The Role of the ECtHR Regarding Crimes Committed by UN Peacekeepers

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Dear Editor,

During the past few years a series of egregious acts of sexual violence were committed in States and territories wherein the United Nations deployed its peacekeeping operations. These acts were perpetrated inter alia by military members of national peacekeeping contingents (MMsNCs) whilst assigned to a UN peacekeeping unit.[1]

With regard to crimes committed by persons involved in these operations, the UN adopted a dual approach distinguishing between its staff and MMsNCs. Whilst the former have the status of officials under the Convention on the Privileges and Immunities of the United Nations (the Convention), the latter is governed by the status of forces agreements (SOFAs) and the Memorandum of Understandings (MOUs).

The main difference between these intricate systems of norms is the extent of granted jurisdictional immunity and the possibility to waive the immunity. The Convention provides that officials are immune from legal process in respect of words spoken or written and all acts

[1] See Report of the Secretary-General 'Special measures for protection from sexual exploitation and sexual abuse' (2013) UN Doc A/67/766.

performed by them in their official capacity. The Secretary-General has the right and duty to waive the immunity of any official after particular circumstances are met.[2]

Under the SOFAs, the MMsNCs are subject to the exclusive jurisdiction of the troop-contributing country. That is, the respective participating States have jurisdiction over acts of MMsNCs committed in both public and private capacity.[3] Unlike the immunities of the UN officials involved in the peacekeeping operation, the exclusive jurisdiction of the respective participating State is not subject to the waiver of the Secretary-General or any other respective UN body.

Therefore, it depends on the will of the respective States whether MMsNCs are prosecuted for the crimes committed during their assignment to an operation. Numerous revelations show that States are reluctant to take action and that, if action is taken, the accused tends to be convicted of crimes of a lesser charge.[4] Unsurprisingly, the UN tries to ensure that the States take action against the perpetrators. This intention may be seen in the amended Model MOU, which stipulates that the respective States assure the UN that they shall exercise such jurisdiction.[5]

Yet recent incidents show that amendments of relevant UN documents do not compel respective States to take the necessary steps to adequately punish MMsNCs of serious crimes committed whilst deployed on a UN mission. The reluctance of respective States to agree on a more imperative and categorical wording of Model MOU's provisions indirectly supports this

[2] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15, art 5, s 20,
[3] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects: Model status-of-forces agreement for peace-keeping operations' (1990) UN Doc A/45/594, para 47(b).
[4] Center for Economic and Policy Research,'Reduced charges against Uruguayan MINUSTAH troops latest example of lack of UN accountability' (Center for Economic and Policy Research , 4 September 2012) <www.cepr.net/blogs/haiti-relief-and-reconstruction-watch/reduced-charges-against-uruguayan-minustah-troops-latest-example-of-lack-of-un-accountability> accessed 20 December 2015.
[5] UNGA 'Report of the Special Committee on Peacekeeping Operations and its Working Group' (2008) UN Doc A/61/19/Rev.1, 5.

position.[6] Balancing the sovereignty of States and the bringing of perpetrators of serious crimes to justice cannot be achieved without overcoming the current status quo secured by the provisions of SOFAs and MOUs.

It must now be considered whether the possibility of legal redress before the European Court of Human Rights (ECtHR) with regard to acts committed by the MMsNCs who are nationals of State Parties to the European Convention on Human Rights (ECHR) whilst they are assigned to the UN mission exists. It will be assumed that, as stipulated in Article 35 ECHR, all domestic remedies are exhausted before sending an appeal to Strasbourg. This letter will focus on other requirements that must be met regarding the particularities of the crime in question and the special nature of the relationship between the UN and MMsNCs.

Several questions need to be addressed. First, it must be determined to which entity the conduct of MMsNCs may be attributed, taking into consideration the specificity of the relationship between the UN and MMsNCs. Indeed, the UN does not possess full command but rather operational authority and control as MMsNCs remain in national service while deployed to the mission. It could be said that the attribution of conduct problem is analogous to the relationship between the Dutch peacekeepers and the UN in an infamous incident in Srebrenica. In this case, the peacekeepers were accused of failure to protect around 300 Bosnian Muslims who were trying to escape from Serbs. The Dutch Supreme Court held that the acts of Dutch peacekeepers were attributable to the Dutch government which had effective control over the peacekeepers.[7]

The ECtHR reached the same conclusion regarding the attribution of conduct in *Al-Jedda v UK* wherein it held that the acts of UK troops in Iraq were attributable to the UK rather than the UN

[6] UNGA 'Revised draft model memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation]' (2006) UN Doc A/61/494, 11.
[7] *The State of the Netherlands v Hasan Nuhanović*, Case no 12/03324 (Supreme Court of The Netherlands, 6 September 2013) para 3.11.2, 3.11.3.

and that the UN had neither effective control nor ultimate authority over the acts and omissions of UK troops.[8] The ECtHR also referred to Article 7 of the Draft Articles on the Responsibility of International Organizations (DARIO) which stipulates that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct.[9] It also acknowledged that the conduct may be attributed either to the UN, respective State or both entities.[10]

Thus, the conduct of peacekeepers may, under certain circumstances, be attributed to the respective States. This does not necessarily mean, however, that the States have effective control over their troops whilst they are committing crimes of sexual violence during their assignment. The responsibility of States may perhaps be established implicitly as it could be claimed that the UN had neither effective control nor ultimate authority over the acts of the troops. Hence, it should be States who have had effective control and, therefore, bear responsibility.

To avoid future confusion, it would be more appropriate if a judicial body dealing with cases involving crimes of MMsNCs would address clearly and explicitly when exactly and under which circumstances an entity has effective control over the troops. Nevertheless, due to the specific nature of an operation, attribution of conduct should be based on 'a factual criterion', as stipulated in the commentary to the DARIO.[11]

Assuming that troop-contributing countries have exclusive jurisdiction over their troops, a failure to adequately investigate potential crimes and bring the perpetrators to justice would

[8] *Al-Jedda v UK* App no 27021/08 (ECtHR, 7 July 2011) para 84.
[9] ibid. International Law Commission, 'Draft articles on the responsibility of international organizations, with Commentaries' (2011) UN Doc A/66/10, art 7.
[10] ibid.
[11] ibid, 22-23.

mean that these States do not comply with their obligations arising from international human rights instruments. Thus, the responsibility of a State may arise through a failure to protect human rights. If we accept this premise, we need to ascertain whether States have obligations to make inquiries in alleged cases where the acts were committed outside of their territory.

This would mean that States, by ratifying the ECHR, accept that the obligations flowing thereof apply extraterritorially. The current approach held by the ECtHR is opposite to the regional context and espace juridique model in the *Banković* case which defined a rather more restrictive view regarding extraterritorial application of the ECHR.[12]

In *Al-Skeini,* the Court shifted its view and stated 'whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation … to secure to that individual the rights and freedoms under [the ECHR] that are relevant to the individual's situation.'[13] In essence, the Court acknowledged that the State's jurisdiction, as stipulated in Article 1 ECHR, may be extended to the other States or territories. What is imperative is the control and authority over an individual.

Under these circumstances, a victim's position regarding a State and its agents is more obvious and complaint to the ECtHR seems plausible. However, to accept this statement, questions concerning the legal basis of such a complaint must be answered. Since sexual violence is not explicitly regulated in any provision of the ECHR, it needs to be determined under which article a victim could submit a complaint to the ECtHR.

Taking into account existing jurisprudence, it could be observed that, in certain circumstances, sexual violence may satisfy the minimum threshold of Article 3 ECHR, by amounting to

[12] *Banković v Belgium* App no 52207/99 (ECtHR, 12 December 2001) para 80.
[13] *Al-Skeini v UK* App no 55721/07 (EctHR, 7 July 2011) para 137.

torture.[14] In particular, the recent *Zontul v Greece* case is worth highlighting as the ECtHR held that the rape of a detainee by a state actor is equal to torture, thereby constituting a violation of Article 3 ECHR.[15]

However, we need to distinguish between sexual violence perpetrated by the peacekeepers assigned to a UN mission and the rape of a detained person by State actors, because the sexual violence by peacekeepers is not necessarily perpetrated on detainees in enclosed spaces. Furthermore, there is a clear difference between rape and sexual violence as the latter is of a broader nature, ie not every act of sexual violence per se would in fact constitute rape. Therefore, it should be noted that the severity of harm criterion for torture may in some cases not be established.

Given the position of MMsNCs it would be very harsh for a victim if a complaint would be rejected on a basis that the act has not reached the minimum threshold of Article 3 ECHR owing to the fact that the violence has not occurred in detention. Moreover, it should be taken into consideration that the MMsNCs are often sent to places where it is not difficult to arbitrarily abuse their powers whilst taking advantage of the vulnerability of a victim.

Nevertheless, the view of ECtHR remains unclear. In the opinion of the author, it should not be decisive whether the act was perpetrated on a person in detention. By the same token, given the specific nature of sexual violence crimes, significance should also be attached to the dire consequences that such crimes could have on mental health of a victim.

Development of jurisprudence of this area is vital. The UN cannot afford to leave the perpetrators of such serious crimes unpunished or to leave these perpetrators to the exclusive jurisdiction of their respective State. In relation to the ECtHR, it can be concluded that the most

[14] *Aydin v Turkey* App no 25660/94 (ECtHR, 24 May 2005) para 86.
[15] *Zontul v Greece* App no 12294/07 (EctHR, 17 January 2012) para 84-93.

crucial factor is to determine whether the violence reaches the threshold of Article 3 of the ECHR. Even if the ECtHR does decide to award compensation to the victim, the judgment needs to be implemented in the respective State. Unfortunately, it is not uncommon that some States are reluctant to do so. That is, however, another issue.

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