of Jamaican delegation); *Provisional verbatim record of the UNSC’s 8068th meeting*, UN Doc S/PV.8068 (12 October 2017) (comments of Bolivian and Ethiopian delegations); *Provisional verbatim record of the UNSC’s 6732nd meeting*, UN Doc S/PV.6732, (8 March 2012) (comments of French delegation).

14 New Approach Report, above n 9.

total just under USD 9 million—roughly 2 per cent of the USD 400 million that Ban sought to implement the New Approach.¹⁵

Drawing on academic literature about reputation regarding other types of entities—private firms, states, and domestic administrative agencies—this contribution argues that the United Nations' response to cholera in Haiti showcases some important limitations and complications of reputation as a motivator and disciplinarian.¹⁶ First, reputation will function as a less effective disciplinarian in the context of factual uncertainty and legal contestation. Both have featured in connection with the cholera outbreak in Haiti. Second, reputation will serve as a less effective disciplinarian when organizations have multiple audiences that are not evaluating the organization against the same standard. An organization that is satisfying one audience may have an easier time “riding out” the harm caused by a damaged reputation in the eyes of another audience. The United Nations' actions suggest that the secretariat was paying more attention to some audiences than others.

Indeed, some of the key decisions made by UN officials suggest that reputation is not only a limited disciplinarian, but that efforts to avoid reputational harm are not necessarily positive or productive. At some key points the United Nations apparently sought to limit reputational harm by perpetuating uncertainty about the facts surrounding the cholera outbreak. In addition, the desire to avoid reputational harm may have also motivated the decision by the United Nations not to acknowledge any legal responsibility in connection with the cholera outbreak in Haiti. On the merits, this legal position is quite problematic.¹⁷ It also has negative practical consequences: by not acknowledging a legal obligation to Haitian victims, the UN secretariat gave up an important tool to influence member states' decisions to fund the New Approach.

Over time, uncertainty over the facts about the source of the outbreak diminished because epidemiologists and investigative journalists produced a detailed and robust account of what happened. By contrast, uncertainty and contestation over the law has persisted. This essay closes with a recommendation

15 United Nations, *UN Haiti Cholera Response Multi-Partner Trust Fund* (18 September 2018) <<http://mpf.undp.org/factsheet/fund/CLH00>>. So far, 40 member states have made contributions to the fund. Among them are a number of less wealthy states making contributions of USD 50,000 or less. Prominent among the states who have not yet contributed are three of the five permanent members of the Security Council: China, Russia, and the United States.

16 This contribution's account of reputational dynamics with respect to international organizations draws on Kristina Daugirdas, 'Reputation as a Disciplinarian of International Organizations' (2019) 113 *American Journal of International Law* 221.

17 See below nn 113–116 and accompanying text.

for achieving greater legal clarity by seeking an advisory opinion from the International Court of Justice to specify the United Nations' international legal obligations.

2 Reputational Dynamics

The desire to cultivate and maintain a good reputation can be a positive and disciplining force—for organizations as well as for individuals.¹⁸ It can motivate compliance with the law. Thus, for example, reputation features prominently in explanations of why states comply with international law.¹⁹ Reputation can also encourage organizations and individuals to go above and beyond what the law requires. For example, reputational concerns may prompt corporations to meet voluntary environmental standards, or to better supervise global supply chains.²⁰ Scholars of domestic administrative agencies, including local police departments, the Food and Drug Administration, and the Federal Reserve have also explored the ways that reputation serves as a powerful motivator—and, by extension—as a constraint, because a bad reputation is costly.²¹

18 Indeed, individuals are sometimes motivated to protect the reputations of the organizations because the “identity and esteem of an individual often depends upon wider social evaluations of the organizations to which she belongs”; Carpenter, above n 3, 47–48; For a personal account of the felt obligation to protect institutional reputation, see Jack Goldsmith, *The Terror Presidency* (W W Norton 2007) 38; For a classic discussion of possible responses of individuals to organizational lapses from “efficient, rational, law-abiding, virtuous, or otherwise functional behaviour”, see Albert O Hirschmann, *Exit, Voice, and Loyalty* (Harvard University Press 1970).

19 Andrew T Guzman, *How International Law Works* (Oxford University Press, 2008) 33–41, 71–117; Rachel Brewster, ‘Unpacking the State’s Reputation’ (2009) 50 *Harvard International Law Journal* 231; Robert E Scott and Paul B Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press, 2006).

20 See David Vogel, *The Market for Virtue* (Brookings Institution Press, 2005). Indeed, regulations that require information disclosure on such topics are designed to operate by raising the reputational stakes; see Adam S Chilton and Galit A Sarfaty, ‘The Limitations of Supply Chain Disclosure Regimes’ (2017) 57 *Stanford Journal of International Law* 1; James T Hamilton, *Regulation Through Revelation: The Origin, Politics, and Impacts of the Toxics Release Inventory Program* (Cambridge University Press, 2005).

21 See generally Carpenter, above n 3 (identifying reputation as a key source of the power of the US Food and Drug Administration, as well as a source of constraints); Charles R Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press, 2009); Kathryn Judge, ‘The Federal Reserve: A Study in Soft Constraints’ (2015) 78 *Law and Contemporary Problems* 65; Nicholas R Parrillo,

Reputational costs are an example of an informal, nonlegal sanction or penalty.²² These costs are not coordinated or centralized; instead, they are imposed directly by those who interact with a given actor. When that actor's reputation is damaged—that is, when an actor's audience discovers that the actor is worse than previously believed along some dimension, that audience will change its behavior. Some members of the audience may choose to stop interacting with the actor entirely, or they may drive a harder bargain when they do. Thus, for example, a state that develops a reputation for not living up to its treaty commitments will have a harder time negotiating treaties in the future.

As noted in the introduction, UN officials and UN member states alike have expressly worried about the reputational damage that the organization's handling of the cholera epidemic has caused.²³ Such concerns accord with the limited scholarship addressing reputation in the context of international organizations. This scholarship reflects the view that international organizations have strong reasons to protect their reputations.²⁴ To be sure, reputation is not the

'The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power' (2018) 131 *Harvard Law Review* 685.

22 See Robert Ellickson, *Order Without Law* (Harvard University Press, 1991).

23 See above nn 11–13 and accompanying text; see also Jenni Lee, 7 *Quotes from António Guterres* (11 October 2016) <<http://unfoundationblog.org/7-quotes-from-antonio-guterres>> ("The SG must stand firmly for the reputation of the UN and its dedicated staff"). For an example involving a different international organization, the Global Water Partnership, see Edouard Fromageau, 'The Global Water Partnership: Between Institutional Flexibility and Legal Legitimacy' (2011) 8 *International Organizations Law Review* 367, 393–394 ("There is constant attention paid to the reputational risks induced by each and every action which can be described as part of the activity of GWP"). On the significance of 'reputational rhetoric' generally, see Ryan Brutger and Joshua T Kertzer, 'A Dispositional Theory of Reputation Costs' (2018) 72 *International Organization* 693, 697 ("The frequency with which leaders resort to reputational rhetoric ... is important because the public reasons leaders invoke when seeking to justify or legitimate their policies reflect their underlying beliefs about the types of arguments that will resonate with their audience and thus the normative environment in which they are embedded").

24 Grant and Keohane, above n 4 (identifying reputation as an accountability mechanism that operates both in the absence of other mechanisms and in conjunction with them); Daugirdas [EJIL], above n 6 (arguing that IOs are likely to be systematically more sensitive to reputational threats than states are); Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance' (2014) 108 *American Journal of International Law* 211, 253–54, 257–58 ("Many global regulatory bodies ultimately require favourable reputations among relevant publics in order to enjoy the support and authority that such bodies need to function effectively"); J C Sharman, 'Rationalist and Constructivist Perspective on Reputation' (2007) 55 *Political Studies* 20, 30 (arguing that "[a]n international organization's

only concern that motivates international organizations (or any other actor), but it is an important one.

Two types of uncertainty or contestation may hamper the effectiveness of reputation as a disciplinarian. One results from limited information about the facts—what actually did or didn't take place.²⁵ When the reputation bearer controls the release of key pieces of information, such uncertainty may be difficult to resolve. The second is uncertainty about what the law requires. Some level of uncertainty about what the law requires is the norm rather than the exception; the law is often open-textured, or takes the form of a standard rather than a rule. When the parties to a dispute about the law can turn to a court, that court will resolve the uncertainty, interpreting the relevant rule and applying it to the facts. But when courts or other formal dispute settlement mechanisms are unavailable, that contestation about what the law requires may persist. And when that contestation persists, it becomes more difficult for informal reputational sanctions to serve as an effective substitute for formal legal sanctions.²⁶

There are other complications that may make reputation a less effective disciplinarian. First, reputations are multi-faceted. A person might simultaneously have reputations for being a brilliant lawyer and a jerk. In the international realm, in addition to having reputations for complying with the law (or not), states also have reputations for being cooperative (or not), or for being rational or irrational.²⁷ Private corporations have, in addition to reputations for legality, reputations for the quality of their products or customer service, reputations as employers, and reputations for their corporate citizenship. Domestic administrative agencies have reputations for efficacy (that is, for the quality of their decision making and their capacity for effectively achieving their objectives), as well as for morality, legality, and technical expertise.²⁸

effectiveness is inseparably bound up with judgments about the reputation of that institution", and illustrating that point with the OECD).

25 Cf Guzman, above n 19, 96 ("[A] violation of international law generates a reputational sanction only if some other country knows about the violation. It follows that a violation will lead to a smaller reputational loss if fewer countries know about it. By reducing the visibility of their violations, then, states reduce the reputational consequences"); Grant and Keohane, above n 4, 39 (describing "transparency, or the widespread availability of information" as "essential" to reputational accountability).

26 See for example, Frederick Schauer, 'Official Obedience and the Politics of Defining "Law"' (2013) 86 *Southern California Law Review* 1165, 1190, 1192.

27 Brewster, above n 19; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2007) 102–03; Robert O Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard International Law Journal* 487, 497.

28 Carpenter, above n 3, 46–47.

Second, organizations also have multiple audiences who observe them—and who are, at least potentially, in a position to impose reputational costs in response to undesirable behavior—including, but not limited to, violations of the law. For corporations, these audiences include consumers, shareholders, employees, and regulators. For administrative agencies, like the Food and Drug Administration (FDA), these audiences include scientists, the U.S. Congress, consumer representatives, and media organizations.²⁹ For international organizations, the list includes academics, journalists, nongovernmental organizations, government officials like judges and members of legislatures. Importantly, these audiences are not merely passive recipients of information supplied by the organization they are observing. They can contribute new legal arguments, facts, or factual analysis, and they can evaluate the legal and factual analysis done by others.³⁰

The general public is an important audience for all of these different types of organizations. It is worth elaborating this point when it comes to international organizations, where it may seem less obvious. The general public is often the intended audience of materials produced by international organizations. Indeed, the ability to speak “over the heads” of governments and directly address the public is an important source of authority and influence.³¹ As scholars have documented, the general public often accords significant weight to the recommendations and decisions of international organizations.³²

That said, organizations are not equally responsive to all of their audiences. Sometimes a negative evaluation will prompt an organization to change because market transactions internalize the cost. Thus, private firms that defraud customers won't have much repeat business, and companies that defraud their employees will face higher input costs.³³ But what about when firms harm individuals with whom they don't do business? Consider an electroplating company that dumps toxic chemicals into a municipal storm sewer, thereby damaging downstream fisheries.³⁴ If the firm is acting illegally, it will face some legal costs from the violation. But it may not face reputational costs above and

29 Ibid 10.

30 Daugirdas, above n 6, 998.

31 Thomas M Franck, *Nation Against Nation* (Oxford University Press, 1985) 121.

32 Katerina Linos, *The Democratic Foundations of Policy Diffusion* (Oxford University Press, 2013); Alexander Thompson, ‘Screening Power: International Organizations as Informative Agents’ in Darren G Hawkins et al, (eds), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006).

33 Jonathan M Karpoff et al, ‘The Reputational Penalties for Environmental Violations: Empirical Evidence’ (2005) 48 *Journal of Law and Economics* 653, 655.

34 Ibid 656–66.

beyond those legal costs. The fishermen don't do business with the firm, and those who do have no incentive to lower their demand for the firm's product since the dumping doesn't affect their quality.³⁵ And, indeed, some empirical evidence supports the conclusion that firms that violate environmental laws do not face reputational penalties that exceed the legal penalty.³⁶

To be sure, a firm's audiences are not hermetically sealed from one another. Take, for example, a firm targeted by journalists and NGOs for tolerating labor practices within its global supply that are morally reprehensible—but not illegal. Based on the logic outlined above, such a firm may choose to “ride out” the bad press and not change its practices. (And, indeed, this is exactly what some firms in this situation do.)³⁷ That said, the barriers between these audiences are permeable. The general public includes many actual and potential consumers of a corporation's product. If those consumers change their purchasing decisions, then the shareholders will see an effect.³⁸ By extension, when an international organization's reputation in the general public suffers, government officials may become less willing to support the organization financially and otherwise, less willing to heed its recommendations, or more reluctant to enlist the organization to address new problems.³⁹

A third complication concerns the numerosity of the individuals and entities to which reputations might simultaneously attach. Consider the US Food and Drug Administration. Reputations can and do attach to individual scientists who work for FDA, FDA's enforcement division, the FDA, the executive branch (or the administration of a particular president), and the federal government in its entirety. For the United Nations, reputations can likewise attach to individuals as well as to nested and overlapping units within and beyond formal legal boundaries. Such entities include individual peacekeeping missions like MINUSTAH;⁴⁰ the Department of Peacekeeping Operations; the UN

35 Ibid.

36 Ibid, 668.

37 David Vogel, *The Market for Virtue* (Brookings Institution Press, 2005) at 70–71, 77–82 (describing Nike's shifting responses to criticisms of its labour practices by NGOs and the press).

38 Ibid.

39 Cf Carpenter, above n 3, 54 (“As a general hypothesis, we may venture the statement that when all things are considered, the more legitimate, expert, and effective a regulator is perceived to be, the more likely politicians will be to create new regulations in policy areas that the regulator governs, and the more likely politicians will be to vest significant authority and resources in the regulator.”)

40 The Security Council established MINUSTAH, the UN Stabilization Mission in Haiti, in 2004 (see SC Res 1542). In 2017, the Security Council terminated MINUSTAH and replaced

Security Council; the UN secretariat as whole; the organization as defined by the UN Charter, including all principal and subsidiary organs, as well as the UN system as a whole.⁴¹ This feature of reputation is important because these individuals and entities may disagree about the amount of weight or significance to accord to any particular dimension of reputation—and may disagree about how much weight to put on the actual or anticipated response of any particular audience member.

In trying to explain and analyze the reputational dynamics of international organizations, then, it's necessary to make a choice about where to draw the boundary line—and, crucially, whether member states are inside or outside.⁴² Both positions are plausible. International organizations normally have one or more organs that are comprised entirely of member states. As a formal legal matter, the acts and omissions of those organs are attributable to the organization.⁴³ This is also the case in political and policy discourse. Thus, for example, the failure of the Security Council to take significant measures to address the civil war in Syria is frequently described as a failure of the United Nations as a whole—even though the Security Council's inaction is the result of the decisions of individual and identifiable member states.⁴⁴ One might also draw the boundary line to enclose only the secretariat—ie, the Secretary-General (or equivalent) and international civil servants—thereby rendering member states part of the audience. After all, secretariats act with significant (but not unbounded) autonomy on behalf of the organization. Secretariats have resources and authority at their disposal, exercise considerable discretion in the way that they carry out their responsibilities, and have the capacity to influence member states' actions.

This contribution takes the latter approach, framing the Secretary-General and international civil servants as the key actors and the member states as an especially important audience for the United Nations. As demonstrated in the sections that follow, the UN secretariat can (and does) take independent steps either expressly designed to protect the organization's reputation—or

it with a new, smaller-scale mission, the UN Mission for Justice Support in Haiti (see SC Res 2350).

41 The UN system includes United Nations as well as to other international organizations that have the status of specialized agencies. *The United Nations System* <http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf>

42 Johnstone, above n 4, 237.

43 *ARIO*, art 6.

44 See, for example, 'The U.N. in Syria: Years of Impotence and Failure', *The Japan Times* (Japan) 25 February 2018 <<https://www.japantimes.co.jp/news/2018/02/25/world/u-n-syria-years-impotence-failure/>>

which have the consequence of affecting the organization's reputation. A comprehensive account of reputational dynamics would need to consider more carefully when and why member states seek to preserve and enhance the reputations of the international organizations in which they participate. There are many examples of member states expressing concern about the reputations of the organizations in which they participate—and of member states acting to preserve these organizations' reputations and legitimacy.⁴⁵ At the same time, member states also have competing priorities, such as limiting expenditures or aligning the position of the organization with their own foreign policy preferences. In addition, member states may seek to enhance or preserve their own reputations by shifting blame for unpopular or unsuccessful policies to the organization.⁴⁶ The conduct of member states in connection with the cholera epidemic in Haiti illustrates all of the above. Systematically analyzing that conduct and its motivations is a worthwhile endeavor, albeit one that this contribution leaves to future work.

Keeping in mind this focus on the secretariat as the key actor, some features of international organizations distinguish them from other entities addressed in the literature on reputation. First, the range of reputations that international organizations might cultivate is narrower than the range of reputations that other actors might seek to cultivate. For example, scholars have pointed out that states might prefer to cultivate reputations for toughness, irrationality, or unpredictability.⁴⁷ But international organizations can't be isolationist the way that some states might choose to be. International organizations depend on voluntary support (financial and otherwise) and on persuasion to operate and advance their missions. As a result, they have especially strong incentives to cultivate reputations for cooperativeness.⁴⁸

More specifically, international organizations have good reason to cultivate reputations for being cooperative with and responsive to their member states. While the public's attention to an international organization may be

45 See for example, Johnstone, above n 4, 238; Ian Hurd, 'The Strategic Use of Liberal Internationalism' (2001) 59 *International Organization* 495.

46 See Roland Vaubel, 'A Public Choice Approach to International Organization' (1986) 51 *Public Choice* 39, 49. Strategic efforts to demarcate the salient boundaries of organizations are quite common—especially for purposes of claiming credit or shifting blame; Carpenter, above n 3, 51.

47 See, for example, Keohane, above n 27, 497.

48 Paul Stephan helpfully highlighted this dimension of reputation. Paul B Stephan, *Reputation and Responsibility: Moving the Goalposts* (26 March 2015) on *EJIL: Talk!* <<https://www.ejiltalk.org/reputation-and-responsibility-moving-the-goalposts/>>; see also Scott and Stephan, above n 19.

fickle, the governance mechanisms of international organizations assure that member states will remain important members of the audience over the long term. Moreover, international organizations may have particularly strong incentives to be responsive to particular states or subsets of states—especially those states that supply key resources to the organization. These resources include, most obviously, funding. But there are other kinds of resources too. For the United Nations, peacekeepers are another resource that is constantly in high demand.⁴⁹ Put in terms of reputation, the states that provide such resources are likely to be an especially important audience of international organizations.

At the same time, international organizations also have incentives to cultivate reputations for independence from their member states—a goal that is in direct tension with cultivating reputations for being cooperative and responsive. In many cases, international organizations are effective and influential precisely because they are perceived to be independent and not in the pocket of any state or group of states.⁵⁰ States may be willing to negotiate with or accept advice or conditions from international organizations that they would reject from other states on the grounds that it is biased or strategically motivated.⁵¹ The tension that international organizations face between cultivating reputations for cooperativeness or responsiveness on the one hand and independence on the other may be particularly acute—but quite common for organizations to face tensions among various dimensions of their reputations.⁵²

3 Factual Uncertainty

As noted earlier, reputation (and other informal sanctions) will operate less effectively when the relevant facts are unknown or uncertain. Initially, the source of the cholera outbreak in Haiti was a genuine mystery. The United

49 See Bank Ki-moon, *Cyril Foster Lecture at the University of Oxford* (2 February 2011) <<https://www.un.org/sg/en/content/sg/speeches/2011-02-02/cyril-foster-lecture-oxford-university-human-protection-and-21st>>: “Securing the required resources and [peacekeeping] troops has consumed much of my energy. I have been begging leaders to make resources available to us”.

50 Michael Barnett and Martha Finnemore, *Rules for the World* (Cornell University Press, 2004) 21.

51 Kenneth W Abbott and Duncan Snidal, ‘Why States Act through Formal International Organizations’ (1998) 42 *Journal of Conflict Resolution* 3.

52 Carpenter, above n 3, 47.

Nations had control over key information regarding the source of the outbreak. The organization's privileges and immunities allowed it to limit access to its documents, its premises, and its personnel.⁵³ At different points, the UN secretariat both impeded and advanced efforts to identify the source of the outbreak. A reputational lens suggests possible motivations for the United Nations' acts and omissions—and for shifts in its position over time. Because the United Nations didn't hold a monopoly over the relevant information, it could slow down—but it couldn't prevent—the emergence of a robust account of the source of the epidemic.

3.1 *The first weeks of the outbreak*

On October 22, 2010, the Haitian National Public Laboratory confirmed the first cholera case in the country in nearly a century.⁵⁴ During the weeks that followed, the United Nations and MINUSTAH did more to obfuscate the investigation of its source than they did to advance it. Rumors that MINUSTAH was responsible for introducing cholera to Haiti started circulating as soon as the very first cases were confirmed. Apparently seeking to get in front of the story, the MINUSTAH spokesperson, Vincenzo Pugliese, issued a press release on October 26 seeking to rebut the rumors. Pugliese insisted that none of the peacekeepers had cholera symptoms, and that MINUSTAH's sanitation practices were sound—indeed, he said, the septic tanks satisfied “the construction standards of the [US] agency for environmental protection.”⁵⁵

Perhaps this press statement reflected an effort to preserve MINUSTAH's reputation for efficacy and competence. As such, it failed. Investigations by journalists and epidemiologists quickly confirmed the plausibility of the rumors. The peacekeepers who arrived at the Mirebalais camp most recently were from Nepal, and the Nepalese press had reported a cholera outbreak in

53 See *Convention on the Privileges and Immunities of the United Nations*, opened for signature on 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946); *Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operating in Haiti*, signed 9 July 2004, 2271 UNTS 235 (entered into force 9 July 2004).

54 Kristina Daugirdas and Julian Davis Mortenson, 'United States Defends United Nations Immunity in Haitian Cholera Case' (2014) 108 *American Journal of International Law* 819.

55 Ralph R Frerichs, *Deadly River* (Cornell University Press, 2016) 62 (describing a press conference on October 26, 2010); see also Robenson Geffrard, 'Une maladie importée, la MINUSTAH clame son innocence' *Le Nouvelliste* (online), 26 October 2010 <<http://www.lenouvelliste.com/m/public/index.php/article/85056/une-maladie-importee-la-minustah-clame-son-innocence>>.

Kathmandu in September.⁵⁶ Local villagers, journalists, and epidemiologists who made their way to the Mirebalais camp saw, and smelled, sanitation practices that did not match Pugliese's press release.⁵⁷ Contaminated feces can spread cholera infection, and the very first confirmed cases were just downstream from the Mirebalais camp.

Indeed, epidemiologists were also key players here, and early on they disagreed about the source of the outbreak. Pursuant to a request from the Haitian government, the French embassy in Port-au-Prince enlisted Renaud Piarroux, an epidemiologist from Marseille. Piarroux's investigations supported the conclusion suggested by journalists: Nepalese peacekeepers at the Mirebalais camp were the source of the outbreak.⁵⁸ Not all scientists who weighed in agreed, however. Other prominent epidemiologists supported variations of an environmental hypothesis—that is, that nonpathogenic cholera bacteria had long resided in the waters in and around Haiti; as a result of the earthquake and changes in other climate-related variables, that bacteria altered into a disease-causing strain.⁵⁹

For its part, the United Nations made it harder rather than easier to confirm which theory was correct. Within days of the initial press reports about the outbreak, MINUSTAH undertook repairs and had “literally covered up the most incriminating evidence, starting with the smell.”⁶⁰ The United Nations and MINUSTAH arranged to test some environmental samples of the water from around the base, and repeatedly touted the negative results.⁶¹ But

56 Jonathan M Katz, *The Big Truck That Went By* (St Martin's Press, 2013) 225.

57 Ibid 227–230; Frerichs, above n 55, 42–43, 62–65, 86–87, 115 (describing press and video coverage by Sebastian Walker of Al Jazeera, Jonathan M Katz of the Associated Press, and Roberson Alphonse of the Haitian newspaper *Le Nouvelliste*).

58 Piarroux's conclusions were eventually published in a peer-reviewed journal. Renaud Piarroux et al, 'Understanding the Cholera Epidemic, Haiti' (2011) 17 *Emerging Infectious Diseases* 1161, 1162.

59 Frerichs, above n 55, 58–60.

60 Jonathan M Katz, 'In the Time of Cholera' (10 January 2013) *Foreign Policy* <<http://foreign-policy.com/2013/01/10/in-the-time-of-cholera/>>.

61 Jonathan M Katz, 'UN Probes Base As Source of Haiti Cholera Outbreak', *Boston.com* (online), 28 October 2010 <http://archive.boston.com/news/health/articles/2010/10/28/un_probes_base_as_source_of_haiti_cholera_outbreak/>; 'Collective Efforts in Haiti Will Be Overwhelmed without Massive, Immediate Response, Secretary-General Warns in Remarks to General Assembly' (Press Release, 3 December 2010) <<https://www.un.org/press/en/2010/sgsm13294.doc.htm>>; UN News Centre, *UN in Talks to Set Up Independent Panel of Experts to Probe Origin of Cholera in Haiti* (15 December 2010) <<https://news.un.org/en/story/2010/12/362232-un-talks-set-independent-panel-experts-probe-origin-cholera-haiti>>.

epidemiologists did not view these results as dispositive.⁶² Scientists also viewed the United Nations' omissions as significant. Most notably, after the outbreak began, the United Nations did not test the Nepalese peacekeepers for cholera antibodies that could reveal a prior infection.⁶³

A reputational lens suggests some possible motivations for the United Nations during this period. Perpetuating uncertainty about the source of the outbreak may have been an attempt to reduce the reputational costs associated with it. A key audience for the United Nations was the Haitian public. Haitian public opinion about MINUSTAH varied; even before the cholera outbreak in Haiti, some Haitians strongly opposed MINUSTAH's presence in the country.⁶⁴ These protests only intensified as the link between MINUSTAH and the cholera outbreak grew stronger. Some turned violent. UN peacekeepers responded with tear gas—and in one case shot and killed a protestor, apparently in self-defense.⁶⁵ By the following summer, Nepalese peacekeepers were incapacitated: “Instead of doing peacebuilding, patrolling, and policing, they themselves had to be policed and secured against the locals.”⁶⁶

The United Nations seemed to be operating on the assumption that forthrightly addressing a possible role in the cholera outbreak would worsen the

62 Associated Press, ‘UN Worries Its Troops Caused Cholera in Haiti’, *CBS News (online)*, 19 November 2010 <<https://www.cbsnews.com/news/un-worries-its-troops-caused-cholera-in-haiti/>> (noting the samples were apparently tested by an obesity specialist who lacked relevant expertise); Frerichs, above n 54, 84 (recounting Piarroux’s interactions with MINUSTAH physicians who gathered the samples and his doubts about the significance of the results); Deborah MacKenzie, ‘Haiti: Epidemics of Denial Must End’ (1 December 2010) *New Scientist* <<https://www.newscientist.com/article/mg20827894-900-haiti-epidemics-of-denial-must-end/>> (“cholera researchers say the bacteria are hard to find in fast-flowing waters”).

63 Ibid (“A single positive swab from a soldier early in the outbreak would have strongly suggested they were the source. A negative result would not have entirely cleared them—tests can produce false negatives—but it may well have calmed public suspicion’); Frerichs, above n 54, 81 (“Piarroux suggested the matter could be resolved by testing for cholera antibodies in the blood of soldiers, a method already used in several studies to measure recent cholera infection. But this was not done”).

64 Frerichs, above n 54, 10, 29.

65 Ibid 10, 57, 85, 88; Arturo C Sotomayor, ‘Nepal’ in Alex J Bellamy and Paul D Williams (eds), *Providing Peacekeepers* (Oxford University Press, 2013) 308; William Booth, ‘U.N. Troops Assaulted, Blamed for Outbreak’ *Washington Post* (Washington, DC) 16 November 2010, A9.

66 Sotomayor, above n 65, at 292.

situation. Whether this is the case, however, is debatable. As one advocate put it, “The way to contribute to public anger is to lie.”⁶⁷

A second key audience for the United Nations was Nepal. In general, the United Nations has reasons to maintain a reputation for cooperativeness and responsiveness to countries that provide significant numbers of peacekeepers. Nepal is among them. Indeed, in 2008, Secretary-General Ban Ki-moon had singled out Nepal, praising it as a “shining example” he hoped other UN member states would emulate.⁶⁸ By obfuscating the source of the cholera outbreak, perhaps the secretariat sought to avoid angering or embarrassing Nepal so that its troop contributions would continue. More broadly, the secretariat may have sought to send a reassuring signal to all troop-contributing countries.

By contrast, the Haitian government was, perhaps, a less important audience. The United Nations needed cooperation and consent from the Haitian government to carry out its peacekeeping mission in Haiti. But Haiti needed the United Nations even more. The situation there was dire, especially in the wake of the 2010 earthquake. Privately, the Haitian government was well-informed about the evidence pointing towards MINUSTAH as the source of the outbreak: Haitian health officials had good information, and they also had access to Piarroux’s work. Publicly, however, the Haitian government appeared inclined to shield the United Nations. Two days after the first cholera cases were identified in Mirebalais, the Haitian president, René Garcia Prével, said that it would be “irresponsible and dangerous” to identify a country as the source of the outbreak.⁶⁹ In the weeks that followed, he refused to speak with the press about the origin of the outbreak, and instructed high level officials to stay quiet as well.⁷⁰ Prével’s successor, Michel Martelly, was frank about the government’s priorities in a 2014 interview with *Der Spiegel*. Asked about a pending lawsuit against the United Nations, Martelly said: “I won’t tell a victim or somebody who has lost a member of his family to not go and talk to the UN or go to court

67 Frerichs, above n 55, 90.

68 ‘Nepal’s Participation in UN Peacekeeping for 50 Years Is “Shining Example,” says Secretary-General, Thanking Every Nepalese Peacekeeper ‘Past and Present’ (Press Release, 12 June 2008) <<https://www.un.org/press/en/2008/sgsm11638.doc.htm>>.

69 Frerichs, above n 55, 32; see also US Centres for Disease Control and Prevention, ‘Laboratory Test Results of Cholera Outbreak Strain in Haiti Announced’ (Press Release, 1 November 2010) <<https://www.cdc.gov/media/pressrel/2010/r101101.html>> (quoting Haitian Minister of Public Health Alex Larsen as saying “Although these results indicate that the strain is non-Haitian, cholera strains may move between different areas due to global travel and trade. Therefore, we will never know the exact origin of the strain that is causing the epidemic in Haiti.”)

70 Frerichs, above n 55, 95, 118.

and sue them. People can do what they want. But the government has the task to manage relationships, and I think we are doing a good job”.⁷¹

3.2 *Mounting pressure for answers*

December 2010 marked a turning point. The United Nations’ efforts to quell rumors about MINUSTAH’s role in the outbreak failed. At least initially, some epidemiologists and key institutions held back from exploring the source of the outbreak.⁷² The World Health Organization remained on the sidelines.⁷³ But the violence on the ground in Haiti persisted and the publicly available evidence pointing to MINUSTAH grew as the press reported Piarroux’s results.⁷⁴ By this point, the United Nations’ efforts to reduce reputation costs by perpetuating uncertainty became counterproductive: the United Nations appeared responsible for both the outbreak and an ineffective attempt to cover it up.

On December 17, Secretary-General Ban Ki-moon announced that he would establish an independent panel to identify the source of the outbreak.⁷⁵ The following month, he appointed four medical experts according to his spokesperson, the panel would “operate independently of the UN” and “have access

71 Family Shafy, ‘Haitian President Martelly: I’m Trying to Re-Establish Confidence’, *Der Spiegel* (online), 5 November 2014 <<http://www.spiegel.de/international/world/interview-with-haitian-president-michel-martelly-a-1000719.html>>.

72 Martin Enserink, ‘Despite Sensitivities, Scientists Seek to Solve Haiti’s Cholera Riddle’ (2011) 331 *Science* 388–389 (noting that that several cholera experts worried “that nailing the source of the outbreak could potentially embarrass the United Nations, distract from the day-to-day fight to control the outbreak, and even lead to violence. So their passion for traditional shoe-leather epidemiology has been tempered by diplomatic and strategic concerns”); Frerichs, above n 55, at 75, 152, 154, 216 (describing lines of inquiry that the CDC did and didn’t pursue); Jonathan M Katz, ‘What They Knew, and When They Knew It’ (30 March 2017) *Slate* <http://www.slate.com/articles/news_and_politics/foreigners/2017/03/when_the_u_n_sowed_cholera_in_haiti_how_fast_did_americans_know.html> (describing documents from Freedom of Information Act highlighting political sensitivities in the early days of the outbreak).

73 MacKenzie, above n 62.

74 See, for example, Deborah Pasmantier, ‘Choléra en Haïti: une épidémie importée’, *La Presse* (online), 29 November 2010 <<http://www.lapresse.ca/international/amerique-latine/2010/11/29/01-4347408-cholera-en-haiti-une-epidemie-importee.php>>.

75 UN News, *Haiti: Ban appeals for more funds to fight cholera, sets up panel to probe its origins* (17 December 2010) <<https://news.un.org/en/story/2010/12/362452-haiti-ban-appeals-more-funds-fight-cholera-sets-panel-probe-its-origins>>.

to all UN records, reports, and facilities”.⁷⁶ The announcement suggested that the United Nations had changed strategies: now it would seek to reduce uncertainty surrounding the source of the outbreak.

The expert panel’s report was released four months later, in May 2011.⁷⁷ The report rejected the environmental hypothesis, and included two conclusions in bold type. First: “the evidence overwhelmingly supports that the source of the outbreak was due to contamination of the Meye Tributary of the Artibonite River with a pathogenic strain of current South Asian type *Vibrio cholerae* as a result of human activity”.⁷⁸ The report continued to explain that the “explosive spread” of the epidemic was due to “several factors,” including deficient water and sanitation systems.⁷⁹ The report closed with a second sentence in bold type: “The Independent Panel concludes that the Haiti cholera outbreak was caused by the confluence of circumstances described above, and was not the fault of, or deliberate action of, a group or individual”.⁸⁰

Although the report the report did not specify the Mirebalais camp as the source of the cholera outbreak, the panel’s findings bolstered that hypothesis while dismissing the main competing hypothesis about the source of the outbreak. In particular, the report confirmed that the “sanitation conditions at the Mirebalais MINUSTAH camp were not sufficient to prevent contamination of the Meye Tributary System with human fecal waste”.⁸¹ Thus, even without pointing a finger directly at MINUSTAH, the report did help to reduce uncertainty about the underlying source of the outbreak. Indeed, the panel members subsequently noted that while they had “refused to lay blame on MINUSTAH [in their initial report], the evidence in the report clearly does”.⁸²

76 UN News Center, *Haiti: Ban appoints four top medical experts to probe source of cholera epidemic* (6 January 2011) <<https://news.un.org/en/story/2011/01/363552-haiti-ban-appoints-four-top-medical-experts-probe-source-cholera-epidemic>>

77 United Nations, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (29 May 2011) <<http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>> (“Cholera Expert Report”).

78 *Ibid.*, 29.

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*, 23.

82 Daniele Lantagne et al, “The Cholera Outbreak in Haiti: Where and How Did it Begin?” (2014) 379 *Current Topics in Microbiology and Immunology* 145, 159. The panelists’ follow-up article explains that they did not blame Nepali MINUSTAH soldiers because they lacked the microbiological evidence to support a direct link between the Nepal and Haiti strain at the time of writing the first report and because they “felt strongly that the

3.3 *Deploying the independent experts' report*

Yet UN spokespersons repeatedly invoked the report to perpetuate a sense of *uncertainty* about the cause of the outbreak. Immediately after the report was released, a UN spokesperson said that the report “does not present any conclusive scientific evidence linking the outbreak to the MINUSTAH peacekeepers or the Mirebalais camp”.⁸³ He continued: “Anyone carrying the relevant strain of the disease in the area could have introduced the bacteria into the river”.⁸⁴ The United Nations stuck with this reading of the report in the months that followed, repeatedly invoking the “confluence of circumstances” sentence and never mentioning the panel’s first conclusion.⁸⁵ The United Nations continued to do so even after two of the four individual panel members commented publicly that the evidence pointing to MINUSTAH as the source had grown stronger in the time since the report was issued.⁸⁶ And the United Nations still continued to do so even after all four panelists jointly authored a follow-up article that did expressly point to MINUSTAH as the “most likely source of introduction of cholera into Haiti”.⁸⁷

Although the United Nations did not publicly engage with it, further published work by epidemiologists provided still more support for the hypothesis that MINUSTAH was the source of the cholera outbreak.⁸⁸ In other words, due to the work of actors outside of the United Nations, over time the factual uncertainty continued to diminish. As Philip Alston put it, this “subsequent

introduction of cholera into Haiti was an accidental, as opposed to a deliberate, act”; *ibid* 159–160.

83 ‘U.N. Haiti Cholera Panel Avoids Blaming Peacekeepers’, *Reuters* (online), 5 May 2011 <<https://www.reuters.com/article/us-haiti-cholera-panel-idUSTRE74457Q20110505>>.

84 *Ibid*.

85 United Nations, *Daily Press Briefing by the Office of the Spokesperson for the Secretary-General* (8 November 2011) <<https://www.un.org/press/en/2011/db111108.doc.htm>>.

86 Deborah Sontag, ‘In Haiti, Global Failures on a Cholera Epidemic’, *New York Times* (New York) 31 March 2012; see also Spokesperson’s Noon Briefing, *Office of the Spokesperson for the Secretary-General* (2 April 2012) <<https://www.un.org/press/en/2012/db120402.doc.htm>> (“[A]s you will recall, that Panel concluded that it was not possible to be conclusive about how cholera was introduced into Haiti”).

87 See for example, ‘Letter from Pedro Medrano, Assistant Secretary-General, Senior Coordinator for Cholera Response to UN Special Rapporteurs Farha, Gallón, Púras, and de Albuquerque’ (25 November 2014) <[http://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_\(3.2014\).pdf](http://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_(3.2014).pdf)> [10].

88 See for example, Eppinger et al, ‘Genomic Epidemiology of the Haitian Cholera Outbreak’ (2014) 5(6) *MBio* 01721–14; Joseph A Lewnard et al, ‘Strategies to Prevent Cholera Introduction during International Personnel Deployments: A Computational Modeling Analysis Based on the 2010 Haiti Outbreak’ (2016) *PLoS Medicine*.

research has provided as clear a demonstration [of the United Nations'] responsibility as is scientifically possible".⁸⁹ There is an unflattering parallel here to tobacco firms, who persisted for many decades in questioning the science establishing that cigarettes are addictive and cause cancer.⁹⁰

The first time any UN report or UN official mentioned the panel's first bold-font conclusion or the panel members' subsequent joint publication was in the November 2016 report presenting Ban's New Approach to Cholera.⁹¹

More generally, these developments highlight how reputation's efficacy as a disciplinarian depends on the availability of information that organizations will often be reluctant to share. Organizations that can control the release of adverse information will be tempted to keep it hidden. In Haiti, the United Nations' initial efforts to deflect blame for the cholera outbreak failed because some particularly dedicated journalists and epidemiologists were willing to invest considerable time and effort into uncovering the facts. This feature of the cholera outbreak is atypical, to say the least. Its importance in this story highlights an important limitation on reputation as a disciplinarian. Reputation depends not only on outside actors' paying attention—but also on the level of control that an organization has over the release or development of adverse information. Both conditions suggest that reputation will fail to be an effective disciplinarian in the event of smaller-scale harms to individuals. It will be easier for organizations to control information about such harms. And, partly as a result, such harms are less likely to garner enough attention to pose a reputational threat to the organization.

4 Contestation regarding the Law

Just as reputation is a less effective disciplinarian when the facts are uncertain, reputation is also a less effective disciplinarian when the law is uncertain.⁹² This feature is a reason to be pessimistic about the capacity of reputation to discipline or constrain international organizations: few aspects of their international obligations are clear. This uncertainty operates at multiple levels. First, some of the sources of international organizations' legal obligations remain contested. These contested sources include customary international

89 Alston, above n 6, [27].

90 John M Broder, 'Cigarette Maker Concedes Smoking Can Cause Cancer', *New York Times* (New York) 21 March 1997.

91 New Approach Report, above n 9, [21]-[22].

92 Schauer, above n 26, 190.

law, general principles, and treaties to which organizations are not parties but which bear on their work.⁹³ Second, even if it's clear that a particular obligation binds an international organization, the content of that obligation may also be challenged. Treaty language is rarely perfectly precise.⁹⁴ The methodology for identifying customary international law norms builds in ample room for debate about the precise contours of such obligations. Finally, relatively few formal dispute settlement mechanisms are available to resolve disputes about international organizations' international obligations.⁹⁵ And even when such dispute settlement mechanisms are available, they are rarely used. As a result, questions about international organizations' legal obligations are usually hashed out through a decentralized discourse among international organizations and their audiences. Such discourse is by no means guaranteed to generate a single authoritative answer to legal questions about international organizations' legal obligations.

There is one factor that cuts in the opposite direction: a reputation for compliance with the law may be especially important to international organizations.⁹⁶ International organizations are creatures of international law. They are created by international law, and many have missions that explicitly or implicitly involve promoting the rule of law. Organizations that themselves flout international law risk accusations of hypocrisy will have a more difficult time persuading other actors to comply with their obligations.⁹⁷ They will be less effective, and may risk losing the voluntary support and cooperation they need to operate. International organizations accused of violating their legal obligations generally can't afford to ignore those charges. As a result, international organizations respond to such charges by ceasing the challenged activity, coming into compliance with the relevant norm (without necessarily accepting an obligation to do so), or contesting the content or applicability of the legal norm on which the accusation is based.⁹⁸

93 Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 *Harvard International Law Journal* 325.

94 Abram Chayes and Antonia Chayes, *The New Sovereignty* (Harvard University Press, 1995) 10–13.

95 Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations' (2015) 12 *International Organizations Law Review* 319, 324.

96 Daugirdas, above n 6.

97 Ibid 1010–1012; Compare Elizabeth Pollman and Jordan Barry, 'Regulatory Entrepreneurship' (2017) 90 *Southern California Law Review* 383 (describing deliberate decisions by private firms, including Uber, as making deliberate and decisions to violate applicable laws and regulations).

98 Daugirdas, above n 6, 1012–1015.

The United Nations took this last approach in connection with cholera in Haiti, and has rejected any legal obligation to provide redress to Haitian victims. The key contested legal obligation is contained in section 29 the Convention on the Privileges and Immunities of the United Nations.⁹⁹ This treaty provision requires the United Nations to “make provisions for appropriate modes of settlement of ... disputes of a private law character to which the United Nations is a party”.¹⁰⁰ Citing that provision, in November 2011, advocacy groups based in Boston and Haiti presented the UN Secretary-General with a formal petition for relief on behalf of cholera victims in Haiti.¹⁰¹ Fifteen months later, in February 2013, the UN Secretary-General denied the petition, describing the claims as “not receivable” under section 29 because considering the Haitian victims’ claims would “necessarily include a review of political and policy matters”.¹⁰²

Perhaps the United Nations took this position in part to protect its reputation for legality.¹⁰³ If the organization had acknowledged a legal obligation, it would have to turn to its member states for the money—and they may or may not be willing to supply it. But if the organization lacked any legal obligation to provide compensation, then there was no risk of violating it by failing to provide such compensation. In other words, when Secretary-General Ban Ki-moon acknowledged a moral responsibility but not a legal responsibility to respond to the cholera epidemic in Haiti, he put the organization’s reputation for morality on the line—but shielded the organization’s reputation for legality. This kind of move parallels that made by governments who choose, in any given case, to make a political commitment rather than a legally binding treaty.¹⁰⁴

99 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 16 (entered into force 17 September 1946) art VIII, s 29(a). There are other sources of legal obligations that are relevant, including the *UN Charter*, the *UN-Haiti Status of Forces Agreement*, and customary international law norms regarding human rights.

100 Daugirdas, above n 6.

101 Daugirdas and Mortenson, above n 54, 821.

102 *Ibid.*

103 Alston, above n 6, [9]; Philip Alston describes other relevant concerns, including “fears that accepting responsibility might undermine the Organization’s immunity, jeopardize its financial viability, have a negative impact on future peacekeeping, create bad precedents, or embroil the United Nations in endless litigation”.

104 Cf Charles Lipson, ‘Why Are Some International Agreements Informal’ (1991) 45 *International Organization* 495: “The effect of treaties, then, is to raise the political costs of

Or perhaps the United Nations was seeking to preserve a reputation for cooperativeness and responsiveness with its member states—especially the United States, which supplies 22 per cent of the UN operational budget and 28 per cent of the UN peacekeeping budget.¹⁰⁵ Publicly, the United States did not take a position on the scope of the United Nations' obligations under section 29. Privately, however, there are some indications that the United States had formulated and expressed strong views about the United Nations' legal position during the Obama administration, while the Haitian victims' petitions were pending with the Secretary-General. Speaking before the General Assembly's Third Committee in October 2016, special rapporteur Philip Alston said that “[t]here is reason to believe that the position adopted by [the UN Office of Legal Affairs] in 2013 was consistent with views strongly pressed at the time by the United States”.¹⁰⁶ Asked to respond to these comments, the U.S. State Department spokesperson didn't directly answer the question, saying only: “We have been very clear that we do not take a position on the validity of the underlying claims in this particular case”.¹⁰⁷ Ban Ki-moon likewise declined to comment when asked by a journalist about US pressure.¹⁰⁸ At the same time, a UN lawyer who resigned in 2016 did so in part because of the organization's handling of the cholera outbreak in Haiti; her letter of resignation cited “political interference” in the UN's consideration of the Haitian victims' claims for compensation.¹⁰⁹

noncompliance ... the more formal and public the agreement, the higher the reputational costs of noncompliance”.

105 *Scale of assessments for the apportionment of the expenses of United Nations peacekeeping operations*, UN Doc A/Res/70/246 (23 December 2015), and *Report of the Secretary General, Implementation of General Assembly Resolutions 55/235 and 55/236*, UN Doc A/70/331/Add.1 (28 December 2015) (peacekeeping budget); *Scale of assessments for the apportionment of the expenses of the United Nations*, UN Doc A/Res/70/245 (8 February 2016) (operational budget).

106 Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, *UN Responsibility for the Introduction of Cholera into Haiti*, UNGA, 71st sess, 3rd comm, Agenda Item 68 (b)-(c) (25 October 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20794&LangID=E>>.

107 Kristina Daugirdas and Julian Davis Mortenson, ‘U.S. Federal Court of Appeals Upholds United Nations' Immunity in Case Related to Cholera in Haiti’ (2017) 111 *American Journal of International Law* 162, 168.

108 Colum Lynch, ‘With an Eye on South Korea's Presidency, Ban Ki-Moon Seeks to Burnish his U.N. Legacy’ (28 December 2016) *Foreign Policy* <<http://foreignpolicy.com/2016/12/28/with-an-eye-on-south-koreas-presidency-ban-ki-moon-seeks-to-burnish-his-u-n-legacy/>>.

109 *Ibid.*

Significantly, other UN member states seemed quite willing to go along with the United Nations' legal position. The cholera outbreak in Haiti was a frequent topic of discussion in Security Council meetings between 2010 and 2018. Once Ban announced the New Approach, the General Assembly discussed the New Approach at some informal and plenary sessions as well. During the meetings for which transcripts or other records are available, there was almost no mention of the United Nations' legal position. Only one UN member state insisted that the United Nations has a legal obligation to compensate Haitian victims: Egypt.¹¹⁰ Outside of discussions on the cholera outbreak in Haiti, a handful of states have expressed general concerns about the adequacy of the United Nations' dispute settlement procedures in peace operations.¹¹¹

While the United Nations' legal strategy may have allowed the organization to preserve a reputation for responsiveness to (at least some) member states, the United Nations' denial of a legal obligation in 2013 did not protect it from reputational damage—including for acting inconsistently with its legal obligations. It is worth considering why not. After all, legal positions taken by the UN secretariat are often quite influential. Scholars of the UN Secretary-General have cited the issuance of legal opinions as one especially important tool for influencing debate and action by member states and others.¹¹² So why did the United Nations' staking out of a legal position fail here? The total absence of express public endorsement of the United Nations' legal position from any quarter is quite striking.

110 See for example, *Provisional verbatim record of the UNSC's 8005th meeting*, UN Doc S/PV.8005 (18 July 2017): “[W]e attach special importance to the cholera outbreak in Haiti, especially as the United Nations bears a moral and legal responsibility to support the Haitian authorities in combating the epidemic” (statement of Egyptian delegate). On one occasion, shortly after the New Approach was first announced, the Russian representative said that while the Russian government “agree[d] that there is a need to compensate those who have suffered from the epidemic, and the relatives of those who have died for their suffering which has been incurred”, Track Two of the New Approach “requires further legal and financial studying”; UN Web TV, *Informal Briefing by the Secretary-General on the United Nations' New Approach to Cholera in Haiti* (1 December 2016) <<http://webtv.un.org/meetings-events/treaty-bodies/watch/informal-briefing-by-the-secretary-general-on-the-united-nations-new-approach-to-cholera-in-haiti/5231380761001/?term=?language&sort=date>> 1:37:45.

111 ‘Statement by Denmark, Finland, Iceland, Norway, and Sweden’, 18th meeting of the Sixth Committee of the General Assembly (23 October 2014) <<https://papersmart.unmeetings.org/media2/4654068/denmark-en-85.pdf>>.

112 Franck, above n 31, 126–27; Ian Johnstone, ‘The Secretary-General as Norm Entrepreneur’ in Simon Chesterman (ed), *Secretary or General?* (Cambridge University Press, 2007) 123–38.

The answer has to do with the nature of legal argumentation. In order to persuade other lawyers, legal positions must have certain features.¹¹³ To start, the conclusion needs to be supported by reasoned analysis. Treaty interpretation is hardly a mechanical exercise, but the standard techniques for going about it are well-accepted and set out in the Vienna Convention on the Law of Treaties.¹¹⁴ The United Nations has never provided a thorough account of its legal position, however. When the Secretary-General denied the Haitian victims' claims in 2013, he merely announced a conclusion. In November 2014, the United Nations supplied a little more detail about its understanding of the distinction between public- and private-law claims in a letter responding to an inquiry from several special rapporteurs.¹¹⁵ On the merits, the international law scholars and former UN officials who examined the United Nations' position found it insufficiently supported and flat-out wrong.¹¹⁶

The combination of an unconvincing legal position articulated by the UN secretariat and passive member states means that unlike the facts regarding the cholera outbreak, the law remains murky.

5 What Next?

Concerns about the United Nations' damaged reputation prompted the Secretary General to propose—and UN member states to endorse—a course correction in the organization's response to the cholera outbreak in Haiti in 2016. At the same time, because limited funds have precluded the implementation of many projects, for Haitian cholera victims and their survivors, the New Approach may not look so different from the old. How, then, to break out of the status quo? This section proposes raising the reputational stakes by seeking an advisory opinion from the International Court of Justice about the scope of

113 Ian Johnstone, *The Power of Deliberation* (Oxford University Press, 2011) 21; Chayes and Chayes, above n 93 (pointing out that the range of plausible legal arguments regarding treaty obligations is not infinite, and that 'within some limits good legal arguments can generally be distinguished from bad').

114 *Vienna Convention on the Law of Treaties*, art 31–32.

115 Letter from Pedro Medrano, above n 87.

116 Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du cholera' (2013) 46 *Revue belge de droit international* 161; Bruce Rashkow, 'Remedies for Harm Caused by UN Peacekeepers' (2014) 108 *AJIL Unbound* 10; Kristen E Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 *Chicago Journal of International Law* 341, 354–362; Alston, above n 6, 4 (describing the United Nations' response to the cholera outbreak as "morally unconscionable, legally indefensible and politically self-defeating").

the United Nations' obligations under section 29 of the General Convention in connection with the cholera outbreak in Haiti. While reputation can operate independently of formal legal mechanisms, it also operates in conjunction with them.¹¹⁷

Assume, for the moment, that meaningful support for seeking such an opinion could be mustered among UN member states. Even without an actual request, the momentum towards one could by itself have positive effects. First, it would increase attention to the issue. Such increased attention by itself may create pressure for the UN secretariat and member states to act. Second, the prospect of such an opinion might help to generate additional funds to address cholera in Haiti. Within the UN secretariat, identifying creative ways to fully fund the New Approach—and urging member states to contribute—may become a higher priority. Member states opposed to the advisory opinion request may find themselves under greater pressure to contribute funds “voluntarily” to support their claim that an advisory opinion on this point is unnecessary. Efforts to fund the New Approach through the regular UN budget, thereby triggering UN member states' obligations to pay their assessed shares, may also gain steam. At least one state—Canada—has already expressed support for this approach.¹¹⁸ Finally, the prospect of an ICJ opinion would create pressure for the UN secretariat and UN member states to seriously consider and to publicly address the legal questions raised by the cholera outbreak. Member states that had been willing to silently go along with the UN's legal position might be embarrassed to expressly support such an approach—and could change their views.

An advisory opinion that affirmed that the United Nations had a legal obligation under section 29 of the General Convention to “make provisions for appropriate modes of settlement” of Haitian victims' claims could offer a face-saving way for the UN secretariat and UN member states to shift their positions in favor of funding the New Approach. Indeed, an advisory opinion from

117 See Grant and Keohane, above n 4, 37; Epp, above n 21 (concluding that lawsuits prompted US police departments to revise their policies on use of force and handling claims of abuse not because the lawsuits imposed financial costs, but because they threatened the defendants' professional reputations); Parrillo, above n 21, 777–789 (arguing that administrative agencies respond to contempt findings against agencies not because sanctions are imposed but because of the desire to avoid shame and adverse reputational consequences).

118 Gabrielle Duchaine, 'Haïti: Ottawa versera 6 millions pour lutter contre le choléra', *La Presse* (online), 10 January 2017 <<http://www.lapresse.ca/actualites/politique/politique-canadienne/201701/09/01-5058039-haiti-ottawa-versera-6-millions-pour-lutter-contre-le-cholera.php>>.

another era offers an illustration. In the early 1950s, the United Nations faced a problem with some parallels to the one Haiti-cholera epidemic. It involved a disputed legal obligation on the part of the United Nations to individuals who were harmed by actions taken by the Secretariat and a refusal to pay compensation led by the United States. An advisory opinion by the International Court of Justice paved the way for a solution.

In 1952, the U.S. government started hunting for Communists among U.S. nationals who were employed by the UN secretariat.¹¹⁹ Under considerable pressure from the U.S. government, then-Secretary-General Trygve Lie dismissed a number of U.S. nationals who had refused to answer questions about their Communist Party membership, espionage, or other subversive activities.¹²⁰ Some of these individuals challenged their dismissal before the UN Administrative Tribunal, which found in their favor and awarded eleven former employees compensation that totaled around USD 180,000.¹²¹ When the next Secretary-General—next Dag Hammarskjöld—sought an appropriation from the UN General Assembly to pay these awards, the United States led the opposition, arguing that the Administrative Tribunal's decisions were seriously flawed and that the General Assembly had the legal right and responsibility to refuse to give effect to those decisions.¹²² This view received scant support from other delegations.¹²³

Ultimately the United States went along with a proposal to seek an advisory opinion from the International Court of Justice on whether the General Assembly “has the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his consent”.¹²⁴ The ICJ released its advisory opinion on July 13, 1954, holding that the General Assembly had no such right, at least so long as the Administrative Tribunal was not acting *ultra vires*.¹²⁵

At first, the opinion appeared to reinforce the opposition to the payments within the U.S. government. A few weeks after the opinion was released, the

119 Franck, above n 31, at 101.

120 Ibid; Maxwell Cohen, ‘The United Nations Secretariat—Some Constitutional and Administrative Developments’ (1955) 49 *American Journal of International Law* 295, 304–305.

121 *Report of the Secretary-General on Personnel Policy*, UN Doc A/2533, (2 November 1953).

122 Frances P Bolton and James P Richards, *Report on the Eighth Session of the General Assembly of the United Nations*, House Report No 1695, 83rd Congress, 2nd sess (28 May 1953), 95–98.

123 Cohen, above n 120, 312.

124 Bolton and Richards, above n 122, 101–02, 217–18; GA Res 785 A (VIII) (8 December 1953).

125 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47.

U.S. Congress adopted a concurrent resolution expressing the “sense of the Congress” that the US delegation to the United Nations should “take all possible steps” to prevent the General Assembly from authorizing or approving the payment to the dismissed American employees—and that “no part of the funds heretofore appropriated, or hereafter appropriated by the Congress for the United Nations shall be used for the payment of such awards.”¹²⁶

But that’s not the end of the story. Key players worked hard to find a way to implement the ICJ decision. Hammarskjöld came up with a creative solution to pay the awarded compensation without running afoul of the Congressional resolution. He proposed paying the awards from “a Special Indemnity Fund financed from the assessments levied on staff salaries—the UN’s internal system of income tax.”¹²⁷ Perhaps surprisingly, the US delegation supported this proposal. Although the US government “remained firmly convinced that the General Assembly had the right to refuse to give effect to decisions made by one of its subsidiary organs,” and “continued to disagree with the particular awards by the Administrative Tribunal,” the delegation explained that “consistent with its policy in other cases, the Government of the United States was prepared to respect the authority of the International Court of Justice.”¹²⁸ Ambassador Henry Cabot Lodge, Jr., reported back to the U.S. Congress on this course of action in a written report and in testimony related to the State Department’s appropriations for the upcoming year.¹²⁹ The response from members of Congress was a collective shrug. The chairman of the subcommittee asked whether any of the eleven individuals had been reinstated by the Secretary General and received a negative answer.¹³⁰ The discussion in the subcommittee moved on to other topics, and the ICJ decision received no further attention as the appropriations bill wended its way through the Congress.

My claim is not that the current US administration would respond identically to an ICJ advisory opinion today; the Trump administration has repeatedly demonstrated hostility towards multilateral institutions. But other states may shift course in response to an ICJ opinion. In addition, to the extent that

126 H Con Res 262 (20 August 1954).

127 Brian Urquhart, Hammarskjöld (Norton, 1972) 70.

128 Report of the Fifth Committee, *Awards of Compensation Made by the United Nations Administrative Tribunal: Advisory Opinion of the International Court of Justice*, UN Doc A/2883 (16 December 1954) [9].

129 See also US Department of State, ‘Participation in the UN: Report by the President to the Congress for the Year 1954’, 84th Congress, 1st Sess, House Document No 166, 202; *Hearings Before the Subcommittee of the Committee on Appropriations*, House of Representatives, 84th Congress, 1st Sess (1955) (testimony of Henry Cabot Lodge Jr) 457–65.

130 *Ibid* (subcommittee testimony) 465.

views within individual national governments are mixed, an ICJ opinion could strengthen the position of national government officials who favor funding the New Approach vis-à-vis those who oppose it. This dynamic could shift outcomes even in the United States. Well-placed members of Congress have the capacity to shape US positions relating to international organizations.¹³¹ In September 2017, Senator Patrick Leahy explained that the Appropriations Committee had unanimously adopted a provision he had authored that “would provide the Trump Administration with the authority to enable the United States to do its part to help” by transferring its share of the MINUSTAH surplus—USD 11.7 million—to the trust fund.¹³² And, indeed, the consolidated appropriations bill that President Trump signed into law in March 2018 included that language.¹³³

Within the UN Secretariat, an ICJ opinion could provide a face-saving way to shift its legal position, and redirect the UN officials to helping to secure implementation of the decision. By not acknowledging any legal responsibility in connection with the cholera outbreak in Haiti, the UN secretariat gave up an important tool to influence member states’ decisions to fund the New Approach. An advisory opinion from the ICJ could restore it.

There are two objections here that need to be addressed. First, although it seems unlikely, the ICJ could issue an opinion that affirms the position that the UN secretariat has articulated to date—that the United Nations lacks any obligation under section 29 of the General Convention to provide redress to Haitian victims. On the one hand, such a decision may reduce pressure to fully fund the New Approach by confirming that the organization’s reputation for legality is not on the line. On the other hand, such a decision would not affect assessments of the United Nations’ moral obligations. Moreover, such a decision (and all of the steps prior to the issuance of the decision) would continue to call attention to the issue. Reputational costs depend on attention, and

131 Kristina Daugirdas, ‘Congress Underestimated: The Case of the World Bank’ (2013) 107 *American Journal of International Law* 517.

132 ‘Statement of Senator Patrick Leahy on Funding to Address Cholera in Haiti’ (Press Release, 19 September 2017) <https://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy_on-funding-to-address-cholera-in-haiti>.

133 Pub L No 115-141 (2018), s 7058 (“\$10,000,000 shall be made available for support of a multi-partner trust fund or other multilateral efforts to assist communities in Haiti affected by cholera resulting from the United Nations Stabilization Mission in Haiti: *Provided*, That prior to the obligation of such funds, the Secretary of State shall ensure that mechanisms are in place for monitoring, oversight, and control of such funds: *Provided further*, That such funds shall be subject to prior consultation with, and the regular notification procedures of, the Committees on Appropriations”).

increased attention would raise the costs of the United Nations' failure to fulfill a moral obligation.

Second, perhaps requesting an advisory opinion is a bad idea because it would provoke a harmful confrontation between the United Nations and key member states. After all, as explained above, international organizations have incentives to maintain smooth and cooperative relations with their member states. One response is that the request for the advisory opinion would necessarily come directly from the member states themselves: only bodies comprised of UN member states are authorized to seek such an opinion.¹³⁴ Thus the decision to seek an advisory opinion would be the product of conflict among UN member states rather than between the UN secretariat and its member states. The even more compelling response to this objection is that it is an argument in favor of the status quo—which has, to date, yielded only a tiny fraction of the USD 400 million needed to fully fund the New Approach. More of the same is failure, not success.

6 Conclusion

The United Nations' response to cholera in Haiti over the past nine years demonstrates the power and the limitations of reputation as a motivator and disciplinarian. Indeed, along some dimensions this tragedy supplies a best-case scenario for reputation as an accountability mechanism. The deficiencies and even pathologies of reputation as a motivator in this context highlights the urgency of developing additional formal accountability mechanisms to assure recourse to individuals harmed by the acts and omissions of international organizations. Just as importantly, however, these developments underscore the value that can be added by making more use of the institutions, like the ICJ, that already exist.

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¹³⁴ Such a request could be made by the UN General Assembly, the Security Council, or the Economic and Social Council. See *UN Charter* art 96, GA Res 89(1) (11 December 1946).