PEACEKEEPER ABUSE, IMMUNITY AND IMPUNITY: THE NEED FOR EFFECTIVE CRIMINAL AND CIVIL ACCOUNTABILITY ON INTERNATIONAL PEACE OPERATIONS

ANDREW LADLEY

Privileges and immunities are the handmaidens of international law. (McCormack Crosswell, 1952: v)

It is common in international relations for individuals operating in foreign countries to be exempt from the laws and courts of those countries for their services on international missions. Examples include state diplomats, officials of international organisations, and military and civilian personnel under international agreements or individual contracts. The focus of this paper is on such immunities in relation to United Nations peacekeeping – particularly on the accountability systems where military or civilian peacekeepers commit crimes (for example: sexual exploitation of children, trafficking in women, rape, murder, negligent killing, or major fraud) in the already-battered localities of their service.

It seems trite to say that inadequate accountability (and especially impunity) on peace operations threatens the integrity, core values and purposes of peace-keeping. The heart of the international mandate is generally about restoring international peace and security – not adding to the problems, committing crimes and being unaccountable. Of course, the issues involve personal ethics, training and discipline. But as in all legal systems, public accountability is critical to credibility. Actually, the noble goals and language in a Security Council resolution may well mask simple and sober realities. What can one *expect* from the deployment of tens of thousands of predominantly male military and civilian personnel into vulnerable domestic populations? There should be no suggestion that the issues are limited to 'inadequately trained troops', as diverse examples show in Cambodia, East Timor, the former Yugoslavia, Somalia, Congo and Iraq.

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International peace operations constantly risk adding serious international insult to existing local injury. Not only is this bad, indeed dangerous, for any mission on the ground trying get the confidence of local (often still armed) populations – it is contradictory for the UN to try to rebuild peace and security if the onthe-ground 'rebuilders of the rule of law' enjoy effective impunity for their own criminal actions.

Of course, the UN knows it has to do better – but current moves in this direction, however useful, simply do not go far enough.

Exhibit A: The Congo

In January 2005, the United Nations watchdog office² reported that its investigations had shown that UN (military and civilian) peacekeepers in the Democratic Republic of Congo had been (and were still) systematically exploiting and abusing local women and children (United Nations, 2005). Commenting on the findings, the Special Representative of the Secretary General for MONUC³ wrote, 'it is apparent that the feeling of impunity is such that not only have the policies (aimed at preventing sexual abuse and exploitation) not been enforced, but the command structures have not always given investigators their full cooperation' (ibid.: 46).⁴

From when the allegations first became public in 2004, issues of accountability were to the fore. The Los Angeles Times reported that the UN Secretary General, Kofi Anan, had vowed to halt the misconduct and 'punish' those responsible. The Under Secretary General in charge of the Department of Peacekeeping Operations, Jean-Marie Guehenno, stated 'we will not compromise on this. ... If it is a UN official, then we will lift his immunity and press for his prosecution'. But who would prosecute, under what country's law, and with what evidence? Summarising the issues, this same newspaper report stated: 'The UN does not have the power to criminally prosecute its officials or peacekeepers, but it can lift their immunity from prosecution where they are serving. It also can fire or suspend peacekeepers and send them home to face justice' (Farley, 2004).

The inability to prosecute directly, but the possibility of prosecution back home, sounds like accountability. But is it? Certainly there is no absence of potentially applicable laws and rules. The established events in this example concerned adult UN soldiers and civilians having sex with children, some as young as thirteen. In most domestic legal systems these would be crimes – including rape and statutory rape; and commanders who actively hindered criminal investigations would be charged with obstruction of justice. For soldiers, any such conduct would also render them liable under their own military justice systems, which generally apply at all times and in all places of service, including in foreign countries under peace operation mandates. Obviously, this same conduct is likely to constitute offences against the laws of

the Democratic Republic of Congo, where they were committed – but the UN, and any state sending civilians or troops to the UN, might understandably be reluctant to expose its troops or nationals to the courts of the Congo.

In the peacekeeping context, these same events are breaches of several UN Codes of Conduct, but the accountability to those Codes is limited to service issues, like pay and employment. So, there are 'laws' – but the framework is full of holes, producing, in the context of the Congo, a 'feeling of impunity'.

Even if there are 'laws' of varying sorts prohibiting certain conduct, the accountability regime is inadequate in at least six main respects:

- (1) To the extent that perpetrators might be liable to prosecution in their home countries for offences committed on UN service abroad, there are major inconsistencies between different countries' legal systems as to what exactly is an offence.⁵
- (2) There are major gaps in legal jurisdiction as regards civilians, compared with military personnel.
- (3) There are significant differences in jurisdiction, capacity and willingness of countries to hold their troops or civilians accountable.
- (4) Even if there were uniform willingness to prosecute back home (and jurisdiction covering both military and civilians), it is often impractical to get reliable evidence to enforce criminal laws back home if the events took place abroad.
- (5) The possibility of lifting UN immunity and subjecting a person to the local courts and punishment systems is often either impractical or would raise major other human rights questions about fair process and punishment.
- (6) The UN's own sanctions are essentially 'employment-related', rather than criminal.

The end result is that people committing the same offence, on the same mission, but from different countries (or even with different commanders), might end up facing radically different accountability processes, including: no action, UN service-employment sanctions, being repatriated from the country of UN Operations, facing courts martial and, finally, the possibility of a criminal prosecution in the home country.

To understand the issues, it is necessary first to outline the relevant policy and legal framework of legal immunity when states or international organisations operate in a foreign jurisdiction.

The Basis for Immunity From the Law in a Foreign Jurisdiction

Governments have long extended to other sovereign states and their representatives certain rights and facilities not available to ordinary citizens. These privileges and immunities are extended in accordance with international law and are customarily based upon reciprocity and diplomatic practice developed

through years of inter-governmental relationship (McCormack Crosswell, 1952).

Representatives of states are protected by diplomatic and consular immunities embodied in international conventions (Denza, 2002). In the context of diplomatic immunities, *reciprocity* forms a constant and effective sanction for the observance of nearly all the rules. First, a state grants immunity to the diplomats of other states serving in its territory, and reciprocally receives immunity for its diplomats serving abroad. But secondly, and in this paper more importantly, every state retains the capacity to punish its own diplomats in its home jurisdiction, notwithstanding that the offences were committed abroad.⁶ In other words, a key part of the entire arrangement is that diplomats are not immune from *all* law, but only from the laws of the foreign country in which they serve.

Likewise, other forms of immunity may be extended to individuals by consent between states under international treaty, and given effect by domestic statute. A common example of such arrangements is provided by Status of Forces Agreements (SOFAs) concluded between states, providing for the jurisdiction governing military forces, and sometimes some civilian personnel, in a foreign state. SOFAs typically permit visiting forces to exercise exclusive disciplinary jurisdiction over its members while they are in the foreign country.

In general terms, then, immunity from the laws and courts in a place of service is regarded as necessary to enable a person to carry out their duties without interference by the receiving state. Of course, a state could waive its immunity for a diplomat, enabling a prosecution in the foreign state where the crime was committed. Or, it could retain the immunity from the laws of the foreign state, bring the person back home, and then prosecute. But such action always faces the major problems of getting sufficient credible evidence about an offence committed abroad.

The interplay between state-representative diplomatic immunity and the immunities of visiting forces under SOFAs illustrates why and how the complexities have arisen in relation to peace operations. 'Diplomatic' immunities were never intended to cover tens of thousands of 'representatives/employees' in a single deployment. SOFAs were intended to cover military personnel, not *all civilians* whether or not connected to the force. The legal framework is thus stretched well beyond protecting officials and employees working for the UN, to cover operations involving tens of thousands of 'UN peacekeepers'. It does not work very well.

Civilians in International Missions

Civilians play an increasingly important role in peace operations. Civilians include those working with intergovernmental organisations, non-governmental organisations, private voluntary organisations, private companies and on behalf of states themselves. Indeed, civilian employees are today an integral part of 'the

military'. Civilians associated with the United States armed forces for example, comprise a quarter of the force and serve in over seventeen nations. The US General Accounting Office estimated that 14,391 civilians were deployed to the Middle East in support of Operations Desert Shield and Desert Storm, and 5,900 civilians supported 6,000 uniformed army personnel in Bosnia for Operation Joint Endeavor. Similarly, civilians contracted to armed forces now deploy frequently for humanitarian missions, peacemaking and peacekeeping. During operations Desert Shield and Desert Storm, approximately one out of every thirty-six deployed personnel was a contractor. That number rose to one out of ten in operations in the Balkans (Turner and Norton, 2001).

The abuse of *diplomatic* immunity is a well-documented source of concern to many nations somewhat trapped by this 'necessary evil' (Barker, 1996: 35).8 In contrast, the subject of abuse of military and civilian immunities in the context of international missions has (until the Congo case) been rife with anecdote and relatively scant on fact. Individual allegations of improper conduct have, however, abounded in respect of personnel in international missions in Cambodia, Somalia, Kosovo, Afghanistan and Bosnia. The events that prompted the introduction of United States legislation (discussed below), involved a case in the 1990s in which US contractors were allegedly running a prostitution ring (Meehan, 2004). Other examples include Army Staff Sergeant Frank J. Ronghi being linked to the January 2000 rape and murder of an 11-year-old Albanian girl in Kosovo, and the infamous allegation of a civilian police officer assisting in Kosovo, raping a young girl and subsequently being smuggled out of the country over night by his home state of Austria (Amnesty, 2004). In Timor Leste, the issue of immunity arose when a Finnish civilian staff member killed a 72-yearold Timorese woman in a hit-and-run car accident. The United Nation's initial refusal to waive immunity was met with dismay by local Timorese and the man's immunity was eventually lifted, although he was subsequently released and allowed to return to Finland (Rawski, 2002).

Although nothing to do with the United Nations, allegations in respect of torture and sexual abuse of Iraqi prisoners in the US-run Abu Ghraib prison also provide a recent example of similar issues. United States military personnel are clearly implicated, as are private contractors allegedly conducting interrogations. The civilian involvement in such abuses raises difficult issues in terms of potential impunity for wrongful actions.

Mechanisms to Punish Civilians on International Missions

In theory, *military personnel* who commit crimes whilst serving anywhere in the world, are subject to at least four sets of laws: the UN Codes, their military justice systems, the laws of the country in which they are serving (if there is no immunity, or if it is waived) and their home criminal laws. In other words, putting aside the problems of evidence, and so forth, military personnel should

be accountable when serving abroad. Similarly, and as noted above, in relation to *civilian diplomats* serving abroad, most countries have also enacted legislation to provide for domestic prosecution of crimes committed abroad by their representatives (again, if immunity is not waived). Thus, as with military personnel, it seems clear that despite notional 'immunity' for civilian diplomats serving a state, there is a reasonably clear framework for accountability of diplomats who break the law whilst serving abroad.

In contrast, mechanisms for accountability in home states for *civilians serving on international missions* are either lacking in terms of jurisdiction and process, or wholly absent. As Chairman Steve Chabot noted to the US House of Representatives (30 March 2000), during debate on the introduction of American legislation to provide for jurisdiction in such cases:

Each year incidents of rape, sexual abuse, aggravated assault, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation declines to prosecute these offences. This problem has been compounded in recent years by the increasing involvement of our military in areas of the world where there is no functioning government, such as Somalia, Haiti, and the Balkans. Because in those places no government exists at all to punish crimes, American civilians who commit crimes there go unpunished.

The absence of domestic authority to prosecute *civilians* working with American armed forces who commit crimes abroad has only very recently been dealt with under American law. However, even this has flaws – the Military Extraterritorial Jurisdiction Act 2000 was only designed to cover civilians *serving with military forces*, not civilians serving as staff in an international mission.

Most states have still not provided for the possibility of local prosecution for offences committed by their civilian nationals on international missions. Domestic mechanisms for conferring jurisdiction over civilian wrongdoing in foreign states have developed on a piecemeal basis and it appears that a great many states have no possible jurisdiction to prosecute, at home, their civilians who commit crimes on UN peace operations.

Occasionally, civilian immunity may be challenged through the negotiation of a specific treaty between the sending state and the host state. However, despite good intentions, this may also lead to complications. A recent example is the dispute between Australia and Papua New Guinea (PNG) concerning the deployment of up to 300 Australian police, and civilian officials to take up posts in the PNG courts, financial and planning agencies, customs and civil aviation as part of a proposed \$800 million Enhanced Cooperation Program. Australia sought full legal immunity from PNG jurisdiction for its police and civilians serving in PNG. PNG Prime Minister Michael Somare initially rejected the demand by Australian state representatives, and an official commented:

We have taken offence to the attitude of the Australian officials. Australia insists on its jurisdiction over criminal immunity for its personnel which Waigani [the locality of the PNG Government in Port Moresby] maintains that PNG's jurisdiction should be applied because PNG is not in a crisis situation, or a failed or weak state. (Marshall, 2004)

In June 2004, a compromise between the two states agreed that a joint steering committee would be established to consider issues of jurisdiction. Should an Australian breach PNG law, the committee would consider each case independently to determine if the civilian should be dealt with under PNG or Australian law.

In other circumstances, national legislation can also lift civilian impunity on international missions. An example in Australasia concerned the current Regional Assistance Mission in the Solomon Islands. Under the relevant SOFA, the Solomon Islands ceded its criminal jurisdiction only if the sending country could prosecute any offences in its domestic courts. To implement this treaty, Australia and New Zealand both rushed legislation through their parliaments. In NZ, the new Act provides that any acts or omissions (that would constitute an offence within NZ), committed outside of NZ, are to be treated as if they have taken place within NZ.

Comparable legislation appears to be extremely rare in the rest of the international community. Further, suppose for a moment that all the legal jurisdiction problems were solved, for both military personnel and civilians. The accountability would still be meaningless if there were no evidence to make a case. The issues here are intensely practical. Witnesses, forensics – all are likely to be extremely difficult to obtain reliably from a crime scene that may be several thousand kilometres (and vast cultural distances) away from the trial court. Apart from some exceptional cases, it seems clear that unless there is an effective on-mission capacity to gather such evidence *at the scene of the offence*, it is extremely unlikely that all the hurdles can be overcome.

Establishing a United Nations Criminal Court

Apart from the possibility of waiving UN immunity, in upholding standards of conduct in international missions the divisions of the United Nations use disciplinary directives and codes of conduct. Such provisions guide officials as to what measures will be taken, and the form of accountability and punishment. At present, usually in the context of a transitional administration where the judicial system is dysfunctional, or under United Nations supervision, an investigation into the underlying facts of an offence allegation is most often conducted by a United Nations-convened Board of Inquiry. However valuable such inquiries are in ensuring better transparency, it must be noted that they are not substitutes for proper judicial accountability. The UN Office of Internal

Oversight Services which produced the Report for the Congo was set up primarily to ensure *financial* accountability, not to conduct reports into substantial sexual abuses and crimes.

In some missions, Ombudsperson offices have also been established to resolve claims of abuse. In theory, these institutions ensure that the mission as a whole acts in a way that is consistent with its mandate and with international human rights standards generally. The offices in both Kosovo and East Timor became focal points where local citizens lodged complaints of unfair treatment. However, as noted by Rawski (2002: 116), 'A lack of enforcement power and material support at the mission level have made the Ombudsperson an ineffective institution. Like a Board of Inquiry, the Ombudsperson lacks enforcement power as its findings are only recommendations.'

Building on the Mission Ombudsperson notion, the obvious question is whether the United Nations should and could provide a judicial system for accountability on international missions? The parallel is the court-martial jurisdiction of military forces, tailored to on-mission work and covering both civilians and military personnel.

Could an on-mission United Nations court decide immunity and conduct trials? A properly resourced and established UN court would remove the possibility of abuse in local courts and the strain on resources or political relationships. Those who break the law of the host country while under United Nations authority could be required either by treaty (on a mission-by-mission basis) or by Security Council resolution or even international convention, to stand trial for breaches of a special criminal code established for UN service.

This may tie in with the establishment of a more robust and independent mission-based Ombudsperson office and keep control firmly within the UN structure. However, such a process may allow states to retain responsibility for prosecuting their own citizens where they see fit (on a similar basis to the concurrent domestic jurisdiction in relation to the International Criminal Court).

A 'Crimes on Peace Operations Statute' would have to be drawn up, listing the agreed crimes and jurisdiction of a court. An international treaty would be necessary on all aspects, including requiring states to receive any of their convicted personnel to serve their sentences back 'home'. Domestic legislation to give effect to such undertakings would be required. There would also be practical matters of staffing, funding and setting-up. But could it be done?

Conclusion

Ensuring accountability for actions in international missions is vital to notions of deterrence and punishment, and the upholding of justice and equality under the law. There should be no suggestion that either military or civilian personnel can avoid accountability in both domestic and international contexts. The issues involve inadequate law, jurisdiction and application – as well as ethics and

training. In the end, it is simply impossible to prevent all forms of abuse. But it should not be impossible to create effective accountability on peace operations. The current system is fragmented and patchy. It can be made better by more training and, in relation to military personnel, by trying to get countries to enforce their own military discipline codes. But in relation to civilians, the issues are much harder. Although some countries (such as New Zealand and Australia) have recently created jurisdiction to prosecute at home their civilians who commit offences on peace operations, most states offer no such possibility. However, it may be that in the end effective accountability will not come from a remote chance of domestic prosecution, but from on-mission processes. That requires the UN to seek a form of investigation and prosecution on mission that is very different from the current framework illustrated in the Congo.

Notes

- ¹ This article draws by consent on a supervised LLB (Hons) research paper at Victoria University of Wellington, 2004, by Chelsea Payne: 'Should Civilians Get Away with Murder?' Responsibility for this article is my own.
- ² Office of Internal Oversight Services (OIOS).
- ³ The acronym for the United Nations Organisation Mission in the Democratic Republic of Congo.
- ⁴ Actually, the Report went further, stating that commanders of some troop contingents had 'either failed to provide the requested information or assistance or actively interfered with the investigation' (para. 38).
- ⁵ A classic case was described to me personally by a UN Military Legal Officer. It concerned a Kenyan soldier caught smuggling alcohol between Iraq and Kuwait in the 1990s. The UN Force Commander agreed to allow the Kenyans to prosecute the offence in Kenya, rather than waiving UN immunity and allowing a prosecution in Kuwait (where the offence carried the death penalty). But under Kenyan law smuggling alcohol was not an offence. Despite the fact that the officer had several hundred thousand dollars in a frozen bank account in Kuwait which was patently the proceeds of this smuggling it proved impossible to prosecute the offence in any jurisdiction, or to reclaim the proceeds of the crime in Kuwait.
- ⁶ For example, in New Zealand, section 8A(2) of the Crimes Act 1961 specifically provides that for NZ diplomats covered by immunity in foreign countries, any matter which constitutes an offence in NZ is 'deemed to have taken place in NZ'. The only legal hurdle to ordinary prosecution is that the consent of the Attorney General is required.
- Despite reports that the US has designated *all* of its tens of thousands of personnel in Iraq, including both civilians and military personnel, to be immune from Iraqi jurisdiction (Wright, 2004).
- 8 For example, in Britain, in the period 1974 to mid-1984, there were 546 occasions on which persons avoided prosecution for alleged serious offences because of diplomatic immunity (Higgins, 1985).
- The new legislation is: Crimes (Overseas) Amendment Act 2003 (Australia) and the Crimes and Misconduct (Overseas Operations) Act 2004 (New Zealand).
- For example, the UN 'Guide for Managers in Peacekeeping Operations on Gender-Based Violence' provides that measures that may be invoked for civilian police and military observers following a finding of serious misconduct include: removal from position of command, recommendation to repatriate, and written censure or reprimand, including possible recommendation of non-eligibility for future assignment with the United Nations. In addition, if local laws of the host country have been violated, the United Nations and the host country can agree on

whether to institute criminal proceedings. Civilian police officers and military observers are subject to the jurisdiction of the host country. The Secretary-General has the right and duty to waive the immunity of such individuals where such immunity would impede the course of justice.

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