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# Reputation and the Responsibility of International Organizations

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## Abstract

*The International Law Commission's Draft Articles on the Responsibility of International Organizations have met a sceptical response from many states, international organizations (IOs), and academics. This article explains why those Articles can nevertheless have significant practical effect. In the course of doing so, this article fills a crucial gap in the IO literature, and provides a theoretical account of why IOs comply with international law. The IO Responsibility Articles may spur IOs and their member states to prevent violations and to address violations promptly if they do occur. The key mechanism for realizing these effects is transnational discourse among both state and non-state actors in a range of national and international forums. IOs have reason to be especially sensitive to the effects of this discourse on their reputations. A reputation for complying with international law is an important facet of an IO's legitimacy. The perception that an IO is legitimate is, in turn, crucial to the organization's ability to secure cooperation and support from its member states. This article argues that IOs and their member states will take action to prevent and address violations of international law in order to deflect threats to IOs' reputations – and to preserve their effectiveness.*

In Haiti, a Creole slogan is repeated on billboards and spray-painted onto cement walls. Translated into English, it reads, 'Cholera is a crime against humanity!'.<sup>1</sup> The signs do not identify the perpetrator, but there would probably be no cholera in Haiti today but for the presence there of United Nations peacekeepers from Nepal.<sup>2</sup> Traditionally, international organizations<sup>3</sup> (IOs) have been viewed as guardians of international law

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<sup>1</sup> Krishnaswami, 'The United Nations' Shameful History in Haiti', 19 Aug. 2013, available at [www.slate.com/articles/news\\_and\\_politics/foreigners/2013/08/united\\_nations\\_caused\\_cholera\\_outbreak\\_in\\_haiti\\_its\\_response\\_violates\\_international.html](http://www.slate.com/articles/news_and_politics/foreigners/2013/08/united_nations_caused_cholera_outbreak_in_haiti_its_response_violates_international.html) (last visited 24 Nov. 2014).

<sup>2</sup> See *infra* sect. 3.

<sup>3</sup> This article uses the term 'international organization' consistently with the International Law Commission's (ILC) definition in the Draft Articles on the Responsibility of International Organizations: '[A]n organization established by a treaty or other instrument governed by international law and possessing its own legal personality': ILC, Draft Articles on the Responsibility of International Organizations, with Commentaries, in Report on the Work of Its Sixty-third Session (26 Apr. to 3 June and 4 July to 12 Aug. 2011), UN Doc. A/66/10, Ch. V [hereinafter IO Responsibility Articles], Art. 2(a).

rather than as potential violators.<sup>4</sup> But occurrences like this one have put IOs under new scrutiny. Scholars and advocates have contended that IOs might violate international law in various ways. UN peacekeepers might violate international humanitarian law. The IMF might violate the economic, social, and cultural rights of individuals residing in states that borrow from it. And any number of IOs might violate international labour standards in their dealings with their own employees.<sup>5</sup>

In 2011, the International Law Commission (ILC) adopted a set of draft articles on the responsibility of international organizations (IO Responsibility Articles). These Articles seek to clarify both the circumstances that establish an IO's breach of an international obligation and the consequences of such breaches. To that end, these Articles identify when conduct is attributable to an IO rather than a state or private individual. They address the circumstances under which violations might be excused. And they specify the consequences of responsibility. According to the IO Responsibility Articles, for example, if the peacekeepers' actions or omissions are attributable to the UN and those actions or omissions constitute a breach of the UN's international obligations, the UN is obliged to make full reparation for injury caused by the violation.<sup>6</sup>

Many states and IOs reacted sceptically to the ILC's undertaking. Draft articles produced by the ILC often provide the starting point for multilateral treaty negotiations, but there are no such plans for the IO Responsibility Articles.<sup>7</sup> Many scholars have also disparaged the ILC's efforts. José Alvarez, for one, has described the ILC's effort as 'at best premature and at worst misguided'.<sup>8</sup> In his view, the IO Responsibility Articles are premature because they are grounded in an extremely limited body of practice and because so many aspects of the primary norms of international law that bind IOs are unsettled. Addressing the consequences of violations while the content of primary norms remains controversial puts the cart before the horse, Alvarez argues.<sup>9</sup> Separately, Jan Klabbers has questioned the practical effect of the IO Responsibility Articles' rules, given the absence of third-party dispute settlement mechanisms that can bind IOs.<sup>10</sup> Klabbers is surely right that the practical effects of the articles cannot be taken for granted.<sup>11</sup>

<sup>4</sup> Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance* (2001) 131, at 131.

<sup>5</sup> There are many other examples. See *ibid.*, at 132; Mégret and Hoffmann, 'The UN as a Human Rights Violator?', 25 *Human Rts Q* (2003) 314, at 335–336.

<sup>6</sup> IO Responsibility Articles, *supra* note 3, Arts 31, 51–57.

<sup>7</sup> See *infra* note 35.

<sup>8</sup> Alvarez, 'Book Review of Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers', 101 *AJIL* (2007) 674, at 677.

<sup>9</sup> *Ibid.*, at 676–677. See also Alvarez, 'Misadventures in Subjecthood', 29 Sept. 2010, available at [www.ejiltalk.org/misadventures-in-statehood/](http://www.ejiltalk.org/misadventures-in-statehood/) (last visited 24 Nov. 2014).

<sup>10</sup> J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009), at 292; see also Alvarez, 'Misadventures in Subjecthood', *supra* note 9 (arguing that the IO Responsibility Articles are unlikely to become 'legally important' in the near future because of the 'scarcity of judicial venues to address issues of IO responsibility').

<sup>11</sup> Cf. A.T. Guzman, *How International Law Works* (2008), at 55 ('In trying to understand why a state might comply with an international obligation, it makes no sense to turn to a rule of international law that says a failure to comply generates an obligation to make reparation. If there is nothing else to encourage compliance with the initial obligation, then the rule requiring reparations will be similarly impotent.')

And yet, this article argues, these critics are too pessimistic; the IO Responsibility Articles are neither premature nor feckless. On the contrary, the IO Responsibility Articles can help to clarify the primary international law norms that bind IOs. There are also reasons to think that the IO Responsibility Articles will spur IOs and their member states to prevent violations and to address violations promptly if they occur. Realizing these practical effects does not require either negotiating a treaty based on the IO Responsibility Articles or developing new dispute settlement mechanisms.

The key mechanism for realizing these effects is decentralized discourse about international norms. This article uses ‘transnational discourse’ as shorthand to describe this discourse, and to emphasize that it takes place among a broad range of actors and in a broad range of forums. Participants in the discourse include government and IO officials, NGOs, national legislators, and private individuals. Forums include not just IOs but also national courts and newspaper editorial pages. The IO Responsibility Articles shape this discourse by heightening the salience of IOs’ violations of international law, increasing the likelihood that policy disputes will be framed as violations of international law, and structuring legal arguments over whether IOs have in fact violated international law.

But will IOs and their member states heed this discourse? Legal process and constructivist scholars have long argued that such discourse plays a prominent role in explaining states’ behaviour. This article argues that IOs’ are likely to be even more sensitive to this discourse than states are. IOs’ reputations for compliance with international law are forged through this transnational discourse. A reputation for complying with international law is an important facet of an IO’s legitimacy. The perception that an IO is legitimate is, in turn, crucial to that IO’s ability to secure cooperation and support from its member states. This article contends that IOs and their member states will take action to prevent and address violations of international law in order to deflect threats to IOs’ legitimacy – and to preserve their effectiveness.

Because the ILC adopted the IO Responsibility Articles only recently, it is early to look for evidence of these dynamics, and this account is necessarily somewhat speculative. And yet some empirical support already exists. The article examines the still-ongoing controversy about claims that the UN violated its international obligations by inadvertently bringing cholera to Haiti.

International relations and international legal scholarship is rife with theories about why states will – or will not – comply with their international obligations. To date, however, efforts to specify IOs’ international obligations and the consequences for violating them have proceeded without any parallel effort to develop a theoretical account of why IOs will comply with those obligations. In the course of providing an account of why the IO Responsibility Articles will have practical effect, this article identifies and takes a first step to fill a crucial gap in the literature on IOs.

## 1 A Tale of Two Efforts to Codify International Responsibility

To understand why critics doubt the prospects of the IO Responsibility Articles, it is helpful to contrast them with the ILC’s previously adopted State Responsibility Articles.

The ILC took up the topic of IO responsibility just as it was wrapping up a decades-long effort to adopt a set of articles governing the responsibility of states for violations of international law. At first glance, the IO Responsibility Articles quite closely track the State Responsibility Articles on matters of both substance and process.

## A Substance

According to the ILC, both the State and IO Responsibility Articles address ‘secondary’ rules of international law.<sup>12</sup> That is, they address the ‘general conditions under international law for the State [or IO] to be considered responsible for wrongful actions or omissions, and the legal consequences that flow therefrom’. Neither set of articles addresses primary rules, or ‘the content of international obligations, the breach of which gives rise to responsibility’.<sup>13</sup> These primary rules are found instead in the international agreements that establish IOs, in treaties to which states or IOs are parties, and in general international law.

Although they address the same set of issues, the IO Responsibility Articles are grounded in far less practice than the State Responsibility Articles.<sup>14</sup> Indeed, when the ILC asked selected IOs to document their responses when charged with violating international law, several reported that no such claims had ever been made.<sup>15</sup> The scarcity of practice reflects in part the comparative novelty of IOs (which did not exist in large numbers before World War II) and of the idea that IOs are both capable of violating international law and responsible for the consequences of such violations. The scarcity of practice also reflects the paucity of third-party dispute settlement mechanisms for resolving legal questions about violations of international law by IOs, as well as the difficulty of accessing those that do exist.<sup>16</sup>

Because the ILC could draw on only a limited body of practice, its work on IO responsibility was primarily an exercise in the progressive development of international law. The ILC has acknowledged as much.<sup>17</sup> By contrast, the State Responsibility Articles are built on a much larger body of practice, and most of the articles have a plausible claim to reflect existing customary international law.

Even the fundamental premise at the heart of the IO Responsibility Articles – that ‘[e]very internationally wrongful act of an international organization entails the international responsibility of that organization’<sup>18</sup> – is not beyond doubt. Writing in 1963, the ILC Special Rapporteur on state responsibility found it ‘questionable whether such organizations

<sup>12</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries [hereinafter State Responsibility Articles], *Yearbook of the ILC* (2001), Vol. II, Part 2, at 31, para. 1; IO Responsibility Articles, *supra* note 3, at 67, para. 3; but see Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, 34 *Michigan J Int’l L* (2013) 359, at 408–412 (noting that some responsibility rules are primary rules under this classification).

<sup>13</sup> State Responsibility Articles, *supra* note 12, at 31 para. 1; IO Responsibility Articles, *supra* note 3, at 67.

<sup>14</sup> IO Responsibility Articles, *supra* note 3, at 67–68, para. 5.

<sup>15</sup> ILC, Responsibility of International Organizations: Comments and Observations Received from International Organizations, UN Doc. A/CN.4/545, 25 June 2004, at 33.

<sup>16</sup> Klabbers, *supra* note 10, at 292.

<sup>17</sup> IO Responsibility Articles, *supra* note 3, at 67–68, para. 5.

<sup>18</sup> *Ibid.*, Art. 3.

had the capacity to commit international[ly] wrongful acts'.<sup>19</sup> Fifty years later, most academics have come to accept the position that IOs have international legal obligations and incur international responsibility when they violate them.<sup>20</sup> This view builds on the ICJ's 1949 *Reparation for Injuries* advisory opinion, in which the ICJ held that the UN has international personality separate from its member states – and that the UN is therefore 'capable of possessing international rights and duties'.<sup>21</sup> The ICJ has since extended this reasoning to other IOs.<sup>22</sup> Yet the ICJ has never directly addressed the consequences of IOs violating international obligations.

Many commentators insist that if IOs are capable of having their own international obligations, it is only logical that IOs themselves are responsible for the violations.<sup>23</sup> If the IOs were not responsible, then their member states would be responsible in their stead, and this outcome contradicts the separate legal personality of the IO.<sup>24</sup> The alternative – that nobody would be responsible – is widely considered intolerable.<sup>25</sup>

The neatness of this logical chain notwithstanding, practice supporting the basic proposition that IOs are responsible for violations of international law is surprisingly thin. The ILC commentary quotes the UN Secretary-General explaining the UN's long-standing practice of settling claims related to injuries caused by UN peacekeepers in terms of the organization's international responsibility.<sup>26</sup> But the UN has also explained this practice in terms of its treaty obligations under the Convention on the Privileges and Immunities of the United Nations (the General Convention).<sup>27</sup> Section 29 of the General Convention requires the UN to 'make provision for appropriate modes of settlement' of

<sup>19</sup> ILC, Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, *Yearbook of the ILC* (1963), Vol. II, at 228–229; see also *ibid.*, at 234 (comments of Jiménez de Aréchaga).

<sup>20</sup> Alvarez, *supra* note 8, at 676–677.

<sup>21</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 Apr. 1949, ICJ Reports (1949) 174, at 179.

<sup>22</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 Dec. 1980, ICJ Reports (1980) 73, at 89–90.

<sup>23</sup> ILC, State Responsibility, International Responsibility: Report by F. V. Garcia Amador, Special Rapporteur, *Yearbook of the ILC* (1956), Vol. II, 173, at 190, para. 83; P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th edn, 2009), at 518; Pellet, 'The Definition of Responsibility in International Law', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010), at 3, 6–7.

<sup>24</sup> See, e.g., H.G. Schermers and N.M. Blokker, *International Institutional Law* (4th rev. edn, 2003), at 1006, sec. 1583.

<sup>25</sup> See, e.g., M. Hirsch, *The Responsibility of International Organizations towards Third Parties: Some Basic Principles* (1995), at 8; see also Arsanjani, 'Claims against International Organizations: Quis Custodiet Ipsos Custodes', 7 *Yale J World Public Order* (1980) 131, at 132.

<sup>26</sup> IO Responsibility Articles, *supra* note 3, at 78 (quoting statement from UN GA, Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations, UN Doc. A/51/389, 20 Sept. 1996, at 4).

<sup>27</sup> UN Secretary-General. Letter Dated 6 Aug. 1965 from the Secretary-General Addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, reprinted in *United Nations Juridical Yearbook* (1965), Part One, ch. 2, at 41; Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, *supra* note 26, at 4, para. 7; Report of the Secretary General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/903, 21 May 1997, paras 10 and 43; Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 *AJIL* (2000) 406, at 409.

‘disputes of a private law character’ and disputes involving ‘any official of the United Nations who by reason of his official position enjoys immunity’.<sup>28</sup> These disputes do not necessarily involve violations of international law; the UN includes arbitration clauses in its commercial contracts and leases pursuant to section 29, for example.<sup>29</sup>

The only other support the ILC adduces is a quotation from the ICJ’s 1999 advisory opinion, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.<sup>30</sup> But this case has nothing to do with the responsibility of the UN for violations of international law. The case arose after Malaysian companies sued a UN Special Rapporteur for defamation based on comments he made during an interview with a magazine reporter. ICJ held that the Special Rapporteur was immune from suit in national courts. The ICJ’s opinion concluded with the observation that the ‘question of immunity from legal process is distinct from the issue of compensation’, and even if the UN is immune it may ‘be required to bear responsibility for the damage arising from such acts’ because of section 29 of the General Convention.<sup>31</sup> The ICJ’s statement is a description of the UN’s primary obligations under the General Convention – not a statement about the consequences of violations of international law. Special Rapporteur’s allegedly defamatory acts may have caused harm and violated *Malaysian* law, but there is no claim that the Special Rapporteur or the UN violated *international* law.

The ILC had even less practice to draw on when it moved beyond the basic principle of IO responsibility for violations of international law. To formulate a complete set of articles on IO Responsibility, the ILC relied heavily on the State Responsibility Articles. ‘It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States’, ILC Special Rapporteur Gaja explained, ‘unless there are specific reasons to do so.’<sup>32</sup> In the end, almost two-thirds of the IO Responsibility Articles directly track their counterparts in the State Responsibility Articles.<sup>33</sup> Many states, IOs, and academics complained that the ILC failed to justify the substantive similarities between the IO and State Responsibility Articles.<sup>34</sup>

<sup>28</sup> Conventions on the Privileges and Immunities of the United Nations 1946, 1 UNTS 16.

<sup>29</sup> Report of the Secretary-General, Procedures in Place for Implementation of Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, UN Doc. A/C.5/49/65, 24 Apr. 1995, para. 3.

<sup>30</sup> IO Responsibility Articles, *supra* note 3, Art. 3, at 78.

<sup>31</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 Apr. 1999, ICJ Reports (1999) 62, at 88–89, para. 66.

<sup>32</sup> ILC, Responsibility of International Organizations, First Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/532, 26 Mar. 2003, at 6.

<sup>33</sup> IO Responsibility Articles, *supra* note 3, Arts 3–5, 9, 11–16, 19–21, 23–24, 26–31, 33–39, 41–47, 54–57, 60, 65–67.

<sup>34</sup> See, e.g., ILC, Responsibility of International Organizations, Comments and Observations Received from Governments, UN Doc. A/CN.4/636, 14 Feb. 2011, at 5–7 (Austria); *ibid.*, at 8 (Portugal); ILC, Responsibility of International Organizations, Comments and Observations Received from Governments, UN Doc. A/CN.4/636/Add. 1, 13 Apr. 2011, at 4–5 (Republic of Korea); ILC, Responsibility of International Organizations, Comments and Observations Received from International Organizations, UN Doc. A/CN.4/637, 14 Feb. 2011, at 8 (ILO); *ibid.*, at 9 (IMF); *ibid.*, at 10 (joint comments from 13 international organizations); see also Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the “Copy-Paste” Approach’, 9 *IOLR* (2013) 53 (arguing the ILC should have used closer analogies with the State Responsibility Articles in order to improve the overall coherence of the law of international responsibility). But see Amerasinghe, ‘Comments on the ILC’s Draft Articles on the Responsibility of International Organizations’, 9 *IOLR* (2013) 29, at 29 (arguing that the parallelism between the two sets of articles is ‘acceptable and correct’).

In the end, then, many of the individual articles on IO Responsibility have little claim to reflect extant international law, and as proposals to progressively develop the law they are controversial.

## B Process

Turning from substance to process, the State and IO Responsibility Articles again initially appear similar. When the ILC completed its work on each set of articles, it recommended that the General Assembly 'take note' of its work instead of proceeding towards a multilateral treaty.<sup>35</sup> But these identical recommendations obscure very different levels of political support for the two projects. The states that opposed negotiating a treaty based on the State Responsibility Articles were motivated by a desire to protect the ILC's work: they feared that an unsuccessful multilateral negotiation would undermine claims that the State Responsibility Articles reflect existing customary international law.<sup>36</sup> In contrast, the main reason for not pursuing a convention based on the IO Responsibility Articles appears to be a pronounced lack of enthusiasm for the ILC's project among many states and IOs.<sup>37</sup>

Commentators expected the State Responsibility Articles to be influential even if they were not codified in a treaty. David Caron argued that international judges and arbitrators would be especially likely to apply an 'apparently neutral external source' like the State Responsibility Articles.<sup>38</sup> These intuitions proved correct, as a wealth of subsequent decisions attests.<sup>39</sup> By contrast, international courts and arbitrators will have few opportunities to apply the IO Responsibility Articles because disputes with IOs are so rarely resolved by third-party dispute settlement mechanisms.

<sup>35</sup> See State Responsibility Articles, *supra* note 12, para. 72; IO Responsibility Articles, *supra* note 3, at 51, para. 85. These recommendations deviated from what had been the ILC's normal practice for many years. Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 29, at 32–33.

<sup>36</sup> ILC, Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/517, 2–3 Apr. 2001, para. 23 (describing negotiations as potentially destabilizing or 'decodifying'); *ibid.*, at 18 (Austria); ILC, State Responsibility, Comments and Observations Received from Governments, 19 Mar., 3 Apr., 1 May and 28 June 2001, UN Doc. A/CN.4/515, at 19 (Netherlands); *ibid.*, at 21 (United States).

<sup>37</sup> See *supra* note 34. When the IO Responsibility Articles were discussed in the General Assembly's Sixth Committee following the ILC's recommendation, states' comments continued to reflect mixed reactions: see generally Sixth Committee, Summary Record of the 20th Meeting, UN Doc. A/C.6/66/SR.20, 26 Oct. 2011. For negative comments from a group of 15 IOs see *ibid.*, paras 92–93.

<sup>38</sup> Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 866, 868; see also J. Alvarez, *International Organizations as Law-Makers* (2005), at 312.

<sup>39</sup> See UN GA, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies, Report of the Secretary-General, UN Doc. A/62/62, 1 Feb. 2007, para. 5; Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Preliminary Draft' (2007), available at [www.biicl.org/files/3107\\_impactofthearticleson-state-responsibilitypreliminarydraftfinal.pdf](http://www.biicl.org/files/3107_impactofthearticleson-state-responsibilitypreliminarydraftfinal.pdf) (last visited 24 Nov. 2014).

The remainder of this article explains why, notwithstanding lukewarm political support from states and IOs, the IO Responsibility Articles are not a dead letter. On the contrary, they promise to be influential – but not for the same reasons that the State Responsibility Articles have been.

## 2 The IO Responsibility Articles in Transnational Discourse

The view that the IO Responsibility Articles are condemned to irrelevance overlooks or unduly discounts the ways in which the IO Responsibility Articles can influence transnational discourse – and the reasons why IOs and their member states are especially sensitive to that discourse. This section describes that discourse and how the IO Responsibility Articles have already begun to shape it. Section 3 illustrates how the IO Responsibility Articles have been deployed in transnational discourse regarding cholera in Haiti – and how that discourse has contributed to clarification about the UN’s primary obligations and spurred some action by the UN. Section 4 explains why and how transnational discourse is likely to affect the actions and decisions of IOs and their member states more generally.

International relations scholars who take a constructivist approach and international lawyers who embrace ‘legal process’ theories have long agreed that discourse about international norms matters. Rejecting the idea that states’ interests are fixed, constructivists maintain that discourse shapes states’ interests.<sup>40</sup> Legal process theorists emphasize how discourse can cause states to comply with their international legal obligations.<sup>41</sup> Both constructivists and legal process theorists have identified IOs as important venues<sup>42</sup> – and IO officials as important participants<sup>43</sup> – in this discourse. But they have paid less attention to how such discourse might influence what IOs do.

Transnational discourse is decentralized. State officials participate in that discourse. But while states are the key actors deciding whether the IO Responsibility Articles will become a treaty, state officials do not have a monopoly on transnational discourse. Other participants in transnational discourse include international civil servants, multinational enterprises, civil society organizations, and private individuals. They engage in discourse about IOs’ legal norms in a range of forums. These participants can play three distinct roles in this discourse: they can initiate and perpetuate discussion, they can contribute new legal arguments or relevant facts, and they can evaluate legal arguments.

Because the motivations and interests of transnational actors diverge, some transnational actors will be willing to press arguments that other transnational actors would prefer to avoid. For example, national legislatures may be willing to raise

<sup>40</sup> For a helpful distillation of constructivist theories see Brunnée and Toope, ‘International Law and Constructivism’, 39 *Columbia J Transnat’l L* (2000) 19, at 25–33.

<sup>41</sup> See *infra* notes 108–113 and accompanying text.

<sup>42</sup> A. Chayes and A. Handler Chayes, *The New Sovereignty* (1995), at 125.; I. Johnstone, *The Power of Deliberation* (2011), at 5.

<sup>43</sup> Chayes and Chayes, *supra* note 42, at 275–276; Johnstone, ‘The Role of the UN Secretary-General’, 9 *Global Governance* (2003) 441, at 441.



challenges to IO action about which executive branch officials would be content to remain silent.<sup>44</sup> One IO (or part of an IO) may be in a position to question another IO (or part of the same IO).<sup>45</sup> Finally, non-state actors – and NGOs in particular – may press legal arguments that governments may be unable or unwilling to make for a variety of reasons.

The availability of diverse forums for making legal arguments allows transnational actors to seek out those forums that are most congenial to their positions. International courts and arbitral tribunals are neither the only important venues nor indispensable ones. Transnational discourse can occur in national legislatures, as well as in the pages of academic journal articles and newspapers.<sup>46</sup> Some forums can be useful even though they are formally unavailable to hear particular claims. IOs typically enjoy immunity from suit in national courts, for example, but these courts can nevertheless be important venues for transnational discourse. Even if cases filed in national courts are ultimately dismissed, those cases can call attention to challenged actions or omissions by IOs.

The IO Responsibility Articles are likely to influence transnational discourse about IOs in the following ways. Transnational actors are likely to cite them for the same reasons that international courts and tribunals so readily turn to the State Responsibility Articles.<sup>47</sup> Both sets of articles offer a detailed, readily accessible, and ostensibly neutral set of rules that specify when IOs are responsible for violations of international law. Indeed, transnational actors seeking to bolster their legal claims would be foolish not to invoke them.

The IO Responsibility Articles may also increase the quantity of transnational discourse about IOs that is framed in legal terms.<sup>48</sup> By heightening the salience of IO violations of international law, the IO Responsibility Articles may indirectly encourage transnational actors to frame their policy disputes with various IOs in these terms.<sup>49</sup> The result is not only more discourse about the topic the IO Responsibility Articles address directly – the consequences of violations of international law. The result is also more discourse about the content of the primary norms that bind IOs.

<sup>44</sup> See, e.g., Daugirdas, 'Congress Underestimated: The Case of the World Bank', 107 *AJIL* (2013) 517; Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture', 22 *EJIL* (2011) 1089, at 1108–1112.

<sup>45</sup> Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001) 851, at 868–869; Deshman, *supra* note 44, at 1097–1098 (describing criticisms of the WHO by the Parliamentary Assembly of the Council of Europe).

<sup>46</sup> See, e.g., Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599, at 2646–2647 (describing legal debates about the Anti-Ballistic Missile Treaty as 'rag[ing] in many fora: Senate hearings, debates over other arms control treaties, journal articles, and op-ed columns').

<sup>47</sup> See *supra* note 38.

<sup>48</sup> Cf. Bederman, 'Counterintuiting Countermeasures', 96 *AJIL* (2002) 817, at 832 ('writing a rule book for self-help may actually encourage governments to play a game of punch and counterpunch that they had previously avoided.').

<sup>49</sup> Cf. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *AJIL* (1970) 1, at 17 (explaining that although the SC need not assert non-compliance with international law to trigger its authorities, it often does because 'the behavior of a state is not easily challenged on grounds of "policy": it is clearly preferable, if one wishes to gain the support of those not directly involved, to show it as a departure from legal obligations').

Consider some examples. The World Trade Organization (WTO) reported to the ILC in 2002 that ‘no claim was ever made against the WTO alleging a violation of international law’.<sup>50</sup> Since then, academic commentators have begun to explore how the WTO might violate international law.<sup>51</sup> The World Health Organization (WHO) likewise reported that ‘to our knowledge no such claims have ever been made against the WHO’.<sup>52</sup> A recently published article contends that that ought to change, arguing that the WHO ought to be responsible under international law for the acts of public–private partnerships in which it participates.<sup>53</sup>

NGOs are increasingly invoking the IO Responsibility Articles to reinforce their arguments about IOs’ obligations and the consequences of violations. Recently Amnesty International, along with several other NGOs, submitted a written statement to the Human Rights Council urging it focus on the human rights obligations of the international financial institutions (IFIs) including the World Bank.<sup>54</sup> After all, as the written statement explains, the ILC’s Articles on IO Responsibility ‘confirm[s] that intergovernmental organizations, such as IFIs, are subjects of international law, and as such they have international law obligations that they must comply with’.<sup>55</sup> Several months earlier, Human Rights Watch had issued its own report addressing the World Bank’s legal obligations to respect and protect human rights – and invoking the Articles on IO Responsibility to support its arguments.<sup>56</sup>

### 3 Transnational Discourse in Action: Cholera in Haiti

Since the adoption of the IO Responsibility Articles, the most extensive transnational discourse regarding IO obligations and the consequences of violations has involved allegations that the UN inadvertently introduced cholera into Haiti. This section demonstrates how non-state actors initiated and perpetuated that discourse. They also introduced new legal arguments and relevant factual information, and evaluated legal arguments made by other actors – especially the UN. This section also rebuts the claim that the IO Responsibility Articles are not premature because disagreement persists about the IOs’ primary international law obligations. Clarity about IOs’ primary obligations need not precede the development of the IO Responsibility Articles because the

<sup>50</sup> UN Doc. A/CN.4/545, *supra* note 15, at 33.

<sup>51</sup> Gal-Or and Ryngaert, ‘From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN’, 13 *German LJ* (2012) 511, at 540.

<sup>52</sup> UN Doc. A/CN.4/545, *supra* note 15, at 33.

<sup>53</sup> Clarke, ‘Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships’, 12 *Chinese J Int’l L* (2011) 55.

<sup>54</sup> See Amnesty International’s Written Statement for the 24th Session of the Human Rights Council, ‘The World Bank and Other International Financial Institutions Must Uphold Human Rights in All Activities They Support’, 16 Sept. 2013, available online at [amnesty.org/fr/library/asset/IOR41/020/2013/en/e379235b-84ea-4062-898d-a17506b28340/ior410202013en.pdf](http://amnesty.org/fr/library/asset/IOR41/020/2013/en/e379235b-84ea-4062-898d-a17506b28340/ior410202013en.pdf) (last visited 24 Nov. 2014).

<sup>55</sup> *Ibid.*, at 3.

<sup>56</sup> Human Rights Watch, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations* (2013), at 26–29.

IO Responsibility Articles themselves can help to achieve that clarity. In fact, the transnational discourse about the UN's role and obligations in connection with cholera in Haiti has shed light on some of the UN's primary legal obligations. Finally, this section describes how the UN's position has shifted since that discourse began. Although it is impossible to establish definitively why those shifts occurred, the next section argues that IOs have reasons to be especially sensitive to such transnational discourse.

UN peacekeepers were already in Haiti when a devastating earthquake struck on 12 January 2010. The Security Council had established the UN Stabilization Mission in Haiti (MINUSTAH<sup>57</sup>) six years earlier in the wake of a contested presidential election that resulted in armed conflict in several cities across Haiti.<sup>58</sup> After the earthquake struck, the Security Council increased MINUSTAH's force levels and expanded its mandate to include supporting recovery, reconstruction, and stability efforts.<sup>59</sup>

Ten months after the earthquake, on 22 October 2010, the Haiti National Public Health Laboratory confirmed the first cholera case in Haiti in nearly a century.<sup>60</sup> Since then, more than 700,000 individuals have been infected, and more than 8,500 have died from cholera.<sup>61</sup>

Within 10 days of the first confirmed case, the US Centers for Disease Control identified the bacteria strain that caused the outbreak as 'similar to a cholera strain found in South Asia'.<sup>62</sup> Suspicions that the UN peacekeepers and the cholera were linked arose quickly. The UN spokesperson for MINUSTAH nevertheless denied any 'objective link . . . between the soldiers and the outbreak'.<sup>63</sup>

On 6 January 2011, UN Secretary-General Ban Ki-moon appointed an independent panel to investigate the source of the cholera outbreak.<sup>64</sup> That panel did not explicitly identify MINUSTAH as the source of the cholera. But the panel found that the sanitation conditions at the Mirebalais MINUSTAH camp were insufficient to prevent contamination of the Meye Tributary System of the Artibonite River. And the panel concluded that 'the evidence overwhelmingly supports the conclusion that the source of the Haiti cholera 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'.<sup>65</sup>

According to press reports, a UN spokesperson said the panel's report 'does not present any conclusive scientific evidence linking the outbreak to the MINUSTAH

<sup>57</sup> MINUSTAH is the French acronym for Mission des Nations Unies pour la stabilisation en Haïti.

<sup>58</sup> SC Res. 1542 (2004); Report of the Secretary-General on Haiti, UN Doc. S/2004/300, 16 Apr. 2004.

<sup>59</sup> SC Res. 1908 (2010) and SC Res. 1927 (2010).

<sup>60</sup> Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, May 2011, at 3, available at [www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf](http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf) (last visited 24 Nov. 2014).

<sup>61</sup> UN Fact Sheet: Combatting Cholera in Haiti, Dec. 2013, at 6–7, available at [www.un.org/News/dh/infocus/haiti/haiticholerafactsheet-december-2013.pdf](http://www.un.org/News/dh/infocus/haiti/haiticholerafactsheet-december-2013.pdf) (last visited 24 Nov. 2014).

<sup>62</sup> Centers for Disease Control, Press Release, 'Laboratory Test Results of Cholera Outbreak Strain in Haiti Announced', 1 Nov. 2010, available at [www.cdc.gov/media/pressrel/2010/r101101.html](http://www.cdc.gov/media/pressrel/2010/r101101.html) (last visited 24 Nov. 2014).

<sup>63</sup> Booth, 'U.N. Troops Assaulted, Blamed for Outbreak', *Washington Post*, 16 Nov. 2010, at A9.

<sup>64</sup> UN News Centre Press Release, 'Haiti: Ban Appoints Four Top Medical Experts to Probe Source of Cholera Epidemic', 6 Jan. 2011.

<sup>65</sup> Final Report of the Independent Panel of Experts, *supra* note 60, at 29.

peacekeepers or the Mirebalais camp'.<sup>66</sup> The Secretary-General issued a statement indicating that he intends to 'convene a task force within the United Nations system, to study the findings and recommendations made by the Independent Panel of Experts to ensure prompt and appropriate follow-up'.<sup>67</sup>

NGOs first pressed the argument that the UN had violated its international legal obligations. In November 2011, the Boston-based Institute for Justice and Democracy (IJDH), working together with a human rights group in Haiti, initiated transnational discourse – and made arguments that Haiti and other UN member states were either unable or unwilling to make – when they presented Secretary-General Ban Ki-moon with a formal petition.<sup>68</sup>

The petitioners argued that the UN acted 'negligently, recklessly, and with deliberate indifference for the Petitioners' health and lives'<sup>69</sup> – and that the UN's actions and omissions relating to the introduction of cholera violated several different international obligations. The petitioners alleged that the UN violated the Status of Forces Agreement (SOFA) between the UN and Haiti, which required the UN to respect Haitian law.<sup>70</sup> They also argued that the UN failed to comply with international environmental principles and violated the petitioners' fundamental human rights.<sup>71</sup>

Separately, the petitioners argued that the UN had obligations to provide compensation under treaty law, customary international law, and the IO Responsibility Articles. The petitioners cited section 29 of the General Convention (which requires the UN to 'make provisions for the settlement' of specified categories of disputes<sup>72</sup>) and a provision of the SOFA that calls for the establishment of a standing claims commission to settle 'third-party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to MINUSTAH'.<sup>73</sup> The petitioners also argued that the UN has obligations under the UN Charter and customary international law to provide an effective remedy. Finally, and most importantly for my purposes, the petitioners argued that the law of IO responsibility requires the UN to 'make full reparation for the injury caused by the internationally wrongful act'.<sup>74</sup>

By filing this petition with the UN, IJDH also prompted legal discourse *within* the UN, which needed to respond in some way. The UN took its time in doing so; the claimants heard nothing for 15 months. But on 21 February 2013, the UN Secretary-General informed Haitian President Michel Martelly that the UN had

<sup>66</sup> 'UN Haiti Cholera Panel Avoids Blaming Peacekeepers', Reuters, 5 May 2011.

<sup>67</sup> Secretary-General Press Statement, Statement Attributable to the Spokesperson for the Secretary-General on the Independent Expert Panel's Report Regarding the Cholera Outbreak in Haiti, 4 May 2011, available at [www.un.org/sg/statements/?nid=5245](http://www.un.org/sg/statements/?nid=5245) (last visited 24 Nov. 2014).

<sup>68</sup> JDH Petition for Relief, available at [ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf](http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf) (last visited 24 Nov. 2014), paras 72–83.

<sup>69</sup> *Ibid.*, para. 72.

<sup>70</sup> *Ibid.*, para. 80.

<sup>71</sup> *Ibid.*, paras 81–83.

<sup>72</sup> See *supra* note 28.

<sup>73</sup> Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti 2004 [hereinafter UN-Haiti SOFA], 2271 UNTS 235, Arts 54–55.

<sup>74</sup> *Ibid.*, para. 95.

rejected the petition.<sup>75</sup> Patricia O'Brien, the UN Under-Secretary-General for Legal Affairs, supplied a written response. Most of her letter addressed efforts by the UN to combat cholera in Haiti and to improve sanitation. The letter included only two sentences about the legal arguments in the petition, and those addressed only the General Convention:

With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 [of the General Convention].<sup>76</sup>

In this initial response, the UN thus ignored most of the legal arguments that IJDH made.

Once the UN had publicly provided a reason (however thin) for denying the petition, transnational actors were in a position to evaluate the UN's position. Unsurprisingly, IJDH found the UN's rationale unsatisfying, and followed up with another letter challenging O'Brien's interpretation of the General Convention and its consistency with the UN's own practice.<sup>77</sup> O'Brien's response to this second missive was brief. It repeated the UN position that the petitioners' claims were 'not receivable'.<sup>78</sup> It also included a sentence addressing the argument that the SOFA required the establishment of a standing claims commission. The UN asserted that '[t]here is no legal basis for the United Nations to establish such a commission in respect of claims that are not receivable'.<sup>79</sup>

The events that followed highlight how transnational actors can perpetuate transnational discourse. Although O'Brien's letters signalled the UN's desire to consider the matter closed, transnational discourse continued in other forums. Rejection of the petition received extensive and uniformly critical press coverage.<sup>80</sup> Nineteen members of the US Congress sent a letter to Secretary-General Ban urging him to 'use [his] office and [his] influence to ensure that the UN takes responsibility for the introduction of cholera into Haiti'.<sup>81</sup> Advocates in Haiti contemplated suing the Haitian

<sup>75</sup> Statement Attributable to the Spokesperson for the Secretary-General on Haiti, 21 Feb. 2013, available at [www.un.org/sg/statements/?nid=6615](http://www.un.org/sg/statements/?nid=6615) (last visited 24 Nov. 2014); Roshan Lall and Pilkington, 'UN Will Not Compensate Haiti Cholera Victims, Ban Ki-Moon Tells President', *The Guardian*, 21 Feb. 2013.

<sup>76</sup> Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Attorney for the Haitian Cholera Victims (21 Feb. 2013), available at [opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf](http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf) (last visited 3 Dec. 2014).

<sup>77</sup> Letter from Mario Joseph *et al.* to Patricia O'Brien, Under Secretary-General for Legal Affairs (7 May 2013), available at [www.ijdh.org/wp-content/uploads/2013/05/Cholera-Victims-Response-to-UN-Final.pdf](http://www.ijdh.org/wp-content/uploads/2013/05/Cholera-Victims-Response-to-UN-Final.pdf) (last visited 3 Dec. 2014).

<sup>78</sup> Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (5 July 2013), available at [www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf](http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf) (last visited 3 Dec. 2014).

<sup>79</sup> *Ibid.*

<sup>80</sup> See, e.g., Rosen, 'How the U.N. Caused Haiti's Cholera Crisis – and Won't Be Held Responsible', *The Atlantic* 26 Feb. 2013; 'Justice in Haiti: Double Standard', *The Economist*, 2 Mar. 2013.

<sup>81</sup> See 'Congresswoman Waters Urges United Nations to Commit Resources to Eradicate Cholera in Haiti', available at [waters.house.gov/news/documentsingle.aspx?DocumentID=336057](http://waters.house.gov/news/documentsingle.aspx?DocumentID=336057) (text of letter from Maxine Waters signed by 18 additional members, dated 30 May 2013) (last visited 24 Nov. 2014).

government seeking to compel it to seek compensation from the UN.<sup>82</sup> A team of Brazilian lawyers has reportedly filed a case against the UN in the Inter-American Court of Human Rights on behalf of Haitian cholera victims.<sup>83</sup> Even the members of the panel appointed by the Secretary-General re-entered the discourse. On their own initiative, they released a follow-up report in July 2013. Citing research completed after their original report was released, the panel members stated: '[T]he preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti.'<sup>84</sup>

Another group associated with Yale University (referred to here as the Yale Group) issued a report in August 2013 that pressed a set of arguments similar to those in the IJDH's petition. The Yale Group's report argued that the UN had violated (1) its obligations under the SOFA and (2) its human rights obligations by failing to respect the right to water, the right to health, the right against the arbitrary deprivation of life, and the right to an effective remedy.<sup>85</sup> The report also rejected the interpretation of the General Convention contained in O'Brien's letter. The report cited both the IO Responsibility Articles and comments the UN made to the ILC to support its claims that 'when a peacekeeping force breaches an international obligation of the U.N., the organization is responsible both for the breach and for remedying it'.<sup>86</sup>

In September 2013, Haitian Prime Minister Laurent Lamothe addressed cholera when he spoke before the General Assembly. His restrained comments reflect the difficulty of making demands on the UN while relying heavily on its assistance. 'While we continue to believe that the United Nations has a moral responsibility in this epidemic, it nevertheless remains true that the UN remains supportive of the efforts of the Government and various national and international agencies involved to eradicate this scourge', he said.<sup>87</sup>

On 9 October 2013, IJDH initiated transnational discourse in a new forum: it filed an action in the Southern District of New York against the UN.<sup>88</sup> The complaint does not cite the IO Responsibility Articles, but does observe that it is 'well-established under international law and UN documents, resolutions, reports and treaties that Defendants UN and MINUSTAH can incur legal liability and have an obligation to provide compensation for injury caused by them'.<sup>89</sup> The UN's immunity from suit is well-established in

<sup>82</sup> Yale Transnational Development Clinic *et al.*, 'Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic' (2013) [hereinafter Yale Study], at 16, available at [www.law.yale.edu/documents/pdf/Clinics/Haiti\\_TDC\\_Final\\_Report.pdf](http://www.law.yale.edu/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf) (last visited 24 Nov. 2014).

<sup>83</sup> *Ibid.*

<sup>84</sup> Colum Lynch, 'Cholera Outbreak in Haiti in 2010 Tied to U.N. Peacekeepers, Report Says', *Washington Post*, 25 July 2013; Lantagne *et al.*, 'The Cholera Outbreak in Haiti: Where and How Did it Begin?', 379 *Current Topics in Microbiology and Immunology* (2014), at 145.

<sup>85</sup> Yale Study, *supra* note 82, at 35–42.

<sup>86</sup> *Ibid.*, at 36 and notes 211 and 219.

<sup>87</sup> 'At UN, Haitian Leader Urges "Second Look" at Island Nation, Where Real Progress is Taking Hold', UN News Centre, 26 Sept. 2013, available at [www.un.org/apps/news/story.asp?NewsID=46067](http://www.un.org/apps/news/story.asp?NewsID=46067) (last visited 3 Dec. 2014).

<sup>88</sup> *Georges v. United Nations*, Civil Action No. 13-cv-07146-JPO (SDNY) (filed 9 Oct. 2013).

<sup>89</sup> *Ibid.*, Complaint, para. 173; see also *ibid.*, at para. 11 ('Defendants UN and MINUSTAH have well-established legal obligations to provide redress to victims of harm caused by acts or omissions attributable to the Defendants.').

US law, and the US government has filed a brief supporting the UN's immunity in the action brought by IJDH.<sup>90</sup> As the lawyers who filed the case know, the likelihood that their action will be dismissed hardly makes it pointless. On the contrary, such actions call attention to the facts of the case and spur further transnational discourse. Indeed, news of the action quickly spread across the globe. The *New York Times* published an editorial emphasizing that 'even a body immune to legal claims cannot shed accountability'.<sup>91</sup> Newspapers in South Africa picked up the message too, publishing editorials calling on the UN to 'acknowledge responsibility, apologize to Haitians, and give the victims the means to file claims against it for the harm they say has been done to them'.<sup>92</sup>

The publicity surrounding the court action prompted a key UN official to reveal that IJDH's petition had already prompted considerable discussion and reflection within the UN itself. Speaking at an awards ceremony in Geneva, UN High Commissioner for Human Rights Navi Pillay spoke out in favour of compensation. She said, 'I have used my voice both inside the United Nations and outside to call for the right – for an investigation by the United Nations, by the country concerned, and I still stand by the call that victims of – of those who suffered as a result of that cholera be provided with compensation'.<sup>93</sup> Responding to Pillay's comments, Nicole Phillips, a lawyer for IJDH, underscored that the federal district court was not the only – or even the most important – forum for resolving the dispute. As she put it, 'public support for the cholera victims' claims could be a game changer in their claims against the U.N.'. <sup>94</sup>

In the months that followed, transnational discourse continued in other forums. In January 2014, 65 members of the US Congress wrote a letter to the US Ambassador to the UN emphasizing that the 'United Nations has a moral and legal obligation to redress the harm resulting from the actions of its peacekeeping operations'.<sup>95</sup> Because of the US Congress's role in appropriating funds for the UN, members of Congress can be particularly influential participants in transnational discourse. In March, two additional actions by Haitian victims were filed in US courts.<sup>96</sup> The next month, an independent expert on the situation of human rights in Haiti, appointed by the UN Human Rights Council, called for the establishment of a reparation commission for cholera victims 'to enable damages to be recorded, corresponding benefits or compensation paid, the persons responsible to be identified, the epidemic to be stopped and other measures to be implemented'.<sup>97</sup>

<sup>90</sup> Statement of Interest of the United States filed 7 Mar. 2014, *Georges v. United Nations*, No. 1:13-cv-07146 (SDNY, filed 10 Oct. 2013).

<sup>91</sup> Editorial, 'Haiti's Imported Disaster', *New York Times*, 13 Oct. 2013.

<sup>92</sup> Editorial, 'Man-Made Disaster', *Cape Times* (South Africa), 14 Oct. 2013, at E1; Editorial, 'UN Must Apologize', *The Mercury* (South Africa), 14 Oct. 2013.

<sup>93</sup> Quoted in 'UN Human Rights Official Urges Compensation for Haiti Cholera Victims', *AP*, 8 Oct. 2013.

<sup>94</sup> *Ibid.*

<sup>95</sup> Letter from Congressman John Conyers and Others to Samantha Power, US Permanent Representative to the UN (10 Jan. 2014), available at [conyers.house.gov/index.cfm/2014/1/conyers-64-colleagues-write-ambassador-samantha-power-urging-un-to-take-responsibility-remedial-action-for-haiti-cholera-outbreak](http://conyers.house.gov/index.cfm/2014/1/conyers-64-colleagues-write-ambassador-samantha-power-urging-un-to-take-responsibility-remedial-action-for-haiti-cholera-outbreak) (last visited 24 Nov. 2014).

<sup>96</sup> Complaint, *Jean-Robert v. United Nations*, Civil Action No. 1:14-cv-1545 (SDNY, filed 6 Mar. 2014); Complaint, *LaVenture v. United Nations*, Civil Action No. 1:14-cv-1611 (EDNY, filed 11 Mar. 2014).

<sup>97</sup> Office of the High Commissioner of Human Rights, Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón, UN Doc. A/HRC/25/71, 7 Feb. 2014, para. 83(f).

The UN's terse declaration that the petitioners' original claim was 'not receivable' under the General Convention has become a focal point for further transnational discourse among a still broader set of actors with expertise to evaluate it. None has endorsed the UN's position. Bruce Rashkow, a 10-year veteran of the UN Office of Legal Affairs weighed in, stating that he 'did not recall any previous instance where such a formulation was utilized in regard to such claims'.<sup>98</sup> Separately, a group of international law scholars and practitioners filed an amicus brief in the IJDH litigation arguing that the Haitian plaintiffs' claims fell squarely within section 29 of the General Convention, and were exactly the kinds of private law claims to which the UN had an obligation to respond.<sup>99</sup> In the absence of any UN-established procedure for doing so, they argued, the court should reject the UN's claim to immunity from suit.<sup>100</sup>

This transnational discourse has not yielded a single clear answer to these questions about the UN's treaty obligations, much less an authoritative one. But by participating in this discourse, transnational actors are contributing to a growing body of information that makes it possible for other transnational actors to both reconstruct a more complete version of the UN's position and to evaluate its merits. These are incremental steps – but also necessary steps – towards clarifying the UN's primary obligations under the General Convention and the UN-Haiti SOFA. And to the extent that the IO Responsibility Articles are prompting this transnational discourse about the UN's legal obligations, the IO Responsibility Articles are helping to achieve greater clarity about these legal obligations.

Since this transnational discourse began, the UN has taken steps to address cholera in Haiti directly. In December 2012 – some 13 months after IJDH filed its petition and two months before the UN announced its decision to deny the petition – Secretary-General Ban Ki-Moon announced a 10-year, US\$2.2 billion initiative that would invest in prevention, treatment, and education regarding cholera in both Haiti and the neighbouring Dominican Republic.<sup>101</sup> The UN estimated that about one quarter of this amount – \$448 million – would be needed for the first two years (2013–2015).<sup>102</sup> In December 2013, the UN reported that about half of this amount has been committed or pledged so far.<sup>103</sup>

In July 2014, as Secretary-General Ban Ki-moon prepared to visit Haiti, he made a statement that reflected a significant shift in the UN's rhetoric. 'Regardless of what the legal implication may be, as the secretary general of the United Nations and as a

<sup>98</sup> Rashkow, 'Remedies for Harm Caused by UN Peacekeepers', *AJIL Unbound*, 2 Apr. 2014, available at [www.asil.org/blogs/remedies-harm-caused-un-peacekeepers](http://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers) (last visited 24 Nov. 2014).

<sup>99</sup> Memorandum of Law of *Amici Curiae* International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, *Georges v. United Nations*, Civil Action No. 13-cv-07146-JPO (SDNY, filed 15 May 2014).

<sup>100</sup> *Ibid.*

<sup>101</sup> UN News Centre, 'UN Launches New Initiative to Eliminate Cholera in Haiti and Dominican Republic', 11 Dec. 2012, available at [www.un.org/apps/news/story.asp?NewsID=43743#.VHNFnLF-QA](http://www.un.org/apps/news/story.asp?NewsID=43743#.VHNFnLF-QA) (last visited 24 Nov. 2014).

<sup>102</sup> UN Fact Sheet, *supra* note 61.

<sup>103</sup> *Ibid.*



person, I feel very sad', Ban said. He continued, 'I believe that the international community, including the United Nations, has a moral responsibility to help the Haitian people stem the further spread of this cholera epidemic.'<sup>104</sup> No substantive policy changes accompanied this statement.

\* \* \*

The transnational discourse about the UN's actions and omissions with respect to cholera in Haiti is hardly over. There has been no objective or authoritative determination that the UN's conduct in connection with Haiti has violated international law – and there may never be. But the transnational discourse has effectively challenged the UN's legal position. And as pressure from that transnational discourse mounted, the UN took some action to address cholera in Haiti and the Secretary-General shifted his rhetorical position. It is important to remember that we remain *in medias res* and the UN may still do more – especially if US courts decline to recognize the organization's immunity. The more transnational actors conclude that the UN's legal position is untenable, the greater the pressure grows on the UN to do more for cholera victims in Haiti.

## 4 Why Transnational Discourse Matters: IO Legitimacy and Reputation

This section returns to a more general question about the role of transnational discourse in influencing IOs. Suppose that the IO Responsibility Articles will both spur and structure transnational discourse about what IOs' international obligations are, whether IOs are complying with them, and the consequences of violations. Is there reason to think that that discourse will affect the actions or decisions of IOs or their member states? This section argues that the answer is yes. In short, here's why. The perception that an IO is legitimate (i.e., its sociological legitimacy) depends in part on the perception that the organization is complying with its international obligations.<sup>105</sup> That perception is forged through the transnational discourse described in section 2. Legitimacy and effectiveness of IOs are tightly linked because IOs depend on voluntary state cooperation and state financial support to carry out their decisions and operations. Unless they are perceived as legitimate, IOs

<sup>104</sup> Charles, 'United Nations Top Official Goes to Haiti to Promote Cholera Elimination, Elections', *Miami Herald*, 13 July 2014.

<sup>105</sup> See, e.g., Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *Am Pol Science Rev* (2005) 29, at 35; Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and Int'l Affairs* (2006) 405, at 405. There is at least one exceptional example where IO legitimacy was decoupled from legality: the 1999 NATO bombing campaign in the former Yugoslavia. Indeed, the Independent International Commission on Kosovo explicitly pronounced the action 'illegal but legitimate'. The decoupling of legality and legitimacy reflects an unusually wide gap between what international law required (no use of force without authorization from the SC, which was not forthcoming) and a morally acceptable result (forgoing the use of force would permit Slobodan Milosevic's campaign of ethnic cleansing to continue unabated).

will have a difficult time securing either one.<sup>106</sup> IOs that are less effective because they are perceived to be illegitimate will be less useful to their member states and may even risk being shut down.<sup>107</sup> Because IOs that are perceived to be illegitimate will be less effective, IOs and their member states will take pains to ensure that IOs avoid – or respond to – credible charges that they are violating international law.

In addition to explaining why the IO Responsibility Articles can have practical effect, this account constitutes a first step towards constructing a theoretical account of why IOs comply with their international legal obligations. International relations theorists and international lawyers have offered many accounts of why *states* comply with international law – but to date they have not asked the same question of IOs. Legal process theorists – who share the view that transnational discourse matters – offer various accounts about how that discourse induces states to comply with their international obligations. Two of these rely on both reputation and transnational discourse.

Antonia Handler Chayes and Abram Chayes argue that states have a propensity to comply with their international obligations because they have a functional need to be accepted members in good standing of the international community.<sup>108</sup> It is only by participating in various international regimes as members in good standing that states can achieve their principal purposes: security, economic well-being, and a decent level of amenity for their citizens.<sup>109</sup> Transnational discourse, on Chayes' and Chayes' account, reinforces states' propensity to comply with their international treaty obligations.<sup>110</sup>

Ian Johnstone blends constructivist and rational-choice approaches (the latter posit that states pursue their exogenously defined interests through international interactions).<sup>111</sup> Johnstone argues that states derive instrumental benefits from maintaining a reputation for compliance with international law. IO membership, in turn, heightens the value to states of maintaining a good reputation: states that benefit from participating in international institutions will want to preserve a reputation obtained from playing by the rules so that they can continue to benefit from those institutions.<sup>112</sup> Transnational discourse also affects states' interests as they internalize the norms of the regimes in which they participate.<sup>113</sup>

<sup>106</sup> Buchanan and Keohane, *supra* note 105, at 407 (describing practical implications of judgments about legitimacy); see also T.M. Franck, *The Power of Legitimacy among Nations* (1990), at 24 ('Legitimacy is a property ... of a rule-making institution which exerts a pull toward compliance on those addressed normatively.').

<sup>107</sup> Koremenos *et al.*, 'The Rational Design of International Institutions', 55 *Int'l Org* (2001) 761, at 768 (arguing that 'over the long haul states gain by participating in specific institutions – or else they will abandon them.'). Sadurska and Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', 30 *Virginia J Int'l L* (1990) 845, at 888 ('[A]ny international organization needs a 'life supporting' system which resides in the national administrations.').

<sup>108</sup> Chayes and Chayes, *supra* note 42, at 27–28.

<sup>109</sup> *Ibid.*, at 4–9, 27.

<sup>110</sup> *Ibid.*, at 25.

<sup>111</sup> Johnstone, *supra* note 42, at 7.

<sup>112</sup> *Ibid.*, at 46.

<sup>113</sup> *Ibid.*, at 47–48.

Some rational-choice scholars have responded sceptically to accounts that credit discourse with causing states to comply with their international obligations. They acknowledge that states often use legal rhetoric and defend their actions in legal terms, but, they argue, talk is cheap and a poor indicator of what states will actually do.<sup>114</sup> Rational-choice scholars generally agree that maintaining a reputation as a reliable international partner will sometimes induce states to comply with their international obligations. A bad reputation imposes costs, which may include exclusion from future opportunities to cooperate or tougher terms of cooperation.<sup>115</sup> Rational-choice scholars disagree, however, about how often – if ever – concerns about avoiding a bad reputation will trump states' short-term interests in non-compliance.<sup>116</sup> This article argues that the reasons these scholars have adduced for doubting the significance of reputation and legal discourse in inducing states to comply with international law have far less force as applied to IOs.

### A IOs' Reputation for Compliance

The universe of IOs is diverse. IOs vary in the breadth or specificity of their missions, in their criteria for membership, in the extent of their authorities, and in the allocation of those authorities between organs made up of member states and organs made up of international civil servants. Some political scientists have modelled relationships between member states and IOs in principal–agent terms.<sup>117</sup> Others emphasize the degree of IO autonomy and implicitly or explicitly challenge the appropriateness of the principal–agent model.<sup>118</sup> For purposes of this argument, resolving this debate is unnecessary. Under both views, member states and international civil servants have discretion. This article argues that both have reason to heed transnational discourse and exercise that discretion in a way that protects IOs' reputations for compliance with international law.

Defending an IO's reputation is, moreover, an ongoing project. An IO's reputation – and by extension its legitimacy – is not established once and for all. On the contrary, it is always vulnerable to charges of non-compliance with international law by transnational actors.<sup>119</sup>

Time and again, IO officials have emphasized the fundamental importance of compliance with international law for the effectiveness of their operations. Consider two examples. François Gianviti, former General Counsel for the IMF, wrote:

<sup>114</sup> J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2006), at 169–171.

<sup>115</sup> Brewster, 'Unpacking the State's Reputation', 50 *Harvard Int'l LJ* (2009) 231, at 231–232, 248, 257–258.

<sup>116</sup> Goldsmith and Posner, *supra* note 114, at 102–103 (expressing concern that role of reputation in causing compliance has been overstated; Brewster, *supra* note 115 (same). Others argue that long-term interests carry more weight. See, e.g., R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); Guzman, *supra* note 11, at 33–41, 71–117.

<sup>117</sup> See, e.g., D.G. Hawkins *et al.* (eds), *Delegation and Agency in International Organizations* (2006).

<sup>118</sup> Barnett and Finnemore, 'The Politics, Power, and Pathologies of International Organizations', 53 *Int'l Org* (1999) 699; Halberstam, 'The Bride of Messina: Constitutionalism and Democracy in Europe' 30 *European L Rev* (2005) 775.

<sup>119</sup> Hurd, 'The Strategic Use of Liberal Internationalism', 59 *Int'l Org* (2005) 495, at 501.

International organizations are also subject to the rule of law. Their members, their debtors and their creditors all expect them to carry out their activities at all times in conformity with the rules that apply to them. However, the international financial organizations, including the Fund, are helping their member countries in developing sound frameworks for governance and better legal and judicial systems, all of which highlights the rule of law as a central element of development. If international organizations are to be successful at this task, they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs.<sup>120</sup>

Louise Arbour, a former UN High Commissioner for Human Rights and Mac Darrow, a former official in that office, have emphasized the same point with respect to the UN's obligations to avoid causing or contributing to human rights violations:

The United Nations has an especially high onus to discharge so as to be taken seriously and fulfill its unique normative role in the human rights field. Its effectiveness in encouraging compliance with human rights norms lies in the balance, as does its very legitimacy.<sup>121</sup>

Scholars who question the significance of reputation point out that the value of a reputation for complying with international law is not the same for every state.<sup>122</sup> Indeed, some states may find it preferable to cultivate other kinds of reputations. Strong states may believe that they will be better able to achieve their foreign policy objectives by establishing reputations for toughness, while others may prefer to cultivate reputations for irrationality or unpredictability.<sup>123</sup> Reputations that may be appealing to isolationist states like North Korea, however, are simply unavailable to IOs. Even more than states, IOs need to be members in good standing of the international community because they depend on their member states for their continued existence.<sup>124</sup> The stakes of maintaining a reputation for complying with international law are thus typically higher for IOs than for states. For an IO, the cost of a bad reputation may include termination.

A reputation for complying with legal obligations may also be more important to IOs than to states because the risk that the organization's immunities will be stripped away remains salient. IOs generally enjoy comprehensive immunity from suit in national courts. But IOs are usually cautious about their privileges and immunities, and often take steps to avoid the charge that they are abusing them. The UN General Assembly, for example, cited its intention 'to prevent the occurrence of any abuse' in connection with its immunities when, in 1946, it instructed the Secretary General to make sure that the drivers of all UN cars were properly insured.<sup>125</sup> Similarly, the World Bank established an administrative tribunal to resolve disputes with its staff

<sup>120</sup> Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund' (2002), at para. 60, available at [www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf](http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf) (last visited 24 Nov. 2014).

<sup>121</sup> Darrow and Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', 103 *AJIL* (2009) 446, at 461.

<sup>122</sup> See Guzman, *supra* note 11, at 75–76.

<sup>123</sup> Goldsmith and Posner, *supra* note 114, at 102–103; Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard Int'l LJ* (1997) 487, at 497.

<sup>124</sup> See *supra* note 107 and accompanying text.

<sup>125</sup> GA Res. 22 (I), part E, 13 Feb. 1946

members in part to ensure that national courts continued to respect its immunity.<sup>126</sup> The Legal Counsel for the World Intellectual Property Organization observed that IOs insert arbitration clauses in all commercial contracts and purchase agreements with private parties in order to both 'meet[] their obligations and avoid[] the criticism that international organizations hide behind their privileges and immunities'.<sup>127</sup>

Before a violation can affect a state's (or IO's) reputation, the violation must be detected.<sup>128</sup> Detection cannot be taken for granted; states monitor each other imperfectly, and states can (and do) take steps to conceal violations.<sup>129</sup> Unlike states, IOs lack territory of their own: they act in the territory of other states. Compared with many states, IO decision-making procedures are relatively transparent. They will usually involve a range of actors from outside the IO, including, at the very least, representatives of member states. For these reasons, IOs may be less likely than states to be able to shield their reputations by concealing violations.

Should they occur, violations of international law will usually exact a high toll on IOs' reputations. IOs' reputations may suffer more than states' reputations from violations for another reason. The states that take the biggest reputational hits from violating international law are those with the best reputations for compliance. After all, if no one expects a state to comply with its obligations in the first place, a new violation will confirm rather than damage its reputation.<sup>130</sup> Expectations that IOs will comply with their international obligations, however, are generally high.

Member states also have incentives to invest in the legitimacy and reputation of existing IOs. After all, IOs are not easily replaced. Establishing new IOs – especially new IOs with universal membership – is not impossible, but it is very costly. The difficulty of establishing new IOs makes it harder for states to treat existing IOs as disposable.

Critics of legal process theory have downplayed the significance of discourse, arguing that it will secure compliance only where cooperation is shallow and states do not have much to gain from violations.<sup>131</sup> Jack Goldsmith and Eric Posner go further; they discount almost entirely the significance of international discourse.<sup>132</sup> Most international discourse, they argue, is 'a kind of empty happy talk' that is 'largely a ceremonial usage designed to enable the speaker to assert policies and goals without overtly admitting that he or she is acting for a purpose to which others might object'.<sup>133</sup>

Whatever force these objections may have with respect to states, they do not carry over to IOs. IOs cannot afford to engage in 'empty happy talk' about their compliance with their international obligations. For IOs, such talk is inevitably expensive. A false claim that an IO is complying with a particular obligation imperils the IO's reputation

<sup>126</sup> Amerasinghe, 'The World Bank Administrative Tribunal', 31 *Int'l & Comp LQ* (1982) 748, at 750.

<sup>127</sup> Kwakwa, 'An International Organisation's Point of View', in J. Wouters *et al.* (eds), *Accountability for Human Rights Violations by International Organizations* (2010) 591, at 600 note 17.

<sup>128</sup> Guzman, *supra* note 11, at 96.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, at 83–84.

<sup>131</sup> See Downs, Rocke, and Barsoom, 'Is the Good News About Compliance Good News About Cooperation?', 50 *Int'l Org* (1996) 379.

<sup>132</sup> Goldsmith and Posner, *supra* note 114, at 169–171.

<sup>133</sup> *Ibid.*, at 180–181.

and its perceived legitimacy. As explained above, violations of international law by IOs may be particularly likely to be discovered. If evidence is unearthed that an IO is violating an international legal obligation, a wide range of transnational actors have available to them a wide range of forums in which to press the charge that the IO is in breach. If these charges are credible, they pose a risk to the legitimacy and reputation of an IO that both the IO and its member states have reason to protect.

A different objection that might be raised to this account of both IO reputation and legitimacy is that it defines too narrowly what makes IOs useful to their member states. Perhaps IOs are useful to their member states because they provide an opportunity to shift blame or shirk responsibility for unpopular or unsuccessful policies.<sup>134</sup> Maybe, for example, the IMF serves as a convenient bogeyman or scapegoat for its member states. Because the IMF imposes and enforces conditions on its loans, the IMF becomes the target of borrowing states' ire while individual states escape it.<sup>135</sup> On this account, UN peacekeeping could be similarly useful. Individual member states benefit from appearing responsive to conflicts abroad by establishing a peacekeeping force, and then to blame the UN when the conflict persists – even when part of the problem is that the Security Council provided the peacekeepers with insufficient authorities or personnel.<sup>136</sup>

Even if member states do use IOs to shift blame in this way, they should *still* care about protecting the organizations' legitimacy and reputation for complying with their international obligations.<sup>137</sup> A delegitimized IMF will not be very effective at enforcing policy conditions on its loans. And Security Council members will hardly be able to make the case that they have dispatched their responsibility to 'do something' about an international conflict by establishing a peacekeeping force if peacekeeping forces are patently ineffective or regularly violate international humanitarian law. One can credibly shift blame for failure to an IO only if there is reason to believe that the IO could plausibly have succeeded.<sup>138</sup>

## B Deflecting Threats to Legitimacy and Reputation

The desire to preserve an IO's legitimacy and reputation for compliance with international law has spurred three different responses when that reputation is challenged. In some cases IO organs comprised entirely of member states took these actions; in other cases, international civil servants did. Regardless of whether states or international civil servants were the key actors for a particular decision, the steps they took to deflect threats to legitimacy and reputation fall into three categories; the UN's response to cholera in Haiti suggests a fourth.

<sup>134</sup> See Vaubel, 'A Public Choice Approach to International Organization', 51 *Public Choice* (1986) 39.

<sup>135</sup> *Ibid.*, at 49.

<sup>136</sup> K. Annan with N. Mousavizadeh, *Interventions: A Life in War and Peace* (2012), at 34–39.

<sup>137</sup> But see Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake', 12 *ILSA J Int'l & Comp L* (2006) 395, at 411, 414 (arguing that states have an interest in designing unaccountable IOs).

<sup>138</sup> Cf. M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (1998), at 28–30 (arguing that one necessary criterion for holding a person or entity responsible for a given state of affairs is the 'real possibility of acting otherwise than one actually did.').

First, and most obviously, IOs sometimes take steps to comply with the relevant international norm. Numerous examples of IOs taking such steps – even without resolving debates about whether those norms bind the IO – testify to the importance to IOs of avoiding reputations for being outlaws.<sup>139</sup> In 1999, UN Secretary-General Kofi Annan mooted decades of debate about whether international humanitarian law binds the UN – and specifically UN peacekeepers. Annan adopted a regulation requiring peacekeepers to comply with both the fundamental principles and rules of international humanitarian law and to protect civilian populations and the natural environment in ways that exceeded the requirements of customary international law.<sup>140</sup> More recently, UN Security Council sanctions targeting individuals and entities associated with Al-Qaida have been criticized in transnational discourse for violating human rights norms.<sup>141</sup> European courts struck down regulations implementing the sanctions regime for failing to comply with fundamental rights protected by the European legal order.<sup>142</sup> Facing threats to the legitimacy and effectiveness of the sanctions regime, the Security Council adopted a series of incremental reforms.<sup>143</sup>

Second, the IO may cease the activity that is the source of the challenge to the IO's reputation. One example involves comprehensive economic embargoes by the Security Council. Starting in the 1990s, these embargoes encountered growing opposition because of the suffering they imposed on the civilian population in targeted states. Some scholars argued that imposing comprehensive economic embargoes violated the Security Council's obligations to protect and promote human rights.<sup>144</sup> The Committee on Economic, Social and Cultural Rights emphasized that IOs imposing sanctions have obligations to respect those rights.<sup>145</sup> The Security Council responded (albeit not directly) by turning away from comprehensive economic embargoes and increasingly resorting to more limited types of economic sanctions.<sup>146</sup>

Another example concerns sanctions that the Security Council imposed on Libya in the wake of the bombing of Pan Am 103 over Lockerbie, Scotland. Aiming to

<sup>139</sup> See, e.g., De Schutter, 'Human Rights and the Rise of International Organizations', in Wouters *et al.*, *supra* note 127, at 51, 104–108 (explaining the 'extraordinary proliferation' of mechanisms to ensure IOs comply with human rights norms as due, in part, to the 'obvious need for international organizations to build their legitimacy').

<sup>140</sup> Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, 6 Aug. 1999; Shraga, *supra* note 27, at 408–409.

<sup>141</sup> See, e.g., Johnstone, *supra* note 42, at 108–111.

<sup>142</sup> Joined Cases C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and others v. Kadi* [2013] ECR I-0000.

<sup>143</sup> See SC Res. 1730, 19 Dec. 2006 (establishing focal point to receive de-listing requests); SC Res. 1904, 17 Dec. 2009 (establishing Office of the Ombudsperson to consider de-listing requests); SC Res. 1989, 17 June 2011 (expanding the Ombudsperson's authorities).

<sup>144</sup> See Reisman and Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programs', 9 *EJIL* (1998) 86; Reinisch, *supra* note 45.

<sup>145</sup> Committee on Economic, Social and Cultural Rights, General Comment 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8, 12 Dec. 1997.

<sup>146</sup> See Hulbauer and Oegg, 'Targeted Sanctions: A Policy Alternative?', 32 *L. & Policy Int'l Bus* (2000) 11; Cortright and Lopez, 'Reforming Sanctions', in D.M. Malone (ed.), *The UN Security Council* (2004) 167.

delegitimize the sanctions, Libya argued that the Security Council had violated international law by imposing sanctions before the two Libyan suspects had even been tried.<sup>147</sup> Libya also maintained that the Security Council had unlawfully circumvented the dispute resolution procedures set out in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and initiated proceedings before the ICJ to vindicate this claim. Libya's legal arguments found a sympathetic audience among some states – and emboldened them to defy the Security Council.<sup>148</sup> In 1998, the Organization of African Unity adopted a formal resolution deciding not to comply with the sanctions regime on the grounds of its illegality.<sup>149</sup> As rates of non-implementation increased still further, the crumbling sanctions regime threatened to expose the Council as out of step with the international community. The Security Council could impose binding legal obligations on states to sanction Libya, but it could not force them to follow through. The Security Council deflected the challenge to its legitimacy by accepting a compromise that the United States and the United Kingdom had previously dismissed as a 'non-starter' – and suspending the sanctions regime.<sup>150</sup>

The stronger the argument that an IO is violating a particular norm, the greater the reputational threat that continued violation poses, and the more likely it is that the IO and its member states will take steps to deflect that threat. And yet, in all of these surveyed examples, when IOs have taken steps to eliminate conflicts with particular norms (either by coming into compliance with them or by ceasing the challenged activity), they have taken them without explicitly acknowledging that international law obliged them to do so. Secretary-General Annan adopted the regulation requiring peacekeepers to comply with humanitarian law without acknowledging that UN forces are directly bound by the Geneva Conventions or customary international law.<sup>151</sup> The Security Council has acknowledged in general terms that the Al-Qaida sanctions regimes faced 'challenges, both legal and otherwise', but never conceded that the changes it made were legally required.<sup>152</sup> A course correction by the IO, then, is not necessarily coupled with an authoritative resolution of the underlying legal issues.

This is not to suggest that IOs will always be silent in transnational discourse.<sup>153</sup> Indeed, a third way to deflect the reputational harm from violating an international obligation is to contest that the obligation in question actually binds the IO. As noted earlier, there is considerable uncertainty about some of the primary norms that bind IOs.<sup>154</sup> And failure

<sup>147</sup> Hurd, *supra* note 119; see also Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 348–350 (arguing that the SC's resolutions regarding Libya were illegal because of 'the absence of due process in the adoption of the binding requests for extradition' and the 'biased way in which Libya's responsibility for the Lockerbie incident was determined'.)

<sup>148</sup> Hurd, *supra* note 119, at 519–520 ('Having a legal justification for defection reduced the political costs enough to change the balance [of incentives for states only weakly attached to the sanctions regime].')

<sup>149</sup> Organization of African Unity, Doc. AHG/Dcl. 127 (XXXIV), 10 June 1998.

<sup>150</sup> Hurd, *supra* note 119, at 518.

<sup>151</sup> Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', 16 *EJIL* (2005) 695, at 705.

<sup>152</sup> SC Res. 1989, 17 June 2011.

<sup>153</sup> See *supra* note 43 and accompanying text.

<sup>154</sup> See *supra* note 9.



to comply with a norm that does not bind the IO should not affect the IO's reputation for compliance with international law – and by extension this facet of the IO's legitimacy.<sup>155</sup> The IMF took this third option in response to arguments by scholars and advocates that the IMF had violated its obligations to comply with international norms contained in the International Covenant on Economic, Social and Cultural Rights. The IMF General Counsel published an extensive legal analysis rebutting those arguments.<sup>156</sup> This legal analysis triggered further rejoinders, of course.<sup>157</sup> But the IMF's vigorous legal response appears to have eased the pressure to respond to the threat to its reputation through the kinds of actions described above.<sup>158</sup>

Initially the UN's response to Haiti on cholera fitted the third category described above – denial of any relevant primary obligations. Unlike the IMF in the example set out above, however, the UN did not publicly engage in a detailed legal argument. The UN's conclusory sentences rejecting the Haitian petitioners' claim failed to quell the controversy. Indeed, the UN's initial response has been described as a 'public relations as well as public health disaster'<sup>159</sup> – and might initially appear to contradict rather than confirm this article's account that IOs are motivated to protect their reputations.

The subsequent actions that the UN has taken, however, suggest a fourth way in which IOs may deflect threats to their reputation posed by credible charges that they have violated international law. Specifically, IOs may seek to preserve their reputations by adhering to the obligations that the IO Responsibility Articles would impose as a consequence of a breach. The UN has emphatically *not* framed the cholera initiative in terms of the IO Responsibility Articles. And yet, the steps that it has taken – leading an initiative to eradicate cholera from Haiti and acknowledging a moral responsibility to do so – could be characterized as an incomplete effort to make reparations as required by the IO Responsibility Articles.<sup>160</sup> Reparation may involve restitution (re-establishing the situation that existed before the wrongful act was committed), paying compensation for all financially assessable damage caused by the breach, and giving satisfaction (by means of, *inter alia*, an acknowledgement of the breach, an expression of regret, or a formal apology).<sup>161</sup> Like the State Responsibility Articles, the IO Responsibility Articles rank the three forms of reparation, with a preference for restitution followed by compensation and satisfaction. Restitution is required unless it is materially impossible or involves a burden out of all proportion to the benefit.<sup>162</sup>

<sup>155</sup> Cf. Brewster, *supra* note 115, at 265 (arguing that the Soviet Union's violation of the non-binding Helsinki Accords would not affect its reputation for strict legal compliance with international law, although it might affect its reputation for general willingness to cooperate with other states).

<sup>156</sup> Gianviti, *supra* note 120.

<sup>157</sup> See, e.g., A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 137–150.

<sup>158</sup> Cf. Swaine, *supra* note 155, at 340 (arguing that entering a reservation to a treaty may bolster a state's reputation for compliance with international law because the reservations 'show that [states] take treaty commitments seriously enough to broadcast when they cannot comply').

<sup>159</sup> Alvarez, 'The United Nations in the Time of Cholera', *AJIL Unbound*, 4 Apr. 2014, available at [www.asil.org/blogs/united-nations-time-cholera](http://www.asil.org/blogs/united-nations-time-cholera) (last visited 24 Nov. 2014).

<sup>160</sup> IO Responsibility Articles, *supra* note 3, Art. 31 (requiring full reparations for injuries caused by IOs' internationally wrongful acts).

<sup>161</sup> *Ibid.*, Arts 34–37.

<sup>162</sup> *Ibid.*, Arts 35, 36(1), and 37(1).

Eradicating cholera from Haiti would partially restore the *status quo* before UN peacekeepers introduced cholera – although it would not, of course, revive the individuals who died from cholera or undo the suffering of those sickened by it. For that reason, even if successful, the UN’s efforts to eradicate cholera would serve as partial rather than full reparation. It remains to be seen whether the UN will offer any compensation to victims. And the Secretary-General’s statement from July 2014, which expressed sadness and accepted moral responsibility for the UN, tracks examples of satisfaction adduced by the ILC in its commentary to the IO Responsibility Articles. Like the Secretary-General’s statement, the examples cited by the ILC do not expressly refer to the existence of a breach of an international obligation. And yet, the ILC stated, they serve as ‘one of the appropriate legal consequences’ of such breaches.<sup>163</sup>

## Conclusion

The ILC’s work on the IO Responsibility Articles has been dismissed by some states, IOs, and academics as both premature and irrelevant. This article has argued that the IO Responsibility Articles are neither. They are not premature because they can help to clarify the content of the primary international law norms that bind IOs. And they are not irrelevant because their invocation by transnational actors can spur IOs to both participate in transnational discourse about their legal obligations and take action to cease, correct, or make reparations for violations of international law.

There are, of course, still other ways in which the IO Responsibility Articles could have practical effect. As the work product of the ILC, the IO Responsibility Articles lack the status of binding law except to the extent that they reflect customary international law. The more the IO Responsibility Articles are invoked in transnational discourse, the more likely they are to shape practice and, in turn, prompt the further development of customary international law regarding IO Responsibility.

More broadly, to the extent that the IO Responsibility Articles are invoked in transnational discourse, they will reinforce the expectation that IOs comply with their international obligations. In turn, that could make it harder for IO officials or member states to dismiss out of hand arguments that an IO might violate international law in any particular instance. The idea that IOs should comply with their international obligations would become part of the ‘taken-for-granted script[]’ of how IOs ought to behave.<sup>164</sup>

Over time, these dynamics may serve to legitimate the IO Responsibility Articles as well. Each time various transnational actors invoke the IO Responsibility Articles, they implicitly signal their acceptance of those Articles. As this process is repeated over

<sup>163</sup> *Ibid.*, at 128, paras 1–4.

<sup>164</sup> Cf. R. Goodman and D. Jinks, *Socializing States* (2013), at 137–138; Goodman and Jinks, ‘Toward an Institutional Theory of Sovereignty’, 55 *Stanford L Rev* (2003) 1749, at 1765–1780 (describing how state actors often embrace common beliefs and practices because they reflect certain taken-for-granted scripts of how ‘liberal’ or ‘modern’ states behave – and these deeply held self-understandings of the purpose and character of modern statehood drive certain aspects of state policy).

time and across a broad range of actors, the IO Articles as a whole – or at least those articles that are consistently accepted – may gain a legitimacy that they lacked at the moment that the ILC adopted them.

At the same time, transnational discourse over particular facets of IO responsibility may yield a widespread rejection or persistent contestation of specific rules contained in the ILC's IO Responsibility Articles rather than acceptance. Should this occur, it should be viewed as a valuable and welcome contribution to the development of international law. Recall that the State Responsibility Articles are considered effective because of the readiness with which international courts and tribunals have applied them. Some commentators have worried that they are doing so too readily – without scrutinizing the content of the rules or whether they actually reflect customary international law. The result is a missed opportunity to revise the State Responsibility Articles where they are found wanting.<sup>165</sup>

Regardless of the fate of the IO Responsibility Articles, the question why IOs comply with their international obligations remains a pressing one. This article has begun to sketch an account that emphasizes transnational discourse and its effects on reputation. Future work will provide opportunities to test this work in a wider range of IOs and IO activities, and to refine this account to identify those circumstances in which the mechanisms this article identifies will be more or less effective.<sup>166</sup>

Future work will also provide an opportunity to evaluate the ways in which this account might complement accounts that are based on internalization of norms. The role of norm internalization in changing the behaviour of IO officials is not entirely straightforward for two reasons. First, IO officials whose work is geared entirely towards ensuring *states* comply with their international obligations are often slow to acknowledge the applicability of those obligations to their own work.<sup>167</sup> Secondly, some international law norms have proved to be difficult to internalize because they do not fit easily with the institutional culture. Galit Sarfaty, for example, argues that human rights remain a marginal issue at the World Bank in part because of the dominance of economists on its staff.<sup>168</sup>

This article's account of why IOs comply with their international obligations contributes to efforts to overcome the divide between rational-choice theories and norm-based theories of why states comply with international law.<sup>169</sup> As other scholars have observed, IOs provide a promising subject for doing so.<sup>170</sup> This article both assumes that state interactions with IOs of which they are member states are strategic and

<sup>165</sup> Caron, *supra* note 38, at 861.

<sup>166</sup> For example, IOs with limited membership will be less concerned about their reputations in the international community as a whole because they depend on only a fraction of that community for their continued existence.

<sup>167</sup> See, e.g., Mégret and Hoffmann, *supra* note 5, at 337.

<sup>168</sup> Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', 103 *AJIL* (2009) 647.

<sup>169</sup> Some scholars have sought to reconcile or move beyond these theories in explaining state compliance with international law. Johnstone, *supra* note 42; Goodman and Jinks, *supra* note 164, *Socializing States*, at 21.

<sup>170</sup> Hurd, *supra* note 119, at 497; Abbott and Snidal, 'Why States Act through International Organizations', 42 *J Conflict Res* (1998) 3, at 25–26.

consistent with rational-choice models: that is, it assumes that states establish IOs and continue to support them over time because member states find them useful for pursuing various policy goals. But it also posits that legal norms and legal discourse are consequential, and offers an account of why rational states acting in their own interests have reason to take legal discourse about IOs seriously. This article thus merges rational-choice and norm-based approaches in part by explaining why some of the objections that rational-choice theorists have advanced for discounting legal discourse will systematically have less force with respect to IOs.