I. CRIMINAL LAW AND PEACE KEEPING OPERATIONS

CRIMINAL LAW PROTECTION AND ACCOUNTABILITY OF PARTICIPANTS IN PEACEKEEPING OPERATIONS

KUNIKO OZAKI
Director, Division for Treaty Affairs, United Nations Office on Drugs and Crime

The problem of criminal acts committed by participants in United Nations (UN) peace-keeping missions and the accountability for such acts is not a new one. However, the events of the past years, especially the cases of sexual exploitation and abuse committed by a significant number of UN peacekeeping personnel in the Democratic Republic of Congo, have forced the Organization to take stock of the measures available to address these problems and to provide an answer to the international community. Hence discussion going on mainly in 6th. Committee of the General Assembly in New York.

From an international criminal legal perspective, this issue is a combination of three sets of questions. One is criminal liability of staff members of public international organizations, and the second is the issue of impunity in the situation where local legal system is seriously compromised. In addition to this, there is an issue of military justice in case of military component of peace keeping operations. Today, I would like to concentrate on the first two issues since my previous speakers already covered the last one.

As for the first issue, the basic elements of the problem are rather simple. Since International Organizations (IOs) are not governments, their staff members, when they commit criminal acts, are usually subject to criminal jurisdiction of sovereign states, usually of the country where the crime is committed. Difficulty arises where the criminal acts committed relate to certain specific function of the Organization,

and where different jurisdictions and officials of different nationalities are involved. Take example of passive bribery of staff members of IOs. This issue has been extensively discussed in the context of United Nations Convention against Corruption (UNCAC). The legal issues involved are, criminalization, jurisdiction, investigation, cooperation among IOs and Member States, and immunity.

In some countries, passive bribery of officials of IOs are not criminalized, since usual bribery offences are offences against interests of that specific governments. Several regional conventions against corruption cover this specific crime, but in the only universal one, UNCAC, provision on criminalization of passive bribery of officials of IOs is not mandatory. Next question is, considering that the bribery of officials of IOs is crime against interests of IOs, which state or states should exercise criminal jurisdiction over such acts; state of nationality of the staff member, state where the acts are committed, or states where the HQ of the IO situated? Another question is who will investigate? In case of financial anomaly or misconduct, it is usual that internal oversight body of the IOs will make investigations. What is the relationship with such administrative investigations and criminal investigations to be conducted by the country which exercises criminal jurisdiction? The related issue is international cooperation between IOs, and between IOs and relevant countries. How can IOs provide evidence to be used by the courts of countries which exercise criminal jurisdiction? Should there be formal mutual legal assistance between IOs and States? UNCAC also contains famous provisions on asset recovery. How can a State freeze, confiscate and return criminal proceeds stolen from IOs to IOs? And, of course, the issue of immunity. IOs are expected to waive immunity to enable investigation and prosecution, but how and on what condition? What are the factors to be considered in such waiver? Ensuring due process for the sake of staff member? How about protection of IOs themselves and of third party, including classified internal document?

In addition to these questions, in case of our subject matter, namely, criminal acts committed by peacekeepers, the whole issue should be considered in the context of the specific situation where the acts are committed. This is the second issue I mentioned earlier.

Peacekeeping missions often operate in countries where the legal system is seriously compromised, if not destroyed, and their criminal justice systems often are inadequate to investigate and prosecute these cases. In some cases, even proper legislation is lacking and there are serious dangers of impunity. Such criminal system can neither guarantee to the alleged offender the same «protection» foreseen under the existing international human rights standards. By the way, this latter factor is the reason why my presentation will not only deal with the issue of «criminal law accountability» for participants in peacekeeping operations, but also «criminal law protection». It is exactly the same situation where International Criminal Court is

operating on the basis of the principle of complementarity. The difference is that our issue is ordinary crime, but not humanitarian crime.

Therefore, our task here is to analyse and discuss how United Nations and international community can respond to the issues of criminalization, jurisdiction, investigation, international cooperation and immunity in these very specific situations where we cannot rely on local justice system. I would like to do so by examining some of the deliberations in the UN during past two years.

The first step in this examination is to look at the different status of personnel within the same peace-keeping mission. United Nations peace-keeping operations of the last generation may have three different components:

1) a civilian component;
2) a civilian police and military observers; and
3) a military component.

These three components are governed by different rules and disciplinary procedures as they have a distinct legal status.

United Nations staff have the status and the privileges and immunities of officials under the 1946 Convention on the Privileges and Immunities of the United Nations (the so-called General Convention). In addition, UN staff are governed by the Staff Regulations and Rules and other administrative issuances, such as the Secretary-General's Bulletins and other administrative instructions. All these standards are enforced through the Organization's disciplinary procedures.

Civilian police and military observers of a peacekeeping mission enjoy the status, privileges and immunities of experts on missions granted under the General Convention. Furthermore, civilian police officers and military observers sign an «undertaking» on the basis of which they agree to be bound by all mission standard operating and administrative procedures, policies, directives and other issuances. Members of civilian police are also governed by mission-specific directives issued by the Police Commissioner. Finally, both the police and military observers are bound to follow the conduct standards set out in the Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers issued by the Department of Peace-Keeping Operations.

The military members of national contingents have the privileges and immunities specified in the so-called «status-of-force agreements» or – if none has been concluded – by the «***model*** status-of-force agreements» which the Security Council applies to peacekeeping operations pending the formal conclusion of a status-of-force agreement with the host State.

On the basis of the *model* «status– of– force agreement» the criminal and disciplinary jurisdiction over military members of the contingents lies with the country

which has contributed the troops. As an administrative measure, the Secretary-General may order the repatriation of any military contingent who has been found culpable of a serious misconduct during a mission investigation.

As one can understand from this brief overview, there is a «mosaic» of rules and provisions governing the conduct of participants in the same peace-keeping mission which has practical consequences.

In October 2003, a Bulletin of the Secretary-General on «Special measures for protection from sexual exploitation and sexual abuse» was released. The Bulletin sets out a series of provisions related to the prohibition of acts of sexual abuse and exploitation as defined in the Bulletin itself. While the UN staff members are unquestionably subject to the provisions contained in the above Bulletin, the civilian police and military observers agree to be bound by directives of the Department of Peace-keeping Operations, which have started incorporating a summary of prohibitions contained in the Bulletin. As relates to the military members of contingents, the rules are binding on them only with the agreement of and action by the troop-contributing country concerned.

In March 2005, His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan, and a Special Adviser to assist SG in addressing the problem of sexual exploitation and abuse by United Nations peacekeeping personnel, submitted a report to the General Assembly. The Zeid report covers several important areas such as (*i*) how the investigation of criminal cases is handled by the United Nations, (*ii*) the issue of organizational, managerial and command accountability as well as the (*iii*) the issue of individual disciplinary and financial accountability for criminal acts. The entire set of findings and recommendations can be found in United Nations document A/59/710 of 24 March 2005.

As for the military members of contingents, which are not criminally accountable under the law of the host country but only under the national law of the troop-contributing State, the Special Adviser recommended that the model agreements would contain a specific provision indicating that if – as a result of an investigation carried out by the Department of Peacekeeping Operations – the allegations are considered well founded, the troop-contributing country is obliged to forward the case to its national authority to be considered for prosecution.

The Special Adviser also proposed that the model agreement should indicate that the relevant national authorities would decide on a case investigated by the department of Peace-Keeping Operations in the same way that they would decide upon an offence of similar nature on the basis of their national law. The model agreement should also provide that if the troop-contributing country should decide not to prosecute, a written explanation should be provided to the Secretary-General on why prosecution was not considered appropriate.

As for the other components of peace-keeping operations, we saw earlier on that the privileges and the immunities of the United Nations staff are ruled by the 1946 Convention on the Privileges and Immunities of the United Nations[1]. The Convention follows the so-called «principle of functionality», i.e. the privileges and immunities are granted to the UN staff for the performance of their official duty and not for personal benefit. The Convention further provides that the Secretary-General shall have the right and duty to waive the immunity of any official in any case where, in his or her opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

In his report, the Special Adviser indicated that the practice of the Secretary-General in implementing the provisions of the Convention is quite clear. «…*If the staff or experts on mission commits a criminal act and the host country seeks to prosecute, the Secretary-General will first make a determination as to whether the acts in question were performed in the course of official duties. If the acts were not performed in the course of official duties, the Secretary-General will inform the local authorities that no functional immunity exists..*[2].

In case there is no functioning local legal system, the criminal accountability of UN staff and experts would depend on whether another State has jurisdiction under its law to proceed with the prosecution. Several States exercise criminal jurisdiction over their nationals but whether a prosecution is really undertaken depends also on other important factors such as whether the offence is a crime under the national law, whether the prosecuting State has the capacity to investigate and collect the necessary evidence as well as to obtain custody of the accused.

Recognizing these legal difficulties and complexity of the matter, the report recommended that the General Assembly would mandate the appointment of a group of experts to provide advice on the best way to proceed in order to redress these obstacles. By adopting resolution 59/300 on 22 June 2005, the General Assembly endorsed the above recommendation and decided to establish a Group of Legal Experts[3] to study the issue of the criminal accountability of officials of the United Nations and experts in peace-keeping missions.

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1 On the basis of article 105, paragraph 2, of the Charter of the United Nations: «…*Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization…»*. The 1946 Convention on the Privileges and Immunities of the United Nations was negotiated with a view to determining the details of the application of article 105 of the Charter.

2 Document A/59/710, paragraph 86, page 29.

3 The composition of the Group of Legal Experts was the following: Sinha Basnayake (Sri Lanka); Enver Daniels (South Africa); Veronika Milinchuk (Russian Federation); Jean-Pierre Picca (France); Suesan Sellick (Australia) and Lionel Yee (Singapore).

The report of the Group, contained in UN document A/60/980 of 16 August 2006, cover relevant legal issues, i.e. *(i)* jurisdiction, (*ii*) the identification of what is considered to be a «criminal conduct»; (*iii*) the differences in the criminal laws of Member States; (*iv*) the issue of immunities; (*v*) the issue of «dual criminality» (*v*) the issue of securing custody of the alleged offender and (*vi*) investigation of criminal acts.

With regard to «jurisdiction», the Group identified three possible scenarios: jurisdiction exercised by the host State, by an international court or tribunal, and jurisdiction of States other than the host State.

The Group clearly recommended that the Organization should give priority to the option of having the host State exercising jurisdiction for obvious reasons that the host State is likely to be the place where most witnesses and evinces are placed and holding a trial in the host State would give the local population a stronger sense of justice being done.

However, in case the local legal system is collapsed, establishment of hybrid tribunals in the host State with specific jurisdiction is suggested as one option to utilize local system while ensuring international standards. At the same time, the Group recognized significant limiting factors to this solution, such as ensuring consent of host state, financial and other costs and danger of double standards.

The Group also considered the possibility that the jurisdiction be exercised by an international judicial institution, such as the International Criminal Court. This option, however, presents a series of difficulties, such as resource requirement and the fact that the jurisdiction of international courts and tribunals has been asserted so far only over conduct that attracts individual criminal responsibility in international law, including genocide, war crimes and crimes against humanity.

In relation to the last and most realistic scenario, i.e. jurisdiction of States other than the host State, the Group recommended that, in addition to the host State[4], criminal jurisdiction should be established:

(a) by the State of nationality of the alleged offender;
(b) by the State where the offender is found, if it does not extradite him or her.

In addition, jurisdiction may be established:

(1) By the State of habitual residence of a stateless offender;
(2) By the State of nationality of the victim.

4 The Group did not question the establishment of jurisdiction by the State in which the crime occurred as the existence of such jurisdiction is not disputed.

The most innovative proposal made by the Group of Legal Experts relates to the modality on how to establish the jurisdiction by States other than the host State. In this regard, the Group recommended the negotiation of a new «*International convention on the criminal accountability of United Nations officials and experts on mission*».

The need for adopting a new international instrument has been motivated by the Experts of the Group with the fact that a convention would ensure that the establishment of jurisdiction on the basis of active nationality and the extradite or prosecute regime would become an international obligation binding on States parties to the convention and would not be left to the discretion of each State. In addition, a convention could be used to address other issues that facilitate the effective exercise of jurisdiction by States, such as extradition obligations and the use of evidence gathered in the host State. Finally, it would create greater consistency for matters such as the scope of the crimes covered.

Although the Group also recognized that the elaboration of a new convention would have some disadvantages such as the long time needed to be negotiated, adopted and brought into force as well as the fact that it would only be binding to those countries parties to it, the Group of Expert went a step further than simply recommending the adoption of an international convention, and submitted to the General Assembly the text of a draft convention on the criminal accountability of United Nations officials and experts on mission, for its consideration.

In connection with its «scope of applications», on the basis of article 2, the draft convention would apply to United Nations officials and experts on mission and **not** to military personnel of national contingents assigned to the military component of a United Nations peacekeeping operation and to other persons who are, under the provisions of the status-of-forces agreement, subject to the exclusive jurisdiction of a State other than the host State.

Article 3 defines which kind of crimes are covered by the draft Convention and for their definition the Group presented two alternative options.

The first one specifies those crimes which, under the national law of that State party, correspond to: (a) murder; (b) wilfully causing serious injury to body or health; (c) rape and acts of sexual violence; (d) sexual offences involving children; (e) an attempt to commit any crime set out in subparagraphs (a) to (d); and (f) participation in any capacity, such as an accomplice, assistant or instigator in any crime indicated above.

The second option defines the crimes to be covered by the Convention as those crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty.

As relates to the issue of jurisdiction, article 4 provides that each State party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in the draft convention when: (a) the crime is committed in the territory of that State; or (b) the crime is committed by a national of that State.

In addition, a State party may also establish its jurisdiction over any of the crimes set out in the convention when: (a) the crime is committed against a national of that State; or (b) the crime is committed by a stateless person who has his or her habitual residence in the territory of that State.

Article 7, on «prosecution of offenders», creates an obligation for the State party in the territory of which the alleged offender is present, if it does not extradite that person, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. The States parties concerned would also commit themselves to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

Other articles of the draft Convention cover issues such as investigations, extradition, transfer of criminal proceedings and prisoners, protection from prosecution of victims and witnesses, etc.

The findings of the Group of Legal Experts, including the text of the draft Convention, have been submitted to and discussed by the Ad Hoc Committee on Criminal Accountability of United Nations officials and experts on mission, established by the General Assembly, which met in New York in April 2007.

Ad Hoc Committee discussed issues contained in the draft convention proposed by the Group of Legal Experts but considered that the discussion on the possible form of instrument to be elaborated was premature and decided to defer the discussion on this topic to a later stage.

Through these discussions, most of the legal issues has been identified and it is to be seen how Member States would proceed with this issue. I would just like to point out several possible items which warrant further discussion.

The first point that would deserve further elaboration is the one related to the identification of which «kind of crimes» should the UN staff and experts on mission be considered accountable for. During the discussion within the Ad Hoc Committee, several delegates expressed their view that the draft convention should not only cover crimes related to sexual exploitation and abuse or crimes against the person but should also be applicable to other forms of serious crimes such as theft, fraud and money-laundering. In this connection, it was also noted that any proposal for the expansion of the scope of a hypothetical convention *ratione materiae* would need to be linked to the eventual scope *ratione personae* as well as to the provisions on dual criminality and extradition.

Within the Ad Hoc Committee, it was also observed that a distinction could be drawn between crimes committed against the population and the crimes committed against the Organization of the United Nations.

Another important area which deserves further attention is the one of the «civil and financial» liability of UN staff, personnel and military contingents for the criminal acts they might commit.

The report of the Special Adviser, Prince Zeid, proposed that any staff member of the UN found guilty of having committed acts of sexual exploitation and abuse, in addition to having their contract terminated by the Secretary-General, should also be fined and the proceeds collected through the fines should be deposited into a trust fund for victims.

A similar concern is echoed in article 15, paragraph 15, of the draft convention prepared by the Group of Legal Experts, which deals with the possibility for victims of the crime covered by the convention to seek compensation for the damages suffered.

Although the focus of my intervention has been the need of ensuring the criminal accountability for UN officials and experts on mission, I would also like to recall that the biggest challenge remains to be ensuring that military members of national contingents are held accountable for the crimes they commit while on a UN mission. As of today, in fact, the large majority of the crimes committed within a UN peacekeeping mission have been perpetrated by military troops.

As we have seen earlier on, on the basis of the UN model «status-of-force agreements», the criminal and disciplinary jurisdiction over military members of the contingents lies with the country which has contributed the troops. Therefore, the final responsibility for prosecution lies with the troop contributing country. Some countries may be willing to prosecute, while other may be more reluctant.

In this regard, the recommendation presented by Prince Zeid, to resort to «on-site» courts martial could provide an important answer. The use of such on-site courts martial would also ensure immediate access to witnesses and evidence in the mission area and would send an important message to the local population that there is no impunity for criminal acts committed by members of the military component.

Finally, another issue which needs to be dealt with by the international community is the one related to the need of addressing the criminal law protection and accountability of UN staff and experts working in countries which are not emerging from a conflict (so there is no peacekeeping mission deployed) but whose legal system does not comply with the recognized, existing international human rights standards. The international community should seriously think of applying the same rules and provision it will decide to adopt for a peacekeeping mission to this specific reality.

In concluding, I would like to point out that – whatever avenue the Member States of the United Nations will decide to take to ensure that UN officials and experts on mission are held accountable for the criminal acts they commit – the final goal of the Organization should be to ensure that the criminal justice systems of the

countries where UN peacekeeping missions are deployed are put in the conditions to play a primary role in the investigation and prosecution of criminal acts committed in their territory.

It is in recognition of the centrality of rebuilding the local criminal justice capacities that the United Nations Office on Drugs and Crime focuses large part of its activities on strengthening the rule of law in countries emerging from conflict, particularly through the undertaking of different activities such as the assessment of criminal justice systems; the promotion and application of international standards and norms; reform of criminal justice systems; assistance in drafting of legislation; training and materials for criminal justice practitioners; penal reform; development/reform of juvenile justice systems; and victim and witnesses support.