Ai Kihara-Hunt September 9th, 2020

Myths about legal obstacles to pursuing individual criminal accountability for sexual exploitation and abuse

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Serious sexual crimes are committed in Peace Operations. Virtually all States recognise these as crimes, yet there have been a very limited number of prosecutions. Ai Kihara-Hunt discusses here the legal obstacles often invoked in the cases and argues that these are in-fact myths and that if truly willing, there can be individual criminal accountability for the sexual exploitation and abuse committed by peace keeping personnel.

It has been over two decades since the issue of sexual exploitation and abuse (SEA) in United Nations (UN) Peace Operations has been added to international security debates and policymaking. A series of cases in the Central African Republic attracted the world's attention again in 2014, and now the UN and member States seem to be serious about tackling the issue. However, one of the important processes in addressing SEA accountability is addressing the individual criminal accountability of perpetrators of sexual crimes, and in this respect, progress has been limited. According to the UN, out of 174 substantiated claims of SEA incidents against uniformed personnel, only 51 perpetrators have been jailed since 2010. Civilian personnel working for UN Peace Operation have not been criminally sanctioned despite 51 substantiated allegations against them during the same period.

According to the UN, sexual exploitation is "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from sexual exploitation of another". Sexual abuse is "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions." Prostitution and sexual intercourse with an adult with consent are not crimes as such under these terms, regardless of power relations.

The scope of acts that are in discussion here are sexual crimes: rape, sexual assault, sexual abuse, sexual intercourse with a minor, sexual slavery and human trafficking, which are crimes under domestic laws of virtually all States, although the scope and the extent of implementation of the domestic laws vary.

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Under Human Rights Law, serious crimes, which includes the sexual crimes in discussion here, shall be investigated, and where there is sufficient evidence, prosecuted. In pursuance of prosecution, there appears to be two myths that are believed to shield prosecution: jurisdiction and immunity.

Following Member States' claims of problems relating to jurisdiction, the UN General Assembly's Sixth Committee, on the item of criminal accountability of UN Officials and Experts on Mission, has been almost exclusively dealing with establishing national criminal jurisdiction. On the issue of Immunity, this has been claimed by the UN in an incoherent way and has been considered by States to shield prosecution. It should be made clear here that these are *not* obstacles to prosecution by a willing State.

Criminal Jurisdiction

Criminal jurisdiction is not so much an issue in regards to locally employed personnel, but rather when looking at international personnel working within UN Peace Operations. Because the UN cannot prosecute,

there are two primary criminal jurisdictions that can be applied: the Host State and the State of Nationality/sending State. Different categories of personnel are under different jurisdictional arrangements. Two main categories exist: military contingent personnel and civilian personnel.

It is clear that military contingent personnel are subject to exclusive sending-state jurisdiction, as stipulated in bilateral agreements between the UN and States sending troops, usually called Status-of-Forces Agreements (SOFAs). Civilian personnel, including police personnel, are subject to host State jurisdiction. Whether or not they are also subject to the jurisdiction of the sending State/State of nationality depends on the domestic law of the sending State.

Research shows that around 90 percent of alleged crimes committed by the UN Police personnel were subject to their sending States' jurisdiction: either that their sending States have criminal jurisdiction for all crimes committed by their nationals regardless of where they are committed, that they have special legislation covering their civil servants or police personnel, or that they have jurisdiction over particular types of crimes committed by their nationals overseas.

In addition, 55 UN Member States have assured that they can exercise criminal jurisdiction over their nationals for crimes committed, as provided in the discussion on Criminal Accountability of UN Officials and Experts on Mission at the Sixth Committee of the UN General Assembly.

In short, the issue of jurisdiction is clear. For military contingent personnel, the host State is shielded from prosecution but the sending State has jurisdiction. For civilian personnel, jurisdiction is never an issue in the host State, and does not pose a major barrier to prosecution of willing sending States.

Immunity

The next myth concerns immunity, which needs to be discussed in two separate parts: the law and its implementation.

Law

For the purpose of discussing immunity, there are four main categories of personnel: military contingent personnel; high-ranking civilian personnel; other civilian personnel; and locally hired hourly-paid personnel. The third category can be divided into two: UN Officials and Experts on Mission.

For military contingent personnel, aforementioned SOFA makes it clear that they are immune from host State jurisdiction and are exclusively subject to sending State jurisdiction. High-ranking civilian personnel, whether they are UN Officials or Experts on Mission, are immune from criminal prosecution in relation to all acts and omissions, including sexual crimes. This is called absolute immunity.

Other civilian personnel are immune from criminal prosecution only if the act is related to their official functions. This is called functional immunity. The query is not whether the act itself (or omission) was part of their official functions, but whether it was committed in the course of delivering official functions.

Either way, most of the reported sexual crimes are not covered by functional immunity. Within this category of personnel, there are Officials and Experts on Mission. The only difference between the two groups relevant to this discussion is whether or not the person is covered by immunity from arrest. Experts on Mission, which includes UN Police personnel, are legally immune from arrest.

For both civilian personnel categories, the geographic scope of immunity should be global, as the logic for immunity is to deliver the UN's functions

without States' intervention. Locally hired hourly-paid personnel are not covered by immunity.

Only when an act is covered by immunity, is there a question of waiver. The UN, or more specifically the Secretary-General, can and must waive when they consider "the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" as envisaged in Section 14 of the UN Convention on the Privileges and Immunities of the United Nations. This means that even for sexual crimes committed by high-ranking civilian officials, the UN can make the act prosecutable. For military contingent personnel, the waiver question rests with the sending State.

Implementation

In practice, the aforementioned two stages of immunity application are often used together. The UN tends to assume the existence of immunity from the host State and discusses the issue of waiver even for cases that are supposed to be covered by functional immunity only. It is also the UN's practice that it only invokes immunity from the host State and not from the sending State. In relation to immunity from arrest, it appears that the UN does not invoke it separately in relation to Experts on Mission in UN Peace Operations.

In summary, immunity, if properly applied, is not a major barrier for most of the sexual crimes committed here, given the nature of the crimes. However, some uncertainties remain in relation to the geographic scope of immunity for civilian personnel. Two main problems arise in the application of immunity: the first is that the UN sometimes invokes immunity where no such immunity exists, and then 'waives' this non-existent immunity. It would be better if the UN were to simply and clearly state that there was no such immunity in the first place.

Second, the UN sometimes invokes immunity, and does not waive it even where it does not, in fact, exist. For example, in a sexual abuse case of a trafficked minor at the offender's house outside his working hours, immunity was invoked and maintained. There are many cases that have followed the same legal path. In some cases, it appears that the real reason for this is the UN's concern about handing over its personnel to a legal system that either may not be able to protect suspect's right to a fair trial, or that is unable to conduct a trial at all. While that is a legitimate concern, it is recommended that this issue be dealt with separately via another mechanism.

It is possible that inappropriate claims of immunity amount to a breach of human rights obligations by the UN. To the extent that this is the case, States may be required not to give effect to such immunity. Given the practice, the exclusive power of the Secretary-General to decide i) whether immunity applies to particular conduct, and ii) whether the UN waives immunity can be problematic.

There are no major legal barriers to criminal prosecution of sexual crimes committed by UN Peace Operations personnel, despite myths that lead people to believe the contrary. Immunity poses some problems in practice. The principal problem appears to be the lack of political will to bring prosecutions in the first place.

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