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The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity

Responding to Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARVARD INT'L L. J. 301 (2010).

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I. INTRODUCTION

Is the United Nations, including the various entities that comprise the organization, bound to observe customary human rights? If so, what provisions of the United Nations Charter form the basis for such an obligation? Are the United Nations, its entities and personnel also bound by human rights *jus cogens*? In time of armed conflict, does the law of war override the reach of human rights law? Does potential liability for human rights violations exist for the U.N. and its entities, the state, and the individual, and if so, should the U.N. be immune? These are some of the important questions raised by Tom Dannenbaum's article, "Translating the Standard of Effective Control into a System of Effective Accountability,"¹ and addressed in this essay.

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¹ Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARVARD INT'L L. J. 301 (2010).

II. THE UNITED NATIONS IS BOUND BY CUSTOMARY HUMAN RIGHTS

A. CONSTITUTIONAL COMMANDS

Dannenbaum's important article rightly recognizes that there is good reason to find the United Nations legally bound to conform to human rights standards,² since "[i]t surely is a consequence of the UN's legal personality at international law that it is bound by customary international law,"³ and "is constitutionally mandated to promote the advancement of human rights"⁴ in Article 1(3) of the U.N. Charter. In this regard, he might have also cited the determination to reaffirm human rights and the dignity and worth of each human being and the objective to "accomplish" these through establishment of the United Nations that is expressed in the preamble to the U.N. Charter.⁵ Importantly, however, there are additional and more significant reasons why the U.N. and its entities are bound by human rights.

A major constitutive mandate appears in Article 55(c) of the U.N. Charter ("Charter"). It expressly requires that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all," a provision of the Charter that necessarily incorporates customary human rights by reference. Clearly, such an express obligation of the United Nations must also condition the authority of its entities, such as the Security Council, the General Assembly, and the Secretariat, and even individual U.N. personnel.⁶ Members of the United Nations are similarly bound under Article 56 of the Charter "to take joint and separate action . . . for the achievement of the purposes set forth in Article 55." Necessarily, therefore, every member has "the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."⁷ Indeed, the International Court of Justice

² Dannenbaum, *supra* note 1, at 323-27.

³ Dannenbaum, *supra* note 1, at 323. This point was recognized by the International Court of Justice. See Advisory Opinion, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 89-90 (Dec. 20).

⁴ Dannenbaum, *supra* note 1, at 324.

⁵ U.N. Charter, prml.

⁶ See, e.g., MYRES S. MCDUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 332-34 (1980); JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 52 (3d ed. 2009) [hereinafter PAUST, VAN DYKE & MALONE], and references cited; 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 920, 923 (Bruno Simma, *et al.*, eds., 2d ed. 2002) [hereinafter Simma]; *infra* notes 12, 15.

⁷ See, e.g., U.N. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations (24 Oct. 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970). Concerning Charter-based human rights duties of states, see also International Covenant on Civil and Political Rights, prml., 999 U.N.T.S. 171 (Dec. 16, 1966); Case

has recognized that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter,”⁸ a recognition that must also necessarily pertain with respect to violative conduct engaged in by the U.N., its entities and personnel. In particular, no U.N. entity can have a lawful purpose to deny human rights, as their violation would be a violation of the Charter. Similarly, no order or authorization to violate human rights could be lawful. For these reasons, I agree with Dannenbaum that there must be “a strong presumption that any vaguely phrased authorization from the UN can reasonably be interpreted to stretch only as far as it is” consistent with human rights law.

For reasons noted above, the Charter-based duty in Article 56 must necessarily condition the conduct of members of the United Nations in connection with peacekeeping processes and, as treaty law binding their nationals, also the conduct of their nationals who might be serving as U.N. officials, U.N. commanders, or soldier-peacekeepers. If any state violates customary human rights law, it has obviously not taken joint and/or separate action in order to achieve “universal respect for, and observance of, human rights,” and it has violated Article 56 of the Charter. Such Charter-based duties of member-states must also condition their decisions when acting within the General Assembly or the Security Council in connection with peacekeeping and other types of resolutions and decisions.

Dannenbaum quotes approvingly Mégret and Hoffman with respect to a so-called “hybrid conception” which recognizes that the U.N. “is bound ‘transitively’ by international human rights standards as a result and to the extent that its members are bound.”⁹ More generally, it is also clear that states could not have delegated to the U.N. an authority that they did not possess under international law, *e.g.*, an authority

Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, 42; Advisory Opinion on the Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 57 [hereinafter Advisory Opinion South West Africa]; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980), also using the Declaration on Principles of International Law as an authoritative evidence of the fact “that the Charter precepts embodied in ... [the] Universal Declaration [of Human Rights, another General Assembly resolution,] ‘constitute basic principles of international law.’” *Id.* at 882. The I.C.J. has used the 1970 Declaration as “an indication of ... *opinio juris* as to customary international law.” *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, paras. 191, 193, 195, 228. Concerning use of certain General Assembly resolutions as authoritative evidence of normative content, *see also* PAUST, VAN DYKE & MALONE, *supra* note 6, at 48-52.

⁸ Advisory Opinion South West Africa, *supra* note 7, at 57, para. 131. Quite clearly, a state or U.N. entity cannot be in compliance with its Charter-based duty to promote universal respect for and observance of human rights if it is violating human rights law. *See* RICHARD B. LILLICH, *ET AL.*, INTERNATIONAL HUMAN RIGHTS 69, 74-77, 155 (4 ed. 2006) (duty to observe, not to violate); MCDUGAL, LASSWELL & CHEN, *supra* note 6, at 323-25, 328; Simma, *supra* note 6, at 923; *supra* note 7.

⁹ Frédéric Mégret and Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations’ Changing Human Rights Responsibilities*, 25 HUM. RTS. QUARTERLY 314, 323 (2003).

to violate customary human rights law. By imperfect analogy concerning delegated authority, “[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”¹⁰ Dannenbaum is also correct to note in this regard that “any transfer of responsibility for the troops contributed voluntarily by member states cannot lead to the evisceration of any of the legal obligations under which those troops are bound as agents of their respective states”¹¹ and that troop contributors remain bound by human rights obligations and are responsible for violations.¹² It is understandable, therefore, that states have no authority to violate customary human rights law that they can delegate to the United Nations, and whatever authority has been properly delegated by the U.N. Charter will not displace independent state obligations to comply with human rights law.

With respect to the Security Council, it is also important to note the express mandate in Article 24(2) of the Charter, which requires that “[i]n discharging ... [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” Among the purposes, principles, and requirements that are Charter-based are those recognized in the preamble to and Articles 1(3) and 55(c) of the Charter relating to the duty to promote “universal respect for, and observance of, human rights.” Necessarily, Article 55(c) conditions the authority of the Security Council and the same form of limitation of authority (and, interestingly, a concomitant conferral of competence to promote human rights) is contained in Article 24(2).¹³ For these reasons, a decision of the Security Council to violate customary human rights law would be without authority or *ultra vires*.¹⁴

Moreover, under Article 25 of the Charter “[t]he Members of the United Nations” must “carry out the decisions of the Security Council in accordance with the present Charter.” Therefore, either (1) the members must carry out only the decisions of the Security Council that were made in accordance with the Charter (including the obligation to promote universal respect for and observance of human rights), or (2) the members must only carry out any decision of the Security Council in such a way that the purposes and principles of the Charter are served.¹⁵ Whichever interpretation

¹⁰ Judgment and Opinion, International Military Tribunal (Nuremberg) (Oct. 1, 1946). *See also* United States v. Von Leeb, *et al.* (The High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 489 (1950) (“International law operates as a restriction and limitation on the sovereignty of nations” and a “directive to violate” international criminal law is “void and can afford no protection to one who violates such law”).

¹¹ Dannenbaum, *supra* note 1, at 327.

¹² *Id.* at 322.

¹³ *See, e.g.*, Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 SO. ILL. U. L.J. 131, 139-41 (1994) [hereinafter Paust, *Peace-Making*]. The Appeals Chamber of the ICTY for Former Yugoslavia recognized that Article 24(2) limits Security Council powers. *See* The Prosecutor v. Tadic, IT-95-1-AR72, para. 28 (2 Oct. 1995), reprinted in 35 I.L.M. 32, 42 (1996).

¹⁴ *See, e.g.*, *supra* notes 6, 13.

¹⁵ *See, e.g.*, Paust, *Peace-Making, supra* note 13, at 141-42 & n.33.

of Article 25 is proper, it is clear that the Security Council has independent Charter-based obligations to respect and observe human rights under Articles 1(3), 24(2), and 55(c) and that members of the U.N. have an independent obligation to do the same under Article 56, which incorporates Article 55(c) by reference.¹⁶

B. THE REACH OF *JUS COGENS*

As noted in prior writings, peremptory norms *jus cogens* must condition the competence of U.N. entities and personnel, since norms *jus cogens* are part of universally applicable customary international law that is binding on all actors (public and private) and prevails over any inconsistent treaty.¹⁷ In 1993, Judge Lauterpacht affirmed that norms *jus cogens* limit the authority of the Security Council and must prevail over its resolutions.¹⁸ Dannenbaum notes that there are some customary human rights that must limit U.N. authority. To stress the point, it should also be noted that many of these are also customary human rights *jus cogens*. In fact, the short list that appears in the U.S. Restatement¹⁹ must be supplemented by the more extensive list recognized by the Human Rights Committee that operates under the International Covenant on Civil and Political Rights (ICCPR) in its General Comment No. 24.²⁰ Several of these human rights *jus cogens* have also been affirmed in U.S. cases.²¹

III. THERE IS NO *LEX SPECIALIS* OVERRIDE

Dannenbaum is correct when affirming what is well-recognized by the international community concerning the reach of human rights – that human rights apply in times of armed conflict²² and that an unlawful order from a U.N. commander

¹⁶ See, e.g., Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT'L L. 15, 15-17 (1996); *supra* note 5, at art. 56.

¹⁷ See, e.g., Paust, *Peace-Making*, *supra* note 13, at 139-40. There are also certain *obligatio erga omnes* that are owing by and to all humankind and, as recognized by the ICJ, they include basic human rights. See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 6, at 59-61.

¹⁸ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* 1993 I.C.J. (Sept. 13) (separate opinion of Judge Lauterpacht), paras. 99, 101-102; Paust, *Peace-Making*, *supra* note 13, at 140.

¹⁹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

²⁰ See U.N. Doc. CCPR/C/21/Rev.1/add.6, General Comment No. 24, para. 8 (Nov. 2, 1994).

²¹ See, e.g., *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 764 n. 5 (9th Cir.); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992), *cited in* PAUST, VAN DYKE & MALONE, *supra* note 6, at 61-63.

²² See, e.g., JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 4, 140 n.35 (2007); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, forthcoming, 19 J. TRANSNAT'L L. & POL'Y (No. 2, 2010), draft available at

might violate both human rights law and the law of war in the context of an armed conflict. It must be stressed, however, that there is no *lex specialis* override of human rights law and obligations. As noted in a forthcoming article:

Some claim that the laws of war are a superior *lex specialis*, but such Latinized nonsense is intellectually bankrupt and unacceptable. Some human rights are peremptory norms *jus cogens* – that is, they are superior and trump any inconsistent international law in any circumstance, including inconsistent laws of war.... Furthermore, some human rights are nonderogable – that is, they cannot be derogated from even in time of war or because of an alleged necessity.... Moreover, the phrase *lex specialis* has been made up and favored by a few textwriters and jurists who do not seem to understand that norms *jus cogens* have primacy, not every type of law of war. Additionally, the phrase *lex specialis* appears in no known international agreement. It is nonsense to claim that every law of war will prevail over every relevant human right in time of armed conflict. Additionally, human rights obligations are universal and apply in all social contexts under the United Nations Charter, and Article 103 of the Charter guarantees their primacy over inconsistent law of war treaties.²³

IV. DISOBEDIENCE OF UNLAWFUL ORDERS

Dannenbaum affirms that orders to violate the laws of war must not be obeyed, but he is concerned that it is allegedly less clear that individuals in peacekeeping situations have authority to legitimately disobey orders that violate human rights, presumably because “criminal” sanctions would be less likely with respect to human rights violations.²⁴ There is no clear basis for this concern. First, as noted above, there is no lawful authority in the U.N., its entities, or U.N. personnel to issue orders to violate human rights, especially human rights *jus cogens*. Such orders would be *ultra vires* and, as unlawful orders, should not be obeyed. Second, the general duty to disobey manifestly unlawful orders is a duty to disobey orders that are manifestly unlawful under international law, not merely orders that might lead to criminal sanctions or violate the laws of war.²⁵ While addressing the concomitant defense or lack of “responsibility” with respect to superior orders, the Rome Statute of the

<http://ssrn.com/abstract=1520717>.

²³ Paust, *supra* note 22, at _ n.89 (footnotes omitted). *See also* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 163 (4 ed. 2007) (nonderogable human rights must be followed even in time of war); *but see* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 81, 383 (2008), *citing* among others Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 266-67 (2000).

²⁴ Dannenbaum, *supra* note 1, at 363.

²⁵ *See generally* JORDAN J. PAUST, M. CHERIF BASSIOUONI, ET AL., INTERNATIONAL CRIMINAL LAW 100-14 (3d ed. 2007).

International Criminal Court uses the term “unlawful.”²⁶ Third, it is expected that even outside the context of war, violations of the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Protection of All Persons From Enforced Disappearance; customary crimes against humanity; and certain human rights reflected in the ICCPR²⁷ must be prosecuted and that unlawful orders are not a defense. Fourth, it is important to recall that violations of certain human rights can lead to criminal sanctions (especially in connection with treaties noted above and customary crimes against humanity) and that although some textwriters and jurists have missed the point, private actors (as well as those acting on behalf of or in cooperation with a state) have certain duties under treaty-based and customary human rights law.²⁸ Fifth, individual actors (whether U.N. officials, U.N. commanders, or others) remain bound by customary and relevant treaty-based law whether or not they wear a U.N. cap. Sixth, what relevant human rights violations in time of armed conflict would not also be war crimes?

V. REALISTIC AUTHORITY, POWER, AND RESPONSIBILITY

Dannenbaum’s article provides an important contribution by demonstrating conclusively that it is not realistic or policy-serving to consider that peacekeeping troops or national contingents are under the sole authority and responsibility of the U.N. or a U.N. commander. The actual relationship between a U.N. command, states, and individuals can be complex. For example, peacekeeping soldiers are “[s]till soldiers in the national service” and, as noted above, they remain bound by relevant treaties acceded to by their state of nationality.²⁹ They also remain bound by customary international law.³⁰ Moreover, states that supply peacekeeping contingents remain bound by both types of international law and, especially, Article 56 of the U.N. Charter. Therefore, it is important to consider what effective power states can

²⁶ See Rome Statute of the International Criminal Court, art. 33, 2187 U.N.T.S. 90 (1998).

²⁷ Concerning prosecution of human rights violators, see, e.g., Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1537-38 & n.15, 1542-43 (2009), available at <http://ssrn.com/abstract=1331159>.

²⁸ See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 6, at 15-20, 254, 334, 413, 470-74; Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801 (2002).

²⁹ See generally PAUST, VAN DYKE & MALONE, *supra* note 6, at 2, 9-10, 15-20, 22, 24-26, 29, 53-54, 62, 121, 147, 149, 270, 275-76, 279, 288, 294, 307, 310, 313, 320-21, 485; Henfield’s Case, 11 F. Cas. 1099, 1101-04, 1120 (C.C.D. Pa. 1793) (No. 6,360).

³⁰ Customary international law is binding on individuals. See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 6, at 2, 10-11, 18-20, 22, 27-31, 135-44, 146-47, 254, 420, 445-46, 449-50, 461-62, 467, 474-78, 588; Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 208-16 (2008); Henfield’s Case, 11 F. Cas. at 1101-04, 1120.

realistically exercise in a given circumstance, although a lack of “effective control” should not be determinative with respect to the extent of every form of liability that might exist for various actors.

Dannenbaum also notes that “the reality is ... [that] [f]ew states ever relinquish full operational control to the United Nations” and he argues convincingly for abandonment of a needlessly limiting “overall operational control” test and a *de facto* limitation of liability of the U.N. and the state by shifting liability exclusively to the UN. He rightly avers that the recognition of shared liability would better serve the human rights of victims to fair and adequate compensation, especially since the U.N. might have immunity in certain contexts. Clearly, draft Article 5 of the Draft Articles on Responsibility of International Organizations is unrealistic and unhelpful; although, as Dannenbaum points out, the ILC Commentary on the Draft Articles notes that “dual or even multiple attribution of conduct cannot be excluded.”³¹

What is not persuasive, especially after his useful demonstration of complexities that are often extant concerning relative and effective control, is a preference for “a simple test” and an alleged need ultimately to allocate liability either to the U.N. or to the state on the basis of “effective control” that in reality can be mixed and relative. What would be more realistic and policy-serving would be “joint and several liability wherever feasible.” Attribution merely to one actor runs counter to general international law, especially when it is realized that the state can be liable to make reparations with respect to war crimes as well as a general officer, captain, and private in the state’s military forces – each according to their own responsibilities under international law. It simply does not matter who among them has “ultimate control,” who is “most capable of preventing the wrongdoing,” or who has the “greatest ‘effective control’ over the outcome.” Moreover, some forms of liability attach for fault and for leader responsibility for dereliction of duty,³² even though some of the same actors and/or others might also have responsibility for complicity or as direct perpetrators. Each form of liability should remain. Additionally, it is well-known that a military commander with *de jure* authority over troops or a leader with *de facto* authority cannot avoid responsibility and criminal or civil sanctions for dereliction of duty because he or she did not maintain “effective control” over troops who had committed, were committing, or were about to commit violations of the laws of war or other international criminal law. The leader’s own dereliction is not a defense.³³ Similarly, where the state or the U.N. has a duty to take action in order to effectuate universal respect for and observance of human rights (as each actor does under the Charter), the actor’s own dereliction cannot rightly be used to avoid relevant liability.

³¹ See Dannenbaum, *supra* note 1, at 357-58.

³² Concerning civil cases recognizing responsibility for leaders, often in circumstances where universal jurisdiction pertains, *see, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 6, at 439-41, 459, 475-76, 519-21, 529-32.

³³ See *United States v. List* (“The Hostage Case”), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757, 1238, 1271 (1950).

VI. THE CASE FOR NONIMMUNITY

It has been recognized for centuries that for every right there must be a remedy and that having a right without a remedy is like having no right at all. Immunity can produce such an unjust result. For the victims of human rights violations, immunity can continue the suffering from violations and result in one more form of oppression, one less measure of human dignity. All forms of immunity ultimately threaten the dignity and worth of each human being addressed in the preamble to the United Nations Charter, the preamble to and Article 1 of the Universal Declaration of Human Rights, and the preamble to the ICCPR. In contrast, the quest for measured justice can be a form of human opposition to the evil of criminal violations of human rights, a reaffirmation of dignity, life, quality of being, and human compassion.

In view of the U.N. Charter, U.N. immunity is counterintuitive. It would be contrary to the values that support a United Nations. More importantly from a legal perspective, it would be ultimately and unavoidably violative of Article 55(c) of the Charter. As Dannenbaum notes, victims of human rights violations have a right to an effective remedy. The right to a remedy is part of customary human rights law³⁴ and is, therefore, necessarily part of the human rights that must be universally respected and observed within the meaning of Articles 55(c) and 56 of the United Nations Charter. As such, the United Nations is constitutionally bound to provide an effective remedy.

For these reasons, it can be recognized that Article 105 of the Charter must be interpreted consistently with the mandate in Articles 1(3) and 55(c). First, Article 105 contemplates limited (not absolute) immunity only where it is “necessary,” and immunity for violations of human rights is not actually necessary “for the fulfillment of” the organization’s “purposes” or the “functions” of officials of the U.N. Second, per terms of Articles 1(3) and 55(c) of the Charter, the U.N. cannot have a lawful purpose to violate human rights, and it is understandable that no U.N. official could have such an authority under the Charter. A violation of human rights law would be *ultra vires*, beyond a lawful “purpose” or “function.” The fact that human rights include the right to an effective remedy compels recognition of the fact that immunity would be contrary to such a right and beyond any lawful purpose of function under the Charter. At a bare minimum, the U.N. must itself provide victims an effective remedy.³⁵

For these reasons also, the immunity provision in the Convention on the Privileges and Immunities of the United Nations is recognizably inconsistent with Articles 55(c) and 56 of the Charter and, under Article 103 of the Charter, member

³⁴ See, e.g., Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhumane, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L. 359, 361-65, 368-69, 371 (2009) (citing numerous sources), available at <http://ssrn.com/abstract=1458638>.

³⁵ Cf. Simma, *supra* note 6, at 1318 (“As long as alternative means of legal recourse (internal appeal procedures; arbitration) are at the claimant’s disposal, ... Art. 10 of the Universal Declaration [which actually mandates that there be a right to a remedy in “an independent and impartial tribunal”] ... [allegedly does not] compel national courts to deny immunity”).

state obligations under Article 56 of the Charter to universally respect and observe human rights (including the human right to an effective remedy) must prevail over the inconsistent immunity provision in the Convention. It is evident, therefore, that the 1999 Advisory Opinion of the ICJ that preferred to read the Convention as requiring immunity for the U.N. and its entities and personnel provided improper advice. It did not address the human rights duty based in Article 55 of the Charter to provide an effective remedy or the Article 103 override of the Convention. In his dissent, Judge Koroma provided a hint of some of the relevant issues posed when noting that U.N. officials should not “exceed the scope of their functions” and that one question should be whether a U.N. official was operating “outside his mandate” and relevant conduct was not “in the course of the performance of his mission.”³⁶ If left unaware of all of the various legal policies at stake, U.N. and state elites might tend to prefer a common immunity for themselves at the expense of humanity. They might even offer specious justifications for such aberrant behavior, such as if immunity does not exist for war crimes and crimes against humanity, the international system of diplomacy might not be able to function or U.N. officials won’t be able to perform their “functions.” Those who perform an educative role in any relevant setting must be emphatic in opposition to such claims by demonstrating, for example, that there is no lawful authority to violate human rights law, the U.N. can have no lawful purpose to do so, no U.N. official could have a lawful function to engage in such violations of international law, and the system of diplomacy will not be unduly inhibited when those reasonably accused are brought to justice. If justice for the claimant and the alleged perpetrator might be problematic in a given country, the U.N. can fulfill its Charter-based responsibility to provide an effective remedy.

When 160 countries met in Rome in 1998 to create the ICC, they recognized the determination of the community “to put an end to impunity for the perpetrators” of core crimes under international law. There are other trends in expectation or *opinio juris* documented in Security Council and General Assembly resolutions that mirror the resolve to end impunity by effectuating the human right to an effective remedy.³⁷ As I have noted in a prior writing:

Undoubtedly for this and related reasons, the United Nations General Assembly emphasized in 2007 and 2008 that “national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation.” Earlier in the Basic Principles and Guidelines on the Right to a Remedy and Reparation, the General Assembly provided informing detail concerning the right to “equal and effective access to justice” and to an effective judicial remedy for victims of violations of

³⁶ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights 1999 I.C.J. 62 (Apr. 29), (dissenting opinion of Judge Koroma), paras. 13, 14, 2 (emphasis in original).

³⁷ See, e.g., *supra* note 34.

human rights law, as well as the type of “[a]dequate, effective and prompt reparation,” compensation, rehabilitation, and “satisfaction” required by international law.³⁸

It would seem appropriate, therefore, that such additional patterns of *opinio juris* concerning the human right to an effective remedy are used not merely to demonstrate the continued affirmation of the customary nature of such a human right, but also under the general principle of estoppel to deny claims of the U.N., its entities and personnel to avoid the reach of such a fundamental human right.

Clearly also, language in Article 51 of the U.N. Model Status of Forces Agreement for Peacekeeping Operations that might allow immunity from a state’s jurisdictional reach because of “any provision of the present agreement” should be changed. Lawyers in the Secretariat should recognize that a provision for immunity that functions to obviate the human right of victims to an effective remedy is beyond the constitutional authority of the United Nations and *ultra vires*. Additionally, a Status of Forces agreement should not attempt to obviate universal jurisdiction over individual violators that pertains in the state with respect to violations of customary human rights. The state is also bound under Article 56 of the Charter to respect and observe the customary human right to an effective remedy and, per express terms of Article 103, any international agreement to the contrary (even a U.N. Status of Forces agreement) would be overridden by Article 103 of the Charter. With respect to violations of the 1949 Geneva Conventions that might also involve violations of human rights, it is pertinent that Article 148 of the Geneva Civilian Convention expressly declares that no party to the treaty “shall be allowed to absolve itself or any other” party to the treaty “of any liability incurred by itself or by another” party.³⁹

VII. CONCLUSION

As this essay demonstrates, the United Nations is bound by human rights under Articles 1(3) and 55(c) of the Charter and this constitutional obligation places limitations on the authority and lawful purposes and functions of the U.N. and its entities. States are similarly bound to take joint and separate action to achieve universal respect for and observance of human rights under Article 56. Relevant human rights include the customary human right to an effective remedy. Articles 55(c) and 56 of the Charter unite each actor in a foundational matrix of joint and separate responsibility, liability, and nonimmunity that should be further recognized

³⁸ Paust, *supra* note 34 at 364-65, and references cited.

³⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 148, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365.

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and effectuated. Universal respect for and observance of human rights demands nothing less.