

How to Make Criminal Accountability of UN Officials and Experts on Mission More Effective?

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The increase in UN peacekeeping operations since the end of the Cold War, as well as their increasingly multifunctional nature, has raised new challenges: how to deal with allegations of sexual exploitation and abuse committed by personnel of these operations. Since 2006 the Draft Convention on Criminal Accountability of UN Officials and Experts on Mission is being considered by the General Assembly; however progress is limited, both because of legal questions raised and because of the Member States' lack of political will. This policy paper, addressed to policy makers at the UN and in its Member States, examines the main aspects of the Draft Convention and aims to provide practical suggestions for improving the effectiveness of criminal accountability.

Context

At the beginning of the last decade reports of alleged sexual exploitation and abuse committed by personnel of peacekeeping operations began to cause alarm. The fact that UN personnel, and especially military contingents provided by the Member States, could be perpetrators of these abuses was highly inconsistent with the ultimate goal of UN missions, as well as incompatible with the principles of integrity and fairness that underlie the UN Charter and govern the actions of the Organization.

Although in 2003 the UN Secretary-General promoted a zero tolerance policy by enacting a series of rules against sexual exploitation and abuse by UN officials, the increase in complaints of such abuses showed that the measures taken so far by the UN were insufficient. In particular, various situations reported in the Congo in 2004 raised for the first time enough international concern highlighting the need for fundamental changes. That year, the Secretary-General asked Prince Zeid Ra'ad Zeid Al-Husseini, Permanent Representative of Jordan to the UN, to assess the extent of the problem and to make appropriate recommendations, since the credibility and impartiality of the Organization were questioned, which in turn may impede the implementation of its mandates.

Based on these recommendations, the General Assembly agreed in 2005 to establish a Group of Legal Experts to study the best way forward to ensure, on the one hand, that staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station and, on the other hand, that they would not be unfairly penalized, without due process.

In 2006, the Group of Legal Experts adopted its report (A/60/980), whose main recommendation was that the UN should give priority to facilitating the exercise of jurisdiction by the host State, i.e. the State that is receiving the international mission, because it was understood that the exercise of jurisdiction by States other than the host State posed numerous problems not limited to the environment of peacekeeping operations. In this sense, the conclusion of the Group of Legal Experts was that a new international convention should be prepared to address the issue of jurisdiction and other related issues, a suggestion that was also supported by the Secretary-General.

Analysis

The magnitude of the problem

The problem of sexual exploitation and abuse does not only happen in peacekeeping operations, but also in contexts of humanitarian or development projects. Additionally, it does not only affect UN agencies, but also other international humanitarian institutions. Furthermore, although the measures taken have increased the visibility of these abuses, we see that the majority of victims of sexual exploitation and abuse still do not complain to the authorities out of fear of retaliation.

The Draft Convention on Criminal Accountability of UN Officials and Experts on Mission is being considered by the General Assembly since 2006

As part of this process, the Secretary-General has adopted numerous measures, policies and practices to address the situation and annually informs on disciplinary matters and cases of alleged criminal conduct of staff members, as well as on actions related to the exchange of information between the UN and State authorities for possible referral of criminal cases. The Secretary-General, in addition to regulatory preventive measures, such as the Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse (ST/SGB/2003/13), has postulated other legal measures, such as the reform of the Memorandum of Understanding (MOU) that is agreed upon with States contributing to peacekeeping operations. In this sense, the new MOUs are planning the establishment of general and particular standards of conduct by national contingents; the recognition of the responsibility of the sending State to investigate any misconduct; while still contemplating that it is the troop-sending State that should exercise its criminal and disciplinary jurisdiction on the troops if necessary.

Additionally, all dimensions related to training, information and awareness of personnel of peacekeeping operations have been strengthened and standards and codes of conduct have been widely adopted. Additionally, as part of a general policy driven by the Security Council, the number of women in peacekeeping operations of the UN has been increased, thereby introducing a gender perspective in peacekeeping missions, which can lead to better performance, particularly considering that most of the

civilian victims of armed conflicts are women and children.

Privileges and immunities of UN staff

Apart from the staff of military contingents that States make available to the UN -who remain under the jurisdiction of the sending State and have absolute immunity in the host State- it is particularly important to note that UN officials and experts on mission enjoy certain privileges and immunities in the exercise of their functions. These privileges and immunities, contained in the General Convention on Privileges and Immunities of the UN, include jurisdictional immunity, which is not given for the personal benefit of the individuals themselves, but to protect them, independently and with the appropriate legal protections, in the performance of its responsibilities entrusted on behalf of the UN.

In this regard, the basic legal problem lies both in the fact that the legal status of UN personnel -with their immunities- can provide impunity or facilitate the circumvention of the criminal jurisdiction of the host State, and in the fact that the UN can only exercise disciplinary measures over its own staff, as it has no ability to exercise criminal jurisdiction. After all, except in cases of international criminal jurisdiction for certain serious crimes of international significance, criminal jurisdiction is still held by sovereign States. In this context, it should be the State of the nationality of the official or expert on mission -or a third State- that should exercise its jurisdiction, albeit with difficulties caused by the distance in relation to the evidence and witnesses of crime, and the care for and compensation to victims. There is, thus, a legal vacuum with regard to the criminal accountability of UN personnel, which is why the Group of Legal Experts proposed the adoption of an international convention.

The proposal of a new international convention

The draft prepared by the Group of Legal Experts has been considered by the Sixth Committee of the General Assembly, which is responsible for legal affairs, and in particular by a Special Committee that has met in two sessions (2007 and 2008). Subsequently, the Sixth Committee left the consideration of the case to a Working Group, which has decided to postpone the debate to the General Assembly's sixty-seventh session (scheduled for late 2012). The issue therefore proceeds very slowly, due to both the political reluctance of States and to the technical and legal complexities presented. In the different sessions of the Special Committee, most delegations made it clear that, for the moment, they had no intention of adopting an international convention, as was recommended by the Group of Legal Experts and the Secretary-General, focussing the discussion instead on some "substantive issues" and especially on how to strengthen

mechanisms of international cooperation amongst States and between States and the UN.

Alleged sexual exploitation and abuse committed by personnel of peace operations erodes the UN's credibility

In short, while there are different positions amongst States, the desire to move very slowly prevails. On the one hand, this is the result of the indisputable fact that the negotiation of a new treaty can take a lot of time and that the treaty shall only apply to those States that are party to it; while, on the other hand, it also reflects the uncertainty on the part of States, which, rather than through formal legal obligations, prefer to advance by means of adopting practical short term measures, particularly of a preventive and cooperative character. In this regard, in the last resolutions of the General Assembly on this subject some steps have been taken towards the formulation of several initiatives that, if States put them in practice, could help reduce cases of impunity and ensure the exercise of jurisdiction. The Member States have therefore been urged to promote international cooperation in this area and to promote the development of domestic legislation in order to guarantee the exercise of criminal jurisdiction by either the host State, by the State of the nationality of the officer or expert on mission, or by a third State.

Main aspects of the draft international convention

First, as to the scope of application *ratione personae*, the draft document is limited to UN officials and experts on mission, i.e. members of a peacekeeping operation who enjoy privileges and immunities under international law. The Group of Legal Experts decided not to define these categories of people and left out of its scope military personnel of national contingents that make up the military component of a peacekeeping operation ("blue helmets"), which are, as already indicated, under the exclusive jurisdiction of the State of which they are nationals. The problem is that these categories of people are not precisely defined and that different concepts, either broader or more restrictive, are being used depending on the perspective taken.

From the victims' point of view, there is no doubt that staff categories, functional immunities or jurisdictional problems are irrelevant. For the victim, the main issue is that an international "agent" has committed a crime,

and the immunities of UN personnel or the different legal regimes applicable to different categories of staff should not be an obstacle to the requirement of criminal accountability.

Second, regarding the scope of application *ratione materiae*, the draft enumerates crimes without defining them. It is not limited to crimes of sexual exploitation and abuse, however, as it also includes, amongst others, the crimes of murder and other acts causing serious injuries. As domestic laws differ greatly in regard to the definitions of these crimes, the Group of Legal Experts also decided that each State Party has to determine which crimes under their national criminal law should acquire an extraterritorial nature when committed in the framework of a peacekeeping operation.

Third, and in relation with the exercise of jurisdiction, the draft reflects the recommendations of the Group of Legal Experts, giving preference to the jurisdiction of the host State. It also requires that the States Parties should establish their extraterritorial jurisdiction over the crimes referred to in the convention, provided they also constitute a crime under domestic law, when committed by nationals of that State. That is, any State Party to the convention would be obliged to investigate and prosecute the alleged offender if that person is a national of that State or present in its territory, or otherwise this person should be extradited to another State that might establish its jurisdiction.

Criminal accountability is only exercised under the jurisdiction of States

This approach is understandable because criminal accountability is only exercised under the jurisdiction of a State, whether the host State, the State of the nationality of the alleged perpetrator, or a third State. The UN can only, in this sense, adopt disciplinary measures (such as the repatriation of staff) and cannot exercise criminal jurisdiction. In addition, investigation activities by the UN can only with difficulty be accepted as evidence in a criminal trial under the laws and jurisdiction of a State. Finally, the problems of jurisdiction and waiver of immunities are also related with the UN's concerns about adequate legal guarantees for its officials or experts in the host State, that is, a consideration that is not strictly of legal technique.

Policy recommendations

1. The UN Secretary-General should undertake the necessary conceptual and practical clarifications in relation with staff categories.

Within the UN, the categories of persons are still not defined and there is much conceptual confusion about the legal status of UN personnel and about to whom and to what extent privileges and immunities must be applied. In this sense, it could be very useful to define the activities to be understood to fall within the official duties of officials and experts on mission. That way, the privileges and immunities that international instruments may give them (e.g. the General Convention on Privileges and Immunities of the UN, Headquarters Agreements or Status of Forces Agreements) apply only to their official duties, thereby generalising the practice of a waiver of immunities for those acts that are not directly related to official duties and that may constitute criminal acts under the domestic law of the host State. That is, to move from a more practical way towards a more restrictive conception of the functional immunities corresponding to UN officials and experts on mission.

2. States should move toward the adoption of a consensus on a possible international convention.

With all the difficulties involved in the adoption and entry into force of an international convention -which would only oblige those States that are parties to it- it would be very useful to speed up the development of an international convention on the criminal accountability of UN officials and experts on mission. The adoption of a legal text as proposed by the Group of Legal Experts would establish obligations in relation with the classification of these criminal acts -thus becoming internal crimes imposed internationally-, and it would require the adoption of the necessary legislative measures for the exercise of criminal jurisdiction by States in the case of alleged criminal acts committed abroad by their nationals when on a mission for the UN. In addition, it would demonstrate the will to put an end to these situations and to factual impunity.

3. Both States and the UN should improve mechanisms for police and judicial cooperation on criminal matters in relation with crimes committed by UN officials and experts on mission.

The mechanisms of police and judicial cooperation in criminal matters between States and between States and the UN should be improved. The aim would be that States should provide full support and mutual assistance in investigations and criminal proceedings or extradition proceedings relating to serious crimes committed by officials or experts of UN missions, also

placing value on the information and material obtained by the UN on the ground, and finally providing effective protection to victims and witnesses of these crimes. In particular, monitoring mechanisms and cooperation between the UN and troop-contributing States should be strengthened.

4. States should consider the possibility of international criminal jurisdictions operating in connection with crimes committed by UN officials and experts on mission.

It is difficult for a body with international criminal jurisdiction, such as the ICC, to enforce criminal accountability for crimes committed by UN officials and experts on mission, including sexual exploitation and sexual abuse, unless the crimes were in connection with the most heinous crimes that fall under the jurisdiction of the ICC or other international criminal institutions. In any case, a possible route that should be explored, even though it might be complex and expensive, is that certain internationalized courts may also be competent to try ordinary crimes under the domestic laws of the State where these mixed tribunals operate and, in this measure, they may submit to their jurisdiction officials and experts of UN missions responsible for these crimes, albeit always with the consent of the host State and with the corresponding waiver of immunities.

5. The UN Secretary-General should continue to adopt practical and preventive measures in relation with serious crimes allegedly committed by UN officials and experts on mission.

The UN Secretary-General, in addition to the preventive measures already adopted regarding normative standards or training and awareness raising, should make progress in the adoption and strengthening of enforcement measures that would allow the activities of the Conduct and Discipline Unit and the Office of Internal Oversight Services to effectively investigate allegations of offences or serious misconduct of UN personnel, and to adopt the disciplinary measures required. Also, the implementation of the UN Strategy on the assistance and support to victims of sexual exploitation and abuse committed by personnel of the Organization should be promoted.

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