

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

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When United Nations peacekeepers violate human rights, they do immeasurable damage to their victims, their missions, and themselves. Reparation for these wrongs is essential for both rebuilding the trust that is needed for effective peacekeeping and affirming the human dignity of those who suffer the abuse. However, because of the unique status of peacekeepers as both troops in their respective national services and members of an international U.N. force, the question of which entity is liable for reparation is particularly complicated. This Article provides a comprehensive analysis of the law and practice of reparation for the human rights abuses of U.N. peacekeepers and advances a new interpretation of how the "effective control" standard of liability attribution should be applied in this context. Specifically, this Article finds that both the United Nations and troop-contributing states are subject to human rights law under certain circumstances. It also finds that both the United Nations and the troop-contributors are subject to the fundamental duty to remedy human rights violations for which they are responsible. The key question is how to determine, for a given situation, which international legal person is responsible for the human rights abuses of peacekeepers. Effective control is the correct governing principle. However, rather than "overall operational control" as advocated by a number of jurists and as applied in some courts, effective control must be understood to mean "control most likely to be effective in preventing the wrong in question." Applying this revised principle to the peacekeeping context, this Article proposes a five-category framework through which to assess the appropriate locus of responsibility for peacekeepers' human rights violations. Emphasizing the importance of considering the full complexity of the command and control relationships between states, the United Nations and peacekeepers, this framework significantly expands the liability of troop-contributing states from what remains de facto immunity under existing interpretations in the vast majority of situations. Finally, by implementing joint and several liability wherever feasible within the confines of effective control, the proposed framework seeks to maximize the avenues to remedy for victims without prejudice to the fairness and effectiveness of a framework that accurately locates those most responsible.

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INTRODUCTION

The blue helmets of the U.N. peacekeeping forces, currently worn by more than 80,000 troops, can today be seen in eleven different theaters.¹ Their arrival brings the anticipation of a new beginning, the hope of security and stability in the wake of the horror of war. For those advocating and awaiting their deployment, to amend the Biblical phrase, blessed indeed are the peacekeepers.² It is therefore particularly poignant when these soldiers of righteousness abuse their unique mandate by violating the human rights of the war-ravaged civilians that they have arrived to protect and the combatants that they hope to pacify. Yet such abuse has become painfully common.³

International human rights law dictates that when rights are violated, remedy must be provided.⁴ However, the unique legal situation of peacekeepers renders the question of liability unusually complicated. Still soldiers in their domestic national service, peacekeepers are also international personnel acting pursuant to Security Council authorization and formally placed under United Nations command and control.⁵ As elaborated below, this peculiar situation has spawned a legal regime that is both inadequate in meeting the needs of victims and inaccurate in properly allocating liability between the principal actors—the United Nations and the troop-contributing state.⁶ This Article's primary contribution is to propose a new liability framework for such situations—one that affirms, but fundamentally reinterprets the principle of "effective control" as it is used to apportion liability between two entities with genuine *de jure* connections to the actors over whose conduct that control is to be exercised.⁷ Rather than "overall operational control" as it has thus far been understood in the peacekeeping context,⁸ "effective control" must be understood to mean "control most likely to be effective in preventing the wrong in question."⁹ Grounded in that interpretation, the proposed liability framework better realizes the fundamental goal of attributing liability to the entity most responsible for the wrongdoing, thus structuring incentives so as to minimize violations, while simultaneously expanding the access of victims to juridical recourse and proper remedy.

1. UNITED NATIONS PEACEKEEPING OPERATIONS, BACKGROUND NOTE 1 (Aug. 31, 2009), available at <http://www.un.org/Depts/dpko/dpko/bnote010101.pdf> [hereinafter UNPO BACKGROUND NOTE].

2. This sentiment has been conveyed most recently in the long, impassioned campaign to deploy U.N. peacekeepers in the Darfur region of Sudan. See, e.g., Editorial, *Darfur Needs UN Peacekeepers Now*, N.Y. TIMES, May 11, 2006, at A36.

3. See *infra* Part I.A.

4. See *infra* Part I.B.

5. See *infra* notes 16–19 and accompanying text.

6. See *infra* Parts I.C.

7. See *infra* Part IV.

8. See *infra* Part III.D.

9. See *infra* Part III.E.

In its current use, “peacekeeping” can denote observer missions, classical consensual peacekeeping forces, so-called “peace enforcement” operations, transitional international civilian administrations, or a combination of the above, and typically involves a range of actors.¹⁰ As the *Peacekeeper’s Handbook* explains, peacekeeping uses “soldiers, police and civilians to restore and maintain peace.”¹¹ This Article focuses solely on peacekeeping forces¹²—military troops contributed by member states in whole contingents, rather than as individuals.¹³ As such, it addresses neither observer missions, whose participants are hired or accepted by the United Nations individually,¹⁴ nor civilian administrations, which follow a similar model.¹⁵ The analysis provided in this Article does, however, apply to the full scope of missions on which peacekeeping forces may be sent, from classical consensual missions to Chapter VII peace enforcement missions. For the sake of brevity, the terms “peacekeeper” and “Blue Helmet” will be used here to refer exclusively to a member of the military element of a peacekeeping operation.

The reason for focusing on peacekeeping *forces* is their unique hybrid legal status. As Moshe Hirsch explains, “[o]rdinarily, the members of national contingents, while remaining in the service of their state, become for the period of their assignment to the force international personnel under the authority of the U.N.”¹⁶ This puts peacekeepers in an odd position, because “although the soldiers within the UN forces are bound by the commitments made by their States of origin, the UN has always insisted on the fact that during the exercise of their mandate these troops are under the sole authority of the organization and not that of their respective States.”¹⁷ As Borhan Amrallah comments, peacekeeping forces “are composed of contingents drawn from various states owing their allegiance to their national governments,” yet at the same time “operating outside the territorial jurisdiction

10. On this diversity, see, for example, CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 304–05 (3d ed. 2008); ROBERT C.R. SIEKMANN, *NATIONAL CONTINGENTS IN UNITED NATIONS PEACE-KEEPING FORCES* 4–7 (1991); MICHAEL BOTHE, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 681–82 (Bruno Simma ed., Oxford University Press 2d ed. 2008) [hereinafter BOTHE]; Ray Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*, 14 *CRIM. L.F.* 153, 166–67 (2003); The Secretary-General, *Report of the Secretary General’s High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 210–30, U.N. Doc. A/59/565 (Dec. 2, 2004).

11. INTERNATIONAL PEACE ACADEMY, *PEACEKEEPER’S HANDBOOK* 7 (1984).

12. This is not an atypical restriction of scope. See SIEKMANN, *supra* note 10, at 5 (“Usually . . . the concept of peace-keeping is taken to refer to force-level operations *stricto sensu* . . .”).

13. BOTHE, *supra* note 10, at 687.

14. *Id.*

15. UNITED NATIONS, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING* 405 (2d ed. 1990) [hereinafter BLUE HELMETS].

16. MOSHE HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES* 66 (1995).

17. Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, 294 *INT’L. REV. OF THE RED CROSS* 227 (1993), available at <http://icrc.org/Web/Eng/siteeng0.nsf/html/57JMBH>.

of their parent state under the operational control of the U.N.”¹⁸ This bifurcation of the peacekeeper’s institutional and legal rights and responsibilities is reflected even in her attire, which is comprised of the national military uniform of her state supplemented with “standard United Nations accoutrements.”¹⁹ The precise nuances of the relationships between the peacekeeper and her state and the peacekeeper and the United Nations are discussed in greater detail below.²⁰ It is one of the central claims of this Article that the nature of the former relationship gives the state “effective control”²¹ over the peacekeeper in a wider range of circumstances than is acknowledged by existing practice in the apportionment of responsibility.

This Article proceeds in five Parts. Part I reports on the ways in which peacekeepers have been responsible for human rights violations against the populations they are deployed to benefit; argues responsible parties are legally obliged to repair such violations; and explains why this obligation is particularly important in the peacekeeping context. It then describes the deficient system of reparation currently employed with respect to such wrongdoing, highlighting in particular the significant obstacles that system places between victims and redress.

Part II outlines legal liability for international wrongdoing—a two-pronged framework that requires first, that the act in question can be attributed to the legal person in question; and second, that the act, once attributed, breaches one of that legal person’s international duties. Part II first addresses the second prong, and argues that international human rights law binds both the United Nations and troop-contributing states in the context of peacekeeping operations. This establishes that abuses of the kind catalogued in Part I are indeed breaches of international law, whether the United Nations or the troop-contributing state is attributed with those actions.

Part III addresses the first prong of the liability framework: the question of attribution. Critically important in this regard is the relationship between the United Nations, the troop-contributing member states, and the peacekeeping forces on the ground. Following an analysis of this relationship, Part III argues that current international practice fails to consider the full complexity of the peacekeeper’s context and, as a result, has developed a legal regime that does not properly and justly attribute responsibility.

Part IV then proposes this Article’s core contribution to international human rights law scholarship: a five-category liability scheme that better realizes the basic principle of “effective control” attribution while also expanding the access of victims to juridical recourse and proper remedy. Under

18. Borhan Amrallah, *The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-keeping Forces*, in 32 *REVUE EGYPTIENNE DE DROIT INTERNATIONAL* 57, 57 (1976).

19. The Secretary-General, *Draft Model Status of Forces Agreement for Peace-keeping Operations*, ¶ 37, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter *Model SOFA*].

20. See *infra* Part III.B.

21. This is the critical factor in determining to whom the peacekeeper’s acts are attributable. See *infra* Part III.A.

this scheme the human rights abuses of peacekeepers are either: (1) committed *ultra vires*, that is, without authorization from U.N. central command; (2) committed within the authorized sphere of discretion granted by the U.N. central command, but not pursuant to a U.N. order; (3) committed pursuant to an order from U.N. central command where the human rights abuse in question is also a war crime; (4) committed pursuant to an order from U.N. central command where the human rights abuse in question is *not* also a war crime; or (5) committed as a “forced omission” where the troops were not given the adequate support or resources to avoid the wrongful omission. Based on a revised understanding of the prevalent conception of “effective control” as articulated in the final Section of Part III, Part IV proposes that category (1) abuses fall under the sole legal liability of the troop-contributing state(s) in question; categories (2) and (3) abuses fall under the joint and several liability of the United Nations *and* the troop-contributing state; and categories (4) and (5) fall under the sole legal liability of the United Nations.

Finally, Part V provides a brief assessment of the implications of the proposed scheme of liability. This final Part first addresses an important objection to the proposed framework. It then explains why the proposed scheme of liability would improve the situation of human rights in peacekeeping by structuring incentives so as to reduce the incidence of human rights violations by peacekeepers and providing better recourse to remedy for victims when such violations do occur.

I. VIOLATIONS AND RECOURSE

A. *Peacekeepers and Human Rights Violations*

U.N. peacekeepers have, at one time or another, been charged with a range of human rights violations. Most prominent in recent years have been reports of sexual violence and abuse by U.N. peacekeepers, particularly in the Democratic Republic of the Congo (“DRC”). In 2004, Marc Lacey filed the following report from the DRC, where, since 1999, the United Nations has operated one of the most expensive peacekeeping forces in history,²² the U.N. Organization Mission in the Democratic Republic of the Congo (“MONUC”):

In the corner of the tent where she says a soldier forced himself on her, Helen, a frail fifth grader with big eyes and skinny legs, remembers seeing a blue helmet. . . . In this same eastern outpost, another United Nations peacekeeper, unable to communicate with a 13-year-old Swahili-speaking girl who walked past him,

22. MONUC’s budget for the current financial year (July 2009–June 2010) is \$1.35 billion, second only to its peacekeeping operation in Darfur. UNPO BACKGROUND NOTE, *supra* note 1, at 2.

held up a cookie and gestured for her to draw near. As the girl, Solange, who recounted the incident with tears in her eyes the other day, reached for the cookie, the soldier reached for her. She, too, said she was raped.²³

These anecdotal accounts are representative of a pervasive practice among members of MONUC.²⁴ Moreover, the problem extends far beyond the porous borders of the DRC.²⁵ As Vanessa Kent laments, the fact that “UN peacekeepers are the perpetrators of sexual exploitation and abuse . . . is [no longer] news.”²⁶ Indeed, “rape, trafficking in women and children, sexual enslavement and child abuse *often* coexist alongside peace operations.”²⁷ Sexual violence by U.N. peacekeepers has flared up in Timor Leste²⁸ and in the former Yugoslavia,²⁹ while contingents in Rwanda, Mozambique, and Cambodia have all been accused of sexually exploiting civilians.³⁰ A recent report by the U.N. High Commissioner for Refugees documents similar abuses in Guinea, Liberia, and Sierra Leone.³¹

Moreover, although sexual abuse has received particular attention, Blue Helmets have engaged in a wide range of other severe human rights violations. In Somalia, U.N. forces held detainees without charge and without notifying their families, denying them access to a lawyer and right of ap-

23. Marc Lacey, *In Congo War, Even Peacekeepers Add to Horror*, N.Y. TIMES, Dec. 18, 2004, at A1.

24. See, e.g., The Secretary-General, *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Dem. Rep. Congo*, U.N. Doc. A/59/661 (Jan. 5, 2005); Sandra Katrin Miller, *Accountability for the Conduct of UN-Mandated Forces Under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)*, in PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW 261, 267–69 (Roberta Arnold & Geert-Jan Alexander Knoops eds., 2006); Peter Heinlein, *Sex Abuse Charges Mar UN Peacekeeping*, VOICE OF AMERICA, Dec. 17, 2005, available at <http://www.voanews.com/english/archive/2004-12/2004-12-17-voa80.cfm>; Joseph Loconte, *The U.N. Sex Scandal*, WKLY. STANDARD, Jan. 3, 2005, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/081zxelz.asp>. The Secretary-General acknowledged “clear evidence that acts of gross misconduct have taken place” in MONUC and expressed “outrage” at the “shameful” behavior of U.N. actors. Lacey, *supra* note 23, at A1.

25. See Loconte, *supra* note 24 (“Allegations of sexual abuse or misconduct by U.N. staff stretch back at least a decade, to operations in Kosovo, Sierra Leone, Liberia, and Guinea.”).

26. Vanessa Kent, *Protecting Civilians from UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse*, in UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 44, 46 (Chiuyuki Aoi et al. eds., 2007).

27. *Id.* at 45 (emphasis added) (quoting Elisabeth Rehn & Ellen Johnson Sirleaf, *Women, War, Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building*, 1 PROGRESS OF THE WORLD’S WOMEN (2002)).

28. See Shukuko Koyama & Henri Myrntinen, *Unintended Consequences of Peace Operations on Timor Leste from a Gender Perspective*, in UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS, 23, 36–37 (Chiuyuki Aoi et al. eds., 2007).

29. Jennifer Gould, *Peacekeeping Atrocities: UN Soldiers Accused of Torture, Murder, Sexual Exploitation of Children*, VILLAGE VOICE, June 24, 1997, at 38.

30. *Id.* at 40.

31. UNHCR & SAVE THE CHILDREN-UK, NOTE FOR IMPLEMENTING AND OPERATIONAL PARTNERS ON SEXUAL VIOLENCE AND EXPLOITATION: THE EXPERIENCE OF REFUGEE CHILDREN IN GUINEA, LIBERIA AND SIERRA LEONE BASED ON INITIAL FINDINGS AND RECOMMENDATIONS FROM ASSESSMENT MISSION, OCT. 22–NOV. 30, 2001 (2002), <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.pdf?id=3c7cf89a4&tbl=PARTNERS>.

peal.³² Some peacekeepers brutally tortured³³ and murdered detainees,³⁴ while others indiscriminately fired upon civilians in the street.³⁵ The abuses in Somalia generated a unique frenzy of media attention in large part because some of the more gruesome atrocities were caught on camera.³⁶ As Jennifer Gould notes, however, “[s]hocking as it is, the UN scandal in Somalia is no anomaly.”³⁷ The Dutch contingent of the U.N. peacekeeping force in Bosnia and Herzegovina, the U.N. Protection Force (“UN-PROFOR”), has been accused of actively and forcibly expelling Bosnian Muslim civilian refugees from the Dutch military base in Srebrenica,³⁸ condemning them to immediate death at the hands of the Bosnian Serb forces in Europe’s most recent genocide.³⁹ Lest these examples suggest that such human rights violations are a contemporary phenomenon, recall the considerable abuses committed by the 1960s U.N. Operation in the Congo (“ONUC”),⁴⁰ including the deliberate targeting of hospitals for mortar shelling.⁴¹

Human rights abuses are deeply unsettling irrespective of their source. However, human rights abuse by foreigners, whose very deployment is intended to herald long-awaited human rights *protection*, is uniquely invasive and destructive. In Kent’s words, “when UN peacekeepers . . . mandated to safeguard local populations . . . are accused of [widespread rape], we are looking not only at gross violations of human rights but at the perversion of [the] international system”⁴² U.N. emergency relief coordinator Jan Egeland, reacting to the situation in the DRC, stated succinctly “[i]f

32. See Mark Huband, *UN Forces Deny Somali Detainees Legal Rights*, GUARDIAN, Sept. 25, 1993, at 14; Keith B. Richburg, *Somalis’ Imprisonment Poses Questions about U.N. Role*, WASH. POST, Nov. 7, 1993, at A45.

33. See *Somalia. Good Intentions Turned to Shame*, ECONOMIST (London), July 5, 1997, at 48; Jennifer Gould, *Military Disgrace: Child Roasted on the Peacekeepers’ Pyre*, OBSERVER (London), June 22, 1997, at 6; Reuters, *Italy Confirms Army Abuses in Somalia but Report Says Senior Officers Largely Blameless*, TORONTO STAR, Aug. 9, 1997, at A12.

34. Howard Schneider, *Canadian Panel Blames Brass For Army Misdeeds in Somalia; Violence Linked to ‘Leadership Failures’*, WASH. POST, July 3, 1997, at A22.

35. See Gould, *supra* note 33; Mark Huband, *Somalia Explodes*, GUARDIAN, Dec. 31, 1993, at 6.

36. Robert Graham, *Italy to Probe Torture Claims*, FINANCIAL TIMES, June 14, 1997, at 2; Gould, *supra* note 33.

37. Gould, *supra* note 29, at 38.

38. Lula Ahrens, *Hague Court Dismisses Srebrenica Case*, RADIO NEDERLAND WERELDOMROEP, Sept. 10, 2008, available at <http://www.rnw.nl/internationaljustice/tribunals/ICTY/080910-Nuhanovic-Srebrenica>.

39. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 108, ¶ 297 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>; Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 5–38 (Apr. 19, 2004).

40. FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 189–97 (1966); ROBERT SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 188–91 (1968).

41. SIMMONDS, *supra* note 40, at 189.

42. Kent, *supra* note 26, at 44.

peacekeepers and aid workers abuse the civilian population, then we have really, really failed”⁴³

This perversion of the peacekeeper’s role is not only inherently reprehensible, it also undermines the efficacy of the force in pursuing its mission. Joint A.U.-U.N. Special Representative for Darfur, Rodolphe Adada describes “local trust” as the “most important capital for any peacekeeper.”⁴⁴ The damage done to that trust when peacekeepers violate human rights is manifest in the reactions of victims and their associates. In the wake of an incident in which U.N. forces fired indiscriminately into a crowd of civilians in Somalia, a nurse at one of the hospitals to which the injured were carried reacted by stating simply, “[w]e are not in the United Nations. We are out of the UN.”⁴⁵ Expressing the breakdown in a different way, one of the young Congolese rape victims described by Lacey explained, “[w]henver I see one of [the peacekeepers], I remember what happened. . . . I’m afraid of them.”⁴⁶ Having had longer to reflect on the expulsion of his parents from the U.N. compound in Srebrenica in 1995, Hasan Nuhanovic’s reaction is no less anguished: “I was betrayed . . . Dutch battalion soldiers UN officials who knew me and my family personally . . . sent my family out to die.”⁴⁷ These feelings of alienation, fear, and betrayal among local populations reveal the debilitating impact of human rights abuses on the United Nations’ peacekeeping mission and illustrate the challenge of recovering the trust that is essential to its work.

B. *The Obligation to Provide Remedy for Wrongdoing*

Nothing can fully repair the damage wrought by human rights violations, nor is there any easy way to restore trust in those responsible. However, this challenge cannot be allowed to paralyze remedial mechanisms. On the contrary, it is a fundamental principle of human rights law that when human rights are violated, a corollary right to remedy is triggered.⁴⁸ This is a consequence of a broader international legal principle:

Whenever a duty established by any rule of international law has been breached by an act or an omission, a new legal relationship

43. Heinlein, *supra* note 24.

44. Statement by JSR Rodolphe Adada to Visiting Security Council Delegation in El-Fasher (June 5, 2008), <http://unamid.unmissions.org/Default.aspx?ctl=Details&tabid=900&mid=1073&ItemID=655>.

45. Huband, *supra* note 35, at 6.

46. Lacey, *supra* note 23, at A10.

47. Ahrens, *supra* note 38.

48. American Convention on Human Rights, art. 25, July 18, 1978, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, Europ. T.S. No. 5; International Covenant on Civil and Political Rights, art. 2(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, art. 25, July 11, 2003 (adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo).

automatically comes into existence. This relationship is established between the subject to which the act is imputable, who must [respond] by making adequate reparation, and the subject who has a claim to reparation because of the breach of duty.⁴⁹

This principle applies to all international persons. Indeed, the International Law Commission has stated expressly that the duty to furnish reparation for breach of a legal wrong applies to both states⁵⁰ and international organizations (including the United Nations)⁵¹ whenever they are legally responsible.

C. *Domestic and Supranational Courts - Recourse Denied*

In current practice, however, troop-contributing states have been absolved of responsibility, even in cases where U.N. control over the acts leading to the violation is weak. The United Nations, though technically considered liable, is immune from process in any national or supra-national court.⁵²

The outcomes of two recent cases before a Dutch court demonstrate the difficulty involved in obtaining reparation for the violations of peacekeepers through national courts. In *H.N. v. the Netherlands*,⁵³ the District Court in The Hague was presented with civil claims by family members of victims of the Srebrenica genocide. The plaintiffs claimed that the Dutch government was responsible for the actions of its troops, whom they accused of forcibly expelling Bosnian Muslim refugees from the U.N. compound and thus condemning those refugees to immediate slaughter at the hands of Ratko Mladic's Bosnian Serb Army.⁵⁴ This occurred despite the Dutch contingent's orders to "[t]ake all reasonable measures to protect refugees and civilians in your care."⁵⁵ The Netherlands denied any wrongfulness or liability towards the plaintiff.⁵⁶

Finding in favor of the defense, the court held that the Netherlands bore no responsibility for the acts or omissions of Dutchbat, reasoning that the "actions of a contingent of troops made available to the United Nations for

49. Amrallah, *supra* note 18, at 70. See also *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); *Spanish Zone of Morocco Claims*, 2 REV. INT'L ARB. AWARDS 615, 641 (1923); U.N. Int'l Law Comm'n, *Report on the Work of its Twenty-Eighth Session*, [1976] 2 Y.B. Int'l L. Comm'n 95-97, 110-12, U.N. Doc. A/CN.4/SER.4/1976/Add.1 (Part 2).

50. U.N. Int'l Law Comm'n, *Report of the International Law Commission, Draft Articles of State Responsibility*, U.N. GAOR, 53rd Sess., Supp. No. 10, art. 31(1), U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 20 [hereinafter *Draft Articles of State Responsibility*].

51. U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of International Organisations*, art. 34(1), U.N. Doc. A/CN.4/L.720 (July 25, 2007).

52. See *infra* notes 61-67, 74-79, 82-85 and accompanying text.

53. *H.N. v. the State of the Netherlands* (Ministry of Def. and Ministry of Foreign Affairs), *Rechtbank 's-Gravenhage* [HA ZA] [District Court in The Hague], Sept. 10, 2008, 265615 / HA ZA 06-1671 (Neth.).

54. Ahrens, *supra* note 38.

55. *H.N.*, 265615 / HA ZA 06-1671 at ¶ 2.12.

56. *Id.* ¶ 2.18.

the benefit of the UNPROFOR mission . . . should be attributed strictly, as a matter of principle, to the United Nations.”⁵⁷ Moreover, the court continued, the acts of Dutchbat could not be concurrently attributed to the Netherlands, because there was no evidence that the Dutch government “cut across the United Nations command structure” by ordering Dutchbat to ignore or disobey UNPROFOR orders.⁵⁸ Claims against the Netherlands were therefore dismissed.⁵⁹

In *Mothers of Srebrenica v. the Netherlands* the District Court in The Hague was presented with further civil claims arising out of the Srebrenica tragedy, in this case brought against both the Dutch government and the United Nations.⁶⁰ The United Nations failed to appear in its own defense, instead submitting a letter expressly invoking its immunity.⁶¹ This, together with an affirming submission from the Dutch government,⁶² was sufficient to garner a favorable ruling from the court, which determined that international legal obligations enshrined in the Genocide Convention, Article 6 of the European Convention on Human Rights (“ECHR”) and Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) were not sufficient to overcome the immunity of the United Nations.⁶³ As such, the court held that it had “no jurisdiction to hear the action against the United Nations.”⁶⁴

In combination, *H.N.* and *Mothers of Srebrenica* effectively: (1) absolved the Dutch government from any responsibility for the actions of its contingent in Srebrenica, (2) attributed exclusive responsibility to the United Nations despite little evidence of U.N. influence over the impugned acts, and (3) held that U.N. immunity protected it from civil claims made pursuant to leading human rights treaties such as the ICCPR, ECHR, and the Genocide Convention. The last finding was not one of immunity before Dutch courts in particular; it was a finding of U.N. immunity before national courts in general. Indeed, the holding was based on Article 105(1) of the U.N. Charter,⁶⁵ the practice of all courts with respect to that provision,⁶⁶ and standards

57. *Id.* ¶¶ 4.10–11.

58. *Id.* ¶¶ 4.14.1, 4.15.

59. *Id.* ¶ 4.15.

60. Ass’n of Citizens “Mothers of Srebrenica” v. the State of the Netherlands and the United Nations, Rechtbank’s-Gravenhage [HA ZA] [District Court in The Hague], July 10, 2008, 295247 / HA ZA 07-2973 (Neth.).

61. *See id.* ¶ 5.13; *see also* Guido den Dekker, Legal Commentary, Immunity of the United Nations before the Dutch courts, Hague Justice Portal, July 28, 2008, <http://www.haguejusticeportal.net/eCache/DEF/9/569.html>.

62. *See* *Mothers of Srebrenica*, 295247 / HA ZA 07-2973 at ¶3.1.

63. *Id.* ¶¶ 5.17–5.26.

64. *Id.* ¶ 6.1.

65. *Id.* ¶¶ 5.15–5.16; U.N. Charter art. 105, § 1.

66. *Mothers of Srebrenica*, 295247 / HA ZA 07-2973 at ¶ 5.13 (“[I]n international-law practice the absolute immunity of the UN is the norm and is respected.”).

of international law in determining the supremacy of that immunity over obligations enshrined in human rights treaties.⁶⁷

The European Court of Human Rights (“ECtHR”) has recently come to an even more restrictive finding at the supra-national level. In the joined cases of *Behrami v. France* and *Saramati v. France* the court was presented with human rights claims against states that had contributed troops to the United Nations-authorized NATO Kosovo Force (“KFOR”).⁶⁸ *Behrami* involved a claim against France on the grounds that its troops had failed to clear a number of unexploded cluster bombs, which detonated on a group of boys playing, killing one and injuring another.⁶⁹ *Saramati* involved a claim against France and Norway demanding reparation for the allegedly illegal pre-trial detention of a Kosovar civilian for half a year at the hands of KFOR, first under the Norwegian Commander of KFOR and subsequently under his French successor.⁷⁰ The court held that an interim U.N. administration for Kosovo (“UNMIK”), not KFOR, was responsible for failing to clear the cluster bombs that killed the two Behrami children,⁷¹ thus rendering moot any consideration of the apportionment of liability between troop-contributors and the United Nations.⁷² The detention of Saramati, however, was deemed to be the responsibility of KFOR.⁷³ The question, then, was who was responsible for KFOR. Despite an even more remote relationship between the acting troops and U.N. decision-makers than was the case in *H.N.*, the ECtHR also held that the impugned actions were the responsibility of the United Nations.⁷⁴ The court reasoned that, although the United Nations had delegated operational control of KFOR to NATO, it retained “ultimate authority and control” over the security of the mission, only delegating operational command to KFOR.⁷⁵ It was sufficient that the United Nations had the authority to delegate such control, that it delegated it within specific limits, and that it was kept abreast of events on the ground by regular reports—no direct U.N. influence over the impugned conduct was required to attribute responsibility to the United Nations.⁷⁶

Having attributed the actions of KFOR to the United Nations, the court observed that the United Nations is not a party to the ECHR,⁷⁷ rendering the court jurisdictionally incompetent to hear any claim against the Organi-

67. *See id.* ¶ 5.26.

68. *Behrami v. France and Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, 45 Eur. H.R. Rep. 85 (2007) [hereinafter *Behrami*].

69. *Id.* ¶¶ 5–7.

70. *Id.* ¶¶ 8–17, ¶¶ 64–65.

71. *Id.* ¶¶ 125–27.

72. *See id.* ¶¶ 142–43.

73. *See id.* ¶ 124.

74. *Id.* ¶ 141.

75. *Id.* ¶¶ 133–35.

76. *Id.* ¶ 134.

77. *Id.* ¶ 144.

zation.⁷⁸ Moreover, the court held that the troop-contributing states could transfer sovereignty over their troops to the United Nations without retaining their ECHR responsibilities, because the United Nations was acting in pursuit of its “fundamental mission . . . to secure international peace and security,” the efficacy of which would be undermined if troop-contributing states could scrutinize orders given to their troops.⁷⁹

The primary implication of *Behrami*, *H.N.*, and *Mothers of Srebrenica* is that unless troop contingents followed their own governments’ explicit directives to *disobey* orders received from U.N. Command,⁸⁰ the wrongs of peacekeepers are attributable exclusively to the United Nations, even if the organization and its appointees had no significant influence over the impugned conduct.⁸¹ The United Nations, in turn, is immune from civil process in any national or supranational court.

*D. Recourse at the United Nations—The Dependence of Victims
on U.N. Benevolence*

Of course, neither the Dutch district court nor the ECtHR was wrong to find the United Nations immune from legal process in their respective fora. Elaborating the Charter’s Article 105 immunity of the United Nations,⁸² the Convention on the Privileges and Immunities of the United Nations provides, “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”⁸³ Article 8, Section 29 further provides that

The United Nations shall make provisions for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

78. European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 19, 30, 33, 34, Nov. 4, 1950, Europ. T.S. No. 5.

79. *Behrami*, *supra* note 68, ¶ 149.

80. *H.N.* held that the state must actively cross the lines of U.N. authority to be attributed with the act, and noted that even if the contingent were to receive parallel orders from the Netherlands and the U.N., that would provide “insufficient grounds to deviate from the usual rule of attribution.” *H.N. v. the State of the Netherlands* (Ministry of Def. and Ministry of Foreign Affairs), *Rechtbank’s-Gravenhage* [HA ZA] [District Court in The Hague], Sept. 10, 2008, 265615 / HA ZA 06-1671, ¶ 4.14.1 (Neth.).

81. In neither *H.N.* nor *Saramati* did the holding depend on any evidence of direct U.N. influence (for example, via a specific order mandating the act in question). Rather, both cases were decided with reference to the general command structure and the finding that it had not been actively violated.

82. UN Charter art. 105, § 1 (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”).

83. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, art. 2, § 2.

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.⁸⁴

The International Court of Justice (“ICJ”) has confirmed that these provisions grant the United Nations full immunity from legal process in national courts for any acts attributable to the organization.⁸⁵

Moreover, if any dispute should arise as to the “appropriate modes of settlement” provided by the United Nations, the only recourse available to an aggrieved party under the Convention is for the U.N. General Assembly or Security Council to request an advisory opinion (i.e. a non-binding declaration) from the ICJ.⁸⁶ This scenario led the Venice Commission to note bluntly in its *Opinion on Human Rights in Kosovo*, “[t]here is no *international* mechanism of review with respect to acts of UNMIK and KFOR.”⁸⁷ The lack of an international judicial forum in which to bring suit against the United Nations reflects the fact that existing international dispute resolution mechanisms were designed to deal with states, not international organizations, a scenario that “poses an obstacle to bind[ing] international organizations to adjudicate in such forums.”⁸⁸ This general problem is only exacerbated with respect to the United Nations, given the organization’s far-reaching immunity from legal process in national courts.

Pursuant to its obligations under Section 29 of the Convention on Privileges and Immunities, the United Nations provides in Article 51 of its Model Status of Forces Agreement for Peacekeeping Operations (“Model SOFA”) that

any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of the {host country/territory} do not have jurisdiction . . . shall be settled by a standing claims commission to be established for that purpose. One member of

84. *Id.* art. 8, § 29.

85. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, ¶ 66 (Apr. 29) (“[A]ny such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that ‘[t]he United Nations shall make provisions for’ pursuant to Section 29.”).

86. *Convention on the Privileges and Immunities of the United Nations*, *supra* note 83, art. 8, § 30. Though the Convention does not specify which legal person may make the request, Mahnouch Arsanjani explains, “[s]tates which may have claims against the U.N. have no direct access to the I.C.J. They must have the General Assembly or the Security Council request an advisory opinion.” Mahnouch H. Arsanjani, *Claims Against International Organizations: Quis custodiet ipsos custodes*, 7 *YALE J. WORLD PUB. ORD.* 131, 172 (1981). Even this non-binding system of recourse was challenged by Judge Koroma in his dissent from the above-cited ICJ opinion. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 85.

87. European Commission for Democracy through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, ¶ 75, No. 280/2004 (Oct. 8–9, 2004) [hereinafter Venice Commission].

88. HIRSCH, *supra* note 16, at 57.

the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government [A]ll decisions shall require the approval of any two members. The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government permit an appeal⁸⁹

As the template for individualized agreements between the United Nations and the state(s) in which peacekeepers are to be deployed, the Model SOFA outlines the core rights and obligations of peacekeeping forces. However, despite recognizing the Article 51 standing claims commission as the only independent avenue for recourse against the United Nations,⁹⁰ the Secretary-General has repeatedly acknowledged that no such commission has ever been established.⁹¹ Instead, those seeking to bring claims against the United Nations for wrongs associated with peacekeeping have been left with two grossly inadequate procedures.

The first and most common⁹² alternative is the internal U.N. “local claims review board,”⁹³ which the Secretary-General has described as leaving “the investigation, processing and final adjudication of the claims entirely in the hands of the Organization.”⁹⁴ Claims under this procedure are brought to panels of three or more U.N. staff members for disposition.⁹⁵

Internal claims review boards are flawed for three reasons. First, the power held by the United Nations as adjudicator of the claim is incompatible with a fair process given its status as one of the parties to the dispute.⁹⁶ This problem is only exacerbated by the fact that the boards’ rulings are not made

89. *Model SOFA*, *supra* note 19, art. 51.

90. The Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶ 10, U.N. Doc. A/51/903 (May 21, 1997) [hereinafter *Secretary-General’s 1997 Peacekeeping Budget Report*]; The Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶¶ 20–21, U.N. Doc. A/51/389 (Sept. 20, 1996) [hereinafter *Secretary-General’s 1996 Peacekeeping Budget Report*].

91. *Secretary-General’s 1997 Peacekeeping Budget Report*, *supra* note 90, ¶ 8; *Secretary-General’s 1996 Peacekeeping Budget Report*, *supra* note 90, ¶ 22; 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, Adopted by the General Assembly on February 13, 1946*, ¶ 17, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995). See also Daphna Shraga, *U.N. Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT’L L. 406, 409 (2000).

92. Shraga, *supra* note 91 (noting that review boards have been established for almost every peacekeeping operation).

93. *Secretary-General’s 1996 Peacekeeping Budget Report*, *supra* note 90, ¶ 22.

94. *Id.* ¶ 20.

95. Frédéric Mégret, *The Vicarious Responsibility of the United Nations, in UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS* 250, *supra* note 26, at 261.

96. See Arsanjani, *supra* note 86, at 145; Mégret, *supra* note 95, at 263. This led the Venice Commission to demand that “a system of independent review of UNMIK and KFOR acts for conformity with international human rights standards be established as a matter of urgency.” Venice Commission, *supra* note 87, ¶ 96.

public.⁹⁷ Second, the review boards are not instituted as a matter of course at the beginning of a peacekeeping operation, but are “set up [by the United Nations] when [it determines that] the need arises,”⁹⁸ compounding the power imbalance between the parties to the claim and creating the risk that claimants may be denied a forum when they initially try to bring a claim.⁹⁹ Third, as the number of claims made against the United Nations has grown over the years, the review boards have, in the words of the Secretary-General, experienced “growing backlogs and longer delays in the settlement of claims”¹⁰⁰ with the result that “a significant number of claims remain[] unresolved at the end of the [review boards’] liquidation period” following the termination of the U.N. mission.¹⁰¹

The second alternative to the non-existent Article 51 claims commission is a process whereby the United Nations settles claims *en masse* through negotiation with the host government,¹⁰² which then distributes the agreed lump sum to individual claimants however it deems equitable.¹⁰³ The Secretary-General has articulated the obvious advantages to the United Nations of the *en masse* negotiation alternative.¹⁰⁴ However, objectively, the procedure is deeply troubling.

First, effective remedy depends largely on a host government that has the capacity and nous to pursue a successful negotiation with the United Nations.¹⁰⁵ International diplomatic power is not a characteristic typical of a state hosting peacekeepers. Thus, the leading examples of successful *en masse* claims negotiations are those that were conducted not by host governments, but by Belgium, Switzerland, Greece, Luxembourg, and Italy following harms inflicted on their citizens by the United Nations Operation in the Congo (“ONUC”) in the 1960s.¹⁰⁶ More typically, Somalia in the 1990s

97. Mégret, *supra* note 95, at 262. This opacity has provoked scathing criticism from Kosovo’s Ombudsperson. OMBUDSPERSON INSTITUTION IN KOSOVO, SECOND ANNUAL REPORT, ADDRESSED TO MR. MICHAEL STEINER, SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS, at 2 (July 10, 2002), available at <http://www.ombudspersonkosovo.org/repository/docs/E6020710a.pdf>.

98. *Secretary-General’s 1996 Peacekeeping Budget Report*, *supra* note 90, ¶ 25.

99. Two years after the Security Council authorized UNMIK and KFOR, there were no functioning claims procedures for either body. See OMBUDSPERSON INSTITUTION IN KOSOVO, FIRST ANNUAL REPORT, ADDRESSED TO MR. HANS HAEKKERUP, SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL OF THE UNITED NATIONS, at 11 (July 18, 2001), available at <http://www.ombudspersonkosovo.org/repository/docs/E6010718a.pdf>.

100. *Secretary-General’s 1996 Peacekeeping Budget Report*, *supra* note 90, ¶ 26.

101. *Id.* ¶ 28.

102. *Id.* ¶ 34.

103. *Id.*; Letter from the Secretary-General of the United Nations to the Minister for Foreign Affairs for Belgium, Concerning the Settlement of Claims Lodged Against ONUC by Belgian Nationals, Annex 1, at 2, U.N. Doc. S/6597 (Feb. 20, 1965) (stipulating that “[t]he distribution to be made of the sum referred to in the preceding paragraph shall be the responsibility of the Belgian Government”).

104. *Secretary-General’s 1996 Peacekeeping Budget Report*, *supra* note 90, ¶ 35.

105. *Id.* ¶ 37 (“The choice of a lump-sum settlement as a mode of handling third-party claims is largely dependent on the State’s willingness to espouse the claims of its nationals.”).

106. See, e.g., U.N. Int’l Law Comm’n, *Report of the International Law Commission on Its Fifty-Ninth Session*, U.N. GAOR, 62nd Sess., Supp. No. 10, at 209-0, U.N. Doc. A/62/10 (May 7–June 5 & Jul.

failed in its “responsibility . . . to seek redress [from the United Nations] for the harms suffered by its own citizens . . . [m]ost likely as a result of the lack of an organized government in Mogadishu”¹⁰⁷ Second, even when a payment is made, just remedy depends on the government’s willingness and capacity to fairly distribute the agreed sum among the individual claimants. This asks a lot of an administration presiding over a divided and unstable society. Finally, negotiated settlements may appear to be humanitarian actions rather than legal responses to rightful claims¹⁰⁸ and may therefore communicate a demeaning message to victims.

The generally bleak financial situation of the United Nations presents an additional obstacle to adequate reparation from the organization, whether via the claims review board or through lump sum negotiation. Fiscal constraints have rendered the United Nations unable to reimburse troop or equipment contributors for some time, causing commentators to talk of the U.N.’s “financial crisis” leading to an “economic recession” in peacekeeping.¹⁰⁹ At the end of August 2009, the United Nations reported over \$3.7 billion in outstanding contributions for peacekeeping.¹¹⁰ This impacts the issue of remedies directly because any claim against the United Nations is to be satisfied from U.N. funds; as the International Law Commission (“ILC”) explains, organizations like the United Nations are akin to limited liability companies in that “no subsidiary obligation of [an international organization’s] members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.”¹¹¹

In sum, the problems with internal claims review boards and lump sum negotiations run deep. Nonetheless, with domestic and supranational courts attributing the United Nations with full and exclusive responsibility for the human rights abuses of Blue Helmets, these are the only mechanisms through which victims of those abuses can seek redress. Of course, if the United Nations is properly attributed with full and exclusive responsibility for such wrongs, the inadequacy of its remedial mechanisms is not reason enough to attribute responsibility to another actor. However, the current

9–Aug. 10, 2007) [hereinafter DARIO Commentary (2007)]; Secretary-General’s 1996 Peacekeeping Budget Report, *supra* note 90, ¶ 36; Hirsch, *supra* note 16, at 69–70.

107. Mark Gibney, Katarina Tomaševski & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 280 (1999).

108. Letter from the Secretary-General to the Acting Permanent Representative of the Union of Soviet Socialist Republics, at 1, U.N. Doc. S/6597 (Aug. 6, 1965) (stating that such payments may be motivated by legal factors, but may also be motivated by “considerations of equity and humanity which the United Nations cannot ignore.”). *But see* Arsanjani, *supra* note 86, at 144 (terming the payments an “obligation”).

109. *See, e.g.,* Stuart Gordon, *Icarus Rising and Falling: The Evolution of UN Command and Control Structures*, in ASPECTS OF PEACEKEEPING 19, 34 (D.S. Gordon & F.H. Toase eds., 2001).

110. UNPO BACKGROUND NOTE, *supra* note 1. The issue is not new; as Frederick Fleitz notes, “[f]unding problems have hampered all U.N. peacekeeping operations since the 1950s.” FREDERICK H. FLEITZ, JR., PEACEKEEPING FIASCOES OF THE 1990S: CAUSES, SOLUTIONS, AND U.S. INTERESTS 77 (2002).

111. DARIO Commentary (2007), *supra* note 106, at 215.

situation emphasizes the importance of carefully considering how responsibility for peacekeepers' human rights abuses should be attributed.

II. THE SECOND PRONG OF THE TWO-PRONG TEST FOR INTERNATIONAL LIABILITY: BREACHING AN INTERNATIONAL DUTY

Per the ILC Draft Articles of State Responsibility and the (as yet incomplete) Draft Articles on the Responsibility of International Organizations, there are two cumulative criteria for finding a state or international organization responsible for an international wrong. First, the act or omission in question must be attributable to the state or organization.¹¹² Second, the act or omission in question must constitute a breach of an international obligation of the state or organization.¹¹³ These criteria are addressed here in reverse order—this Part considers the second prong, Part III considers the first.

Even before considering the legal obligations that the United Nations or troop-contributing states might breach in the context of peacekeeping operations, however, it is first necessary to address a preliminary matter. For an entity to bear international obligations, the breach of which would render that entity liable at international law, it must first be established that the entity is a legal person. It is a long-established, and indeed foundational, international legal principle that states are legal persons under international law.¹¹⁴ The international legal personality of the United Nations is by now equally undeniable. It is explicitly codified in Article I, Section 1 of the Convention on Privileges and Immunities¹¹⁵ and was affirmed without equivocation by the ICJ when it considered the question just four years into the United Nations' existence.¹¹⁶ More recently, the ILC stipulated that just as "[e]very internationally wrongful act of a State entails the international responsibility of that State,"¹¹⁷ so "[e]very internationally wrongful act of an international organization [including the United Nations] entails the international responsibility of the international organization."¹¹⁸

With the international legal personality of both the United Nations and the troop-contributing state thus affirmed, it is clear that either entity can be held liable for the legal wrongs for which it is responsible (albeit that there exists no independent judicial forum for making claims against the

112. *Draft Articles of State Responsibility*, *supra* note 50, art. 2(a); Int'l Law Comm'n, *Responsibility of International Organizations*, art. 3(2)(a), U.N. Doc. A/CN.4/L.632 (2003) [hereinafter DARIO (2003)].

113. *Draft Articles of State Responsibility*, *supra* note 50, art. 2(b); DARIO (2003), *supra* note 112, art. 3(2)(b).

114. *See, e.g.*, Paul S. Reinsch, *International Law*, in 12 MODERN AMERICAN LAW 113, 121 (Eugene Allen Gilmore & William Charles Wermuth eds., 1914).

115. Convention on the Privileges and Immunities of the United Nations, *supra* note 83, art. 1, § 1.

116. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

117. *Draft Articles of State Responsibility*, *supra* note 50, art. 1.

118. DARIO (2003), *supra* note 112, art. 3(1).

former). The first task, then, is to establish the relevant legal obligations that these persons may breach.

The law governing peacekeeping operations is found in ad hoc resolutions and regulations passed by the appropriate U.N. body; a variety of bilateral and multilateral agreements among troop-contributing states, the United Nations, and the host state; and the accumulation of past peacekeeping rules and practice.¹¹⁹ In addition to these specifically tailored provisions, however, the various actors remain subject to international law more generally.¹²⁰ In determining whether the human rights violations of U.N. peacekeepers are breaches of international obligations of either troop-contributing states or the United Nations, it is necessary first to determine whether human rights law applies in the peacekeeping context; that is, whether the kinds of acts described in Part I.A, *supra*, are in fact violations of human rights law. Thus far, this Article has assumed that they are, but this position requires substantiation.

A. *The Extra-Territorial Human Rights Obligations of States*

The generally accepted standard for the application of international human rights law to agents of a state acting outside the territory of that state is “effective control.” Effective control can be exerted over either the foreign territory, bringing all individuals within that territory under the responsibilities of the controlling state, or over specific individuals (in cases of detention) bringing only those specific individuals under the human rights responsibilities of the controlling state.

The applicability of human rights law when a state exerts effective control over a foreign territory is well supported. In its 1971 *Namibia* advisory opinion, the ICJ held that “[t]he fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law”¹²¹ The relevance of that holding to human rights was elaborated in the court’s *Wall* advisory opinion,¹²² which held that the ICCPR,¹²³ the International Covenant on Social, Economic and Cultural Rights (“ICESCR”),¹²⁴ and the Convention on the Rights of the Child (“CRC”)¹²⁵ each apply extra-territorially whenever the impugned state exercises effective control over the foreign territory. The *Armed Activi-*

119. Oscar Schachter, *The Uses of Law in International Peace-keeping*, 50 VA. L. REV. 1096, 1099–100 (1964).

120. *See id.* at 1100.

121. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, 54 (June 21).

122. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

123. *Id.* ¶¶ 108–11.

124. *Id.* ¶ 112.

125. *See id.* ¶ 113.

ties case—in which the ICJ found Uganda liable for actions in the DRC that violated the ICCPR, the CRC, and the African Charter on Human and Peoples' Rights (“ACHPR”)—reiterated this point.¹²⁶

Commenting on the ICCPR, the Human Rights Committee has also endorsed the principle of effective control over territory and even applied it explicitly to peacekeeping operations, finding that:

[A] State [P]arty must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. . . . [T]he enjoyment of Covenant rights . . . must . . . be available to all individuals, regardless of nationality . . . who may find themselves . . . subject to the jurisdiction of the State Party. [This includes] those [persons] within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.¹²⁷

Similarly, the ECtHR held in its hearing on preliminary objections in *Loizidou v. Turkey* that:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control¹²⁸

Loizidou is just one ruling in a line of particularly inconsistent ECtHR jurisprudence.¹²⁹ However, in even its most restrictive interpretation of the extraterritorial reach of the ECHR, the court in *Banković v. Belgium* accepted that the principle of effective control remained valid, albeit only within the *espace juridique* of the Convention.¹³⁰ This restrictive interpretation appears

126. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶¶ 215–20 (Dec. 19).

127. U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

128. *Loizidou v. Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. 7, 24 (1995).

129. Josephine Lett, *The Age of Interventionism: The Extraterritorial Reach of the European Convention on Human Rights*, in *PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW* 117, 137 (Roberta Arnold & Geert-Jan Alexander Knoops, eds., 2006) (“the most consistent factor in the jurisprudence of the European Court of Human Rights is its lack of consistency.”).

130. *Banković v. Belgium*, 123 Eur. Ct. H.R. 335, 354–55 (2001).

to have loosened recently—most notably in *Issa v. Turkey*¹³¹—leading Lett to argue, that:

[t]he reality is that the ECHR may travel with [peace enforcement] troops . . . [protecting even those] victims in countries not party to the Convention [and therefore supposedly outside of its *espace juridique*] . . . *Banković* . . . did not really close the door on this debate.¹³²

Overall, then, there is firm support for the extra-territorial application of human rights obligations in situations of effective territorial control. There are, of course, debates about what constitutes effective territorial control. As noted by Cordula Droege, the ECtHR in *Ilaşcu v. Moldova and Russia*¹³³ “found Russia to be responsible for human rights violations on the basis of the presence of a relatively small number of troops—not enough to amount to occupation in the sense of Article 42 of the Fourth Hague Regulation.”¹³⁴ In other cases, a higher standard has been required. Commenting on the judgment of the U.K. Court of Appeals in *Al-Skeini v. Secretary of State for Defence*,¹³⁵ Droege notes that:

It was undisputed that while there was occupation of British troops in the Al Basrah . . . province[] . . . the United Kingdom possessed no executive, legislative, or judicial authority in Basrah city. It was simply there to maintain security in a situation on the verge of anarchy. The majority of the Court of Appeals therefore found that there was no effective control for the purpose of application of the European Convention on Human Rights.¹³⁶

Here the court required something closer to “quasi-sovereign” control, as espoused by Frédéric Mégret and Florian Hoffmann.¹³⁷

131. See *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004). In *Issa* the court considered the possibility of the Convention applying in Northern Iraq – territory clearly outside the *espace juridique*. Having found that Turkey might have exercised effective control over an area of Northern Iraq during a military operation it executed in the region, *id.* ¶ 74, the Court held that “if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey.” See *id.* It did not find such factual basis, but the legal point stands. *Id.* ¶ 81.

132. Lett, *supra* note 129, at 140.

133. *Ilaşcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. 179 (2004).

134. Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 331 (2007).

135. *Al-Skeini v. Sec’y State Def.*, [2005] EWCA (Civ) 1609 (Eng.).

136. Droege, *supra* note 134, at 331–32. The finding that “there was no effective control” was upheld with respect to the UK’s Human Rights Act, which incorporates the ECHR. *Al-Skeini v. Sec’y State Def.* [2007] UKHL 26, ¶¶ 8–26, 133–51. The Lords were divided on whether it was necessary to determine the reach of the ECHR itself. See, e.g., *id.* at 27, ¶¶ 62–81, 102–04. Those who addressed the issue, however, affirmed the lower court’s limited reading of the principle of effective control. *Id.* ¶¶ 62–81, 90–92, 105–32.

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

Deeper analysis of the precise meaning of “effective control” over territory is beyond the scope of this Article. For the current purpose, it is sufficient to establish that peacekeepers can in fact exercise such control. Buttressing this conclusion, the Human Rights Committee cites peacekeeping missions as a paradigmatic example of situations in which effective control is exercised.¹³⁸ Moreover, Mégret and Hoffmann affirm that U.N. peacekeeping operations can attain even the heightened standard of quasi-sovereign control, most obviously when the operations involve international civilian administrations, as in Kosovo under UNMIK and East Timor under the U.N. Transitional Administration (“UNTAET”).¹³⁹ The forces attached to such administrations often take on certain quasi-governmental duties and thus exercise effective control in their own right.¹⁴⁰

A second manner in which human rights law applies extra-territorially is via control over individual detainees. In *Al-Skeini*, one of the plaintiffs was the father of Mr. Baha Mousa, who was seized and detained by British forces while working in Basra, Iraq.¹⁴¹ Upon his arrest, British troops took Baha Mousa to a British military base in Basra, where he was “brutally beaten by British troops,”¹⁴² which ultimately caused his death.¹⁴³ Despite having disputed the application of the ECHR to Baha Mousa’s claim in the lower courts, once the case reached the House of Lords, the British Defence Secretary accepted that the ECHR extends to such situations.¹⁴⁴ A lower court had explained that “a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception [to the primarily territorial ECHR jurisdiction].”¹⁴⁵

This position also finds support from the ECtHR in *Öcalan v. Turkey*, which addressed a claim from Abdullah Öcalan, who had been arrested by Turkish officials in Kenya after being captured by the local authorities.¹⁴⁶ The ECtHR held that the Convention applied to Öcalan, reasoning that:

Directly after he had been handed over by the Kenyan officials to the Turkish officials [Öcalan] was under effective Turkish authority and was therefore brought within the ‘jurisdiction’ of that State for the purposes of Art. 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.¹⁴⁷

138. See *supra* text accompanying note 127.

139. Mégret, *supra* note 137, at 327–28.

140. See Venice Commission, *supra* note 87, ¶ 68. (“UNMIK and KFOR are administering a territory to an extent which is comparable to that of a state.”)

141. *Al-Skeini v. Sec’y State Def.* [2007] UKHL 26, ¶ 6.

142. *Id.*

143. *Id.*

144. *Id.* ¶¶ 3, 6.

145. *Id.* ¶ 31 (quoting the lower court’s decision).

146. *Öcalan v. Turkey*, 37 Eur. Ct. H.R. 238 (2003).

147. *Id.* ¶ 93.

A year later, in *Issa v. Turkey*, the ECtHR again applied the same jurisdictional test.¹⁴⁸ Similarly, the Human Rights Committee has recognized the application of the human rights provisions enshrined in the ICCPR to situations of a state's control over individuals in foreign territory,¹⁴⁹ as have the Inter-American Commission on Human Rights with respect to the American Convention on Human Rights¹⁵⁰ and the Committee Against Torture with respect to the Convention Against Torture.¹⁵¹

Peacekeeping forces are clearly capable of asserting such control. Many of the most shocking abuses committed by peacekeepers in Somalia were perpetrated against individual detainees¹⁵² and the *Saramati* tranche of the *Behrami* case directly considered a case of individual detention by peacekeeping forces.¹⁵³ As Dupont explains, peacekeeping forces "face public order matters and, sometimes, [have to] make arrests in order to maintain a safe environment."¹⁵⁴

In sum, through either effective territorial control or control over individuals, Blue Helmets can trigger the application of human rights law. To the extent violations can be attributed to states bound by that law, those states would be liable for breach, and thus have a duty of reparation.¹⁵⁵

B. *The United Nations' Legal Duty to Uphold Human Rights*

The question of breach by the United Nations requires a separate analysis. As the ICJ clarified in *Reparation for Injuries Suffered*, acknowledging that the United Nations is a legal person "is not the same thing as saying that it is a State . . . or that its . . . rights and duties are the same as those of a State."¹⁵⁶

148. *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004) ¶ 71. A number of Iraqis claimed that their relatives were illegally detained and killed by Turkish forces operating in northern Iraq. *Id.* ¶¶ 1, 4. After deciding on the facts that Turkey did not exercise overall territorial control, *id.* ¶ 75, the court considered whether Turkish troops were operating in the area where the killings took place, implying that if they had been, the Convention for the Protection of Human Rights and Fundamental Freedoms would apply. *Id.* ¶ 76. The court also dismissed this latter theory on the facts, not the law. *Id.* ¶¶ 76–81.

149. U.N. Human Rights Comm., *General Comment No. 31 (80): The Nature of the General Legal Obligation Imposed on States Parties to the International Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."); *Saldías de López v. Uruguay*, Comm'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) ¶¶ 12.3, 14; *Celiberti de Casariego v. Uruguay*, Comm'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981) ¶¶ 10.3, 12.

150. *Coard et al. v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999).

151. Committee Against Torture, *Conclusions and recommendations of the Committee against Torture: United States of America*, ¶ 15, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

152. See *supra* notes 32–36 and accompanying text.

153. See *supra* note 70 and accompanying text.

154. Pascal M. Dupont, *Detention of Individuals During Peacekeeping Operations: Lessons Learned from Kosovo*, in PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW 249, 255 (Roberta Arnold & Geert-Jan Alexander Knoops eds., 2006).

155. See *supra* Part I.B.

156. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

The United Nations, unlike most states, is party to no human rights treaty. Before examining how responsibility for the human rights violations of peacekeepers should be apportioned between troop-contributors and the United Nations, it must first be shown that the organization is actually bound by human rights law.

It is worth noting in this regard that the United Nations accepts that its peacekeeping missions should uphold human rights. *We Are United Nations Peacekeepers*—a U.N. Department of Peacekeeping Operations (“DPKO”) document resembling an oath of enlistment for peacekeepers—states, “We will comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights as the fundamental basis of our standards.”¹⁵⁷ Similarly, Rule five of DPKO’s *Code of Personal Conduct for Peacekeepers*, commands: “Respect and regard the human rights of all.”¹⁵⁸ However, although such internal documents indicate the United Nations’ commitment to human rights mores, they do not establish that the organization is under *legal obligation* to uphold human rights. It is this latter question that is of importance here and this section contends that, on several grounds, the answer is affirmative.

The first sense in which human rights obligations bind the United Nations is what Mégret and Hoffmann call the “external conception” of human rights’ applicability to the United Nations.¹⁵⁹ On this view, the United Nations is bound “‘customarily’ as a result and to the extent that international human rights standards have reached customary international law status.”¹⁶⁰ It surely is a consequence of the United Nations’ legal personality at international law that it is bound by customary international law, *mutatis mutandis*,¹⁶¹ and there is a strong argument that a number of human rights are protected under customary international law,¹⁶² and even that a “subcat-

157. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS TRAINING UNIT, *WE ARE UNITED NATIONS PEACEKEEPERS*, available at http://www.un.org/Depts/dpko/dpko/Conduct/un_in.pdf.

158. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, *TEN RULES: CODE OF PERSONAL CONDUCT FOR BLUE HELMETS*, ¶ 5, available at http://www.un.org/Depts/dpko/dpko/Conduct/ten_in.pdf.

159. Mégret & Hoffmann, *supra* note 137, at 317.

160. *Id.*

161. D.W. BOWETT, *UNITED NATIONS FORCES: A LEGAL STUDY* 507 (1964); Boris Kondoch, *The United Nations Administration of East Timor*, 6 J. CONFLICT & SEC. L. 245, 261 (2001). Those who object to the application of customary law to the United Nations do so on the grounds that the scope of customary law is uncertain and its rules tailored to states. Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 319 (1996). The latter concern is significantly mitigated by the qualifier that customary law applies to the United Nations only *mutatis mutandis*. The former concern is somewhat disingenuous in this context; it is an objection to the very concept of customary international law rather than to its application to the United Nations.

162. See, e.g., Comm. on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in REPORT OF THE SIXTY-SIXTH CONFERENCE 525, 544 (International Law Association, 1994); Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (Int’l & Comp. L.Q. Supp. No. 11, 1965); John P. Humphrey, *The Univer-*

egory”¹⁶³ of those has attained *jus cogens* status.¹⁶⁴ Moreover, with respect to the broader corpus of customary human rights law, there can be no plausible claim that the United Nations is a persistent objector.¹⁶⁵ On the contrary, the United Nations is constitutionally mandated to promote the advancement of human rights globally¹⁶⁶ and has repeatedly asserted the importance of human rights norms in governing its own behavior.¹⁶⁷ The “external conception” argument is therefore both persuasive and sufficient to support the conclusion that the United Nations has a duty under international law to uphold certain human rights. Indeed, the only limitation on the external conception is that although the precise population of customary human rights provisions is debatable,¹⁶⁸ it is clearly only a subset of the full range of human rights law.¹⁶⁹

The second argument establishing the application of human rights law to the United Nations is based on what Mégret and Hoffmann term the “internal conception.”¹⁷⁰ Their basic contention in this regard is that “the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added juridical *finesse*.”¹⁷¹ Pursuant to the U.N. Charter, the promotion of human rights is indeed a fundamental purpose of the organization¹⁷² and among the United Nations’ broader *raison d’être*, the ad-

sal Declaration of Human Rights: Its History, Impact and Juridical Character, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 29–38 (B. G. Ramcharan ed., 1979); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1 (1996). But see US Observations on the General Comment, quoted in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 655–56 (2004).

163. Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 498 (1997).

164. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987); Goodman & Jinks, *supra* note 163, at 498–506; Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 15 (1986). Among the human rights norms assigned *jus cogens* by at least one of these authorities are prohibitions on genocide, slavery, disappearance, official torture, prolonged arbitrary detention, and apartheid.

165. On the persistent objector rule in human rights law, see generally Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT’L L. 495 (2005); Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147 (1996).

166. One of the purposes of the United Nations under its Charter is to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms.” U.N. Charter art. 1 ¶ 3.

167. See, e.g., *supra* notes 157–158 and accompanying text.

168. Goodman & Jinks, *supra* note 163, at 498.

169. U.N. Human Rights Comm., *General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (asserting the customary international law status of a subset of the human rights enshrined in the ICCPR). See also Meron, *supra* note 164, at 6, 15–16; LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU’S INTERNATIONAL AGREEMENTS 89, 93 (2005); Wesley V. Carrington, *Corporate Liability for Violations of Labour rights under the Alien Torts Claims Act*, 94 IOWA L. REV. 1381, 1408–18 (2009).

170. Mégret & Hoffmann, *supra* note 137, at 317.

171. *Id.*

172. U.N. Charter art. 1, ¶ 3.

vancement of human rights has taken increasing prominence over time.¹⁷³ This alone might be enough to create an obligation on the organization, on the grounds that it cannot legally negate one of the reasons for its constitution as a body. Potentially more important than this general constitutional argument, however, is the fact that the United Nations often *grounds* its specific peacekeeping missions in human rights.¹⁷⁴ This is of consequence because if the need to preserve human rights provides part of the basis for action, it must also delimit the scope of action that can be taken on that basis. Put simply, one cannot violate human rights on the grounds that one is promoting human rights.

Of course, this logic applies only to peacekeeping missions that are authorized on human rights grounds. As it happens, this grants it considerable reach—eight of the current peacekeeping operations with troop deployments were at least partially justified on a human rights basis;¹⁷⁵ just three were established with no reference to human rights.¹⁷⁶ Moreover, the latter three are the longest standing U.N. peacekeeping missions, suggesting a powerful trend toward the former model.

Pascal Dupont advances a third argument concerning exclusively those situations in which the United Nations takes on quasi-sovereign status, as it has done with UNMIK and UNTAET. Dupont contends with respect to UNMIK that “the human rights obligations of the Federal Republic of Yugoslavia remain in force throughout the territory and may be said to be binding by reasoning of established principles of the law of state succes-

173. Perhaps the most notable watershed in the rising prominence of human rights at the United Nations was the establishment of a permanent human rights executive in the form of a High Commissioner for Human Rights. High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, U.N. Doc A/RES/48/141 (Dec. 20, 1993). Julie Mertus argues that, since its creation, the Office of the High Commissioner for Human Rights (OHCHR) has become the “focal point for all UN human rights activities.” JULIE A. MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA* 3 (2005). Moreover, she contends, “the organizational role of the OHCHR has consistently increased the relevance of human rights issues within the United Nations.” *Id.* at 43.

174. See, e.g., Dupont, *supra* note 154, at 255–56 (suggesting that the Secretary-General’s July 1999 Report on UNMIK interprets Security Council Resolution 1244 as invoking “international human rights standards as . . . [the] basis for the exercise of its authority.”) See also sources cited at *infra* note 175.

175. MINURSO (U.N. Mission for the Referendum in Western Sahara), S.C. Res. 690, U.N. Doc. S/RES/690 (Apr. 29, 1991) (noting the Mission’s role in facilitating the “self-determination of the people of Western Sahara”); MONUC (U.N. Organization Mission in the Dem. Rep. of the Congo), S.C. Res. 1291, U.N. Doc. S/RES/1291 (Feb. 24, 2000); UNMIL (U.N. Mission in Liberia), S.C. Res. 1509, U.N. Doc. S/RES/1509 (Sept. 19, 2003); UNOCI (U.N. Operation in Côte d’Ivoire), S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004); MINUSTAH (U.N. Stabilization Mission in Haiti), S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004); UNMIS (U.N. Mission in the Sudan), S.C. Res. 1590, S/RES/1590 (Mar. 24, 2005); UNAMID (A.U.-U.N. Hybrid Operation in Darfur), S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007); Report of the Secretary-General and the Chairperson of the African Union Commission, U.N. Doc. S/2007/307/Rev.1 (June 5, 2007); MINURCAT (U.N. Mission in the Central African Republic and Chad), S.C. Res. 1778, U.N. Doc. S/RES/1778 (Sept. 25, 2007).

176. UNFICYP (U.N. Peacekeeping Force in Cyprus), S.C. Res. 187, U.N. Doc. S/5603 (Mar. 13, 1964); UNDOF (U.N. Disengagement Observer Force), S.C. Res. 350, at 4, U.N. Doc. S/INF/30 (May 31, 1974); UNIFIL (U.N. Interim Force in Lebanon), S.C. Res. 425 & 426, U.N. Docs. S/RES/425 & S/RES/426 (Mar. 19, 1978); S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

sion.”¹⁷⁷ Along similar lines, though with application beyond quasi-sovereign control scenarios, the Model SOFA requires “[t]he United Nations peace-keeping operation and its members [to] respect all local laws and regulations.”¹⁷⁸ The point of commonality here is that as long as the host state has signed on to the relevant human rights treaty or treaties, peacekeeping personnel are bound by those obligations, either under one of the agreements that provide the legal structure of the peacekeeping operation,¹⁷⁹ or—on Dupont’s view and in the rare cases in which the United Nations exercises quasi-sovereign control—by the law of state succession as applied to human rights law.¹⁸⁰

The final argument in favor of holding the United Nations to human rights obligations is what Mégret and Hoffmann call the “hybrid conception.”¹⁸¹ On this view, “the United Nations is bound ‘transitively’ by international human rights standards as a result and to the extent that its members are bound . . . because states should not be allowed to escape their human rights obligations by forming an international organization to do the ‘dirty work.’”¹⁸² As Hirsch explains, states can transfer or delegate powers to an international organization only “if the organization is legally bound . . . or voluntarily undertakes to comply with all attached obligations toward third parties Where the organization receiving the powers is not bound by law or is not ready to assume the relevant obligations, the transferring state is to be held responsible.”¹⁸³

This logic is complicated in the case of the United Nations, because Article 103 of the U.N. Charter provides for the supremacy of states’ Charter obligations over obligations sourced elsewhere in international law, such that the latter obligations are negated if they conflict with the former.¹⁸⁴ However, contra the House of Lords in *Al Jeddah v. Secretary of State for Defence*¹⁸⁵ and the ECtHR in *Bebrami*,¹⁸⁶ Article 103 does not apply to the

177. Dupont, *supra* note 154, at 256.

178. *Model SOFA*, *supra* note 19, art. 6.

179. Namely, the SOFA. *Id.*

180. Supporting this understanding of the relationship between the law of state succession and human rights law, the Human Rights Committee has found that “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession.” U.N. Human Rights Comm., *General Comment No. 26: Continuity of obligations*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997). See also *Fifth Meeting of the chairpersons of the UN human rights treaty bodies*, ¶10, U.N. Doc. E/CN.4/1995/80 (Nov. 28, 1994). See generally Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUR. J. INT’L L. 469 (1996). But see Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUR. J. INT’L L. 141 (2003); Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights*, 45 INT’L & COMP. L. Q. 928, 928–38 (1996).

181. Mégret & Hoffmann, *supra* note 137, at 318.

182. *Id.* (internal quotations and citations omitted).

183. HIRSCH, *supra* note 16, at 54 (footnote omitted).

184. U.N. Charter art. 103.

185. R (on the application of Al-Jedda) (FC) v. Sec’y State Def. [2007] UKHL 58, [2008] W.L. 31, 46–49 (appeal taken from Eng.).

contribution of troops for peacekeeping, for the simple reason that troop contribution is strictly voluntary and involves no Charter *obligation*.¹⁸⁷ Therefore, 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. The upshot of this is that *either* the United Nations is bound by human rights obligations for any or all of the reasons outlined above and the question is how to apportion responsibility for peacekeepers' rights abuses between the United Nations and troop-contributing states, *or* the United Nations has no human rights duties and states retain responsibility for all of the human rights relevant behaviors of their troops even when those troops act pursuant to U.N. control.

This Article proceeds on the assumption that, for the reasons articulated in this Part, both troop-contributing states and the United Nations are bound by human rights obligations, such that the pertinent question is that of attribution. However, even if one were to conclude that the United Nations is not subject to human rights obligations, that outcome should provide no great succor to those seeking to insulate peacekeeping forces from human rights responsibilities. Indeed, pursuant to the reasoning presented in the preceding paragraphs, troop-contributing states in such a situation would remain responsible for all human rights violations of their troops precisely *because* that responsibility could not be transferred to the United Nations.

III. THE FIRST PRONG OF THE TWO-PRONG TEST FOR INTERNATIONAL LIABILITY: ATTRIBUTING THE ACT

If both the United Nations and troop contributors have obligations not to violate human rights extra-territorially (under the appropriate circumstances of effective control over territory or control over individuals), the critical issue that remains to be examined is to whom the human rights abuses of peacekeepers should be attributed. This Part begins in Part III.A with an abstract description of the legal standard for attributing responsibility for peacekeepers' human rights violations—namely, the standard of “effective control” (which, despite sharing its name, is distinct from the standard of territorial control discussed in Part II.A, *supra*). To provide the context for the application of this concept, Part III.B presents an overview of the formal structure of command and control in U.N. peacekeeping missions, noting in particular the different command responsibilities assigned to the troop-contributing state and to the United Nations, respectively. Part III.C then identifies the ways in which peacekeeping in practice deviates from the formal

186. Behrami, *supra* note 68, ¶ 147.

187. SIEKMANN, *supra* note 10, at 44.

command and control structure. Turning back to the legal principle, Part III.D describes how the standard of “effective control” has been applied to the peacekeeping context and to other contexts and suggests that, given the structure described in Part III.B and III.C, the standard has been applied deficiently. Part III.E then presents a proposed alternative interpretation of “effective control,” which better reflects the fundamental principle codified in the Draft Articles on Responsibility of International Organizations and affirmed as legal authority by the ECtHR in *Behrami*.¹⁸⁸ This interpretation of “effective control” lays the foundation for the proposed scheme of liability presented in Part IV.

A. *The Standard—Effective Control Over Peacekeepers’ Conduct*

Just as was the case in determining the human rights obligations of states and the United Nations, the critical concept with respect to attributing liability between those entities is that of “effective control” over the wrongdoing. However, in this context it is not effective control over territory or victims that is at issue, but effective control over the troops that perpetrate the human rights violations, and more specifically, effective control over their *conduct* in perpetrating those acts.

Article 5 of the ILC’s unfinished Draft Articles on Responsibility of International Organizations codifies the appropriate rule as follows:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct¹⁸⁹

There can be no question that this, rather than Article 4 (which addresses the attribution of the conduct of organs or agents of the international organization), is the relevant provision.¹⁹⁰ Recall that the peacekeeper operates as a member of her national military acting under the command authority of the United Nations.¹⁹¹ Troop contingents are not organs or agents of the United Nations. They are organs of their sovereign states that those states have “placed at the disposal” of the United Nations for the purposes of a peacekeeping mission. Indeed, peacekeeping was the paradigmatic example that informed the drafters of Article 5. As the Commentary on the Article explains:

188. *Behrami supra* note 68, ¶ 30.

189. Int’l Law Comm’n, *Draft Articles on Responsibility of International Organisations*, art. 5, U.N. Doc. No. A/CN.4/L.648 (May 27, 2004) [hereinafter DARIO (2004)].

190. *Id.* art. 4.

191. *See supra* notes 16–19 and accompanying text.

When an organ of a State is placed at the disposal of an international organization, the organ may *be fully seconded to* that organization. In this case . . . the general rule set out in article 4 would apply. Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization.¹⁹²

Therefore, the ECtHR was correct to use Article 5 as the basis for its decision on Saramati's claim in *Behrami*,¹⁹³ although, as is made clear below, it misapplied the standard in that case.¹⁹⁴

The key point for examination under Article 5 is which entity had "effective control over [the specific] conduct" in question. In providing this standard, the Draft Articles codified what was already a longstanding principle for the attribution of wrongdoing at international law, as recognized by both courts¹⁹⁵ and scholars.¹⁹⁶ It is a simple test. As Hirsch explained in 1995, by which time he assessed that the rule was one of customary international law,¹⁹⁷ "the entity which exercises effective control over the individual who commits the wrongful act—either the organization or the contributing state—will be held internationally responsible."¹⁹⁸ This test is to be applied to the specifically impugned conduct, not to the general command and control relationships between the individual concerned and the United Nations and the individual and her state.¹⁹⁹ However, an understanding of the command and control of U.N. peacekeeping operations is critical to understanding the context within which more specific judgments can be made.

192. Int'l Law Comm'n, *Report of the International Law Commission of Its Fifty-Sixth Session*, U.N. GAOR, 59th Sess., Supp. No. 10 at 110, U.N. Doc. No. A/59/10 (May 3–June 4 & July 4–Aug. 6, 2004) [hereinafter DARIO Commentary (2004)] (emphasis added).

193. *Behrami*, *supra* note 68, ¶¶ 30, 151.

194. *See infra* Part III.D.

195. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 143–47, ¶¶ 399–407 (Feb. 26); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 54, ¶ 115 (June 27).

196. *See, e.g.*, Amrallah, *supra* note 18, at 65; BOWETT, *supra* note 161, at 245 (1964); Finn Seyersted, *United Nations Forces: Some Legal Problems*, 37 BRIT. Y.B. INT'L L. 351, 429 (1961).

197. HIRSCH, *supra* note 16, at 77.

198. *Id.* at 64 (citation omitted).

199. DARIO Commentary (2004), *supra* note 192, at 113 ("the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."); HIRSCH, *supra* note 16, at 65.

B. *Command and Control in Peacekeeping*

The system originally envisioned in the U.N. Charter for the application of force by the United Nations has never been realized.²⁰⁰ In its attempts to use force in the absence of that system, the United Nations has resorted to a number of “ad hoc” responses.²⁰¹ One of those is the institution of peacekeeping, which as White notes, “was not envisaged by the founders” but “has grown with the Organisation.”²⁰² However, in part because of the ad hoc nature of peacekeeping—and, indeed, all other U.N. military deployments—there is in the world of U.N. peacekeeping what McCoubrey and White term “a degree of institutional ambiguity not normally considered consistent with an efficient and effective command structure.”²⁰³

In deploying military force, the United Nations has used a wide variety of command and control systems.²⁰⁴ Even within the narrower realm of peacekeeping, the United Nations has a diverse range of precedents in terms of the mandates given to peacekeeping missions as well as the command and control structures under which they operate and through which they report to the Security Council.²⁰⁵

Nonetheless, the core elements of most peacekeeping organizational structures are similar enough that an examination of the typical structure provides sufficient information to proceed with the analysis of effective control. As Simma describes, the basic organization of a peacekeeping operation involves “four hierarchical/organizational levels: (1) the principal organ, which creates the peace-keeping forces [typically the Security Council, though very occasionally the General Assembly], (2) the [Secretary-General],

200. Under that ideal, states would enter into long-term agreements with the U.N. Security Council to provide troops that would comprise a standing army at the disposal of the Security Council, pursuant to Article 43 of the Charter. The Security Council could then, upon finding a threat to or breach of international peace and security or an act of aggression pursuant to Article 39 of the Charter, mobilize those troops pursuant to Article 42, and through the subordinate Military Staff Committee, established pursuant to Article 47 of the Charter, exercise what would be U.N. action through a U.N. command and control system with a U.N. standing army.

201. MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS* 321 (2005).

202. NIGEL D. WHITE, *KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 224 (2d ed. 1997).

203. HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS* 137 (1996).

204. Consider, for example, the following array of operations: the action in Korea in 1950 (U.S. command over a United Nations-authorized multi-national force); the action in Kuwait in 1991 (U.S. and Saudi Command over multi-national forces); the actions in Somalia and Bosnia in the mid-1990s (United Nations commanded forces alongside U.S./NATO forces operating with a “dual key” command system); the action in Kosovo in 1999 (U.N. civil administrations alongside NATO forces authorized by the Security Council); today’s MONUC peacekeeping force (United Nations commanded forces with a mandate to use force); and the first United Nations peacekeeping mission - UNEF I (United Nations commanded forces without a mandate to use force, except in self-defense).

205. Of the missions cited *supra* note 204, all but Korea and Kuwait were peacekeeping forces of some sort.

(3) the commander-in-chief and his staff, (4) national contingents [each] headed by a contingent commander.”²⁰⁶

The first delimitation on the scope of the peacekeeping operation’s action is the mandate provided by the Security Council in creating the mission, which defines, for example, the extent to which the operation may use force and to what end.²⁰⁷ Put simply, the mandate provides the legal authority for the operation. This initial Security Council action, however, only authorizes the Secretary-General to “take the necessary steps to provide . . . military assistance”; it does not itself create a peacekeeping force by requiring member states to contribute troops.²⁰⁸ Indeed, the nature of troop contribution is fundamentally voluntary.

Once the mandate provides for military assistance, the Secretary-General must solicit voluntary troop contributions from Member States in order to garner the necessary personnel for the proposed operation. As Siekmann explains, arguing that the principle is one of customary law,²⁰⁹ “there is no general duty on Member States to participate in a UN peace-keeping force. The practice points unambiguously to voluntarism: participation is optional.”²¹⁰ Member states thus contribute troops conditionally, based on the limited plan of action as defined in the mandate. An important corollary of this voluntary contribution is the right to withdraw the contingent.²¹¹

While soliciting troop contingent contributions, the Secretary-General, who is responsible to the Security Council throughout the mission, also establishes a system of command.²¹² The first step in that direction is to appoint a Head of Mission. According to the Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the U.N. Peace-keeping Operations,

the Secretary-General of the United Nations shall have full authority over the deployment, organization, conduct and direction of [the United Nations peace-keeping operation], including the personnel made available by [the Participating State]. In the field, such authority shall be exercised by the Head of Mission, who shall be responsible to the Secretary-General. The Head of Mission shall regulate the further delegation of authority.²¹³

206. Bothe, *supra* note 10, at 687.

207. McCoubrey & White, *supra* note 203, at 139.

208. Siekmann, *supra* note 10, at 28–29.

209. *Id.* at 46–47.

210. *Id.* at 45.

211. UNITED NATIONS, PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 68 (2008), available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf. But see SIMMONDS, *supra* note 40, at 144 (reporting only a qualified right of withdrawal from the ONUC force).

212. BLUE HELMETS, *supra* note 15, at 406.

213. 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) [hereinafter *Model Agreement on Peacekeeping Personnel and Equipment*].

Operational control is thus unified and centralized in the United Nations, with the chain of command running from the Security Council to the Secretary-General to the Head of Mission.²¹⁴ The Peacekeeper's Handbook explains, "The Force, created by the Security Council, operates under the exclusive command of the United Nations at all times."²¹⁵ The Head of Mission may be a civilian with immediate authority over the most senior military actor—the Force Commander,²¹⁶ or may be the military Force Commander herself,²¹⁷ in which case the chain of command runs directly from the Secretary-General to the Force Commander.²¹⁸ It is in the Force Commander that supreme field command is vested,²¹⁹ and like the Head of Mission, the Force Commander is also individually hired as a U.N. appointee requiring Security Council approval.²²⁰ Rod Paschall observes that "there is usually a steady stream of reports, directives, inspections, and advisory messages between the commander and his political masters."²²¹ As Simmonds described with respect to ONUC,

Messages to and from New York went directly to and from the head of the whole United Nations Operation in the Congo. This civilian official had the position of a political adviser and personal representative of the Secretary-General. The Political Officer, as head of ONUC passed on whatever instructions he received from the Secretary-General to the Commander of the Force who directed the military activities, and also to the Commander's counterpart in rank and authority - the chief of the civilian operation.²²²

The Force Commander is the link between the United Nations and the national troop contingents. As the Secretary-General explained in an Aide-Mémoire on UNFICYP, "[t]he contingents comprising the Force are integral parts of it and take their orders exclusively from the Commander of the Force."²²³ Whereas the Commander and his political superiors and col-

214. UNITED NATIONS, *supra* note 211, at 68.

215. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 46. Technically, "command" includes a wider remit of authority than is held by the United Nations in peacekeeping operations. *See infra* notes 231–236 and accompanying text.

216. UNITED NATIONS, *supra* note 211, at 68–70.

217. DEP'T OF THE ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, at 65 (Dec. 30, 1994). *See also Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 1 ("'Head of Mission' means the Special Representative/Commander appointed by the Secretary-General.").

218. *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 1; BLUE HELMETS, *supra* note 15, at 406.

219. MCCOUBREY & WHITE, *supra* note 203, at 144; BLUE HELMETS, *supra* note 15, at 406.

220. HIRSCH, *supra* note 16, at 66; INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 46.

221. Rod Paschall, *Solving the Command-and-Control Problem*, in SOLDIERS FOR PEACE, FIFTY YEARS OF UNITED NATIONS PEACEKEEPING 57, 62 (Barbara Benton ed., 1996).

222. SIMMONDS, *supra* note 40, at 160.

223. The Secretary-General, *Aide-Mémoire Concerning Some Questions Relating to the Function and Operation of the United Nations Peace-keeping Force in Cyprus*, ¶ 7, U.N. Doc. S/5653 (Apr. 10, 1964).

leagues are hired individually, national troop contingents are provided in discrete and indivisible units with internal structures of command, whose integrity cannot be violated.²²⁴ Siekmann observes, “National contingents in UN peace-keeping forces are under UN Command, *through the commanders of those contingents.*”²²⁵

This juncture between the Force Commander and the National Contingent Commander is an important one. The national contingents are voluntarily provided as whole units by the troop-contributing states on the basis of a mandate to which they have agreed. Given this, as the U.S. Army Field Manual for Peace Operations states, “a foreign UN commander cannot . . . change the mission or deploy US forces out-side the area of responsibility agreed to by the [U.S. National Command Authorities].”²²⁶ James Boyd concurs, noting “widespread appreciation of the fact that the national commander has a responsibility to his own government . . . to insure that his unit is not used [in excess of] . . . the approved mandate or [inconsistently with] . . . the understanding of his national authorities.”²²⁷ There is, then, a distinct limit on what the U.N. Commander may ask or require of the national contingent, and that limit is set by the agreement (formal or informal)²²⁸ between the troop-contributing state and the United Nations, through the person of the Secretary-General.

The mandate is not the only basis on which the National Contingent Commander can stand up to U.N. Command. As the *Peacekeeper's Handbook* stipulates, “if soldiers of a contingent are required to undertake duties or acts which in any way clash with the normal principles under which they would be expected to operate in their own army, the contingent commander has the right to refer to his own Minister of Defence.”²²⁹ This is a critical point in the context of this Article, because orders to violate the laws of war (many of which overlap with human rights law)²³⁰ are clear examples of the kinds of orders that would legitimately trigger the right to refer to the national government.

Moreover, there are several areas over which the National Contingent Commander retains sole authority and is independent from any material in-

224. Françoise J. Hampson & Ai Kihara-Hunt, *The Accountability of Personnel Associated With Peacekeeping Operations*, in UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 195, *supra* note 26, at 198.

225. SIEKMANN, *supra* note 10, at 119 (emphasis added).

226. DEP'T OF THE ARMY, *supra* note 217, at 24.

227. JAMES MORE BOYD, UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY AND POLITICAL APPRAISAL 150 (1971), *quoted in* MCCOUBREY AND WHITE, *supra* note 203, at 145.

228. Bothe, *supra* note 10, at 688 (“National contingents are provided by States on the basis of agreements (formal or informal) made between the governments of these States and the [Secretary-General].”).

229. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 365.

230. *See, e.g.*, U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); Droge, *supra* note 134; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 20–25 (2004); Murphy, *supra* note 10, 157–58.

tervention by the U.N. Commander. It is worth pausing here to distinguish full command and control from the solely operational control exercised by the commander of a U.N. peacekeeping force. As Paschall explains with respect to multinational forces in general, "There is usually not much command and only some control vested in any multinational or joint-service (i.e., ground, air, sea) headquarters."²³¹ Indeed, the United Nations itself states in *Peacekeeping Operations: Principles and Guidelines*, "military personnel provided by Member States . . . are placed under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command."²³²

Taking as an example the legal provisions delimiting command authority in the U.S. military, full command includes inter alia the authority to direct training,²³³ prescribe the chain of command,²³⁴ coordinate internal organization, training, and discipline,²³⁵ select subordinate commanders, suspend subordinates, and convene courts martial.²³⁶ In U.N. peacekeeping, each of these roles remains the sole preserve of the National Contingent Commander and her government.

As explained above, national troop contingents are provided as discrete units with internal command structures. Authority over the internal command chain remains within the contingent.²³⁷ Simmonds noted in his commentary on ONUC, "responsibility for pay of members of [ONUC], as well as their promotions in rank, rests with their respective national Governments."²³⁸ This principle was codified in the legal agreements governing all of the early peacekeeping operations,²³⁹ and remains a key component of the Model Agreement today.²⁴⁰ The U.S. Army Field Manual for Peacekeeping states simply that "a foreign UN commander cannot . . . promote individuals, or modify the internal organization of US units."²⁴¹

The rules governing authority over discipline are equally clear. Although the Head of Mission is nominally responsible for the "good order and discipline" of the peacekeeping operation as a whole,²⁴² the universally applied rule is that responsibility for any disciplinary *action* against any individual peacekeeper or group of peacekeepers remains the sole province of the Na-

231. Paschall, *supra* note 221, at 58.

232. UNITED NATIONS, *supra* note 211, at 68.

233. 10 U.S.C. § 164(c)(1)(A) (2008).

234. 10 U.S.C. § 164(c)(1)(B) (2008).

235. 10 U.S.C. § 164(c)(1)(F) (2008).

236. 10 U.S.C. § 164(c)(1)(G) (2008).

237. Hampson & Kihara-Hunt, *supra* note 224, at 198.

238. SIMMONDS, *supra* note 40, at 155.

239. SIEKMANN, *supra* note 10, at 126.

240. *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 12.

241. DEP'T OF THE ARMY, *supra* note 217, at 24.

242. *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 8.

tional Contingent Commander.²⁴³ At most the U.N. Head of Mission may launch an investigation and consult with the National Contingent Commander over the action taken,²⁴⁴ but the final decision on what to do rests entirely with the latter.²⁴⁵ Moreover, in addition to determining the appropriate disciplinary action for any violations of U.N. standards, National Contingent Commanders “remain equally responsible to their national governments for the conduct and discipline of their own contingents”²⁴⁶ As Siekmann notes, a standard clause states that “[m]embers of the Force shall remain subject to the military rules and regulations of their respective national states without derogating from their responsibilities as members of the Force”²⁴⁷

Similarly, although the “military police of the United Nations peace-keeping operation shall have the power of arrest over the military members of the United Nations peace-keeping operation,” this power is of limited consequence since “[m]ilitary personnel placed under arrest outside their own contingent areas shall be transferred to their contingent Commander for appropriate disciplinary action.”²⁴⁸ Moreover, “[m]ilitary members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory].”²⁴⁹ The troop-contributing states agree to exercise that criminal jurisdiction where appropriate,²⁵⁰ however, the fact remains that the authority to actually convene a court martial is vested exclusively in the national command²⁵¹—the United Nations can do nothing to force the issue.

Finally, training is also the preserve of the troop-contributing state, as is the development and application of military tactics, techniques, and procedures.²⁵² The troop-contributor is responsible for ensuring that its contingents are properly trained to U.N. standards with respect to languages and fitness²⁵³ and, more importantly, that they are trained in and aware of the

243. *Id.*; INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 368; Dep’t of Peacekeeping Operations, Directives for Disciplinary Matters Involving Military Members of National Contingents, ¶ 28, DPKO/MD/03/00993 (2003) (“the responsibility to discipline military members of national contingents remains a national responsibility”).

244. BLUE HELMETS, *supra* note 15, at 407.

245. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 368.

246. *Id.* at 47.

247. SIEKMANN, *supra* note 10, at 127 (quoting Article 34(c) UNEF T Regulations, Article 29(c) ONUC and UNFICYP Regulations).

248. *Model SOFA*, *supra* note 19, ¶ 41.

249. *Id.* ¶ 47.

250. *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 25.

251. See HIRSCH, *supra* note 16, at 66–67.

252. UNITED NATIONS, *supra* note 211, at 9.

253. The Secretary-General, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations*, Annex A – Personnel, ¶ 4, U.N. Doc. A/50/995 (July 9, 1996).

laws of war as provided in the Geneva Conventions and their Additional Protocols.²⁵⁴

The insulation of each of the above areas from the influence of the U.N. Commander emphasizes the limited scope of his authority, which is confined to operational control and does not extend to full command and control in the technical sense. Even under the formal system of command and control, then, it is clear that the national contingent Commander, and indeed the national governments, retain important command functions alongside the operational control granted to the United Nations. Moreover, that formal picture significantly underestimates the influence of states in practice.

C. *Command and Control—The Practice of National Influence*

Murphy observes of the notion that national contingents are under U.N. control that “[t]his may be the theory, but even a superficial knowledge of United Nations peacekeeping indicates that the reality is much more complex. Few states ever relinquish full operational control to the United Nations.”²⁵⁵ McCoubrey and White explain: “Generally, a pragmatic *modus vivendi* must be found between the international or transnational authority of a UN Force Commander and the national authority and responsibility of the contingent commanders.”²⁵⁶ The practice of peacekeeping generates a number of contradictions to the formal model’s uninterrupted and constantly utilized U.N. chain of command.

Most obviously, as Hampson and Kihara-Hunt note, “It is absolutely clear that in practice the majority of contingents reserve the right to consult their own capital”²⁵⁷ Formally, it is undisputed that the national contingents may engage in regular contact with their domestic governments to discuss matters over which the troop contributor retains jurisdiction, such as discipline, administration, and the like.²⁵⁸ In practice, however, this line of communication can be and is used to endorse the contravention of U.N. orders.²⁵⁹ As Captain Davis Brown explains, “[d]ifferent 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.”²⁶⁰ Such conflicts have been re-

254. *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 28.

255. Murphy, *supra* note 10, at 174.

256. MCCOUBREY & WHITE, *supra* note 203, at 145.

257. Hampson & Kihara-Hunt, *supra* note 224, at 199.

258. SIEKMANN, *supra* note 10, at 113; DEP’T OF THE ARMY, *supra* note 217, at 23; *see also* INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 213.

259. *See, e.g.*, FLEITZ, *supra* note 110, at 79; MCCOUBREY & WHITE, *supra* note 203, at 149.

260. Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 281 (1997).

ported recently in the DRC²⁶¹ and in Somalia,²⁶² but the problem is hardly new—indeed, the pattern began with UNEF I, the very first U.N. peacekeeping force.²⁶³ Such insubordination is often unabashed; recalling a 2001 Security Council discussion on peacekeeping in Somalia and the Balkans, Christine Gray reports, “as a major troop contributor [Jordan said] it was not prepared to be the servant of others, blindly obeying, unquestioning.”²⁶⁴

Overt disobedience of the U.N. Commander is only the most blatant way in which national Commanders (and their governments) exert influence over a mission. More subtle is the power inherent in the discretion they retain within the broad limits set by orders from U.N. command. It is because of this on-the-ground influence that Murphy, for example, sees troop contributors as holding the key to improvements in peacekeeper behavior: “In most instances the task of applying theoretical principles of international law to specific cases becomes the responsibility of armed forces on the ground. There are a number of measures that contributing states could take to improve the current situation.”²⁶⁵

At the other end of the chain of command, troop-contributing states may also exert considerable influence on the overall political and strategic direction of the mission.²⁶⁶ In the early missions there were formal systems through which the U.N. mission leadership would consult with troop contributors on major decisions.²⁶⁷ In modern operations, despite the absence of formal consultative mechanisms, there are a number of points of contact between troop-contributing states and the leadership of the peacekeeping operation.²⁶⁸ Thus, while no formal system of consultation is in place, the influence of troop contributors remains significant. The U.S. Army Field Manual has commented: “Consensus is painstakingly difficult, and solutions

261. Allan Thompson, *Canada spurns UN plea on Congo*, THE STAR, June 2, 2008, <http://www.thestar.com/News/Canada/article/435224>.

262. Alan Cowell, *Italy, in UN Rift, Threatens Recall of Somalia Troops*, N.Y. TIMES, July 16, 1993, at A1; Donatella Lorch, *Disunity Hampering UN Somalia Effort*, N.Y. TIMES, July 12, 1993, at A8.

263. FLEITZ, *supra* note 110, at 74 (“There were serious chain of command problems, especially from national contingent commanders who refused to follow orders from UN commanders.”).

264. GRAY, *supra* note 10, at 309.

265. Murphy, *supra* note 10, at 193.

266. Michael R. Gordon, *Paris Ends Threat to Drop its Role in Bosnian Force*, N.Y. TIMES, Dec. 13, 1994, at A1 (“The French and British can change Unprofor’s policies if they want to,” a senior Clinton Administration said. “They are the key troop contributors. Whether they will use their influence remains to be seen.”).

267. SIEKMANN, *supra* note 10, at 100–04.

268. See, e.g., DPKO SITUATION CENTRE, FUNCTIONS, <http://www.un.org/Depts/dpko/dpko/sitcen/functions.html> (“The Situation Centre acts as a point of contact at UN Headquarters for all DPKO field missions, and provides a 24-hour communication link between senior staff members at UN Headquarters, field missions . . . and Member States through their diplomatic missions in New York.”); *Model Agreement on Peacekeeping Personnel and Equipment*, *supra* note 213, ¶ 10 (“The Government of [Participating State] may raise with the Secretary-General any matter relating to its personnel serving with [the U.N. peace-keeping operation].”); UNITED NATIONS, *supra* note 211, at 68 (noting that Standing Integrated Operational Teams “provide a principal entry point for missions, [troop-contributing countries] and partners to engage in the planning and conduct of integrated peacekeeping operations.”).

are often national in character.”²⁶⁹ Stuart Gordon concurs, recognizing that “troop-donating governments frequently limit the employment options available to a UN commander.”²⁷⁰ Writing of his time as Commander of UNPROFOR, General Sir Michael Rose remembers: “There was . . . a clear limit set to the UN’s use of force by the troop-contributing nations who were rightly concerned that their soldiers were not caught up in a war. . . . This consideration will always greatly inhibit the use of force in any peacekeeping mission. . . .”²⁷¹

The capacity of national governments to effectively influence the direction of the peacekeeping mission is bolstered considerably by the voluntary nature of their contribution and the consonant right of withdrawal. India withdrew its contingent from UNAMSIL after Major General Jetley was dismissed from his position as U.N. Commander, stripping the force of its “most competent troops.”²⁷² Indeed, unscheduled withdrawals have affected U.N. peacekeeping throughout its history.²⁷³ As Simmonds notes, the “[w]ithdrawal of individual national contingents can . . . have very important political and military consequences for the United Nations.”²⁷⁴ This gives troop-contributors considerable leverage over the U.N. command, as the threat of withdrawal can be used as an ultimatum to resolve debates over the direction of a mission²⁷⁵ or the specific situation of the national contingent.²⁷⁶ With national representatives using such leverage, a peacekeeping operation’s headquarters can become a forum for politicking as troop-contributors battle for influence over the mission.²⁷⁷ This situation is exacerbated when inadequate U.N. funding results in troop-contributors or other states subsidizing the mission.²⁷⁸

A final point to consider with respect to the actual command practices of U.N. peacekeeping is that of discipline and punishment. Some have argued that the national sovereignty over discipline and punishment comes with an obligation to the United Nations to effect the discipline or criminal punishment of peacekeepers where necessary and appropriate.²⁷⁹ Others have denied that states are under any obligation in this regard.²⁸⁰ To the extent such

269. DEP’T OF THE ARMY, *supra* note 217, at 23.

270. Gordon, *supra* note 109, at 22.

271. SIR MICHAEL ROSE, *FIGHTING FOR PEACE* 242 (1998).

272. FLEITZ, *supra* note 110, at 81.

273. *See, e.g.*, SIEKMANN, *supra* note 10, at 9, 40, 103.

274. SIMMONDS, *supra* note 40, at 145.

275. R.C. Longworth, *The Peacekeepers’ Retreat: Pulling Out ‘Will Mean War, More Unhappiness, More Suffering’*, CHICAGO TRIB., Dec. 8, 1994, at 1.

276. *See, e.g.*, Cowell, *supra* note 262, at A1 (“Gen. Domenico Corcione, the Italian chief of staff, referring to a debate over whether the 800 Italian soldiers in Mogadishu should be assigned to other parts of Somalia, said: ‘I think that if we don’t agree . . . [w]e may as well leave.’”).

277. Gordon, *supra* note 109, at 21.

278. FLEITZ, *supra* note 110, at 77 (“Some U.S. withholding of UN payments has been in response to poor decision making by U.N. peacekeeping officials.”).

279. Bothe, *supra* note 10, at 691; SIEKMANN, *supra* note 10, at 153–54.

280. Kent, *supra* note 26, at 49; Hampson & Kihara-Hunt, *supra* note 224, at 208.

a duty does exist, states have been conspicuously reluctant to act on it. As Sandra Katrin Miller observes with respect to criminal punishment, from “the UN missions in Bosnia and Herzegovina and Kosovo in the early 1990s, to Cambodia and Timor-Leste in the early and late 1990s, to West Africa in 2002 and the Democratic Republic of Congo in 2004, peacekeepers committing these crimes have escaped with impunity, returning to their home countries unpunished.”²⁸¹ Similarly, Vanessa Kent notes that “disciplinary action depends upon the will and capacity of the country of origin. Most are reluctant to bring charges against their own troops . . . for alleged actions that took place in foreign lands.”²⁸²

This discussion of the *de jure* and *de facto* systems of command and control sets the context for analyzing the attribution of responsibility for the human rights violations of U.N. peacekeepers. Moreover, it also serves to re-emphasize that with considerable room for troop-contributor influence over outcomes, both formally and through practice that ignores the formal rules, analysis of the *effective* control over peacekeeper conduct is essential to proper attribution of responsibility.

D. Applications and Interpretations of the Effective Control Standard

It is important to reiterate that, as the Commentary on the Draft Articles on Responsibility of International Organizations emphasizes, effective control “is based according to article 5 on the factual control that is exercised over the specific conduct taken.”²⁸³ The above discussion of the organizational structure of peacekeeping forces is intended to illuminate the complex array of factors that must go into making such a determination.

Disappointingly, liability for the human rights violations of peacekeepers has, in recent cases, generally been attributed to the United Nations with very little thought or deliberation on what “effective control” means with respect to the specific case before the court. Even if there is no obvious controlling link between the United Nations and the impugned acts, the United Nations has nonetheless been found to have effective control. In *H.N. v. the Netherlands* the general “operational command and control”²⁸⁴ of the United Nations over the peacekeeping force as a whole was deemed sufficient to show effective control over the specific acts of a single battalion, unless it could be shown the state actively “cut across” the U.N. command structure.²⁸⁵ In *Behrami*, the issuance of a Security Council mandate together with the requirements regarding the duty of the peacekeeping force to re-

281. Miller, *supra* note 24, at 261 (footnote omitted).

282. Kent, *supra* note 26, at 49.

283. DARIO Commentary (2004), *supra* note 192, at 111.

284. *H.N. v. the State of the Netherlands* (Ministry of Def. and Ministry of Foreign Affairs), Rechtbank's-Gravenhage [HA ZA] [District Court in The Hague], Sept. 10, 2008, 265615 / HA ZA 06-1671, ¶ 4.9 (Neth.).

285. *Id.* ¶ 4.14.1.

port to the Council were considered sufficient to demonstrate the organization's effective control over individuals making detention decisions on the ground.²⁸⁶

Neither court provided any analysis of how the command structures in these forces actually worked. Nor did either court give any consideration as to how the supposed indicia of effective control that it presented may correlate or fail to correlate with the United Nations' actual control over the specifically impugned conduct. Thus, despite the *Behrami* court's explicit acknowledgement of the applicability of the effective control standard,²⁸⁷ Antonio Cassese hails the *Behrami* decision as an exemplar of jurisprudence favoring "overall control"²⁸⁸ over "effective control" as the proper test.²⁸⁹

Indeed, in the one case that stands out in assigning responsibility to a troop-contributing state, *Attorney General v. Nissan* (1969), the House of Lords did not apply the test of effective control at all.²⁹⁰ Instead, it was deemed sufficient that the troops (as do all peacekeepers) "remain[ed] in their own national service"²⁹¹ and in that sense "continued . . . to be soldiers of Her Majesty"²⁹² regardless of who controlled their actions or how. *Nissan* is not popular with commentators. Siekmann writes bluntly, "The judgement in the 'Nissan case' . . . is wrong" ²⁹³ Hirsch is particularly irked by the Lords' failure to apply the effective control test. He argues that "the British contingent was . . . a secondary organ of the UN. This fact, combined with the operational control exercised by the organization . . . justifi[es] the imposition of responsibility on the UN, and not on the contributing state."²⁹⁴ However, Hirsch's own conclusion is reached without any analysis of the control mechanisms actually exercised over the particular impugned conduct in the *Nissan* case. His conclusion is instead no doubt based on his general theory that:

[t]he application of the effective control principle to the UN forces leads to the conclusion that in most cases the UN will be

286. *Behrami*, *supra* note 68, ¶ 134.

287. *Id.* ¶¶ 30–31.

288. Judge Cassese was on the International Criminal Tribunal for the former Yugoslavia (ICTY) appeals bench that articulated the alternative (and far less stringent) "overall control" standard for the attribution of international liability in *Prosecutor v. Tadić*. *Prosecutor v. Tadić*, Case No: IT-94-1-A, Judgment, ¶¶ 98–145 (July 15, 1999). In particular, see *id.* ¶ 120.

289. Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 667 (2007) ("[U]nder [the overall control] standard, responsibility will be borne by the particular international subject (state or organization) which was exercising a *global control* over the relevant members of the military contingent [rather than control over the specifically impugned conduct]. This, it would seem, is precisely the approach recently taken by the European Court of Human Rights in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*." (emphasis added).

290. *Attorney Gen. v. Nissan*, [1970] A.C. 179 (H.L. 1969) (appeal taken from A.C.).

291. *Id.* at 223.

292. *Id.* at 222.

293. SIEKMANN, *supra* note 10, at 144.

294. HIRSCH, *supra* note 16, at 76.

held responsible for illicit acts committed by the members of the national contingents while engaged in peace-keeping operations. These members are, through the chain of command, under the operational control of the organization.²⁹⁵

In *H.N. and Bebrami*, such broad tests attributed effective control to the United Nations despite little or no evidence of any real link between the impugned action and the organization.

Similarly, in paying out claims through its internal procedures and negotiations, the United Nations itself has accepted liability for acts that it is hard to argue lie within its sphere of effective control. For example, Amrallah reports U.N. payment for “claims arising out of the shooting of a person by one member of the force where no official function or superior order required that member to shoot, even though the person was prosecuted in his home country for having [shot] the person in question.”²⁹⁶

Some of the tendency to assign liability to the United Nations may derive from the broad policy worry that assigning liability to states will deter future troop contributions. As discussed in Part V.A *infra*, however, this worry is probably exaggerated and is anyway offset by policy considerations tending in the opposite direction. More importantly, the application of broad standards of global operational control is simply inconsistent with the fundamental principle articulated in Draft Article 5 that effective control is based “on the factual control that is exercised over *the specific conduct taken.*”²⁹⁷ As such, not only do the courts applying these broader tests violate the very effective control principle they purport to uphold, they also fail to attribute liability to the party most responsible for the specific wrongdoing in question. They therefore undermine the efficacy of the system of liability in incentivizing the relevant actors to act differently so as to prevent such violations in the future.

Rightly rejecting the general operation-wide control standards that are increasingly used to attribute full responsibility to the United Nations, some academics have asked more directly “who is giving the orders—the State or the organisation?”²⁹⁸ This question channels what was the core of the effective control test applied by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*.²⁹⁹ In *Nicaragua*, the ICJ appeared to equate the question of whether the United States had “effective control” over the human rights law and humanitarian law violations of the Nicaraguan Contras with the question of whether “the United States directed or

295. *Id.* at 67.

296. Amrallah, *supra* note 18, at 63.

297. DARIO Commentary (2004), *supra* note 192, at 111 (emphasis added).

298. Marko Milanović & Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights' Bebrami and Saramati Decision and General International Law*, 58 INT'L. & COMP. L.Q. 267, 282 (2009).

299. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

enforced the perpetration of [those] acts”³⁰⁰ The ICJ recently reaffirmed the *Nicaragua* test in the *Bosnian Genocide Case*.³⁰¹

Looking at the source of the orders leading to the impugned action is certainly an important factor in understanding whether a party has effective control over that action. In that sense, the “who gave the orders?” test does a better job of determining whether a party has effective control over specific conduct than do the more general tests applied by the courts in *H.N.* and *Behrami* and by the United Nations in the case cited by Amrallah; indeed, each of those seems to require no controlling link to the impugned conduct whatsoever.³⁰² However, there is surely more to effective control than giving orders. Indeed, throwing confusion on its understanding of “effective control,” the ICJ—in the same breath as affirming the *Nicaragua* test—appeared to recognize the distinction between ordering conduct and having effective control over conduct. Specifically, the ICJ held:

The Court is . . . of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [*Nicaragua*] . . . Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, *or* under its effective control.³⁰³

The “or” used in the final clause of this passage was repeated throughout the judgment,³⁰⁴ suggesting that “effective control” is, for the ICJ, distinct and separate from the mere giving of orders.³⁰⁵

Moreover, to the extent the World Court does equate “effective control” over conduct with having directed that conduct, it is important to understand that the reason for this somewhat restrictive understanding of the concept is specific to the issue that was before the Court in the *Nicaragua* and *Bosnian Genocide* cases. In both of those cases, the ICJ was confronted with the question of whether the actions of persons not having the status of organs of the respondent states (or indeed of any other state) could nonetheless be attributed to the respondent states.³⁰⁶ In the *Bosnian Genocide Case*, the

300. *Id.* ¶ 115.

301. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 143, ¶¶ 399, 401 (Feb. 26).

302. See *supra* notes 284–289, 296 and accompanying text.

303. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. at ¶ 401 (emphasis added).

304. See, e.g., *id.* ¶¶ 400, 406, 412, 413.

305. However, the ICJ did not elaborate further with a clear definition of “effective control” and its consideration of the evidence before it does not illuminate in this regard.

306. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 137, 142, ¶¶ 384, 396 (Feb. 26); Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*) 1986 I.C.J. 14, ¶ 109 (June 27).

Court explained the danger of an expansive rule for answering such a question:

[T]he “overall control” test [applied in *Tadić*] has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.³⁰⁷

This fundamental concern is significantly reduced in the U.N. peacekeeping context, because one of the unique features of peacekeepers is that—in a very tangible sense³⁰⁸—they act on behalf of both their governments and the United Nations itself.³⁰⁹ Put differently, whereas the forces under consideration in *Nicaragua* and *Bosnian Genocide* had no de jure relationship to any official government—and in particular no official relationship to the United States or the former Federal Republic of Yugoslavia, respectively—peacekeepers have genuine de jure connections to both their home states and the United Nations. Indeed, this is at the heart of a fundamental distinction between the situations under consideration by the ICJ in *Nicaragua* and the *Bosnian Genocide Case* and the situations under consideration in *H.N., Bebrami*, and this Article. As the ILC’s Commentary on Draft Article 5 states,

[w]ith regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State. *In the context of the placement of an organ or agent at the disposal of an international organization, control plays a different role.* It does not concern the issue *whether* a certain conduct is attributable at all to a State or an international organization, but rather *to which entity*—the contributing State or organization or the receiving organization—conduct is attributable.³¹⁰

The Commentary goes on to stress the fundamentally *comparative* role played by the concept of control in the context of Draft Article 5, explaining that “when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be *who has effective control* over the conduct in question.”³¹¹ The

307. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 144–45, ¶ 406 (Feb. 26).

308. The hybrid uniforms provide a particularly obvious example of this. See *supra* note 19 and accompanying text.

309. See *supra* notes 16–19 and accompanying text. See also *supra* notes 231–236 and accompanying text in the context of the broader information provided in Part III.B.

310. DARIO Commentary (2004), *supra* note 192, at 111 (emphasis added).

311. *Id.* at 113.

premise is that one of the entities on whose behalf the troops are acting is liable, the challenge is to determine which of these entities it is in a given context. There is no worry that perhaps the act should be attributed to neither. It is this “decisive” comparative question that the next Part contends should be at the heart of the definition of “effective control” for the purposes of Draft Article 5.

E. A Proposed Interpretation of the Standard of Effective Control

The jurisprudence on the allocation of responsibility between the United Nations and troop-contributing states has thus far equated Draft Article 5’s conception of “effective control” over the impugned conduct with global, or overall, control over the peacekeeping troops.³¹² Applying the concept of “effective control” to the slightly different question of state responsibility for the acts of non-state armed groups, the ICJ has developed a different standard, which seems to tie the notion very closely to the question of whether the relevant entity directed or ordered the impugned act.³¹³ This section suggests an interpretation of “effective control” that requires a tighter link between the relevant entity and the impugned act than that provided for in the jurisprudence on the allocation of responsibility between the United Nations and troop-contributing states, but that does not go so far as to require that the link be in the form of a direct order. As discussed above, the ICJ has not considered directly the standard codified in Draft Article 5,³¹⁴ and even the contours of the “effective control” standard it has applied to states controlling non-state armed groups are not yet clear.³¹⁵ Therefore, the proposal advanced in this section, although novel, is not incompatible with existing ICJ jurisprudence.

Motivating the proposed re-interpretation is the need to answer the ILC’s “decisive question in relation to attribution of a given conduct,”³¹⁶ namely, “who has effective control over the conduct in question.”³¹⁷ A simple assessment of which entity gave the orders will not always provide an answer to this comparative question because, in many cases, human rights abuses occur at the foot-soldier level, having been ordered neither by the United Nations nor by the relevant state. Even when acts or omissions *are* taken directly pursuant to a superior order, an entity other than the one that issued the order might have a form of veto authority that affords it a degree of control over the conduct. It should be of no surprise, then, that the ILC, in its commentary to Draft Article 5, discusses not orders, but “command and

312. See *supra* notes 284–296 and accompanying text.

313. See *supra* notes 299–301 and accompanying text.

314. See *supra* notes 306–311 and accompanying text.

315. See *supra* notes 303–305 and accompanying text.

316. DARIO Commentary (2004), *supra* note 192, at 113.

317. *Id.* at 112–13.

control” more generally,³¹⁸ and states that “[a]ttribution of conduct to the contributing State is clearly linked with the retention of *some powers* by that State over its national contingent and thus on the control that the State possesses *in the relevant respect*.”³¹⁹

This Article asserts that those command and control powers most “relevant” to a given conduct are those most likely to be useful in preventing that conduct from occurring. Indeed, this is surely the most logical reading of the ILC Commentary. Consider that in the same paragraph as the reference to relevant powers, the Commentary states, “[p]ractice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct.”³²⁰ Both of the mentioned powers are relevant to how the state might have prevented the conduct from occurring, but they do not reflect ways in which the state might have deliberately caused the wrong to happen, as in the case of a direct order.

Under the proposed interpretation, then, the question is not simply “who gave the orders?” but rather, “given the command and control authority and responsibility with which each entity was endowed, and given the de facto actions that each took, which entity was positioned to have acted differently in a way that would have prevented the impugned conduct?” The answer to this question, it is proposed here, should determine whether the United Nations or the troop-contributing state had effective control over the wrongful conduct, and therefore which entity is liable for that conduct. Indeed, this interpretation of the “effective control” standard as it is applied to the question of liability for peacekeeper abuses is both the interpretation most consistent with principles elaborated in the ILC Commentary³²¹ and also the interpretation most narrowly focused on ensuring that liability tracks genuine responsibility for the wrongdoing.³²² Defined succinctly, “effective control,” for the purposes of apportioning liability in situations of the kind addressed by Draft Article 5, is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question.

318. *Id.* at 114. Recall that “command and control” encompasses much more than just the authority to give orders. See *supra* notes 231–236 and accompanying text.

319. DARIO Commentary (2004), *supra* note 192, at 113 (emphasis added).

320. *Id.* at 112 (footnote omitted).

321. See *supra* notes 318–320 and accompanying text.

322. This is so because it examines the full range of the responsibilities and actions of each entity and determines which entity should have acted differently pursuant to its responsibilities and authority. This holistic process is in stark contrast to the “overall operational control” test and the “who gave the orders” test, each of which examines only one dimension of control and, therefore, inevitably ignores other information that may be relevant to the determination of responsibility for the specific conduct in question.

IV. A PROPOSED SCHEME OF LIABILITY—"EFFECTIVE CONTROL" AS A MEASURE OF AN ACTOR'S POTENTIAL TO PREVENT THE ABUSE

Pursuant to this definition of "effective control," this Part proposes a new five-category approach to attributing liability for the human rights abuses of peacekeepers. A secondary consideration in developing this framework is the importance of protecting the right to remedy.³²³ Taking this second-order human right seriously means attributing liability in a way that minimizes the unique obstacles to recourse faced by the victims of peacekeepers' human rights abuses,³²⁴ wherever doing so is compatible with the overarching principle of "effective control."

With these two principles as its guiding lights, the five-category approach proposed in this Part achieves three important ends. First, it apportions responsibility in a way that is morally and legally appropriate, ensuring that the actor held responsible is the actor most capable of preventing the human rights abuse. Second, it matches liability to responsibility in a way that provides victims with the maximum recourse to adequate remedy within the confines of what is morally and legally sensible. Third, it structures incentives so as to minimize the likelihood of future violation.

A. Acts Ultra Vires—Peacekeepers Acting Without Authorization

The first class of human rights violations to consider is that in which peacekeepers act beyond the scope of the authority granted them by U.N. Command—cases, in other words, in which peacekeepers act *ultra vires*. A peacekeeper is immune from civil process for any acts perpetrated in her official capacity.³²⁵ If the right to remedy is to be upheld, then, her official acts must be attributed to either the United Nations or her sending state. This section argues that under the typical peacekeeping command structure described in Part III.B, *supra*, the troop-contributing state is endowed with all of the competencies relevant to the prevention of *ultra vires* abuses. The United Nations, by contrast, is impotent in this realm. Therefore, pursuant to the proposed interpretation of effective control,³²⁶ liability for human rights violations in this category should be attributed solely to the troop-contributing state.

Article 6 of the Draft Articles on Responsibility of International Organizations states: "The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes

323. See *supra* Part I.B.

324. See *supra* Parts I.C–I.D.

325. Model SOFA, *supra* note 19, art. 49; SIEKMANN, *supra* note 10, at 132.

326. See *supra* Part III.E.

instructions.”³²⁷ This application of *respondeat superior* to international law is in accord with the ICJ’s Advisory Opinion in *Certain Expenses*, which stipulates that “[b]oth national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.”³²⁸

Of course, Draft Article 6 refers to an “organ or agent” of the United Nations. Neither description applies to peacekeepers, who are organs of their states placed at the disposal of the United Nations and, as such, are more appropriately analyzed under Draft Article 5.³²⁹ Oddly, this distinction has thus far been ignored. The Secretary-General has asserted the United Nations’ responsibility for the *ultra vires* acts of peacekeepers, except when peacekeepers exhibit “gross negligence or wilful misconduct,” in which case responsibility falls on the state.³³⁰ The general control tests applied in *Behrami* and *H.N.* would also appear to subsume *ultra vires* acts under U.N. responsibility.³³¹ Moreover, the ILC Commentary to Draft Article 6 suggests that it is intended to apply to peacekeepers.³³²

This attribution of the *ultra vires* acts of peacekeepers to the United Nations does not conform to the interpretation of the principle of effective control proposed herein. Explaining the value of *respondeat superior* in this context, Hirsch writes: “on balance, it seems that, in principle, the subject which hires a person and places him in a position that enables him to commit the wrongful act should assume the responsibility. The allocation of responsibility in accordance with the institutional link is sustained in this case not only by a sense of fairness but also by a requirement of effectiveness.”³³³ Hirsch is absolutely right here, and the proposal advanced in this Article seeks to infuse into the “effective control” doctrine precisely the “requirement of effectiveness” to which he refers. However, contra the Draft Article 6 Commentary and the Secretary-General, the unique situation of peacekeepers means that such a standard militates in favor of attributing responsibility for *ultra vires* acts to troop-contributors, not the United Nations, and doing so in all cases, not only those in which peacekeepers were grossly negligent or engaged in willful misconduct.

327. DARIO (2004), *supra* note 189, art. 6.

328. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 168 (July 20).

329. DARIO (2004), *supra* note 189, art. 5 (addressing “[t]he conduct of an organ of a State . . . that is placed at the disposal of [an] international organization”); see *supra* notes 189–192 and accompanying text.

330. The Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶ 9, U.N. Doc. A/50/995 (July 9, 1996).

331. See *supra* notes 284–289, 296 and accompanying text. The general test does not examine specific orders or authorizations, so it cannot distinguish *ultra vires* acts from any others committed under an entity’s overall control.

332. DARIO Commentary (2004), *supra* note 192, at 119.

333. HIRSCH, *supra* note 16, at 94–95 (footnote omitted).

The U.N. Commander, the Security Council, and the Secretary-General all have an influence over the boundaries within which national troop contingents can operate.³³⁴ The Commander (and, through her, the Council and the Secretary-General) also gives specific orders requiring certain action of those contingents.³³⁵ However, when troops act *ultra vires*, by definition they are acting *despite* the best efforts of those who delimited their scope of authorized action. By acting outside of the scope of the action authorized by the U.N. Commander, or, indeed, by disobeying her direct orders, peacekeepers undermine the bases for effective U.N. control. The acts fall beyond the reach of that control precisely because by their very nature they deny the efficacy of that control.

Ordinarily, this obstacle is overcome by the line of reasoning articulated by Hirsch. Because the organization hired the individual(s) who acted *ultra vires* and put him in a position in which he could so act, the organization *did* in fact retain some capacity to effectively control the outcome.³³⁶ It could have hired a more reliable, responsible, or capable individual; it could have monitored his capabilities before placing him in a position from which he could harm others; it could have better prepared him for the situation that provoked his wrongful action; et cetera. The scope for an organization to prevent or pre-empt the *ultra vires* acts of its agents in this way gives it a degree of effective control over such acts. In the peacekeeping context, however, all of the mechanisms through which *ultra vires* acts could have been effectively prevented or pre-empted lie within the exclusive control of the troop-contributing state.

Consider the plea of Jean-Marie Guéhenno to member states as the United Nations sought to recover from abuses perpetrated in the DRC: “. . . count upon your continued support to ensure that your troops . . . fully understand the behaviour expected of them as UN peacekeepers; that commanders ensure good conduct, and that appropriate disciplinary or criminal action is taken against perpetrators after repatriation.”³³⁷ Guéhenno recognized the limits of his organization’s effective control and turned to those who held that control for assistance in the battle against sexual violence and abuse in the DRC.

One area in which Guéhenno requested member states’ help was discipline. This lever of control is important; effective discipline can deter troops from acting beyond the scope of their authority. However, as suggested by Guéhenno’s plea and as discussed in greater detail above, the authority to discipline members of a National Contingent remains the sole preserve of

334. See *supra* notes 205–213 and accompanying text.

335. See *supra* notes 218, 219–223, 225 and accompanying text.

336. See *supra* note 333 and accompanying text.

337. Jean-Marie Guéhenno, Under Secretary-General for Peacekeeping Operations, Remarks to the Special Committee on Peacekeeping Operations (Mar. 10, 2008), available at <http://www.un.org/Depts/dpko/articles/article100308.htm>.

the National Contingent Commander, acting pursuant to the authority of his national government.³³⁸ American U.N. Commander General Zinni, who led the U.N. force in Somalia, admitted to knowing of the human rights abuses of members of national contingents under his operational control from an early stage, but correctly understood himself to be legally powerless to do anything: “When the first incidents took place, we sat down with our judge advocate. . . . We decided that although we have tactical control and combatant command, we don’t have discretionary authority [over discipline]. That rests with the national forces.”³³⁹ General Zinni seemed to want to address the known abuse of forces under his control at an early stage by disciplining the perpetrators and deterring others. However, as the U.N. Commander, he was stymied by a system that grants sole authority over disciplinary power to the troop-contributing states.

An official Commission of Inquiry into the abuses by the Canadian contingent during the same mission found that “the many troubling incidents involving Canadian soldiers in Somalia all have a common origin—a lack of discipline.”³⁴⁰ The report ultimately lays the blame at the door of the Canadian national command, finding that “the leadership errors in the Somalia mission were manifold and fundamental: the systems in place were inadequate and deeply flawed”³⁴¹ Underlying such an assignation of responsibility is the notion that through proper discipline military leaders have the power to create positive organizational cultures in which individuals do not exceed their authority. Troop contributing states retain that disciplinary prerogative and through it an important tool of effective control over *ultra vires* conduct. The United Nations, on the other hand, is powerless in this realm.³⁴² The organization has made recommendations and is “working with its troop-contributing countries to ensure effective follow-up,”³⁴³ but ulti-

338. See *supra* notes 242–247 and accompanying text.

339. Ben Barber, *U.S. Officers Concede Knowing of Atrocities*, WASH. TIMES, July 27, 1997, at A10.

340. PUBLIC WORKS AND GOVERNMENT SERVICES OF CANADA, *DISHONOURED LEGACY: THE LESSONS OF THE SOMALIA AFFAIR, REPORT OF THE COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA* (1997), available at <http://www.dnd.ca/somalia/somaliae.htm> [hereinafter *DISHONOURED LEGACY*] (follow the link to “Executive Summary,” then to the section “Discipline”); see *id.* (follow the link to “Volume 2,” then look to chapters 18–21).

341. *Id.* (follow the link to “Executive Summary”). Investigating the abuses perpetrated by their troops in Somalia, Italian officials initially equivocated on the extent of the responsibility of the national contingent commanders. Reuters, *Italy Confirms Army Abuses in Somalia: But Report Says Senior Officers Largely Blameless*, THE TORONTO STAR, Aug. 9, 1997, at A12. However, when it became clear that the abuses were widespread within the contingent and thus indicative of poor disciplinary practice, inquiries into higher responsibility were re-opened. Rene Pollett, *Italy reopens Somalia inquiry*, THE GLOBE AND MAIL (Canada), Aug. 29, 1997, at A1.

342. As Loconte observes, Kofi Annan’s insistence on “‘zero tolerance’ of sexual exploitation by peacekeepers . . . [could] apply only to UN employees [because] military personnel fall under the jurisdiction of their own governments.” Loconte, *supra* note 24.

343. FACT SHEET: U.N. PEACEKEEPING - PREPARED BY THE UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS IN COOPERATION WITH UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, DPI/2429/Rev.2, (2008), available at <http://www.un.org/events/peacekeeping60/factsheet.shtml>.

mately these efforts are non-binding—it is the troop-contributing state that must actually “repress” the violations.³⁴⁴

Closely intertwined with discipline in this respect is criminal punishment, jurisdiction over which is also the sole preserve of the troop contributor.³⁴⁵ Criminal punishment affects outcomes in peacekeeping primarily by deterring future violators and taking existing violators out of the theater of operations. This logic is straightforward and parallels much of that regarding the impact of discipline. Moreover, the existing liability system already attributes grossly negligent acts to troop-contributing states.³⁴⁶ For these reasons, there is no need to belabor the point here. Suffice it to say that criminal punishment represents an additional and important tool of effective control over *ultra vires* conduct.

In addition to discipline and punishment, the authority to hire and promote responsible, reliable, and capable individuals and to send those individuals who have exhibited such traits on peacekeeping missions is also a critically important lever of effective control over *ultra vires* violations. The *Peacekeeper's Handbook* emphasizes:

The care needed to be taken in the selection of these individuals should not be underestimated. . . . Character weaknesses in restraint, self control, temperament and understanding can create animosity and cause irrevocable damage in the relationship between peacekeeper and those he serves. Practical commonsense, flexibility of approach, infinite patience and quiet diplomacy are the essential characteristics required, as well as a good sense of humour and an objective approach to the task.³⁴⁷

The *Handbook* is focused primarily on the efficacy of the mission, but it is clear that many of the same considerations are paramount in pre-empting *ultra vires* human rights abuse.³⁴⁸ Like discipline and punishment, the authority to select and promote troops is the sole preserve of the state. Governments offer the United Nations complete national contingents with pre-

344. Palwankar, *supra* note 17, at 234.

345. See *supra* notes 248–251 and accompanying text; see also Press Conference, Assistant Sec’y-Gen. Jane Holl Lute, Peacekeeping Misconduct Allegations (July 25, 2007), available at http://www.un.org/News/briefings/docs//2007/070725_Lute.doc.htm (noting in a press conference on peacekeeper abuses that “the United Nations had no way of punishing violators themselves”).

346. See *supra* note 330 and accompanying text.

347. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 263.

348. See, e.g., DISHONoured LEGACY, *supra* note 340 (follow the link to “Volume 2”, then look to chapter 21) (“The mission called for troops who were . . . able to respond flexibly to a range of tasks which demanded patience, understanding and sensitivity to the plight of the Somali people The sad events which came to characterize the mission must not be allowed to happen again. . . . We must equip our armed forces personnel not only with requisite technical skills and equipment, but also with the attitudes, character, psychological strengths, and ethical grounding to help them maintain their professionalism, humanity, and honour under the pressures of fear, discomfort, anger, boredom, horror, and uncertainty.”).

selected members and pre-existing and inviolable command structures.³⁴⁹ The United Nations can take or leave the contingent on offer. With peacekeepers always in high demand, the organization is often forced to take it.³⁵⁰

Perhaps the most astonishing example of a troop-contributing state's discretion to determine the caliber of the personnel sent on a peacekeeping mission is that of the Bulgarian contingent sent on the UNTAC peacekeeping mission in Cambodia in the early 1990s. As William Branigin reports, "Bulgarian authorities, in an apparent money-making scheme, filled up to a quarter of the original battalion with convicts."³⁵¹ Even after the contingent began to wreak havoc, the most a U.N. spokesman could say was that although the Bulgarian troops "behave in a manner that makes all of us blush . . . [i]t would be a terrible insult [to send them home]."³⁵² Using peacekeeping as a way of freeing up prison space is undoubtedly an extreme example, but the fact is that many states have contributed grossly unqualified troops³⁵³ and officers³⁵⁴ to peacekeeping operations. The Bulgarian case simply emphasizes the extent of troop-contributing state authority over this area.

The final mechanism through which the troop-contributing state can assert its effective control in a way that would prevent *ultra vires* human rights abuse is training. Canada's Somalia Commission of Inquiry report begins: "The soldiers, with some notable exceptions, did their best. But ill-prepared and rudderless, they fell inevitably into the mire that became the Somalia debacle."³⁵⁵ Canadian leaders were found to have "victimized" their troops by sending them to Mogadishu without proper preparation, creating the conditions for the deterioration that resulted in severe human rights abuses.³⁵⁶ Similarly, the Italian report on the abuses committed by its contingent in Somalia emphasized the importance of improving the training of its troops.³⁵⁷ The *Peacekeeper's Handbook* also stresses the critical importance of preparing "junior ranks" for a mission and ensuring that they "assume a correct attitude of mind."³⁵⁸

349. See *supra* notes 224-225 and accompanying text.

350. FLEITZ, *supra* note 110, at 80 (noting that in order to fully staff its peacekeeping operations in the 1990s, the United Nations "was forced to dramatically lower its standards to find peacekeepers").

351. William Branigin, *Tarnishing U.N.'s Image In Cambodia*, WASH. POST, Oct. 29, 1993, at A33. See also Gould, *supra* note 33, at 7.

352. Branigin, *supra* note 351, at A33.

353. See, e.g., FLEITZ, *supra* note 110, at 80; Gould, *supra* note 33, at 6; DISHONOURED LEGACY, *supra* note 340, vol. 2, ch. 20.

354. DISHONOURED LEGACY, *supra* note 340 (follow the link to "Volume 2", then look to chapter 19) ("many non-commissioned officers were young, inexperienced, and demonstrated poor leadership").

355. *Id.* (follow the link to "Executive Summary").

356. Schneider, *supra* note 34; see DISHONOURED LEGACY, *supra* note 340 (follow the link to "Volume 2," then look to chapters 19-21).

357. *Italy Confirms Army Abuses in Somalia*, *supra* note 341.

358. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 259.

Peter Rowe has highlighted a possible reason for the inadequate training that many troop contributors provide, noting that peace operations

may be considered by fighting units of an army to be 'useful' and 'easy.' 'Useful' in the sense of giving the unit concerned a sense of purpose, rather than what might appear to be an endless round of training exercises and 'easy' in the sense that the normal risks and prolonged stresses of combat are unlikely to be encountered. This view disguises the real nature and difficulties of peace support operations. As a result, there is a danger of inadequate preparation prior to deployment.³⁵⁹

Despite such commentaries on the deficiencies of peacekeeper training, this outcome is not inevitable. On the contrary, some states have exhibited exemplary attention to the specific training needs of future peacekeepers, " earmark[ing] and . . . training special units" for precisely that purpose, and even "co-operating to be able to provide multinational units trained to operate together."³⁶⁰ The fact that such wide disparities exist between states that set aside programs for peacekeeper training before even having a mission to which to contribute and states that send troops "ill-prepared and rudderless" into violent and chaotic theaters of conflict emphasizes the scope of state power here and the sense in which it affords states effective control over *ultra vires* conduct.

In sum, the capacity of troop-contributing states to have an influence on *ultra vires* human rights violations is manifold—they can select the right people for peacekeeping missions, train them well, promote them to positions of responsibility when they are ready, discipline them properly for acts that exceed the authority granted to them, and render them liable to criminal punishment when they commit crimes. Through acting with purpose and vigor along these dimensions, states can exert considerable effective control over this class of human rights violations. By contrast, the United Nations has limited capacity to do anything at all. Indeed, what defines this class of actions is precisely that the violations exceed the authority granted from above. For these reasons, under the effective control standard advocated in this Article, human rights violations committed by national contingent troops *ultra vires* must be attributed to the troop-contributing state and not to the United Nations. The troop-contributing state(s) in question must therefore be held solely liable for abuses in this category.

359. Peter Rowe, *Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents*, 5 J. CONFLICT & SECURITY L. 45, 46 (2000).

360. Bothe, *supra* note 10, at 683. The collaboration between Sweden, Denmark, the Netherlands, Poland, and Austria to which Simma refers here has since been disbanded. See Standby High Readiness Brigade for UN Operations, Public Statement, http://www.shirbrig.dk/html/public_statement_shirbrig.pdf. However, the point remains that troop contributors have a great deal of flexibility in how they train their forces for peacekeeping missions and that this collaboration was exemplary in its commitment to that cause.

B. *Peacekeepers Acting on Authorized Discretion*

Acts authorized by the U.N. Commander and/or his superiors in the Security Council or the Secretariat constitute a second category of peacekeeper-inflicted human rights violations. As a matter of general and necessary practice, military troop commanders give their subordinates discretion to act in a variety of ways.³⁶¹ U.N. peacekeeping operations are no different in this respect.³⁶² Occasionally, in granting the National Contingent Commander discretion, the U.N. Commander may include in the range of authorized options an act or omission that—if pursued—would result in the violation of human rights.³⁶³ When the National Contingent pursues such an option, the question is to whom the consequent human rights violations should be attributed.

In authorizing a national troop contingent to act in ways that violate human rights, the U.N. Commander fails to properly constrain the authority of her subordinates to legitimate ends. Equally, however, under such circumstances, the National Contingent Commander and the members of his contingent are under no direct command *requiring* that they violate human rights—such an act is simply one among a number of alternatives falling within their discretion. To reflect this mutual responsibility, while affording victims the widest possible array of fora in which to bring suit, this section contends that when peacekeepers violate human rights in this scenario, the United Nations and the troop-contributing state should be jointly and severally liable for the violation.

Before fleshing out the substantive argument for this standard, it should first be noted that this category will almost certainly be narrower than the first category, because it will be only in rare circumstances that a U.N. authorization is properly interpreted as allowing human rights violations. As Peter Rowe comments with respect to military forces acting pursuant to Security Council authorization, the mandate

is likely to be expressed in rather general terms, telling states where the pitch is, who the players are and the objective of the operation, but providing no clear rules as to when a yellow or red card should be shown to the players.

In missions involving some enforcement, it is common to express the obligation to use ‘all measures necessary’ to achieve the objective. This cannot, of course, be taken literally.³⁶⁴

361. See, e.g., U.S. Army Regulation 600-20, Army Command Policy, at 6 (May 13, 2002).

362. See, e.g., ROSE, *supra* note 271, at 106.

363. If such an eventuality seems unlikely to occur in practice, consider that U.N. commanders have in the past not merely authorized, but *ordered* serious violations of international law. See, e.g., *infra* note 391 and accompanying text.

364. Rowe, *supra* note 359, at 47.

Indeed, it would be manifestly absurd for a National Contingent Commander to read such an authorization literally. Terms such as “all measures necessary,” or indeed any grant of discretion, must be interpreted in light of certain robust presumptions. Since one of the primary purposes of the United Nations is to promote and encourage respect for human rights, pursuant to Article 1(3) of the U.N. Charter,³⁶⁵ one of those presumptions is surely that U.N. orders be interpreted so as to be compatible with human rights law. Thus, any vaguely phrased authorization from the United Nations can reasonably be interpreted to stretch only as far as is permissible under human rights law.

The application of such a presumption to peacekeeping limits the scope of this second category of human rights violation scenarios because many cases in which there may be a *prima facie* authorization to violate human rights can be quickly disposed of with the finding of an implied limit.³⁶⁶ Indeed, where there clearly exists such an implied limit, any action by peacekeepers in breach of that limit should be understood as action beyond the peacekeepers’ authority and would therefore be properly classified in the first category—as an *ultra vires* human rights violation.³⁶⁷

It is important, however, that the line between that *ultra vires* class of situations and the class of situations under analysis in this section be drawn in a way that preserves the integrity of the former classification as that of acts *exceeding* authorization. To maintain this distinction, this Article advocates the following standard of objective reasonableness. If, all things considered,³⁶⁸ it is reasonable to interpret the authorization as including the impugned act, the act should be assigned to the second category of violations. If however, such an interpretation of the authorization is *unreasonable*, the impugned act should be included in the category of *ultra vires* acts.

At this stage, given the United Nations’ core human rights purpose, are there *any* superior authorizations that could be reasonably interpreted as sanctioning the violation of human rights? The answer must surely be in the affirmative. Authorizations can be so specific as to leave no doubt as to what are the available options. Take, for example, the following hypothetical scenario. The U.N. Commander might, in authorizing a National Contingent Commander to interrogate a given individual, specify a list of techniques that may be used in the interrogation. Suppose that some of the interroga-

365. One of the core purposes of the United Nations is to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms.” U.N. Charter art. 1, ¶ 3.

366. The example cited by Rowe (*supra* note 364 and accompanying text) is a particularly obvious one. Given the extremely general language of the mandate, the prominence of human rights among the United Nations’ core purposes, and the reasonable presumption that orders are constrained by law, the authorization to use “all measures necessary” should be read as an authorization to use “all measures necessary *within the limits set by international law, including human rights law.*”

367. See *supra* Part IV.A.

368. Including, of course, the above-mentioned fact that the promotion of human rights is one of the United Nations’ guiding purposes. *Supra* note 365 and accompanying text.

tion techniques permitted fall under the definition of torture currently accepted as authoritative under the Convention Against Torture.³⁶⁹ In such a situation (contrived as it is here), the only reasonable interpretation would be that the U.N. Commander authorized human rights abuses because some of the alternatives explicitly allowed clearly violate human rights.

The key point about this category of action, however, is that as specific as the U.N. Commander might be in providing such an authorization, she ultimately delegates to the National Contingent Commander (and his troops) the choice of which authorized action to take.³⁷⁰ Whether or not to act in a way that violates human rights is therefore—with regard to the internal command structure if not the law—a matter for the latter’s discretion. Regardless of what he might have been *permitted* to do under the authorization, he was not *ordered* or *required* to torture the detainee.

In situations such as this it is clear that the U.N. Commander (or other authorizing U.N. actor) has a degree of effective control over the violation. By explicitly allowing the action in question, the U.N. Commander missed an opportunity to prevent the violation. She could have properly delimited the authorization so as to preclude human rights violations. In failing to do so, the Commander failed to properly exercise her effective control so as to prevent the human rights violation from occurring.

The U.N. Commander’s failure in this regard is attributable to the United Nations even if the United Nations—acting through the Secretary-General or the Security Council—did not specifically approve the authorization granted.³⁷¹ This attribution applies because the United Nations can be held responsible for the acts of its agents acting in their official capacities pursuant to Draft Article 6 of the Draft Articles on the Responsibility of International Organizations, even if those agents act *ultra vires* by “authorizing” acts that they have no authority to authorize.³⁷² Draft Article 6 properly applies to the U.N. Commander because, unlike the members of the national contingents, she is an agent of the United Nations,³⁷³ not a member of a state organ placed at the disposal of the United Nations.³⁷⁴ More abstractly, the underlying principle of *respondeat superior* links the U.N. Commander to the United Nations in a way that it does not link the national

369. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85. Whether a given act meets the Article 1 standard for torture might be influenced by a finding of the Committee Against Torture (*see id.* arts. 17, 19–24), the Human Rights Committee, or a consensus reached by domestic and international courts.

370. If a U.N. Commander delegates to the National Contingent Commander discretion over a range of options, *all* of which are human rights violations, this would be covered by the analysis provided *infra* Parts IV.C and IV.D.

371. For more on the managerial roles of the Secretary-General and the Security Council, see FLEITZ, *supra* note 110, at 87–91.

372. *See* DARIO (2004), *supra* note 189, art. 6.

373. DARIO (2004), *supra* note 189, art. 4(2) (“[T]he term ‘agent’ includes officials and other persons or entities through whom the organization acts.”).

374. *See supra* notes 191–192, 329 and accompanying text.

contingent to the United Nations in *ultra vires* situations because the former was hired individually by the United Nations and can be dismissed individually by the United Nations,³⁷⁵ whereas the latter was incorporated into the peacekeeping force as an indivisible unit³⁷⁶ and its members are subject only to the disciplinary authority of the National Contingent Commander.³⁷⁷

However, a strong case can also be made for the attribution of the act to the troop-contributing state. Most fundamentally, under the stipulated fact pattern, the National Contingent Commander is under no obligation to take the option that violates human rights.³⁷⁸ Better decision-making on his part would avoid the violation altogether. The arguments regarding the importance of domestic authority over selecting and training appropriate national commanders and troops apply here just as in the first category of rights abuse.³⁷⁹ Specifically, by appointing responsible commanders and training them properly in their human rights responsibilities, troop-contributing states can go some way to ensuring that they do not choose to violate human rights when given viable alternatives.

It is also important to remember that National Contingent Commanders retain the right to engage in regular communication with their national governments.³⁸⁰ This communication must not involve soliciting or taking orders, particularly to the extent that they conflict with the orders of the U.N. Commander.³⁸¹ However, since the troop contingent remains responsible for upholding the laws applicable to it as an agent of its state,³⁸² a natural interpretation of the right of communication is that it includes the right to ask for legal advice vis-à-vis whether an authorized action is compatible with the state's human rights obligations. To engage in such communication would not be to solicit orders contrary to the U.N. chain of command; it would merely be to ask for professional advice as to the legal consequences of one of a number of options left at the National Contingent Commander's discretion. Indeed, the right to ask one's domestic government for legal advice appears to be implicit in the standard under which "if soldiers of a contingent are required to undertake duties or acts which in any way clash with normal principles under which they would be expected to operate in their own army, the contingent commander has the right to refer to his own Minister of Defence."³⁸³

375. See *supra* note 220 and accompanying text.

376. See *supra* notes 224–225 and accompanying text.

377. See *supra* notes 237–247 and accompanying text.

378. See *supra* notes 369–369 and accompanying text.

379. See *supra* notes 337–360 and accompanying text.

380. See INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 213; SIEKMANN, *supra* note 10, at 113; DEP'T OF THE ARMY, *supra* note 217, at 25.

381. SIEKMANN, *supra* note 10, at 113; see also *supra* notes 219, 223 and accompanying text.

382. INTERNATIONAL PEACE ACADEMY, *supra* note 11, at 47.

383. *Id.* at 365.

A well-selected and well-trained National Contingent Commander will better perceive when one of the alternatives available to him has human rights implications and will therefore recognize when to use the available line of communication to his home state to seek advice as to the legal consequences of pursuing one avenue or another. The effectiveness of the selection and training of the individual and the quality of the legal advice provided are both variables over which the troop-contributing state has control and through which it can influence the likelihood of acts occurring that are properly classified in this second category of human rights violations.

In sum, in situations falling into this second category, both the United Nations and the troop-contributing state have real tools with which to prevent abuse. Whether they are *equally* responsible for the outcome is impossible to gauge—what is important is that the agents of each are independently well-positioned to prevent the violation. In essence, then, both entities have “effective control” over the individuals committing the violation. Under these circumstances, the right of victims to adequate remedy militates in favor of joint and several liability, whereby victims would be able to bring a claim against the troop-contributing state, the United Nations, or both, with the total damages paid not to exceed the remedy appropriate for the harm they suffered.³⁸⁴

This scheme appears to be in accord with the standard advocated by Hirsch with respect to decisions implemented by international organizations, such as Security Council authorizations. He contends that

when the UN organization takes a significant part in the decision-making process leading to the adoption of certain conduct, i.e. authorizing a member [state] to adopt a particular measure in accordance with its internal law . . . the member has latitude in implementing the measure authorized . . . but the act of authorization should not be underestimated. In such cases, both the executing state and the organization should be held responsible.

That an outcome of joint and several responsibility is cognizable under the international law of the responsibility of states and international organizations is quite clear. With respect to the general question of attribution, the ILC’s commentary provides,

[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State,

384. See, e.g., BLACK’S LAW DICTIONARY 933 (8th ed. 2004).

nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.³⁸⁵

Aurel Sari has strongly criticized the *Behrami* court for failing to consider this possibility.³⁸⁶ Part V, *infra*, discusses some of the primary policy benefits of a system of joint and several liability. Here it is sufficient to note that such a system achieves the laudable end of multiplying the avenues of recourse available to victims and therefore better facilitates the realization of the right to remedy.³⁸⁷

Whether the paying party under the proposed scheme of liability should have a right of contribution and indemnity from the nonpaying party and at what proportion of the total payment are not questions that this Article purports to address in any detail.³⁸⁸ As a tentative suggestion, it may be best if the party against whom the victim in question brought the claim has responsibility to bear the claim in full. There are several reasons to prefer such a system. First, there is no forum in which the United Nations or the troop-contributing state could bring suit against each other, which significantly complicates any contribution and indemnity scheme.³⁸⁹ Second, each entity has independent effective control, so each essentially bears full responsibility for the event, even though the other could also have prevented it. Third, a system in which either the troop-contributor or the United Nations could be forced to pay out the total damages provides the greatest incentive for the troop-contributors to ensure that the United Nations has an effective and accessible independent claims system.³⁹⁰ By contrast, under a contribution system, the troop contributors would stand to gain little from an effective United Nations claims system, because regardless of whether the United Nations or the troop-contributing state were the initial defendant in any litigation, the cost of paying out damages would be shared between the two in the same manner.

385. DARIO Commentary (2004), *supra* note 192, at 101. See also U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of International Organisations, Report of the International Law Commission Sixtieth Session*, art. 50 [49], U.N. GAOR, 60th Sess., U.N. Doc. A/CN.4/L.725 (May 30 2008); *Draft Articles of State Responsibility*, *supra* note 50, art. 47(1).

386. Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151, 158–59 (2008).

387. Contrast this with the current denial of recourse. See Parts I.C, I.D, *supra*.

388. This is, however, clearly an important question in general assessments of joint and several liability schemes. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY §§ C18–C21 (2000); Kevin Keogh, *Liability for Securities Law Violations*, 14665 PRACTISING LAW INSTITUTE IN UNDERSTANDING THE SECURITIES LAWS 2008 835, 845 (2008) (noting that the “general drift of [American] law today allows contribution among joint tortfeasors”).

389. See *supra* notes 82–88 and accompanying text.

390. See *infra* notes 499–502 and accompanying text.

C. *Orders that Violate the Lex Specialis—International Humanitarian Law and Peacekeepers' Duty to Disobey*

Direct orders from U.N. command to national contingents, obedience to which would lead to human rights violations, must be divided into two categories. The first of these is addressed in this section and includes orders, obedience to which would result in violations of both international human rights law and international humanitarian law, with the latter violation rising to the level of a war crime. The second category is addressed in Part IV.D and includes all other orders, obedience to which would violate human rights.

This section contends that the appropriate liability scheme for actions falling into the first of these two categories is again one of joint and several liability for the United Nations and the troop-contributing state. This scheme is appropriate because both entities have the authority and means to prevent such violations—the U.N. command by issuing lawful orders, and the state by training its troops in international humanitarian law, providing them real-time legal advice when necessary, directing them to disobey criminal orders, and prosecuting them when they fail to do so.

Before elaborating the substance of this argument, it is important to establish this category's practical relevance by addressing two threshold concerns. First, as an empirical matter, the category of United Nations-ordered war crimes is unfortunately not a null set. In one clear example, African Rights reported that in Somalia between June and October of 1993, senior officials in UNOSOM ordered helicopter attacks on civilian targets and armed assaults on hospitals.³⁹¹ Similar tactics were allegedly used by ONUC in the 1960s.³⁹² *Prima facie*, these actions appear to be war crimes, as codified in Article 8 subsections (2)(b)(i), (2)(b)(ii), and (2)(b)(ix) of the Rome Statute of the International Criminal Court.³⁹³

Second, the concept of an act that is both a war crime and a human rights violation is clearly legally cognizable. It is now well documented that international human rights law and international humanitarian law overlap in certain circumstances.³⁹⁴ Indeed, such overlap is inevitable when one considers that human rights law applies during times of conflict as well as peace³⁹⁵

391. African Rights, Human rights abuses by the United Nations forces, July 10, 1997, <http://www.hartford-hwp.com/archives/27c/423.html>

392. See *supra* notes 40–41 and accompanying text.

393. Rome Statute of the International Criminal Court art. 8(b)(i, ii, ix), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

394. See, e.g., Droege, *supra* note 134, at 330–332; Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationships of the Laws*, 31 AM. U. L. REV. 935 (1982); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. L. 1, 14–17 (2004).

395. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 122, ¶ 106; Armed Activities on the Territory of the Congo, *supra* note 126, ¶¶ 215–216; U.N. Human Rights Comm., *International Covenant on Civil and Political Rights: General Comment No. 29*, art. 4, U.N. Doc CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

and humanitarian law applies not only in times of conflict, but also in times of occupation.³⁹⁶ Thus, in its *Nuclear Weapons* Advisory Opinion, the ICJ held that the human right to life, for example, must be interpreted through the *lex specialis* of international humanitarian law when applied to situations of armed conflict.³⁹⁷ War crimes are, of course, simply the most serious of violations of international humanitarian law.³⁹⁸

The real legal and empirical possibility that a U.N. Commander might order actions that are *both* war crimes *and* human rights violations is important here because orders to commit war crimes temporarily sever the chain of command, making disobedience not only possible, but mandatory. It is now standard among states to provide that soldiers have a *right* to disobey unlawful orders.³⁹⁹ However, that right becomes a *duty* to disobey when the orders are *manifestly* unlawful. Thus, the International Committee of the Red Cross recently found that it is a matter of customary international law that: (1) “[i]ndividuals are criminally responsible for war crimes they commit,”⁴⁰⁰ (2) in this regard, “[e]very combatant has a *duty to disobey a manifestly unlawful order*,”⁴⁰¹ and (3) “[o]beying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered.”⁴⁰²

Martha Minow has noted that “crucial” to the very basis for the Nuremberg trials at the International Military Tribunal established following World War II was an “explicit rejection of the superior orders defence” for war crimes.⁴⁰³ This was enshrined in Article 8 of the Nuremberg Charter,⁴⁰⁴ which was subsequently affirmed by the U.N. General Assembly.⁴⁰⁵ Following in that tradition, the International Criminal Tribunals for the former Yugoslavia and for Rwanda (“ICTY” and “ICTR”) and the Special Court

396. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 2 is common to all four Geneva Conventions of 1949.

397. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8); see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9); *Bámaca Velásquez v. Guatemala*, 2000 Inter-Am. Ct. H.R., (ser. C) No. 70, at 79 (Nov. 25, 2000).

398. *Prosecutor v. Tadić*, Case No: IT-94-1-A, Judgment, ¶¶ 98–145 (July 15, 1999); Rome Statute, *supra* note 393, art. 8(2).

399. See, e.g., Army Act 1955, 5 Eliz. C. 18 §§ 34, 36, (Eng.); Rowe, *supra* note 359, at 47 (“In the disciplinary codes of most states a soldier will commit a military offence if he . . . fails to obey a *lawful* command . . .”).

400. Jean-Marie Henckaerts & Louise Doswald-Beck, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 551 (2005) (describing Rule 151).

401. *Id.* at 211 (emphasis added) (describing Rule 154).

402. *Id.* at 211 (describing Rule 155).

403. Martha Minow, *Living up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 4 (2007).

404. Charter of the International Military Tribunal art. 8, Aug. 8, 1845, 59 Stat. 1544, 82 U.N.T.S. 279.

405. G.A. Res. (G.A. Res. 95) ¶95(1), U.N. Doc. A/RES/95(1) (Dec. 11, 1946).

for Sierra Leone (“SCSL”), each of which takes jurisdiction over war crimes,⁴⁰⁶ have all affirmed that “[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him . . . of criminal responsibility”⁴⁰⁷ for such crimes. Although superior orders may mitigate the sentence imposed on a convict,⁴⁰⁸ this does not reverse the basic point that subordinates are criminally liable when they follow criminal orders.⁴⁰⁹ The Statute of the International Criminal Court (“ICC”), though affirming the duty to disobey manifestly unlawful orders,⁴¹⁰ equivocates as to whether war crimes are manifestly unlawful.⁴¹¹ Nonetheless, the unanimity of the various precedent tribunals surely establishes a common standard that the ICC should follow when it comes time to adjudicate this matter.

The principle has also been applied in domestic courts. In a paradigmatic example, Israeli courts upheld the duty to disobey manifestly unlawful orders with respect to the infamous “Black Flag” incident at Kfar Kassem, in which soldiers killed 47 civilians after receiving what was interpreted as an order to shoot anyone returning to a number of Arab villages near the Jordanian border after a government-imposed curfew.⁴¹² Similarly, in *United States v. Griffen*⁴¹³—a typical American case of its kind—an American soldier was convicted of murder after he followed his platoon leader’s order to execute a prisoner of war.⁴¹⁴

This discussion of individual criminal responsibility is directly pertinent to the issue of civil human rights liability in U.N. peacekeeping because it demonstrates that the criminal nature of a superior order temporarily severs what is ordinarily a firm chain of command.⁴¹⁵ This bifurcates the lines of

406. Statute of the Special Court for Sierra Leone arts. 2–3, Aug. 14, 2000, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>; Statute of the International Criminal Tribunal for Rwanda art. 4, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the former Yugoslavia arts. 2–3, May 25, 1993, 32 I.L.M. 1192.

407. Statute of the Special Court for Sierra Leone art. 6(4), Aug. 14, 2000, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>; Statute of the International Criminal Tribunal for Rwanda art. 6(4), Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(4), May 25, 1993, 32 I.L.M. 1192.

408. Statute of the Special Court for Sierra Leone art. 6(4), Aug. 14, 2000, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>; Statute of the International Criminal Tribunal for Rwanda art. 6(4), Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(4), May 25, 1993, 32 I.L.M. 1192.

409. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 13 (Oct. 7, 1997).

410. Rome Statute, *supra* note 393, art. 33(1).

411. *Id.* art. 33(2).

412. See, e.g., Minow, *supra* note 403, at 43–44.

413. STJEPAN G. MESTROVIC, RULES OF ENGAGEMENT? A SOCIAL ANATOMY OF AN AMERICAN WAR CRIME 7, 151 (2008) (“U.S. military judges routinely hold . . . that it is the low-ranking soldier’s duty to disobey an unlawful order.”).

414. *United States v. Griffen*, 39 C.M.R. 586, 587, 590 (1968) (upholding a guilty sentence on the grounds of obeying a manifestly unlawful order).

415. MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR 287 (1999) (noting the “broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit atrocities”).

responsibility. The United Nations is, of course, responsible for the initial order.⁴¹⁶ However, the National Contingent Commander and his troops have the duty and authority to veto that order. Whether they fulfill that duty is a function of their understanding of the laws of war, their firmness of character, and whether or not a failure to disobey the unlawful order is likely to be met with criminal sanction. These factors are in turn a function of the state's systems of training, troop and commander selection, ad hoc legal advice, and criminal punishment.

The responsibility of states to properly train their troops in the laws of war is explicitly required by the ICRC⁴¹⁷ and codified in the Model SOFA.⁴¹⁸ Together with selecting and promoting men and women of strong will and good character, this training is of particular importance in ensuring that members of the national contingent are prepared to make the extraordinary and difficult decision to disobey superior orders.⁴¹⁹

To supplement the pre-emptive mechanisms of troop selection and training, states can also provide real-time legal advice. The Italian investigation into the human rights abuses of its troops in Somalia suggested that "magistrates and human rights experts should travel with soldiers on future peacekeeping missions to guarantee international law [is] upheld."⁴²⁰ Short of this, the issue of determining whether orders from U.N. command are criminal is another on which it would be perfectly appropriate for the National Contingent Commander to consult with her domestic government to clarify any legal ambiguity.⁴²¹ Such communication would be legitimate precisely because subordinates have a duty to disobey such orders, negating any concerns regarding the state encouraging violations of the chain of command.

Finally, through providing robust penal sanctions for those participating in war crimes,⁴²² troop-contributing states can reduce the occurrence of such acts through effective deterrence.⁴²³ Indeed the Secretary-General's "Bulletin on the Observance by the United Nations forces of International Humanitarian Law" places this responsibility squarely on troop contributors, providing that "[i]n case of violations of international humanitarian law, members

416. See *supra* notes 371–377 and accompanying text.

417. Palwankar, *supra* note 17 ("[T]he ICRC considers that each State remains individually responsible for the application of [international humanitarian law] treaties whenever it provides a contingent for a [peacekeeping force]. In consequence, the State should do what is necessary, especially by issuing appropriate instructions to the troops before they are posted abroad.")

418. *Model SOFA*, *supra* note 19, art. 28 ("[The Participating State] shall . . . ensure that the members of its national contingent serving with [the United Nations peace-keeping operation] be fully acquainted with the principles and spirit of [the Geneva] Conventions.")

419. See *infra* notes 438–440 and accompanying text.

420. *Italy Confirms Army Abuses in Somalia*, *supra* note 341.

421. See *supra* notes 379–382 and accompanying text.

422. See, e.g., *supra* notes 411–413 and accompanying text.

423. See *supra* notes 337–345 and accompanying text.

of the military personnel of a United Nations force are subject to prosecution in their national courts.”⁴²⁴

Of course, there can be no doubt that when the U.N. Command orders actions that violate human rights protected under both human rights law and international humanitarian law, the United Nations is responsible for those acts, should they transpire.⁴²⁵ After all, simply withholding the criminal order would be sufficient to frustrate the act. For that reason, commanders who issue such orders are themselves criminally liable for the criminal acts that they instigate.⁴²⁶ However, subordinates have a duty to disobey orders that are manifestly unlawful—including, *inter alia*, orders to commit war crimes⁴²⁷—and troop-contributing states have a number of mechanisms to ensure that members of their national contingents uphold that duty. These levers of effective control include troop and commander selection, training, *ad hoc* legal advice, and the application of criminal justice.

Since violations falling into this third category are in that sense under the effective control of both the United Nations and troop-contributing states, a system of joint and several liability should again be applied in the interests of maximizing victims’ access to just reparation.⁴²⁸ The obvious objection to such a system is that this will give states a basis on which to interfere in and disrupt the U.N. control system. In the case of human rights violations that are also war crimes, that concern is misplaced. Precisely because participating in war crimes can lead to criminal liability, individual soldiers already have a duty to disobey orders requiring such participation.⁴²⁹ The integrity of the chain of command in such circumstances is eviscerated by the very nature of the command given, obviating the need for protection from troop contributor interference.

D. Orders that Violate Human Rights Law—When U.N. Orders Lead to Tragic Consequences

The second class of direct U.N. orders that entail the violation of human rights is comprised of all direct orders that do not fall into the first class—namely all direct orders to violate human rights that do not also entail war crimes. The critical distinction between these two categories is that in this second class there is no duty on the part of the subordinates to disobey the orders of their superiors, and there may not even be a robust right to disobey those orders. This substantially curtails the capacity of the troop-contribut-

424. The Secretary-General, *Bulletin on the Observance by United Nations Forces of International Humanitarian Law*, 1, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

425. *See supra* notes 370–376 and accompanying text.

426. Rome Statute, *supra* note 393, art. 25(3)(b).

427. *See supra* notes 400–414 and accompanying text.

428. *See supra* notes 384–390 and accompanying text.

429. *See supra* notes 400–414 and accompanying text.

ing state to influence the situation, thus undermining its effective control over the wrongful conduct. For this reason, human rights violations falling into this category should be attributed solely to the United Nations, and not to the troop-contributing state.

As discussed at length above, the authorities upholding the “duty to disobey” doctrine restrict that duty to *manifestly* unlawful orders.⁴³⁰ Though the right to disobey extends to all unlawful orders,⁴³¹ the practical flimsiness of this right is revealed by the U.S. Department of Defense *Manual for Courts-Martial*, which stipulates that “[a]n order requiring the performance of a military duty or act may be *inferred to be lawful* and it is disobeyed *at the peril of the subordinate*. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.”⁴³² The implications of this standard are profound. True, technically it does not overturn a subordinate’s right to disobey orders that are unlawful, but not patently (or manifestly) so. However, if a subordinate is to activate that right she must be supremely confident that the order is actually unlawful. After all, she faces a heavy penalty for willful insubordination⁴³³ and the legal presumption is against her—she acts at *her peril* and must overcome a *presumption of lawfulness*.⁴³⁴ Since the duty to disobey covers only manifestly (or patently) unlawful orders, and disobedience to all other unlawful orders involves a heavy personal risk, the incentives are clear. As Mark Osiel comments, in effect there is a “broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit *atrocities*.”⁴³⁵ Orders that are unlawful but not patently so fall on the former side of this bright line—soldiers have a *de facto* duty to obey them,⁴³⁶ despite their *de jure* right to disobey.⁴³⁷

This structure is not without reason. As Minow notes, there is a genuine dilemma at the heart of this issue:

Military training and discipline emphasize compliance with commands . . . penalties attach to failures to comply even with trivial directives in order to underscore military discipline. How can this training maintain its effectiveness if it includes not only the invitation but also the command to question or evaluate orders for their lawfulness? The conflict between obeying orders and assessing whether an order is one that deserves obedience is obvious and

430. See *supra* notes 400–414 and accompanying text.

431. See *supra* note 399 and accompanying text.

432. U.S. DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2008), ¶ 14(c)(2)(a)(i), at IV-19, available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf> (emphasis added).

433. *Id.* ¶ 14(a)(2), at IV-18.

434. See, e.g., *Ponder v. Stone*, 54 M.J. 613–14, 617 (N-M. Ct. Crim. App. 2000) (finding that petitioner failed to rebut the presumption of lawfulness).

435. OSIEL, *supra* note 415, at 287 (emphasis added).

436. *Id.* at 287–89.

437. See *supra* note 399 and accompanying text.

confusing to commanding officers and soldiers alike. . . . Taken to an extreme, directives to “think for yourself” and “question authority” would disturb the command structure and practice of drilled obedience in the military.⁴³⁸

Beyond emphasizing the rationale for a bright line rule, this observation also suggests why human rights violations not rising to the level of war crimes do not fall on the “duty to disobey” side of that line. As Matthew Lipman comments, a broad duty to disobey requires that subordinates “be capable of cataloging and comprehending the encyclopedic rules of the law of war during the heat of battle, many of which require intricate and nuanced factual and legal judgments.”⁴³⁹ Holding individuals responsible for mobilizing such a body of law against superior orders is extremely demanding, even when limited to the body of law that is central to the “warrior’s ethic.”⁴⁴⁰

Human rights law is even broader,⁴⁴¹ potentially more ambiguous in its requirements,⁴⁴² and not fundamental to the military craft. It would be simply unrealistic to hold individuals responsible for mobilizing such a body of law *against* superior orders, which they must presume to be lawful.⁴⁴³ Moreover, to hold individuals responsible for upholding human rights *qua* human rights, against the orders of their superiors, and independent of any duty under criminal law (in the military context, the law of war crimes) would be rather bizarre when one considers that human rights law contains obligations for states, not individuals.⁴⁴⁴ It should perhaps be of little surprise, then, that when academics write of a duty to disobey orders to commit human rights violations,⁴⁴⁵ the authorities they cite for such statements are strictly limited to those dealing with human rights violations that are also war crimes or crimes against humanity.⁴⁴⁶

438. Minow, *supra* note 403, at 5.

439. Matthew R. Lippman, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, 20 PENN ST. INT’L L. REV. 153, 154 (2001); *see also* Minow, *supra* note 403, at 9 (“Sorting out lawful military orders from unlawful ones is difficult under the best of circumstances. . . . Interpreting . . . complex [legal rules] and applying them to shifting contexts, new military technologies, and disputed facts are subtle and difficult tasks.”).

440. Lippman, *supra* note 439, at 153–54.

441. *See infra* note 450 and accompanying text.

442. *See infra* notes 451–452 and accompanying text.

443. *See supra* notes 432–434 and accompanying text.

444. *See, e.g.*, Antenor Hallo De Wolf, *Modern Condottieri In Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 346 (2006). Contrast this with humanitarian law, which individualizes responsibility. Hernan Montealegre, *Human Rights and Humanitarian Law*, 31 AM. U. L. REV. 969, 972 (1982).

445. *See, e.g.*, Minow, *supra* note 403, at 4 (“The Nuremberg trials . . . rejected the ‘I was just following orders’ defence to charges of military atrocity and human rights violations.”); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2603 (1991) (“[C]onsistent with universally accepted principles of law, individuals should never be exonerated or exempted from prosecution for grave human rights violations on the ground that they were ‘following orders.’”).

446. *See, e.g.*, Minow, *supra* note 403, at 4 n.4 & 17 n.51; Orentlicher, *supra* note 445, at 2603 n.300.

Soldiers should be trained to follow orders and disciplined when they do not.⁴⁴⁷ Soldiers, particularly at the senior level, should also be trained in human rights law and should be able to make decisions so as to uphold human rights or—at a minimum—know when they need legal advice.⁴⁴⁸ However, asking them to adjudicate the lawfulness of the commands of superior officers in any but the most unambiguous cases is simply too demanding on the soldier and too disruptive to the command structure that is integral to military cohesion and functionality. Improper insubordination is a serious military offense,⁴⁴⁹ so soldiers need a bright line to demarcate the situations in which it is appropriate. The categories discussed in this section and in Part IV.C, *supra*, fall on opposite sides of that bright line.

When subordinates have no robust right to disobey, the troop-contributing state has no mechanism through which to exert effective control over the impugned conduct. In particular, the levers of control that are so important in the war crimes situation discussed in Part III.C, *supra*, are of no use here. Even properly trained and carefully selected troops cannot be expected to disobey orders in this category. Moreover, penal deterrence is not applicable, because the peacekeepers' acts in such situations are not criminal. Finally, the prospect of ad hoc communication between a troop-contributing state and its national contingent raises the specter of chain of command infringement.

This last point is important. If troop-contributing states are to be held even jointly responsible for an infraction, they will naturally claim that they need to be able to protect themselves from liability by ensuring that their troops do not do anything that might engage that liability. In the three categories discussed above, states are able to exercise that influence legitimately through their formal channels of command (training, troop selection, communication, discipline, and criminal punishment), and can supplement those with limited legal advice. Indeed, a state would not better insulate itself from liability for abuses falling into any of those first three categories by interfering with the U.N. chain of command.

In this fourth category, by contrast, none of the formal channels of troop-contributor command could prevent the realization of a human rights violation ordered by the U.N. Commander, because the troops comprising National Contingents have a duty to follow that order. The only way in which a state could stop its troops from engaging in such violations would be by intervening and contradicting the U.N. command. While such opposition may seem justified when the command truly violates human rights, the danger is that states will start using this concept as a crutch to excuse *any* kind of intransigence, thus generally undermining the unified and centralized op-

447. See generally *supra* Part IV.A.

448. See generally *supra* Part IV.B.

449. See U.S. DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2008), *supra* note 432.

erational control vested in the United Nations. Exacerbating this worry is the concern that the broad⁴⁵⁰ and potentially “vague”⁴⁵¹ and “amorphous”⁴⁵² scope of human rights law could provide ample cover for such state disruption of U.N. command. This ambiguity is, after all, one of the features that distinguishes the broader class of human rights violations from the *manifestly* unlawful category of war crimes.⁴⁵³

The obvious response to this worry is that national contingents *already* act independently, consult their governments on whether to obey orders, and disregard the centralization of operational control in the United Nations.⁴⁵⁴ Given the prevalence of such behavior, one might argue that the law would better approximate true effective control if it embraced this reality by holding troop-contributing states liable for the covert influence they currently exert with impunity.

However, this realist contention is misplaced. Troop-contributor interference and political influence, though it certainly happens, is not currently accepted as legitimate practice.⁴⁵⁵ Providing legal justification for such interference on the grounds that it is necessary to ensure that human rights are respected would open the floodgates to more brazen, more frequent, and potentially more destabilizing troop-contributing state behavior. Perhaps more importantly, the doctrine of effective control anyway mandates that each case be investigated individually.⁴⁵⁶ In cases where member states *are* surreptitiously exercising control over operations, a proper “effective control” investigation would acknowledge that and assign liability to the troop contributor. Indeed, when troops follow their domestic governments contra U.N. command, they act *ultra vires*.⁴⁵⁷

In sum, the human rights violations of peacekeepers perpetrated in the execution of a direct U.N. command should not be attributed to any party but the United Nations itself.⁴⁵⁸ To reiterate, there are three basic points here: first, states do not exercise effective control over such acts through any of their formal avenues of control. Second, they should not be given the authority to exercise such control through other avenues. Third, if they do

450. See DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 14 (1999) (noting that there are close to 100 global and regional human rights treaties).

451. See, e.g., Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 *PENN ST. INT'L L. REV.* 615, 656 (2006); Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 *U. PA. L. REV.* 1925, 1936 (2006).

452. Meron, *supra* note 164, at 22.

453. See *supra* notes 400–414, 430–449 and accompanying text.

454. See *supra* Part III.C.

455. See *supra* note 215 and accompanying text; see, e.g., FLEITZ, *supra* note 110, at 74 (referring to the influence of troop-contributing states as a “chain of command problem[]”).

456. DARIO (2004), *supra* note 189, art. 5; DARIO Commentary (2004), *supra* note 192, at 111 (“[E]ffective control” is a question of “the factual control that is exercised over the specific conduct taken.”).

457. See *supra* Part IV.A.

458. On why such acts are attributable to the United Nations, see *supra* notes 371–377, 425 and accompanying text.

exercise such control through illegitimate means, the act would be properly classified in the first category, as an *ultra vires* violation.

*E. Forced Omissions—When the United Nations Fails its Peacekeepers
in Times of Crisis*

Each of the above categories incorporates both actions and omissions on the part of peacekeepers. Thus, for example, both authorized acts and authorized omissions fall into the second category above and both *ultra vires* acts and *ultra vires* omissions fall into the first category. Generally, acts and omissions in each category have the same basic implications, and for the most part there is little need to distinguish between the two. However, there is one aspect of omissions that requires separate, if brief, attention—namely what is termed here the “forced” omission. While refraining from taking a certain action is almost always *possible* for a given actor, taking affirmative steps can require a considerable additional investment of resources. When the resources necessary for action are not available, taking that action is rendered impossible. Such circumstances require a specially tailored standard, and this section contends that “forced omissions” should be attributed solely to the United Nations and not to the troop contributor.

To ground this concept in an example, consider an argument that has been invoked on behalf of the Dutch government in defense of Dutchbat’s failure to do more to protect Bosnian civilians from genocide in the supposed “safe area” of Srebrenica.⁴⁵⁹ Put simply, the argument is that by denying the lightly armed Dutch contingent’s repeated requests for air support,⁴⁶⁰ the United Nations undermined the possibility for effective action in the face of a powerful Serb armed force when the killing became imminent.⁴⁶¹

The nature of the role played by Dutchbat at Srebrenica is disputed⁴⁶² and it is beyond the scope of this Article to assess whether the argument advanced in defense of Dutchbat is ultimately credible on the evidence.⁴⁶³ The point of discussing the Srebrenica example is rather to consider the paradigm that the argument ascribes to that case, whether that ascription is

459. S.C. Res. 819, U.N. Doc. S/RES/819 (April 16, 1993) (classifying Srebrenica as a “safe area”).

460. See, e.g., Manuel Fröhlich, *Keeping Track of U.N. Peace-keeping*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 185, 230–32 (2001); SHERI FINK, *WAR HOSPITAL* 269 (2003).

461. See Murphy, *supra* note 10, at 178.

462. For example, one survivor has insisted that it was Dutchbat’s active expulsion of his parents that should render the Dutch Government liable and that the focus on omissions is misplaced. Ahrens, *supra* note 38.

463. In point of fact, the notion that the Dutch government was blameless for the failings of Dutchbat is not particularly plausible. Indeed, following an independent report on the Dutch role in Srebrenica, the Dutch government engaged in a remarkable public expression of self-reproach with Prime Minister Wim Kok’s entire cabinet resigning in shame. *Dutch Government Quits Over Srebrenica*, BBC NEWS (Apr. 16, 2002), available at <http://news.bbc.co.uk/2/hi/europe/1933144.stm>. See also NETHERLANDS INSTITUTE FOR WAR DOCUMENTATION, *SREBRENICA – A ‘SAFE’ AREA*, (Apr. 10, 2002), Parts II–III available at <http://srebrenica.brightside.nl/srebrenica/>.

successful or not.⁴⁶⁴ This section contends that this paradigm requires a fifth and final category for the determination of liability attribution. The paradigm is one in which the culpable omission of one or more troop contingents is rendered practically inevitable by the failure of the United Nations to provide those contingents with the support required to act as required (or, in other words, to avoid “perpetrating” the omission). As Murphy notes, “The real problem for the United Nations is that acknowledging a duty to intervene [in situations like Srebrenica] then creates an onus to give the force(s) the means and capacity to do so without exposure to unnecessary risk.”⁴⁶⁵

The previous four categories have proceeded upon the foundational assumption that the peacekeepers could have acted otherwise—that they had a free choice. The unique situation of a forced omission does not fit into that framework. Where the omission perpetrated by its troops is truly forced, any effective control the troop-contributing state might otherwise have had is eviscerated. What use is authority over discipline, training, and troop-selection when even the perfectly disciplined, trained, and selected force is hamstrung by inadequate allied support? With no effective control over such a situation, the troop-contributing state in question cannot be attributed with the human rights violations instantiated by the forced omissions.

By contrast, to the extent it fails to give its peacekeepers the capacity to act, the United Nations *does* exercise control over the outcome. The United Nations—having operational control over the peacekeeping force as a whole,⁴⁶⁶ and more specifically, control over how the operation’s resources are allocated⁴⁶⁷—is best placed to ensure that the necessary resources are deployed to the situations in which they are needed. Moreover, having overall operational control, the organization is also in the optimal position to foresee the need for troops and resources in various parts of the theater of operations and to plan accordingly.⁴⁶⁸ In cases of forced omissions, then, the United Nations is far better positioned than the troop-contributing state to affect a different outcome and it is the United Nations that must bear sole responsibility for the violation.

An objection might be raised here. The United Nations ultimately receives its funds from member states.⁴⁶⁹ Thus, the extent to which the organization is limited in its means is in part a function of whether member states

464. See *Dutch Government Quits Over Srebrenica*, *supra* note 463; NETHERLANDS INSTITUTE FOR WAR DOCUMENTATION, SREBRENICA—A ‘SAFE’ AREA, *supra* note 463.

465. Murphy, *supra* note 10, at 178.

466. See *supra* notes 213–223 and accompanying text.

467. See, e.g., James W. Houck, *The Command and Control of United Nations Forces in the Era of “Peace Enforcement”*, 4 DUKE J. COMP. & INT’L L. 1, 25 (1993).

468. Consider also that the United Nations has a permanent Situation Centre monitoring the needs of all ongoing U.N. peacekeeping operations on a real-time basis. DPKO SITUATION CENTRE, FUNCTIONS, available at <http://www.un.org/Depts/dpko/dpko/sitcen/functions.html> (last visited Oct. 31, 2009).

469. FLEITZ, *supra* note 110, at 77; SIEKMANN, *supra* note 10, at 168–70; BOTHE, *supra* note 10, at 688–90.

pay their dues⁴⁷⁰ and how far they go beyond those dues by donating supplementary funds to specific missions or projects.⁴⁷¹ The central concern this raises is that if the inadequacy of U.N. support for its peacekeepers is a direct function of the inadequacy of the organization's own resources, and that is—in turn—a function of insufficient member state payments, it may seem odd that troop-contributing states would be able to defer responsibility to the United Nations for this deficit.

This objection, however, is misplaced. A state contributing troops to a peacekeeping operation is no more responsible for the overall budgeting of the United Nations than is any other member state.⁴⁷² If anything, by contributing their personnel to a mission, troop-contributing states are exceeding what is required of them.⁴⁷³ The fact that U.N. member states in general may be ultimately responsible for the lack of U.N. resources that leads to a forced omission is no reason to hold liable the particular troop-contributing state whose troops perpetrated that omission. Indeed, rather than addressing the proposal, the objection raises an issue not under consideration here—namely, whether and how member states might be vicariously liable for the international wrongs of the United Nations.⁴⁷⁴ That question falls beyond the scope of this Article, which is focused on the prior question of which wrongs are appropriately deemed the wrongs of the United Nations and which are deemed the wrongs of the troop-contributing state.

A second potential concern with respect to this fifth category is that it risks the creation of an expansive loophole with respect to each of the other four categories. Specifically, one might worry that states will claim as a matter of course that support from the United Nations was inadequate. This would burden victims and other litigants with the difficult obligation of establishing that the United Nations provided the resources and central coordination necessary for action in each case. There are two responses to this objection. First, the loophole is inherently limited to omissions,⁴⁷⁵ and, more specifically, to omissions about which it can be plausibly claimed that inadequate support from central U.N. Command was the determinative factor.⁴⁷⁶ Second, to prevent such abuse of this fifth category, there should be a

470. See, e.g., Gordon, *supra* note 109, at 34.

471. See BOTHE, *supra* note 10, at 689–90 (noting that all costs not borne voluntarily are costs of the organization).

472. See SIEKMANN, *supra* note 10, at 169.

473. See *supra* note 210 and accompanying text.

474. The ILC considers the United Nations in much the same way as a limited liability company, suggesting its members are not liable beyond the contributions they have already made. See *supra* note 111 and accompanying text.

475. The United Nations can make omissions inevitable by withholding necessary resources. Even an under-resourced unit, however, can abstain from *acting* in a way that violates human rights.

476. This response would clearly rule out the use of the inadequate support defense in a number of situations. For example, although ultimately there was an argument that UNMIK was unable to perform the omitted demining that triggered the *Behrami* litigation. Behrami, *supra* note 68, ¶¶ 6, 67, 73, 126. The same claim could certainly *not* be plausibly made with respect to KFOR (the force the applicants claimed was the appropriate focus of the Court's analysis). *Id.* ¶ 6 (“[A] French KFOR officer had

rebuttable presumption that the peacekeepers were not prevented from action by inadequate support from U.N. Command. In other words, to enter the situation into this fifth category, the troop-contributing state must make an affirmative showing that it was rendered powerless by inadequate support at the time of the impugned act.

Finally, it is important to note that in this category too there may be situations in which joint and several liability is most appropriate, along the lines discussed with respect to the second and third categories.⁴⁷⁷ For example, such a liability allocation would make sense when acting to avoid culpable omission is not rendered *impossible* by U.N. inaction, but is significantly obstructed by that inaction. In such cases, the national contingent cannot be excused for its failure to do what it could, but nor can the United Nations be excused for failing to provide adequate support. Such an allocation may, ultimately, be the most appropriate assessment of the Dutchbat failure in Srebrenica.⁴⁷⁸

V. APPLYING THE PROPOSED SCHEME OF LIABILITY— IMPLICATIONS AND CONCERNS

The above proposal suggests that in response to a dual problem—the prevalence of human rights violations by peacekeepers⁴⁷⁹ and the subsequent lack of recourse to reparations for the victims of those violations⁴⁸⁰—there is at least a partial legal solution—a re-interpretation of the principle of “effective control”⁴⁸¹ and a new framework of liability.⁴⁸² One might object to such a project on the basis of the familiar realist claim that changing international law does not change state behavior, because states ignore law to act in whatever way suits their interests (which may or may not happen to align with their legal responsibilities on any given issue).⁴⁸³ The general debate over the efficacy of international law is far beyond the scope of this Article. Suffice it to say here that a steadily accumulating and impressive body of scholarship demonstrates, contra the realist school of thought, that international law does affect state behavior and that it does so in a number of ways and for a number of reasons.⁴⁸⁴ Building on the foundations of that work,

accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority.”).

477. See *supra* notes 384–390 and accompanying text.

478. See sources cited *supra* notes 461–463.

479. See *supra* Part I.A.

480. See *supra* Part I.C–I.D.

481. See *supra* Part III.D–E.

482. See *supra* Part IV.E.

483. See, e.g., JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); John J. Mearsheimer, *The False Promise of International Institutions*, 19 *INT’L SECURITY* 5 (1995).

484. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Martha Finnemore &

this Article operates on the assumption that, should domestic and supranational courts adopt the proposed re-interpretation of the law, states will comply with the reparations judgments of those judicial institutions.

Starting with this premise, Part V.B explains why the proposed scheme of liability attribution for peacekeeping human rights violations would improve on the status quo in terms of fairness, the incidence of human rights violations by U.N. peacekeepers, and the recourse to remedy for victims. Before that, Part V.A addresses an important counter-argument concerning the impact of the proposed system of liability on peacekeeping.

A. *The Worry that States will Stop Contributing Troops*

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. The argument was articulated by a number of states during the *Behrami* litigation.⁴⁸⁵ It is a natural worry. After all, from a purely logical standpoint there can be little doubt that an increase in the expected cost of engaging in peacekeeping missions would make such engagement less attractive to potential troop contributors. Moreover, the deficit in the supply of peacekeepers means that such a scenario cannot be taken lightly.⁴⁸⁶

However, it is argued here that this concern is not fatal to the proposal advanced in this Article. First, it is not at all clear that the impact on state incentives would be sufficient to cause any reduction in troop availability. States participate in peacekeeping for a variety of complex reasons. Among the motivations commonly ascribed to troop contributing states are the following: states send troops in an attempt to “establish, preserve, or increase [their] position and power base in the world”⁴⁸⁷; to enhance their prospects of obtaining a seat on the U.N. Security Council⁴⁸⁸; to maintain the stability of a world order from which they benefit⁴⁸⁹ or which they care about for

Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Ryan Goodman, *The Difference Law Makes: Research Design, Institutional Design, and Human Rights*, 98 AM. SOC. INT'L L. PROC. 198 (2004); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

485. See, e.g., *Behrami*, *supra* note 68, ¶¶ 90, 94, 101 (noting the submissions and oral statements of Norway, France, and Denmark).

486. See *supra* note 351 and accompanying text.

487. Kgomoiso Monnagotla, *The Naked Face of U.N. Peacekeeping: Noble Crusade or National Self-interest*, 5 AFR. SECURITY REV. 53 (1996) available at <http://www.iss.co.za/pubs/ASR/5No5/Monnagotla.html>; see also Laura Neack, *UN Peace-Keeping: In the Interest of Community or Self?* 32 J. PEACE RES. 181, 184 (1995).

488. Monnagotla, *supra* note 487 (“South Africa . . . does not have a peacekeeping record. However, like many other African countries, this is likely to change . . . especially with the country being touted for a permanent seat in the Security Council.”).

489. Neack, *supra* note 487, at 184; Davis B. Bobrow & Mark A. Boyer, *Maintaining System Stability: Contributions to Peacekeeping Operations*, 41 J. CONFLICT RESOL. 723, 724 (1997).

ideological reasons⁴⁹⁰; to satisfy domestic political pressure motivated by high-profile suffering in a foreign theater of war⁴⁹¹; to stabilize neighboring states,⁴⁹² former colonies, or economic partners⁴⁹³; and/or to provide military experience to their combat-starved troops.⁴⁹⁴ Some argue that certain states are partially influenced by financial incentives, using the U.N. stipend (which is sometimes higher than the troops' base salaries) to take their troops off the payroll and even pocketing the difference.⁴⁹⁵

The multiplicity of overlapping motives states have for contributing troops to peacekeeping operations makes it difficult to gauge with any precision the likely impact of the proposed scheme of liability on contributions. Indeed, even for those states currently motivated by financial incentives, it is unclear that the expected cost of potential rights violation liability would be enough to offset the benefits they currently reap from participating in peacekeeping missions. Moreover, some of the other motivations—particularly those of a geopolitical nature—are highly unlikely to be outweighed by marginal changes in expected cost.⁴⁹⁶ In this sense, there is good reason to question whether the increased expected liability cost would actually have any material impact on prospective troop contributors' calculations with respect to whether or not to send troops.

Moreover, the very reason a troop contributor state would be held liable for a given violation under the proposed scheme is that the state could and should have acted to prevent the abuse.⁴⁹⁷ Therefore, in reacting to the new incentives, a state would not be limited to a binary set of alternatives—(A) contribute despite the increased expected liability cost; or (B) withhold a contribution because of the increased expected cost. On the contrary, the scheme of liability presents potential troop-contributing states with a range of options marked by the following points of extremity: (1) do not send troops at all; (2) send improperly trained, poorly chosen, and ill disciplined

490. Andreas Andersson, *Democracies and U.N. Peacekeeping Operations, 1990-1996*, 7 INT'L PEACEKEEPING 1, 2 (2000); Michael Pugh, *Peacekeeping and Critical Theory*, 11 INT'L PEACEKEEPING 39, 41 (2004); see also PHYLLIS BENNIS, *CALLING THE SHOTS: HOW WASHINGTON DOMINATES TODAY'S UN* 84 (1996) (attributing the phenomenon to "a serious delusion of benevolence").

491. Peter Viggo Jakobsen, *National Interest, Humanitarianism or CNN: What Triggers UN Peace Enforcement After the Cold War?*, 33 J. PEACE RES. 205 (1996).

492. Bobrow & Boyer, *supra* note 489, at 727.

493. Brian Urlacher, *Contributions to U.N. Peacekeeping Operations: Who and Why?* 19-21 (Feb. 2008), available at http://www.allacademic.com/meta/p252244_index.html.

494. See Deborah L. Norden, *Keeping the Peace, Outside and In: Argentina's UN Missions*, 2 INT'L PEACEKEEPING 330, 341 (1995); *supra* note 359 and accompanying text.

495. Antonio L. Palá, *Peacekeeping and its Effects on Civil-Military Relations*, in INTERNATIONAL SECURITY AND DEMOCRACY: LATIN AMERICA AND THE CARIBBEAN IN THE POST COLD WAR ERA 130, 138 (Jorge I. Domínguez ed., 1998); see also Norden, *supra* note 494, at 341 (noting that "Peacekeepers . . . enjoy (at least in theory) higher wages than they would normally earn at home" and that "someone else pays for the ammunition (crucial for the financially strapped Argentine military)").

496. Miller, *supra* note 24, at 281 (citing the view of Roberto Ricci, the former Head of Human Rights for MONUC, that states are driven to contribute to peacekeeping missions for a diverse array of reasons, which are not easily outweighed).

497. See *supra* Parts III.E, IV.A, IV.B, IV.C.

troops with a relatively high expected human rights liability cost; or (3) send well trained, carefully selected, and effectively disciplined troops with a relatively low expected human rights liability cost.

The liability scheme proposed in this Article would make it more likely than under the current system that a state potentially interested in contributing its troops would select option (1) over option (2). Crucially, however, under the proposed scheme such a state would also be more likely than under the current scheme to select option (3) over option (2) because properly chosen, trained, and disciplined troops are less likely to engage in the kinds of violations for which a troop contributor would be liable. For the same reason, fewer states would be likely to adjust from option (3) to option (1) than from option (2) to option (1).

Ultimately, then, the incentives under the proposed scheme point to either withholding the troops or ensuring they are well trained, carefully selected, and properly disciplined. Given the myriad reasons states have for participating in peacekeeping operations, many would likely determine that participation remains worthwhile, and prepare their troops accordingly. Of the states that contribute under the current scheme of liability, those that would have the strongest incentive to withhold troops under the proposed scheme would be those whose contingents are poorly selected, undisciplined, and/or inadequately trained. Thus, the proposed scheme of liability may reduce the quantity of peacekeepers, but in exchange it would improve the quality of those that are deployed.

There is a genuine tradeoff here. However, to reiterate a point made earlier in this Article, when peacekeepers violate human rights, they undermine the very purpose of their mission and they shatter the local trust and acceptance that is essential to their work.⁴⁹⁸ Indeed, if peacekeeping's human rights debacles teach us anything, it is surely that effective peacekeeping is not a matter of simply putting bodies on the ground, but rather a matter of ensuring that the right bodies are put on the ground at the right time and in the right manner. In that sense, to the extent such a tradeoff materializes, perhaps it is time that U.N. peacekeeping started valuing quality over quantity.

A final point in response to the troop depletion worry focuses on the proposed scheme of joint and several liability.⁴⁹⁹ Under the current system of liability, no state (except the victim's) has any interest in ensuring that the United Nations provides proper process recourse to adequate remedy, because none suffers increased vulnerability to suit when the United Nations does not pay out.⁵⁰⁰ Whenever it might share liability with the United Nations under the proposed joint and several liability scheme, however, a troop-contributing state would naturally seek to insulate itself by ensuring

498. See *supra* notes 42–47 and accompanying text.

499. See *supra* notes 384–390 and accompanying text.

500. Indeed, states are essentially immune from suit under the current system. See *supra* Part I.C.

that as many claims as possible would be borne by the United Nations. Perhaps the best way of achieving that goal would be to pressure the United Nations to establish either the standing claims commission it has long promised,⁵⁰¹ or an alternative system granting victims effective and proper recourse to remedy.

The United Nations is an agent of its member states, and in the context of peacekeeping, troop-contributing states in particular hold heavy influence over the organization.⁵⁰² This shift in incentives is therefore likely to be consequential. Moreover, because it would be located in the theater of war, where violations occur and where most victims reside, a truly effective U.N. claims system would likely attract the lion's share of the claims, thus considerably reducing the prospects for troop contributor liability and limiting the disincentive to contribute troops.

In combination, although these points do not render the worry about reduced peacekeeper contributions irrelevant, they demonstrate that in many cases the impact may not be material, that it is likely to be mitigated by state pressure on the United Nations to establish and maintain a proper claims system, and that any lost troop contributions may be worth the attendant improvement in troop quality.

B. The Benefits of the Proposed Scheme of Liability— Fairness and Dual Efficacy

Overall, the five-category system of liability proposed in this Article is fairer than the current system, would structure incentives so as to reduce the incidence of human rights violations by peacekeepers, and would provide better recourse to remedy for victims when such violations occur.

There is no need to spend much time on the first of these claims. Without getting into a philosophical debate over the meaning of "fairness," it is asserted here that on a common-sense understanding, when one or both of two entities must be held liable for a given act, it is fairer to tie responsibility to the question of what each entity could and should have done differently, than to the question of which entity held the formal status of overall commander, regardless of whether that status conferred upon it any authority relevant to preventing the impugned act. This distinction, of course, is precisely the revision proposed in Part III.E, *supra*.

The second claim is that the proposed liability scheme would reduce the incidence of human rights violations by U.N. peacekeepers. For logistical and financial reasons, not all victims would likely be able to bring suit individually in the courts of foreign troop-contributors, or in the supranational

501. See *supra* notes 89–91 and accompanying text.

502. See *supra* notes 266–278 and accompanying text (discussing the influence of troop-contributing states on the United Nations with respect to a particular mission); see also COURTNEY B. SMITH, *POLITICS AND PROCESS AT THE UNITED NATIONS: THE GLOBAL DANCE* 22–41 (2006) (describing the varying efficacy of different member states in influencing the general behavior of the United Nations).

human rights courts with jurisdiction over those states. However, it is not unrealistic to suggest that, with the help of international advocacy NGOs⁵⁰³ or through self-mobilization into their own domestic organizations,⁵⁰⁴ a sample of such victims would often gain access to these judicial fora.

As argued in Part V.A, *supra*, the prospect of being held liable for category one, category two, or category three violations would provide states with incentives to either withhold their troop contributions or to better train, select, and discipline the troops that they send. States with better troops are less likely to need to consider these options. The possibility of liability under categories two and three would provide states with a further incentive to make real-time expert legal advice available to their troops. This would help states to ensure that when given an overly broad authorization from U.N. command, the national contingents would consider the available options in light of human rights law, and that when ordered to commit war crimes, the contingents would be able to confirm their duty to disobey.

None of these incentives is currently in place. Of course, not all states would react to the new incentives imposed by the proposed scheme of liability. However, at the margins, some states surely would change their behavior in response to their modified expected costs and benefits, and in so doing they would contribute to reducing human rights violations in each of the first three categories.

The proposed scheme would not only expand state liability; it would also eliminate U.N. liability for category one violations. However, this change would not impact the proclivity of peacekeepers to engage in *ultra vires* violations. Simply put, the United Nations has none of the powers necessary to prevent such conduct.⁵⁰⁵ Therefore, even assuming an effective system for holding the United Nations liable,⁵⁰⁶ the organization would be unable to respond to the threat of such liability in a way that would cause a reduction in violations. Removing that threat of liability, then, would have no consequence for the incidence of *ultra vires* violations.

With respect to category two and category three violations, the United Nations is already legally liable under the status quo standard.⁵⁰⁷ As such, one might argue that the organization's incentives with respect to such vio-

503. This is the model frequently used in Alien Torts Claims Act (ATCA) litigation in the United States, beginning with the first human rights ATCA litigation, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See, e.g., Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 664 (1998).

504. This is the model that was employed in *Mothers of Srebrenica v. the Netherlands*. The plaintiff in that Dutch case was a group called *Srebreničke Majke*—"Mothers of Srebrenica"—an association of Bosnian citizens who lost the male members of their families in the Srebrenica massacre. See *Srebreničke Majke*, http://srebrenickemajke.org/index.php/Srebrenica_Mothers_in_Srebrenica.html (last visited Sept. 1, 2009).

505. See *supra* Part I.D.

506. Which is, of course, not the case at present. See *supra* Part IV.A.

507. See *supra* notes 284–289, 296 and accompanying text (elaborating the status quo standard(s)).

lations would change very little under the proposed scheme and—if anything—might be slightly blunted by the fact that liability for some violations in categories two and three would be borne by the troop-contributing states. However, this line of contention ignores the impact of the system of joint and several liability in mobilizing states to pressure the United Nations to create a proper and adequate U.N. claims system,⁵⁰⁸ such as the long-promised Article 51 standing claims commission.⁵⁰⁹

Many of the problems with the existing U.N. claims structure are grounded in its lack of independence, the discretion retained by the United Nations, and victims' dependence on their governments.⁵¹⁰ The implementation of a local independent standing claims commission would somewhat assuage these problems. Thus, to the extent states would influence the United Nations to finally institute such a body, the frequency and efficacy of claims brought against the United Nations would likely rise under the proposed system. Overall, then, the United Nations would likely face a *greater* incentive for effective action to prevent category two and category three rights abuses than it does under the status quo system, which has no independent judicial forum in which victims can bring a claim against the United Nations.⁵¹¹

This logic also applies to category four and category five abuses. The fact that the proposed system does not depart from the status quo with respect to such violations might lead one to argue that these two categories do not escape the criticisms leveled in Parts I.C and I.D, *supra*. However, because the joint and several liability scheme for categories two and three would likely motivate the establishment of a *standing* claims commission, the benefits of its creation would not be limited only to violations for which the United Nations is jointly and severally liable with the troop-contributing states, but would extend to all violations for which the United Nations is liable. Therefore, such a commission would enhance the ability of victims to hold the United Nations liable for category four and category five violations, thus creating greater incentives for the United Nations to exercise its effective control to prevent rights abuses in these categories.

Moreover, the very reason for not holding the troop-contributing states liable for abuses falling into categories four and five is that the troop-contributing states do not exercise effective control over such abuses.⁵¹² To provide for state liability in category four situations would be to create an incentive for troop-contributing states to violate the U.N. command structure⁵¹³ in a way that would fundamentally undermine the effectiveness and

508. See *supra* notes 499–502 and accompanying text.

509. *Model SOFA*, *supra* note 19, art. 51; see also *supra* notes 90–91 and accompanying text (noting that the promise has yet to come to fruition).

510. See *supra* notes 91–108 and accompanying text.

511. See *supra* Part I.D.

512. See *supra* Part IV.D–IV.E.

513. See *supra* notes 449–457 and accompanying text.

coherence of peacekeeping operations.⁵¹⁴ To provide for state liability in category five situations would not reduce the occurrence of such abuses, because states have no way of acting to achieve that end, regardless of what incentives they are given to do so.⁵¹⁵

For each of the above reasons, the proposed system of liability attribution would help to reduce the incidence of human rights violations by U.N. peacekeepers. The third and final claim of this part of the article is that when such abuses do occur, the proposed system best provides victims with recourse to remedy, without sacrificing the basic fairness instantiated in the proposed understanding of “effective control.” This contention is closely linked to the second claim, because an entity’s incentive to act to prevent violations is largely a function of its vulnerability to liability.

The system of joint and several liability applicable to category two and category three violations is clearly the most beneficial with respect to providing victims with recourse to remedy. By broadening the avenues open to victims, the system increases the possibility that they can each obtain adequate redress in the forum most accessible to them and with the most robust judicial process. Moreover, as articulated above, the joint and several liability scheme is likely to lead to the institution of standing claims commissions or other systems for proper redress in the theaters of peacekeeping operations.⁵¹⁶ The breadth and enhanced quality of the fora open to victims of category two and category three violations under the proposed scheme would clearly enhance their recourse to remedy.

Victims of category four and category five violations would not be furnished with the same range of alternative fora. However—as noted above—they would benefit equally from the likely enhanced quality of the on-site U.N. recourse mechanisms.⁵¹⁷ Moreover, this is as much as can be done to expand their recourse to remedy within the bounds of fairness and without undermining the cohesion and functionality of peacekeeping forces by encouraging disregard for the chain of command.⁵¹⁸

What then, of category one violations? Under the proposed scheme of liability, victims would have recourse to remedy for such violations only against the troop-contributing state, not against the United Nations.⁵¹⁹ This might provoke some concern, since litigation against states in this regard has thus far been unsuccessful.⁵²⁰ However, such concern would be misplaced. Rather than being a consideration against reinterpreting “effective

514. See FLEITZ, *supra* note 110, at 79 (“Casualties occurred in Somalia when some peacekeeping contingents refused to follow orders given by UN commanders without first consulting with their capitals.”); sources cited *supra* notes 261–262.

515. See *supra* Part IV.E.

516. See *supra* notes 499–502, 508–511 and accompanying text.

517. See *supra* notes 511–512 and accompanying text.

518. See *supra* notes 512–514 and accompanying text.

519. See *supra* Part IV.A.

520. See *supra* Part I.C.

control” and changing the system of liability, the current drought with respect to state liability is in fact a consequence of the existing interpretation of “effective control.”⁵²¹ Indeed, a considerable advantage with respect to recourse to remedy under the proposed system as compared with the status quo system is that by rendering states liable for category one abuses, the proposed framework would make available to victims those domestic and international judicial fora in which states can be sued, but before which the United Nations is immune.⁵²²

Of course, it cannot be denied that eliminating U.N. liability for category one violations limits the recourse available to victims of such violations. Indeed, for some victims, the obstacles to accessing a distant foreign or supranational court would be prohibitive. By contrast, bringing a claim before one of the United Nation’s local internal claims review boards is significantly more feasible, despite qualms one might have about fair process and adequate reimbursement.⁵²³ Such qualms are a genuine concern. However, from the perspective of fairness, they cannot justify attributing liability to a party impotent to prevent the impugned conduct.⁵²⁴ Put simply, considerations about the scope of victims’ recourse to remedy cannot override the standard by which actors are attributed with the impugned act.

Several options might be pursued to counteract this consequence. First, states might establish their own fora for claims review in the theater of operations. This has already occurred in some situations,⁵²⁵ though similar problems to those experienced with U.N. claims review boards have arisen.⁵²⁶ Alternatively, a state body more akin to the proposed U.N. standing claims commission could be created,⁵²⁷ or states could participate as defendants in the U.N. commission, thus guaranteeing fairer process at a local venue. Were such a body to be provided for in the standard SOFA, one important factor in improving the likelihood of its instantiation as compared to the failed U.N. experiment would be human rights NGOs. To the extent NGOs can bring suit in the supranational or national courts with jurisdiction over the troop-contributing state, they could potentially force the troop-contributing state to follow through on its remedial obligations in a way that the United Nations cannot be forced, because there is no independent forum in which advocacy groups can bring claim against the United Nations.⁵²⁸ In this way, concerted action by NGOs could render the

521. See *supra* Part III.D.

522. See *supra* Part I.C.

523. See *supra* Part I.D.

524. See *supra* Part IV.A.

525. Hampson & Kihara-Hunt, *supra* note 224, at 205 (noting that “many of the national contingents serving in Somalia had some form of civil complaint system open for the local population”).

526. *Id.* at 205 n. 46.

527. See *supra* notes 89–91 and accompanying text.

528. On the U.N.’s immunity from suit in national and supranational fora, see *supra* notes 65–67, 77, 82–88 and accompanying text.

local liability of states more effective than the local liability of the United Nations.

Overall, the proposed scheme of liability clearly expands the recourse to remedy for victims of human rights violations falling into categories two through five. With respect to victims of category one violations, considerations of fairness and efficacy mandate that the proposed system change the recourse to remedy, opening up new avenues and closing old ones. To counteract the possibility that the net effect might be a narrowing of victims' recourse with respect to category one violations, it is suggested that troop contributors be required to participate in a claims commission in the theater of conflict.

CONCLUSION

When peacekeepers violate human rights, they do immeasurable damage to the victims, themselves, and their missions. To begin rebuilding the trust that is needed for effective peacekeeping, to deter future violations, and to affirm the human dignity of the victims, reparation is essential. The question is from which entity that reparation should come.

In response to that question, this Article advocates a revision of the concept of "effective control" as it is applied in the peacekeeping scenario. "Effective control" is the correct governing principle, but rather than "overall operational control" as it has thus far been understood in the peacekeeping context, "effective control" must be understood to mean "control most likely to be effective in preventing the wrong in question." Applying this revised principle, this Article proposes a five-category framework through which to assess the appropriate locus of responsibility for peacekeepers' human rights violations. Considering the full complexity of the command and control relationships between states, the United Nations, and peacekeepers, this framework significantly expands the liability of troop-contributing states from what is currently *de facto* immunity. Additionally, by implementing joint and several liability wherever feasible within the confines of the "effective control" principle, the proposed framework maximizes the avenues to remedy for victims without prejudice to the fairness and efficacy of a framework that accurately locates those most responsible.

The implementation of this scheme of liability would facilitate improvement along three dimensions. First, it would apportion responsibility in a way that is morally and legally appropriate, attributing liability to the actor most capable of preventing the human rights abuse. Second, within that limit, it would provide victims with the maximum recourse to adequate remedy. Third, it would structure incentives so as to minimize the likelihood of future violation.