



HARVARD ILJ ONLINE
VOLUME 51 – JUNE 28, 2010

Finding Balance in the Attribution of Liability for the Human Rights Violations of U.N. Peacekeepers: A Response to the Responses of Paust and Rowe

Responding to Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT'L L.J. ONLINE 1 (2010) and Peter Rowe, *United Nations Peacekeepers and Human Rights Violations: the Role of Military Discipline: A Response to Dannenbaum*, 51 HARV. INT'L L.J. ONLINE 69 (2010).

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This Essay addresses the responses of Professors Jordan Paust¹ and Peter Rowe² to my article, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers* (hereinafter “the article”).³ The article proposes a new interpretation of the concept of “effective control” as it relates to the attribution of liability for the human rights abuses of U.N. peacekeepers. Paust and Rowe’s critiques, although different in important ways, both add nuance

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¹ Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT'L L.J. ONLINE 1 (2010).

² Peter Rowe, *United Nations Peacekeepers and Human Rights Violations: the Role of Military Discipline: A Response to Dannenbaum*, 51 HARV. INT'L L.J. ONLINE 69 (2010).

³ Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113 (2010).

and insight to the debate on this complicated question and are therefore most welcome.

This Essay proceeds in four Parts. Part I emphasizes the overarching principle that any legal structure designed to combat and redress the wrongdoing of U.N. peacekeepers must not thereby undermine the vital work of Blue Helmets in protecting and upholding human rights. Part II addresses Paust's assertion that the United Nations and troop contributing states should be held jointly and severally liable for *all* peacekeeping human rights abuses. Contra Paust, I demonstrate that this suggested blanket rule is less policy-serving and in weaker accord with international law than is the scheme of liability attribution I advance in the article. Part III clarifies the boundary between the third and fourth categories of my proposed scheme of liability attribution and allays the disparate concerns raised by Paust and Rowe with respect to the distinction between those categories. Finally, Part IV responds to Rowe's contention that our focus should be on improving peacekeeper discipline, rather than on developing a system of liability attribution for peacekeeper abuses. Contra Rowe, the latter endeavor is not only compatible with improving discipline, but actually invigorates that project.

In what follows, I refer to the types of human rights violation under examination by their categorization in part IV of the article.⁴ Thus, abuses committed by peacekeepers contrary to U.N. authorization are hereinafter termed "Category 1 violations."⁵ "Category 2 violations" are committed pursuant to U.N. authorization, but are not mandated by direct U.N. order.⁶ "Category 3 violations" are committed pursuant to manifestly unlawful U.N. orders, such that subordinates executing the orders would be criminally liable for doing so.⁷ "Category 4 violations" encompass other violations committed pursuant to U.N. orders,⁸ and "Category 5 violations" are so-called "forced omissions."⁹

I. THE IMPERATIVE OF BALANCE

One point undergirds much of what follows and is therefore worth emphasizing up front. In the article, I describe the extent and devastating impact of human rights violations by U.N. peacekeepers.¹⁰ These violations are, of course, the central focus of the debate at hand. Preventing such wrongdoing and providing appropriate remedy when it occurs must be our guiding objectives. However, these violations must be considered in context. Peacekeepers do extraordinarily important work in protecting the human rights of countless civilians in some of the most war-ravaged regions of the world.

⁴ *Id.* at 158–83.

⁵ *See id.* at 158–64.

⁶ *See id.* at 165–70.

⁷ *See id.* at 171–75; *infra* notes 41–45 and accompanying text (clarifying the scope of this category).

⁸ Dannenbaum, *supra* note 3, at 17–80.

⁹ *See id.* at 180–83.

¹⁰ *Id.* at 117–20.

The U.N. Mission in the Democratic Republic of Congo (“MONUC”) has been the subject of concerted criticism regarding the complicity and participation of its members in grave human rights abuses.¹¹ However, even while highlighting some of these failures, Human Rights Watch notes in its most recent report on the Democratic Republic of Congo (“DRC”), that MONUC has “undoubtedly helped to save and protect civilian lives.”¹² Head of Mission Alan Doss reports that MONUC peacekeepers “protect humanitarian convoys supplying about 1.2 million people”¹³ and notes that in North Kivu alone they conduct around 1,800 day and night patrols each month.¹⁴ Indeed, responding to the prospect of the withdrawal or downsizing of MONUC, Amnesty International’s Tawanda Hondora argued recently, “Withdrawing or reducing the peacekeeping force could have disastrous consequences . . . UN peacekeeping bases are often the only places where people can seek safety when clashes occur.”¹⁵ Similarly, the human rights community has opposed vehemently Chad’s recent request that the U.N. withdraw its peacekeeping forces from that country.¹⁶

In short, although occasionally implicated in human rights violations, even troubled peacekeeping operations do invaluable work protecting the human rights of the communities they serve. This is of paramount importance to the debate at hand. If measures aimed at combating peacekeeper violations also undermine the efficacy of peacekeeping missions, those measures may ultimately prove injurious to human rights on aggregate.

Two threats to efficacy are of particular relevance here. First, different systems of liability attribution create varying incentives for potential troop-contributing states to withhold high-quality troops from peacekeeping operations. The greater these incentives, the worse the prospects for peacekeeping success. Second, different systems of liability attribution create varying incentives for troop-contributors to cut

¹¹ See, e.g., *id.* at 117–18; HUMAN RIGHTS WATCH, “YOU WILL BE PUNISHED”: ATTACKS ON CIVILIANS IN EASTERN CONGO 138–43, 155 (2009).

¹² *Id.* at 148. The report commends that the operation “contributed to enhanced protection for civilians.” *Id.* at 149.

¹³ Alan Doss, *The UN Mission in Congo Has not Signed a ‘Pact with the Devil’*, GUARDIAN (London), Feb. 24, 2010, at 31.

¹⁴ *Id.*

¹⁵ Amnesty International, *UN Forces Must Remain in the Democratic Republic of Congo* (Mar. 5, 2010), <http://www.amnesty.org/en/news-and-updates/un-forces-must-remain-democratic-republic-congo-2010-03-05>.

¹⁶ See, e.g., Human Rights Watch, *Letter to UN Security Council on Consequences of MINURCAT Withdrawal from Chad* (Feb. 16, 2010), <http://www.hrw.org/node/88637> (noting *inter alia* that “the peacekeepers appear to have prevented a resumption of large-scale violence and mass killings.”); Amnesty International, *Chad: UN Security Council Must Work to Ensure Further Extension of UN Mission Mandate* (Mar. 12, 2010), <http://www.amnesty.org/en/library/asset/AFR20/004/2010/en/8c3d5db9-0e56-4121-a342-0e84fe3edc56/afr200042010en.html> (“If both [MONUC and the United Nations Mission in the Central African Republic and Chad] were to leave their areas of operations prematurely, Amnesty International fears that the human rights and humanitarian crisis in the two very troubled regions of Africa will deteriorate sharply.”).

across the official chain of command, thus compromising the U.N. Force Commander's operational control over the peacekeeping force. This, too, can impact a mission's effectiveness.¹⁷

Finding balance in the design of a scheme of liability attribution means considering both the human rights of those who would be protected by an effective peacekeeping force, and the human rights of those at risk of suffering from peacekeepers' violations. Of course, these populations overlap, and a peacekeeping force that commits abuses fundamentally undermines its overall potency, including its efficacy in protecting human rights.¹⁸ In that sense, measures tackling peacekeeper violations can augment the capacity of the peacekeeping force to protect human rights. However, this alignment of interests between the potential victims of peacekeeper abuse and the beneficiaries of peacekeeper protection is not perfect.¹⁹ Any plausible response to peacekeeper violations must not ignore the human rights of those who would gain from an effective peacekeeping mission.

II. PAUST'S PREFERENCE FOR BLANKET JOINT AND SEVERAL LIABILITY

Professor Paust considers the liability scheme I advocate overly restrictive. He contends, "What would be more realistic and policy-serving [than Dannenbaum's proposal] would be 'joint and several liability wherever feasible.'"²⁰ Several issues require response here.

First, examining Paust's alternative proposal, it is not immediately clear what he means by "feasible." Paust cites me as the authority for the relevant phrase, but he leaves out the most important words. My formulation is: "joint and several liability wherever feasible *within the confines of the 'effective control' principle . . .*"²¹ "Feasibility," on my view, is thus defined by the limits of the concept of effective control advanced in the article.²² Clearly Paust does not mean to use "feasible" in that sense.²³ However, he provides no elaboration of the limits of feasibility on his view. Reading in context, it seems that Paust means to advocate simply "joint and several liability in all cases."²⁴

If this is indeed the system of liability attribution that he prescribes, Paust's claim that his proposal would be more "policy-serving" than the standard that I advance is not persuasive. Paust's approach would broaden the avenues of recourse open to

¹⁷ See *infra* notes 69–76 and accompanying text.

¹⁸ Dannenbaum, *supra* note 3, at 120.

¹⁹ After all, the only way to guarantee zero peacekeeper abuses would be to refrain from deploying any peacekeepers at all, thus neglecting completely the human rights of those who would be protected by peacekeepers.

²⁰ Paust, *supra* note 1, at 8.

²¹ Dannenbaum, *supra* note 3, at 192 (emphasis added).

²² *Id.* at 156–57. See also *id.* at 158–83 (elaborating this standard into a five-category liability framework).

²³ Paust, *supra* note 1, at 8 ("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.'").

²⁴ See *id.* at 8 ("Each form of liability should remain.").

victims in certain situations and, potentially, would make it somewhat less complicated for victims to bring suit. These are important goods. However, there are three ways in which Paust's prescription would have deleterious policy consequences as compared to my proposal. I submit that these costs outweigh the potential marginal benefits of broader access and simplicity.

First, extending joint and several liability to all cases would create for potential troop-contributing states an enhanced incentive to withhold even their high-quality troop contingents from peacekeeping operations. In the article I acknowledge that *any* system that expands the scope of troop-contributing states' liability for the human rights violations of their peacekeepers would create for those states an incentive not to contribute troops.²⁵ However, I contend that under my proposal this incentive would in many cases be mitigated by troop-contributors limiting their exposure to liability by preventing violations from occurring in the first place.²⁶ States would have an incentive *either* to withhold their troop contributions *or* to send carefully-selected, well-trained, and tightly-disciplined troops, subject to the threat of prosecution for criminal wrongdoing. Under such a system, I argue, the possibility of a reduction in troop contributions would be offset by the attendant improvement in troop quality.²⁷

In this sense, the standard I propose seeks balance between facilitating recourse and providing remedy for violations on the one hand, and preserving peacekeepers' capacity to achieve their purposes on the other. Paust's alternative, by contrast, focuses solely on the former objective. Consider our divergent approaches with respect to Category 5 violations.²⁸ Paust's system would hold the troop-contributing state liable for human rights violations caused by the omissions of its contingent, even when that contingent lacks the logistical support from the United Nations necessary to avoid omitting the relevant action. This may expand victims' recourse, but how could the troop-contributing state protect itself from exposure to liability in such situations? Even if it were to use all of its levers of control by sending high-quality, disciplined troops prepared to execute conscientiously all lawful orders, the state would be no less vulnerable to Category 5 liability than if it were to send a contingent of considerably weaker composition. Indeed, the only way for a state to protect itself from liability for such violations would be to withhold its troop contribution altogether. This is not a policy-serving incentive. When peacekeeping operations lack troops, the human rights of the persons they are deployed to protect are put at greater risk.²⁹

The second sense in which Paust's proposal is not policy-serving is that it would not structure incentives so as to minimize human rights violations by peacekeepers.

²⁵ Dannenbaum, *supra* note 3, at 184 ("The obvious concern with a system that expands liability of troop-contributing states is that the prospect of incurring financial liability would deter states from contributing troops to peacekeeping missions. . . . [T]he deficit in the supply of peacekeepers means that such a scenario cannot be taken lightly.").

²⁶ States would achieve this by properly training well-selected troops and disciplining and punishing malefactors. *Id.* at 184–87.

²⁷ *Id.* at 187.

²⁸ Dannenbaum, *supra* note 3, at 180–83.

²⁹ See, e.g., HUMAN RIGHTS WATCH, *supra* note 11, at 143–45; Doss, *supra* note 13.

As noted above, under Paust's scheme, troop-contributing states would be held liable for Category 5 violations, despite their lack of preventive capacity. Of course, Paust's proposal would also allow for U.N. liability in Category 5 situations, thus holding liable the entity that *is* in a position to prevent the wrongdoing. However, under blanket joint and several liability, the U.N. would expect to share some of the aggregate liability burden for Category 5 violations with the troop-contributing states, and would therefore face a diluted incentive as compared to the incentive provided by a system under which it would be solely liable for violations of this kind. Under the system I propose, by contrast, the U.N. would instead expect to bear the entire aggregate liability burden for Category 5 violations, and, thus, a more policy-serving incentive structure would be in place.

The same logic operates in reverse with respect to Category 1 violations.³⁰ As explained in the article, all of the levers of effective control over these *ultra vires* abuses are in the hands of the troop-contributing state, with the United Nations largely impotent with regard to prevention.³¹ Joint and several liability for such abuses would wrongly hold the United Nations liable and dilute troop-contributors' incentive to prevent the wrongdoing as compared to their incentive under my proposed liability scheme.³²

The third sense in which Paust's proposal is not policy-serving is specific to Category 4 violations. Because both Paust and Rowe question my approach to this class of violations, this issue is addressed in greater detail in Part III, *infra*. Suffice it to say here that extending joint and several liability to Category 4 would create for troop-contributing states an incentive to retain ultimate operational control over their troops, in direct contravention of the requirement that such control be vested solely in the U.N. Force Commander and her superiors.³³ Such national usurpation of operational control fundamentally undermines the efficacy of peacekeeping operations, including their effectiveness in protecting civilians and upholding human rights.³⁴ By encouraging this outcome, a scheme of blanket joint and several liability would fail to achieve balance between broadening the civil recourse available to victims of peacekeeper abuses and providing the conditions for peacekeepers to act effectively and uphold human rights.

For these three reasons, Paust's argument that a blanket system of joint and several liability would be more "policy-serving" than the scheme of liability I propose is unpersuasive. His argument that "[a]ttribution merely to one actor runs counter to general international law"³⁵ is similarly problematic. In support of this assertion, Paust argues that a commander with *de jure* or *de facto* authority over troops may be liable for "dereliction of duty" even if "he or she did not maintain 'effective control' over troops who had committed, were committing, or were about to commit violations of

³⁰ Dannenbaum, *supra* note 3, at 158–64.

³¹ *Id.* at 164.

³² *Id.* at 156–57 (defining the liability scheme).

³³ See *infra* notes 60–64 and accompanying text.

³⁴ See *infra* notes 69–76 and accompanying text.

³⁵ Paust, *supra* note 1, at 8.

the laws of war or other international criminal law.”³⁶ Reasoning by analogy, Paust contends, “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.”³⁷

Contra Paust, this analysis in fact supports my proposed scheme of liability to the detriment of the system of blanket joint and several liability. The crux of the problem for Paust’s argument here is his reliance on the concept of “dereliction.” To be “derelict” in the sense invoked by Paust, a person or entity must have failed to act as she or it should have done.³⁸ It is simply implausible to assert that the United Nations could be properly labeled “derelict” in cases in which it and its agents do everything correctly under the law – enacting a lawful mandate, issuing lawful orders, and making proper authorizations – but the troops over which it has no hiring, training, promotion, or disciplinary authority disregard those orders, or exceed the terms of their mandate and authorizations, and violate human rights.³⁹ Similarly, it is not tenable to label the troop-contributing state “derelict” when it sends carefully-selected, well-trained, and highly-disciplined troops on a peacekeeping mission, only for those troops to be forced into wrongful omissions by inadequate U.N. logistical support.⁴⁰ On the contrary, it is precisely because the United Nations is *not* derelict in the former scenario and the state *not* derelict in the latter scenario that under my proposed liability scheme the United Nations would not be liable in the former situation and the state would not be liable in the latter. In stark contrast, Paust’s proposal would assign liability without consideration of how the relevant actors might have acted differently so as to obviate the wrongful outcome. This simply ignores the parties’ dereliction or lack thereof.

In sum, on Paust’s own terms, and with respect to both law and policy, his arguments against my proposal and in favor of a system of blanket joint and several are not persuasive.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 42–54 (Nov. 16, 2005) (considering command responsibility as a “dereliction of duty” under international criminal law and explaining that the “the commander should bear responsibility for his failure to act”); MANUAL FOR COURTS-MARTIAL UNITED STATES at IV–23, IV–24 (2008) (defining the elements of “dereliction of duty” and explaining “derelict” as used in Article 92 of the Uniform Code of Military Justice, 10 U.S.C. § 892 (2005)); BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “dereliction” in the relevant context to be “Willful or negligent failure to perform assigned duties; culpable inefficiency in performing assigned duties.”).

³⁹ This, of course, describes a form of Category 1 violation.

⁴⁰ This describes a form of Category 5 violation.

III. THE DISTINCTION BETWEEN CATEGORIES THREE AND FOUR OF THE PROPOSED SCHEME OF LIABILITY

Although otherwise animated by quite different concerns, Paust and Rowe find common ground in objecting to the distinction I make between Categories 3 and 4 in my proposed scheme of liability.⁴¹ In drawing this distinction in the article, I focus primarily on the difference between human rights violations that are war crimes, on the one hand, and human rights violations that are not war crimes, on the other.⁴² One issue requires immediate clarification here. In addition to war crimes, Category 3 also includes other human rights violations for which troops would be criminally liable despite having followed the orders of their superiors. The manifest unlawfulness of such orders triggers for subordinates that receive them a duty to disobey. Obvious examples include crimes against humanity and genocide.⁴³ Incorporation of such acts into Category 3 is implicit in the article's elaboration of that class of violations.⁴⁴ However, the focus on war crimes may obfuscate this point.⁴⁵ Therefore, to avoid misunderstanding in this regard, it is here stated explicitly that Category 3 includes *all* human rights violations for which subordinates would be criminally liable despite having acted pursuant to orders.

Although important, this clarification does not dispose fully of the objections raised by Paust or Rowe. Paust's argument emphasizes the manifest unlawfulness of *any* order that, if followed, would result in the violation of human rights. Rowe argues more broadly that the decision on whether to follow even lawful U.N. orders is at the discretion of the National Contingent Commander. I address these concerns in turn.

⁴¹ Paust, *supra* note 1, Part IV; Rowe, *supra* note 2, at 73-74 ("It is not easy to see why, as Dannenbaum suggests . . . an 'order' [from U.N. Command] would create joint and several liability between the U.N. and the state supplying the national contingent, whereas an 'order' which caused a breach of an individual's human rights would make the United Nations solely responsible.").

⁴² Dannenbaum, *supra* note 3, at 171-80.

⁴³ Rome Statute of the International Criminal Court art. 33, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

⁴⁴ Dannenbaum, *supra* note 3, at 175 ("subordinates have a *duty to disobey orders that are manifestly unlawful* - including, *inter alia*, orders to commit war crimes- and troop-contributing states have a number of mechanisms to ensure that members of their national contingents uphold *that duty*. . . . [V]iolations falling into this third category are *in that sense* under the effective control of . . . troop contributing states . . ."); *id.* at 173, n. 411 (citing to article 33(2) of the Rome Statute of the International Criminal Court, which provides "orders to commit genocide or crimes against humanity are manifestly unlawful.").

⁴⁵ See Paust, *supra* note 1, at 7 (criticizing my approach on the grounds 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 ICCPR must be prosecuted and that unlawful orders are not a defense").

A. ORDERS THAT VIOLATE HUMAN RIGHTS ARE NOT NECESSARILY MANIFESTLY UNLAWFUL

The United Nations has no lawful authority to issue orders that violate human rights.⁴⁶ It is for this reason that (1) the U.N. must be liable for any violations that occur as a consequence of its agents issuing such orders,⁴⁷ and (2) subordinates have a right to disobey such orders.⁴⁸ On these matters, Paust and I agree. However, the question at hand is a different one; namely, to which entity should a human rights violation be attributed when that act is a consequence of a direct U.N. order? Which of the troop-contributing state, the United Nations, or both should be held liable for the violation? I argue that the key factor necessary to making this determination is whether individual troops receiving the order have the *right* or the *duty* to disobey that order.⁴⁹ This is a question of whether the orders in question are manifestly unlawful.⁵⁰ Paust acknowledges the importance of the “manifestly-unlawful” standard, but seems to argue that this standard encapsulates all orders to violate human rights.⁵¹

This all-encompassing stance is not correct. Orders that would violate human rights if obeyed are not, in virtue of that characteristic, *manifestly* unlawful. Indeed, a case to which Rowe alludes in his response⁵²—*McCann v. United Kingdom*⁵³—provides a useful example of this. In *McCann*, the European Court of Human Rights heard a complaint against the United Kingdom for the killing of suspected members of the Irish Republican Army (IRA) in Gibraltar.⁵⁴ The Court found:

[T]he soldiers [who killed the IRA suspects] honestly believed, in the light of the information that they had been given . . . that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives. . . . It follows that . . . the actions of the soldiers do not, in themselves, give rise to a violation of [the right to life as codified in Article 2 of the European Convention on Human Rights].⁵⁵

⁴⁶ Paust, *supra* note 1, at 3. Dannenbaum, *supra* note 3, at 134-39 (the United Nations is bound by human rights law).

⁴⁷ Dannenbaum, *supra* note 3, at 171-80.

⁴⁸ *Id.* at 176. *See also id.* at 172.

⁴⁹ *Id.* at 171-80.

⁵⁰ *Id.* at 172.

⁵¹ Paust, *supra* note 1, at 6-7.

⁵² Rowe, *supra* note 2, at 77-78.

⁵³ *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1996).

⁵⁴ *Id.* ¶¶ 13-96.

⁵⁵ *Id.* ¶ 200.

Notwithstanding this analysis, however, the Court found the United Kingdom liable for violating the right to life of each of the killed IRA suspects.⁵⁶ The Court held that the command-level decision-makers had failed to pursue alternative non-lethal strategies for quelling the terrorist threat earlier in the mission, and that they had not scrutinized adequately their intelligence assessments prior to instructing the soldiers as to the threat posed by the IRA suspects.⁵⁷ On these grounds, the Court reasoned that the operation as a whole violated the European Convention's necessity standard for law-enforcement killings.⁵⁸ Thus, contra Paust, *McCann* establishes that orders that are not manifestly unlawful from the perspective of the soldiers receiving them may nonetheless violate human rights law when considered in the broader command-level context. Peacekeepers are likely to face similar situations.⁵⁹

B. STATES' INCENTIVE TO CUT ACROSS THE COMMAND CHAIN

For the reasons articulated in the article, when the U.N. Force Commander's orders violate human rights without being manifestly unlawful, the troop-contributing state possesses none of the mechanisms of effective control that warrant holding it liable for violations in Categories 1, 2, and 3.⁶⁰ If the state were attributed with Category 4 violations despite this relative impotence, it would justifiably demand greater operational control over its troops as the only means by which to control the occurrence of those violations and thus protect itself from liability.⁶¹ To be clear, the worry here is not that the state would intervene to stop human rights abuses from occurring. Rather, the worry is that to ensure its ability to stop human rights abuses from occurring even when the orders received from U.N. Command are not manifestly unlawful, the state would reasonably require permanent involvement in operational decision-making with respect to its troops, including veto power over commands they receive from the U.N. In short, all actions would have to be vetted by the troop-contributing state's home capital.

⁵⁶ *Id.* ¶ 214.

⁵⁷ *Id.* ¶¶ 210–11.

⁵⁸ *Id.* ¶ 213. For discussion on the necessity standard, see ¶ 148.

⁵⁹ Consider, for example, a situation in which peacekeeping forces are asked to perform the quasi-law enforcement function of quelling a threat posed by a criminal gang. In such a situation, the individual criminals would not be lawful targets under international humanitarian law. As such, they would be protected under the *McCann* standard of necessity. See Inter-Am. C.H.R., Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, doc. 9 rev. ¶¶ 152–154, 208, 213 (1999); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 347 (2007). Rowe also suggests an example of detention orders that might violate human rights without being manifestly unlawful. Rowe, *supra* note 2, at 77.

⁶⁰ Dannenbaum, *supra* note 3, at 178–80.

⁶¹ Dannenbaum, *supra* note 3, at 178–80.

C. THE PROPER LIMITS OF THE NATIONAL CONTINGENT COMMANDER'S DISCRETION

In his argument against my distinction between Category 3 and Category 4 violations, Rowe appears to embrace precisely the above scenario as he asserts the general freedom of the National Contingent Commander to reject *any* directive she receives from the U.N. Force Commander. This model poses a distinct threat to the efficacy of the peacekeeping force, including its ability in protecting human rights.

Rowe's understanding of the authority of the National Contingent Commander is expansive. He argues that the decision on whether to execute a U.N. order rests "only with the national commander, who, in turn, can compel obedience from his subordinates."⁶² Emphasizing that the U.N. Force Commander "cannot enforce his 'orders' down the chain of command within a national contingent," Rowe asserts that "each national contingent must be fully responsible for its own actions or inaction."⁶³

Rowe is correct that the U.N. Force Commander does not have the disciplinary authority over individuals within the national troop contingents necessary to "enforce" his orders down the chain of command.⁶⁴ However, this is quite different from arguing that the National Contingent Commander is at liberty to disregard U.N. commands. To take such a position would be to render the U.N. Force Commander little more than a hopeful coordinator of fully autonomous national contingents. This is contrary to the legal agreements that govern the typical U.N. peacekeeping operation. Pursuant to these agreements, the United Nations retains full operational control of the force through the persons of the Head of Mission and the Force Commander.⁶⁵ The U.N. Secretariat makes it explicitly clear that members of national troop contingents are "under the authority of the United Nations and subject to the instructions of the Force Commander."⁶⁶ Similarly, the Department of Peacekeeping Operations stipulates, "It is impermissible for contingent commanders to be instructed by the national authorities to depart from United Nations policies, *or to refuse to carry out orders.*"⁶⁷ Although these requirements are not always upheld in practice,⁶⁸ their contravention is detrimental to peacekeeping efforts.

Recent events in the DRC showcase the deleterious consequences of national contingent autonomy. In 2009, the United Nations designated a remote region in

⁶² Rowe, *supra* note 2, at 73.

⁶³ *Id.* at 74.

⁶⁴ Dannenbaum, *supra* note 3, at 146–47.

⁶⁵ *Id.* at 143–44; The Secretary-General, *Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peace-keeping Operations*, ¶ 7, U.N. Doc. A/46/185 (May 23, 1991); UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 68 (2008).

⁶⁶ U.N. Secretariat, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 17, U.N. Doc A/CN.4/545 (June 25, 2004).

⁶⁷ DEPARTMENT OF PEACEKEEPING OPERATIONS, GENERAL GUIDELINES FOR PEACEKEEPING OPERATIONS ¶ 7 (1995) (emphasis added).

⁶⁸ Dannenbaum, *supra* note 3, at 148–51.

North Kivu a “must-protect” area in response to widespread atrocities against the local civilian population.⁶⁹ However, with the Indian and Pakistani MONUC contingents at loggerheads over responsibility for effecting this directive, a base was not established for seven months.⁷⁰ When thirty civilians were killed in an attack during this period, MONUC peacekeepers took six days to respond.⁷¹ Problems arising from national contingent insubordination have also blighted U.N. operations in Sierra Leone,⁷² Cambodia,⁷³ Somalia,⁷⁴ and Western Sahara.⁷⁵ Jean-Marie Guéhenno and Jake Sherman argue that as a general matter national contingent assertions of unwillingness to follow certain U.N. orders can cause a “dramatic weakening in the effectiveness of force, and . . . a weakening of [peacekeeping] efforts more generally.”⁷⁶

As noted above, peacekeepers play a vital role in upholding the human rights of local civilian populations.⁷⁷ Liability rules that encourage states to assert independent operational control over their contingents undermine the agreements governing peacekeeping and imperil mission efficacy, with injurious consequences for human rights. Although this already occurs in some cases, it must not be encouraged. For these reasons, troop-contributing states should not be held responsible for Category 4 violations.

⁶⁹ HUMAN RIGHTS WATCH, *supra* note 11, at 149–52.

⁷⁰ *Id.* at 151.

⁷¹ *Id.* at 151.

⁷² Douglas Farah, *Internal Disputes Mar UN Mission*, WASH. POST, Sept. 10, 2000, at 1.

⁷³ Cpt. Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 255, 281 (1997) (“Different contingent commanders will have different agendas, usually directed from home, and may find themselves serving two masters: the Force Commander and, through the ‘rear link,’ their home governments. In several instances this has contributed to a breakdown of cohesiveness in U.N. peacekeeping forces.”).

⁷⁴ *Id.*; Donatella Lorch, *Disunity Hampering UN Somalia Effort*, N.Y. TIMES, July 12, 1993, at A8 (“The deepening rifts and the increasing independence of each contingent is significantly slowing down military and humanitarian operations in the capital, United Nations and relief officials say.”).

⁷⁵ FREDERICK H. FLEITZ, JR., PEACEKEEPING FIASCOES OF THE 1990S: CAUSES, SOLUTIONS, AND U.S. INTERESTS 74–75 (2002).

⁷⁶ JEAN-MARIE GUÉHENNO & JAKE SHERMAN, COMMAND AND CONTROL ARRANGEMENTS IN UNITED NATIONS PEACEKEEPING OPERATIONS, ¶ 19 (Background Paper for the International Forum of the Challenges of Peace Operations 2009: “A New Horizon for Peace Operations Partnerships – What are the next steps?”) (2009). *See also Comprehensive Review of the Whole Question of Peacekeeping Operations in all their aspects - Command and Control of United Nations Peacekeeping Operations*, ¶ 19, U.N. Doc. A/49/681 (Nov. 21, 1994) (asserting that consultation between the U.N. Force Commander and the National Contingent Commanders cannot “be allowed to develop into indirect negotiations with national headquarters, which could impede action and undermine the willingness and vigour with which the orders of the United Nations are carried out.”).

⁷⁷ *See supra* notes 10–16 and accompanying text.

IV. DISCIPLINARY CODES, PUBLICIZING WRONGDOING, AND HUMAN RIGHTS
LITIGATION: ALLIES IN THE SAME BATTLE

In addition to his useful contribution to the above debate, Professor Rowe's primary line of critique makes the broader claim that a focus on human rights litigation in the peacekeeping context is misplaced. For Rowe, the problem at hand is best countered not by designing an intricate scheme for attributing responsibility for those violations, but rather by focusing on preventing them from occurring in the first place. As he puts it, "an ounce of prevention is better than a pound of cure."⁷⁸ The response to this argument is twofold: (1) valuing prevention does not mean ignoring the need for a "cure" when preventive measures fail;⁷⁹ (2) with respect to certain problems, including the problem of human rights violations by U.N. peacekeepers, properly designed responses *ex post* can augment, rather than detract from, the preventive goal.

With respect to the first of these responses, Rowe admits that remedies for the human rights violations of peacekeepers should not be repudiated where available.⁸⁰ However, he contends that bringing successful human rights claims against the entities involved in U.N. peacekeeping is an undertaking fraught with difficulty and bedeviled by legal complexity.⁸¹ Efforts to clarify the attribution of peacekeepers' human rights violations, Rowe appears to suggest, carry the opportunity cost of neglecting "the most effective way of preventing" such violations; namely, strong implementation of "the military disciplinary code of the individual participating nations."⁸²

Concern about the difficulty of human rights litigation is neither new, nor specific to claims regarding violations by U.N. peacekeepers.⁸³ However, despite manifold obstacles to success,⁸⁴ victims' appetite for bringing transnational human rights claims

⁷⁸ Rowe, *supra* note 2, at 75.

⁷⁹ The term "cure" is problematic here given the inevitable inadequacy of reparations for human rights abuses. However, that inadequacy should not detract from the import of facilitating the reparations process.

⁸⁰ Rowe, *supra* note 2, at 75 (the emphasis on prevention is "not to suggest that were a remedy to be more feasibly available, it should be closed off to a claimant under these circumstances.").

⁸¹ *Id.* at 71–75.

⁸² *Id.* at 78.

⁸³ See, e.g., *Proyectos Orchimex de Costa Rica, S.A. v. E.I. DuPont de Nemours & Co.*, 896 F. Supp. 1197, 1201 (M.D. Fla. 1995); John Haberstroh, *In Re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 *ASIAN L. J.* 253 (2003); Cynthia R.L. Fairweather, *Obstacles to Enforcing International Human Rights Law in Domestic Courts*, 4 *U.C. DAVIS J. INT'L L. & POL'Y* 119 (1998); Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 *TEX. INT'L L. J.* 169, 181–83 (1987).

⁸⁴ Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 *VA. J. INT'L L.* 41, 67–68 (1998); *Litigating Human Rights: Promise v. Perils*, 2 *HUMAN RIGHTS DIALOGUE* (2000),

continues to grow.⁸⁵ These individuals show courage, patience, and tenacity in the face of great adversity. It is imperative that they not be denied the opportunity to succeed in these claims by a wrongheaded standard for the attribution of responsibility. Yet this is precisely what occurs under the current standard for the attribution of peacekeepers' human rights violations, which often obstructs adequate recourse to remedy altogether.⁸⁶ Although not free of legal complexity, my proposal would improve on the status quo by holding liable the entity (or entities) responsible for the violation in question and broadening victims' recourse to the greatest extent possible under that condition.⁸⁷ Even if the challenges Rowe highlights are such that only a small subset of the victims currently denied justice would take advantage of this improvement to hold accountable the party responsible for their suffering, this alone would justify revising the system of attribution. Striving for prevention does not mean ignoring victims when prevention fails.

Of course, Rowe is correct to emphasize seeking to prevent abuse before it happens. However, prevention is not a policy; it is a policy objective. The question at hand is *how* to induce the implementation of preventive measures. Rowe's own response to this question highlights the importance of measures *ex post* in creating positive incentives *ex ante*. Claiming that most peacekeeping human rights violations are breaches of discipline rather than actions pursuant to official orders, Rowe argues that the key to prevention is the implementation of effective disciplinary procedures by troop-contributing states.⁸⁸ In advocating enhanced discipline, Rowe already relies in part on the efficacy of disciplinary punishment *ex post* in deterring abuse *ex ante*.⁸⁹

Moreover, even the prescription for enhanced discipline is useful only if accompanied by a theory as to how states might be convinced to implement the required procedures. Towards this end, Rowe argues that the Security Council could provide "unwelcome publicity" for states that fail to properly discipline their troops,⁹⁰ and that the Secretary-General should "encourage as much press coverage as possible" of peacekeeper misconduct and monitor carefully each state's use or neglect of disciplinary and criminal proceedings in response to violations.⁹¹ Much for Rowe, therefore, rests on the efficacy of the threat of negative publicity *ex post* in motivating states to properly discipline their troops and achieve prevention *ex ante*.

http://www.cceia.org/resources/publications/dialogue/2_02/index.html/_res/id=sa_File1/HRD_Litigating_Human_Rights.pdf.

⁸⁵ Indeed, despite the lack of success thus far, more and more plaintiffs are making human rights claims against corporations under the Alien Tort Claims Act. Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151, 163 n.44 (2006).

⁸⁶ Dannenbaum, *supra* note 3, at 121–29.

⁸⁷ *Id.* at 187–92.

⁸⁸ Rowe, *supra* note 2, at 76.

⁸⁹ *Id.* at 75 (noting the importance of the National Contingent Commander's authority to "initiate investigations or bring proceedings against individual soldiers and thus provide a deterrent to others.").

⁹⁰ *Id.* at 79.

⁹¹ *Id.* at 80.

I do not disagree that these are important initiatives. However, contra Rowe, I submit that my proposal is wholly complementary to the mission he charts. I advocate attributing peacekeeping violations to the legal person with “control most likely to be effective in *preventing* the wrong in question.”⁹² This standard would impose the costs of reparation on the entity best placed to avoid those costs by implementing measures to stop the violation from happening in the first place.⁹³ Rather than being contrary to, or detracting from, Rowe’s emphasis on prevention, this would augment the arsenal of mechanisms through which such prevention might be achieved. For example, consistent with Rowe’s primary concern, the proposal would encourage the troop-contributing state to discipline and punish its troops for engaging in *ultra vires* human rights abuse, so as to protect itself from the liability it would incur if such violations were to take place.⁹⁴

Rowe may respond that the limited prospect of successful suit against responsible states would dilute this incentive. This may or may not be true with respect to the immediate financial costs a state would expect to bear as a result of human rights litigation arising from peacekeeping abuses. My view is that Rowe is excessively pessimistic in this regard. However, even assuming, *arguendo*, that states would not be forced into great reparative outlays, Rowe cannot be quite so dismissive of the publicity costs a state would incur as a result of litigation on its troops’ human rights violations. Defendant entities often incur such costs whether or not technical obstacles prevent litigation from generating reparative payments for victims.⁹⁵ Since

⁹² Dannenbaum, *supra* note 3, at 114 (emphasis added). *See also id.* at 156–57.

⁹³ For the United Nations, such measures include selecting high-caliber heads of mission and force commanders, issuing lawful orders, and managing logistics so as to be human rights compliant. *Id.* at 165, 167–68, 171, 175, 180–83. The United Nations Department of Peacekeeping Operations has recently re-emphasized the importance of selecting high quality force commanders and heads of mission. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 78 (2008). For the state, preventive measures include carefully selecting, promoting, and training its troops in advance of deployment, and – in accordance with Rowe’s policy prescription – disciplining and, where appropriate, subjecting to criminal prosecution those troops that fail to adhere to the standards required. *See* Dannenbaum, *supra* note 3, at 160–64.

⁹⁴ *Id.* at 160–62.

⁹⁵ *See, e.g.,* Rosemary Nagy, *Post-Apartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?*, 40 LAW & SOC’Y REV. 623, 627–28 (2006); Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC’Y REV. 271, 291 (2009). Perhaps in part for this reason, corporations are starting to show willingness to reach out-of-court settlements with plaintiffs bringing suit under the Alien Torts Statute, despite the fact that no such case has yet produced a final verdict in favor of the plaintiff. *See, e.g.,* Ed Pilkington, *13 Years after Ken Saro-Wiwa Execution, Oil Giant Shell to Pay Dollars 15.5m to the Ogoni Nine: Nigerian Activists Alleged Company Damaged Delta: Settlement Agreed despite Company’s Innocent Plea*, GUARDIAN (London), June 9, 2009 at 15 (reporting Shell’s settlement of \$15.5 million reached with family members of Ken Saro-Wiwa and eight other leaders of the Ogoni tribe of southern Nigeria, in whose execution Shell was alleged to have been complicit. Shell director Malcolm Brinded stated, “While we were

Rowe's prevention model relies heavily on the potency of public scrutiny in influencing states to act more responsibly with respect to their human rights obligations,⁹⁶ it is difficult to understand why he would not endorse the use of litigation as a powerful supplement to this process. Indeed, the potential impact of such litigation may well be more reliable than that of U.N. scrutiny. After all, the negative publicity Rowe seeks to mobilize stands to hurt the United Nations as well as states. The plaintiffs that initiate human rights litigation do not have the same conflict of interest.

In sum, Rowe is correct that prevention must be a priority. However, this does not mean the right of victims to proper recourse to remedy should be ignored. On the contrary, the development of the legal standard for determining the identity of the parties against whom claims for reparation may be brought remains an important task. Moreover, a properly calibrated liability standard can play a valuable role in contributing to the mission of prevention.

V. CONCLUSION

The debate over how to attribute responsibility for the human rights violations of U.N. peacekeepers is a complicated but pressing one. The United Nations will continue to deploy peacekeeping forces to many of the most war-ravaged regions in the world. These missions have the potential to perform a vital human rights function. Ensuring their efficacy in this regard is imperative. Equally, it is crucial to prevent peacekeeping forces from becoming the agents of human rights violations and to provide for the reparation of victims when such wrongs do occur. Achieving these various goals requires a collective effort to answer difficult questions of law and policy. The responses of Professors Rowe and Paust contribute constructively to that endeavor.

prepared to go to court to clear our name, we believe the right way forward is to focus on the future for Ogoni people." Meanwhile, as Pilkington reports, "Supporters of the legal action said the fact that Shell had walked away from the trial suggested the company had been anxious about the evidence that would have been presented had it gone ahead.").

⁹⁶ Rowe, *supra* note 2, at 80.