

PRINCIPLE OF IMMUNITY AND JURISDICTION VIS A VIS SEXUAL ABUSE BY UN PEACEKEEPING FORCE

*Anshul Agnihotri*¹

ABSTRACT

The United Nations Peacekeepers who were once known as the torch bearers of the peace keeping are now being criticized by whole world for civilians allegations of various atrocities done by the 'blue helmets'. The peacekeepers in the shield of peacekeeping has violated several human rights and got an escape route through the principle of immunity and jurisdiction. The diplomatic immunity provided by the United Nations leads to the gross injustice to the civilians who suffered due to the criminal conduct of peacekeepers. It is the duty of United Nations and Host States to prevent these Sexual Exploitation and Abuse (SAE) cases and give the victims a proper forum to redress their complaints. The present article deals with the paradigm shift of the nature of peacekeeping from peace keeping to the peace enforcement. The article main theme deals with the issue of immunity and jurisdiction of Host State which leads to the miscarriage of justice at international frontier. In the shield of these principles, the article presents the tale of two regions of the peacekeeping mission in Somalia and La Cote D' Ivorie. Finally, the few recommendations in the policy are suggested to curb the mischief which is present in the mechanism of United Nations Peacekeeping Missions.

INTRODUCTION

There is no clear legal and textual foundation of peacekeeping operations carried by United Nations in the UN Charter. The peacekeeping operation is originated as a practical response to the failure of the system of collective security as originally envisaged by the founders.² The first UN peacekeeping mission is the *UN Truce Supervision Organisation (UNTSO)* established in 1948 for the purpose of supervising the atrocities between Israel and Arab States.³ At present, there are sixteen UN peacekeeping operations going on in four continents.⁴ There is a paradigm shift in the nature of the peace keeping operations carried by the UN which leads to the blurred distinction between peacekeeping and peace enforcement.

¹ Anshul Agnihotri, 4th year Law Student, Institute of Law, Nirma University

² <http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml> (last accessed March 20, 2016).

³ GUGLIELMO VERDIRAME, *THE UN AND HUMAN RIGHTS (WHO GUARDS THE GUARDIANS?)* 196 (1st ed. Cambridge University Press 2011).

⁴ *Supra* 2.

The Security Council developed the practice of delegating the use of force to member states through the mechanism of authorisation, first employed for Operation Desert Storm in 1990.⁵

The powers exercised by the UN carries a serious risk of human rights abuse and mere principles and rules of the institutions won't ensure the compliance and accountability. Peacekeepers have on a number of occasions been responsible for their actions that violated human rights by misusing their position of trust and authority on local civilian population.⁶ Allegations and complaints against peacekeepers engaging in sexual abuse and exploitation first came to the notice of authorities and attracted the international attention in 2001.⁷ The media reports uncovered an example, in the year 2004, of sexual abuse and exploitation in the United Nations Organisation Mission in the DRC (MONUC).⁸ By early 2005, seven of the cases were confirmed and it was proven that children are being used for sexual exploitation in lieu of consideration of average five dollars or food.⁹ In 2015, there were several allegations made against French peacekeepers in Bangui, Central African Republic. There are nearly 100 allegations of sexual exploitation across 69 countries were received by the UN against its peacekeepers last year and accused were mainly from Congo, Morocco, South Africa, Cameroon, Rwanda and Tanzania in 2016.¹⁰

In the present scenario, the present liability of troop sending States is diluted under the veil of just a mere benefit of immunity in Sexual Abuse and Exploitation (SAE) cases alleged against peacekeepers. The most common defence taken by the accused peacekeeper personnel is the *immunity* and *lack of jurisdiction*. In Zeid report, it is clearly stated that the founders of the organisation did not intend that immunity would function to shield the experts and staff on the mission from national prosecution if they committed crimes in the host States.¹¹ However, the absence of judicial system in some peacekeeping location require long term international co-operation to ensure that personnel on mission are not immune from criminal prosecution.¹² The claim of a sending state to inquire into the criminal allegations

⁵ *Supra* 3.

⁶ *Id.*

⁷ MunaNdulo, The United Nations Responses to the Sexual Abuse of women and girls by Peacekeepers during Peacekeeping Missions (2009 Cornell Law Faculty Publications).

⁸ Jonathon Clayton & James Bone, *Sex scandal in Congo threatens to engulf UN's peacekeepers*, THE TIMES LONDON, Dec.2004.

⁹ *Supra* 2.

¹⁰ Yoshita Singh, UN registered 99 sexual abuse allegations against its staff in 2015, The Indian Express, March 8, 2016.

¹¹ Secretary General, "Report on Comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations" UN DOC. A/59/710, March 24, 2005.

¹² *Id.*

against their nationals during peacekeeping operations would lead to the biasness and provide an escape route to the accused from getting harsher punishment leads to the impunity of the accused.

ISSUES OF IMMUNITY AND JURISDICTION: GROSS INJUSTICE

The main obstacle in fixing the criminal liability through national courts on the peacekeepers is the law of immunity conferred upon them. Clearly, the privilege of immunity does not free the peacekeepers from each and every obligations but this may not fulfil the object behind the enforcement of law.¹³ The United Nations had enacted the most important document *Secretary General's Bulletin on Special Measures for Protection from Sexual exploitation and Sexual Abuse*.¹⁴ There are two types of immunity- functional immunity and personal immunity. Under section 18 of *the Convention on the Privileges and Immunities of the United Nations* it is specifically mentioned that UN officials are immune from legal process in respect of the acts performed by them in their official capacity. Under section 20 of the Convention it is clearly stated that the immunity is given to the officials for the benefit of the United Nations and their missions' objectives and not for personal benefit. Therefore, the secretary General of shall have the right and duty to waive the duty of any official in the cases where the immunity would impede the course of justice.¹⁵

IMMUNITY IN HOST STATES

The jurisdiction of the Host State is barred from prosecuting the peacekeepers which leads to the jurisdictions of troops sending state where hardly any proceedings initiated or any appropriate punishment is being given. This immunity continues after peacekeepers cease to be members of the operation for the acts done during the peacekeeping missions.¹⁶ According to SOFA provisions, the peacekeepers do bound by the substantive provisions of the domestic law of the Host State and their criminal acts did not give them immunity from being prosecuted but only jurisdictional exemptions for prosecution i.e. they can be prosecuted in their own country. The sexual abuse and exploitation are clearly not within the scope of the duties of peacekeeper so the functional immunity cannot be availed when the heinous crimes are committed. The Host State would be able to take an action only when the immunity is

¹³ H.G.SCHERMERS&N.M.BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 645(4th ed. Martinus Nijhoff 2003).

¹⁴ *Id.*

¹⁵ *Supra* 3.

¹⁶ Secretary General, Report on Model Status-of-Forces Agreement for Peacekeeping Operations, UN Doc A/45/594, October 9, 1990.

being waived off by the Secretary General and even if United Nations would like to waive immunity but that become difficult when it believes that the judicial system of that country doesn't meet the minimal requirements prescribed by the international human rights law.¹⁷The waiver of immunity generally is not being granted because the Host States, whose legal system has already been completely broken, doesn't have well defined the proper judicial system to prosecute the peacekeepers.

PROSECUTIONS IN TROOP-CONTRIBUTING STATES

Under SOFA provisions the peacekeepers under UN mission has been conferred with absolute immunity from local jurisdiction. The jurisdiction is being given to the troop sending states in the criminal prosecution of their nationals. The role of United Nations is limited in imposing the sanctions on the guilty peacekeepers- by ordering suspension or repatriation to the home state.¹⁸ Furthermore, the jurisprudence of international human rights law confers the jurisdiction on the sending state due to active personality jurisdiction.¹⁹ The third State can also exercise jurisdiction when crimes are being done violating the *jus cogens* due to universal jurisdiction. There are various problems in collecting evidence and in rape cases, where girl get pregnant, obtaining DNA and then matching with the child who live in the other State's jurisdiction.²⁰

SOMALIA AND COTE D' IVOIRE: TALE OF TWO REGIONS

AFRICAN UNION MISSION IN SOMALIA (AMISOM)

The famine and conflict prompted the displacement of 1, 50,000 persons as a result of famine and ongoing conflicts between insurgent group and UN- backed Somali Transitional Federal Government.²¹ In 2007, the African Union Peace and Security Council deployed peace force to Somalia mandated by the UN Security Council to provide humanitarian assistance including Ugandan People's Defence Force (UPDF) and Burundian National Defence Forces (BNDF).²²The members of African forces had sexually abused and exploited the numerous vulnerable women and girls of Somalia by giving them the return consideration ranging from

¹⁷ *Supra* 8.

¹⁸ *Id.*

¹⁹ Velasquez v. Houndras, Inter AM- C.H.R. (Ser. C) No.4 (1988).

²⁰ <http://www.washingtonpost.com/sf/world/2016/02/27/peacekeepers/> (last accessed Mar 11,2016).

²¹ http://relief.web.int/sites/reliefweb.int/files/resources/Somalia_Fact%20Sheet_%20Mogadishu_May%2012.pdf (last accessed March 10, 2016).

²²United Nations Security Council, Resolution 1744 (2007), S/RES/1744, <http://www.un.org/News/Press/docs/2007sc8960.doc.htm>(last accessed March 10, 2016).

money to medical assistance. They have been raped, abused and molested in the AMISOM camps and bases, particularly Burundian base, are perceived as the protected areas for the innocent civilians. There were as many as 21 women, who were interviewed by Human Rights Watch, confessed of the getting rape and abused but only 2 of them has filed the complaint due to fear of social stigma, authorities, Islamic insurgent group.²³ They were raped, on AMISON property, vehicle and camps, for giving them the basic medical needs to them and their sick children i.e. trading sex for money and goods.

Even Somalia's police suspect the misconduct and want to investigate but they have no jurisdiction over African troops.²⁴ Since this is international peacekeeping operations all the African peacekeepers including local civilians of Somalia recruited for this mission are immune from any legal process and the troop contributing states exercise have exclusive jurisdiction over them legal obligations of all the troop contributing countries and African Union (AU) are governed by the MOUs signed between them. All the countries contributing to troop have different MOU having different definitions of sexual abuse and exploitation like Burundian MOU clearly defines Sexual Exploitation and Abuse (SEA) but MOU of Kenyan and Uganda does not define it specifically. The investigations were not conducted properly and the mechanism is not accountable for SAE cases. For instance, the rape of a girl in Baidoa by Burundian soldier was investigated by the legal officers of that country and they came to the conclusion that the girl had fabricated the story to get access of medical care. The investigators never compiled a formal file of the case and closed the case even before receiving the results of medical examination.²⁵

UNITED NATIONS OPERATION IN COTE D'IVOIRE (UNOCI)

The civil war began in 2002 when Northern army officer Guillaume Soro led an attempted coup against President Laurent Gbagbo.²⁶ The crisis elevated to the stage where jus cogens openly violated led to the displacement of many people to the neighbouring country Libya and Ghana. In 2003, Security Council send 6,240 troops and 200 military observers to establish UNOCI in Cote D' Ivoire.²⁷ This aggravated the number of victims changing *from*

²³ *Supra* 11.

²⁴ *Id.*

²⁵ Human Rights Watch Interview with Captain Gahungu, Bujumbura, April 9 2014.

²⁶ Ivory Coast: Conflict Profile, Peace Direct, <http://www.insightonconflict.org/conflicts/ivorycoast/conflict-profile> (last accessed March 31, 2016).

²⁷ Nadia Abramson, United Nation Peacekeepers Can Do No wrong: How Blue Helmets achieved immunity for Sexual Abuse in Cote d' Ivoire and How to ensure Accountability in future, available at

victims of war to victims of peace. The blue helmets committed SAE in the states where already the legal machinery was broken down by taking the undue advantage of the broken system and helpless population.

The host country contends that the foreign military is committing crimes in the peacekeeping mission then they enjoy absolute immunity with respect to the jurisdiction of the Host State and troop contributing State does have the exclusive jurisdiction.²⁸ The United Nations has its own charter which laid down the basic fundamental freedom and protection of human rights as well as provisions of ICCPR and UNDHR Conventions. The United Nations by providing immunity to the peacekeepers, who committed crimes, in veil violated its own Charter and Conventions leading to the gross violation of human rights. For instance, Elizabeth, Ivorian national, was raped and brutally assaulted by the Pakistani Peacekeeper. The remedy which is available for her is that the accused can be prosecuted in the Host Country *i.e.* Pakistan but this is very unlikely to happen. United Nations avoid pressuring the member states to prosecute because it depends upon the voluntary donations to staff peacekeeping missions.²⁹ The immunity is used as a weapon by the blue helmets to commit sexual crimes without any fear and situations becomes more worse when there is no proper mechanism to lodge complaints and get proper remedy.

CONCLUSION & RECOMMENDATIONS

At present, the United Nations had taken very few measures against the criminal conduct of their peacekeepers. United nations recently conducted enquiry upon the complaints of SAE against its peacekeepers and sixteen Bienesee peacekeepers repatriated and barred from serving in the United Nations Mission.³⁰ The United Nations is in the process of reconstituting its policy against these SEA acts and started inquiry about it. The responsibility is being shared among all the stake holders and victim's complaint can be reach to the authorities immediately. Recently, the United Nations has ordered DNA tests of their peacekeepers so that the paternity of the child can be established. The United Nations, with the due efforts of

<https://law.wm.edu/academics/intellecualife/researchercentres/postconflicjustice/documenrs/abramson.paper.pdf> (last accessed March 9, 2016).

²⁸ *Id.*

²⁹ Nadia Abramson, United Nation Peacekeepers Can Do No wrong: How Blue Helmets achieved immunity for Sexual Abuse in Cote d' Ivorie and How to ensure Accountability in future, <https://law.wm.edu/academics/intellecualife/researchercentres/postconflicjustice/documenrs/abramson.paper.pdf> (last accessed March 9, 2016).

³⁰ Laura Burke, Wikileaks: UN Peacekeepers Traded Food for Sex, Huffington Post, http://www.huffingtonpost.com/2011/09/01/wikileaks-un-peacekeepers-_n_944917.html (lat accessed 1 March 13, 2016).

Child Rights International Network (CRIN), has in several cases punished the peacekeepers.³¹

Few policy recommendations which can be implemented is that first of all, the immunity which is provided to the peacekeepers must be limited and shall be waived off whenever any criminal allegation is being levied. Secondly, United Nations must have an accountable system of complaint registration and well mechanised system of inquiry system. Thirdly, since it is a worldwide practice that host states never give fair trial to the complaints of victims against their own nationals or peacekeepers, therefore, there must be constitution of special trial courts for these peacekeepers where justice can be served. Finally, if from the very inception of the troop the peacekeepers shall get training and then the troops which are being sent by the United Nations as well as other States must be well checked about their history, past conduct and criminal case pending against them and vetting shall be done prior sending the troops to affected area. The victims and peacekeepers' babies born out of their sexual abuse must be tried to compensate and maintained either by their fathers or United Nations. There are many blue helmets which have raped many vulnerable girls under the immunity given by the United Nations and using UN-tag to violate the human rights. The immunity which is given for their benefit to expedite the process of restoring the society into normal conditions is being used as a shield to cover their criminal acts. For the future peacekeeping missions, the United Nations shall take due responsibility and adopt the certain mechanism to prevent the vulnerable populations suffering more miserable.

³¹ The French Peacekeepers suspended by the French prosecutors in the peacekeeping mission for sexually abusing the child in Burkina Faso, available at (last accessed March 11, 2016).