

Human Trafficking by United Nations Peacekeepers: Mapping the Legal Terrain

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ABSTRACT

If a United Nations peacekeeper allegedly is involved in human trafficking, they become part of the problem, rather than the solution. This research finds that human trafficking and UN peacekeeping frameworks are not sufficiently linked to hold peacekeepers accountable for alleged human trafficking crimes. International human trafficking legislation does not aptly apply to troop-contributing countries, whose domestic legislation could be inefficient in combatting human trafficking. Moreover, UN peacekeeping legislation largely omits human trafficking. Lastly, there are practical obstacles to ensuring accountability due to the UN's weak regulatory system and the reliance of TCCs' ability and willingness to cooperate.

Keywords

United Nations, peacekeeping, human trafficking, legislation

INTRODUCTION

When a United Nations (UN) mission is deployed in a conflict-ridden area, peacekeepers are expected to take the role of guardians. Allegations have emerged, however, of peacekeepers allegedly involved in crimes such as human trafficking.¹ If peacekeepers do not enjoy trust and legitimacy among the local population, the mission could lose its credibility.

Attributing individual responsibility to those very peacekeepers who misbehave is, however, a challenge. This is because UN personnel are under immunity from prosecution in the country where they serve following the agreement between the UN and the host country (the Status of Forces Agreement or 'SOFA').² Moreover, the country who contributes personnel, the troop-contributing country (TCC), has been given the sole jurisdiction to prosecute its nationals deployed on a UN operation as written in the agreement between the UN and the TCC (Memorandum of Understanding or 'MoU').³ This means that if a peacekeeper allegedly commits a crime, the peacekeeper's TCC has sole jurisdiction for disciplinary actions. This leaves room for impunity in case of non-prosecution by TCCs.

This area of research has received limited attention and lacks hugely in data. This paper examines the legal framework in place to address possible human trafficking crimes by UN peacekeepers by trying to bridge the two fields of law. To what extent does the current legal framework on UN peacekeeping and on human trafficking cover human trafficking crimes in cases when these are allegedly committed by UN peacekeepers?

The author has limited the scope of this thesis by

interpreting 'peacekeepers' to national military contingents as sent by TCCs.

Human trafficking is defined according to the definition in the Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime (hereinafter the Trafficking Protocol).⁴ For an act to be called 'human trafficking', it should contain an action ("meaning the recruitment, transportation, transfer, harbouring or receipt of persons"), followed by the means ("the threat or use of force or other forms of coercion etc.") and lastly, for a particular goal ("for the purpose of exploitation" i.e. prostitution, forced labour etc.). For an offence to qualify as human trafficking, "one element from each of the above must be present."⁵

LITERATURE REVIEW

Currently, academics have focused on the causes of alleged misconduct by UN peacekeepers. One common paradigm is "boys will be boys."⁶ This is the attitude that male soldiers away from home are tacitly allowed to rely on sexually misusing people in the host country.⁷ Due to a predominantly male military, a masculine culture arises which helps to create a 'wall of silence' around sexual misdemeanours.⁸ Consequently, 'whistle-blowers' are stigmatised.

Other scholars seek to account for the problem in the virtual lack of *de facto* prosecution after misconduct has allegedly occurred. Allred claims that peacekeepers think of themselves as immune from prosecution for committed crimes.⁹ Since in the bilateral agreements, jurisdiction over disciplinary actions of troops is entirely given to the TCC, the UN relies on the ability and willingness of the TCC to undertake such actions where needed.

Harrington argues that the socio-legal perceptions of peacekeepers from TCCs also play a role. This is important since the training of peacekeepers is almost exclusively done by the TCCs themselves.¹⁰ Harrington concludes that the peacekeepers' understandings of what they can and cannot do is attributable to the nature of the legal structure coupled with the societal view of these acts in their home countries.¹¹

Problematically, the debate on human trafficking as linked to UN peacekeeping is less in abundance. There

⁴ Trafficking Protocol, Article 3(a) Definition.

⁵ Aronowitz 2009, p.2.

⁶ Martin 2005, Executive summary.

⁷ Ibid.

⁸ Ibid., p.6.

⁹ Allred 2006, p.9.

¹⁰ Bolkovac 2016, Interview by author.

¹¹ Harrington, p.292.

¹ Harrington 2008, p.230

² Model SOFA, para 46.

³ Model MoU, Article 7 quinquies

has been an observation, however, that trafficking tends to increase during and post-armed conflicts.¹² In times of conflict, individuals may be abducted or trafficked by armed groups or the State military for labour, military or sexual purposes.¹³ Even more so, Smith and Smith posit that the introduction of UN peacekeeping forces into a post-conflict area increased the rate of human trafficking, due to an increased demand for trafficked victims' services and a more profitable source of income for traffickers when a UN mission is deployed.¹⁴

APPLYING HUMAN TRAFFICKING TO PEACEKEEPING

Human trafficking legislation can be seen on two levels: the international plane and the domestic level. Both levels give TCCs (international) obligations.

The Trafficking Protocol

The main instrument of international law with regard to human trafficking is the Trafficking Protocol. This Protocol importantly provides a definition for human trafficking, calls for international cooperation and criminalises every aspect of the definition of human trafficking. Whether a TCC is bound by the provisions of the Trafficking Protocol depends on the status of ratification or signature. Following The Vienna Convention on the Law of Treaties (VCLT), States can express consent to be bound by a treaty "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession [...]."¹⁵ The Trafficking Protocol requires ratification as said in Article 16.3.¹⁶ If a TCC has ratified the Trafficking Protocol, then all provisions of the Protocol apply. If a TCC has signed the Trafficking Protocol, then following Article 18 of the VCLT, the State cannot engage in behaviour that would defeat the general "object and purpose"¹⁷ of the Protocol. This allows for a negative obligation from the State to refrain from engaging in human trafficking, but does not by any means attribute a positive obligation to signatory States to 'prevent, protect and punish,' which are the main goals of the Trafficking Protocol.¹⁸ For States that have neither signed nor ratified the Protocol, it is more difficult to argue that they are bound by the content of the treaty. It is a well-known rule that treaties cannot be imposed upon States without their consent.¹⁹

The importance of domestic legislation

The Trafficking Protocol only provides a definition of human trafficking, and has in itself limited enforcement powers.²⁰ Therefore, it is equally necessary to assess the domestic legislation of a TCC

if some of its peacekeepers are allegedly involved in human trafficking. An analysis of the domestic legislation in place helps to see how peacekeepers of those countries can be held accountable domestically for human trafficking crimes. Moreover, scholars such as Harrington have argued that there exists a correlation between the existence and strength of domestic legislation on human trafficking and the frequency of allegations. Important to ask when assessing domestic legislation is firstly whether human trafficking is criminalised under national legislation and if so, which forms of human trafficking are criminalised? Secondly, to what extent are the domestic laws in this field being enforced? It is beyond the scope of this paper to assess national legislation of individual countries.²¹ The aforementioned research has indicated, however, that human trafficking has often been criminalised, albeit to different degrees. Moreover, the enforcement of human trafficking laws is frequently insufficient.

LINKING PEACEKEEPING TO HUMAN TRAFFICKING

UN peacekeeping relies on a number of policies amongst which the 'Code of Conduct' (which include ten rules of behaviour for peacekeepers), the bilateral agreements (the SOFA and the MoU), Security-Council resolutions and policy documents. For peacekeepers from TCCs, the documents which are legally binding upon their national countries are the MoU (which is a legal contract) and the Security-Council resolutions.

Terminology: Human trafficking is not appropriately addressed

A common observation to UN policies, with the exception of Security-Council Resolution S/RES/1674 (2006) on the protection of civilians in armed conflict, is that human trafficking is not explicitly mentioned as a crime. In the current terminology, any allegations towards peacekeepers are classified as 'sexual exploitation and abuse (SEA).'²² Although this crime is distinct from human trafficking, it is the only type of crime which has clearly been addressed through policy documents and the UN Conduct and Discipline Unit.²³ Arguably, overlaps exists when it comes to some aspects of sex trafficking, namely the exploitation of sex related labour. However, reducing human trafficking to SEA would exclude many aspects of human trafficking, such as labour trafficking, and instead equate human trafficking to sex related crimes.

Vague formulations: The 'Local Population' and 'Respect'

The rules under the Code of Conduct and the MoU, for example, state that peacekeepers have to 'respect the local laws' and 'treat the inhabitants of the host

¹² Gallagher 2010, p.430.

¹³ Ibid.

¹⁴ Smith and Smith 2010, p.13.

¹⁵ Vienna Convention on the Law of Treaties, Article 11.

¹⁶ Trafficking Protocol, Article 16.3.

¹⁷ VCLT, Article 18.

¹⁸ Ibid.

¹⁹ VCLT *supra* note 191, Art 34. The essence of the law of treaties dictates that 'pacta sunt servanda', namely treaties are only binding when the entity consents to them.

²⁰ Aronowitz 2016, Interview by author and limitations of Trafficking Protocol in Gallagher, pp.47-53.

²¹ See Harrington for a detailed overview of the legislation of TCCs who received allegations against its peacekeepers.

²² Used for example in the Model MoU.

²³ Ibid., the Conduct and Discipline Unit's "About" page looks notably at SEA and provides a link to the Security Council Resolution UNSC S/RES/2272 on SEA.

country with *respect*, courtesy and consideration.²⁴ From a strict textual interpretation, respecting “the inhabitants of the host country” or “the local population” would exclude trafficked victims from abroad as they are technically not inhabitants if trafficked without documents for example, nor part of the local population. Trafficked victims might reside temporarily in the host country, but this does not make them an inhabitant.

A second recurring use of terminology is ‘respect.’ Engaging in human trafficking would not be ‘respectful’ to the local population nor would it respect the laws of the host country. However, what obligations exist if ‘respect’ is used? Currently, the key human rights obligations are formulated in ‘respect, protect and fulfil.’²⁵ Instead of using a much stronger obligation, such as ‘fulfil,’ respect is a negative obligation which merely entails refraining from a type of behaviour.²⁶ Understandably, these three interpretations cannot be applied to the same extent to States Parties as to individual peacekeepers, but it does signal the type of language in the internal rules is vague and ill-defined.

PRACTICAL OBSTACLES

The apparent legal gap in assuring accountability for human trafficking crimes if allegedly committed by UN peacekeepers might enable political involvement.

The UN’s reliance on TCCs

When an allegation arises within a peacekeeping mission, the UN has the Office of Internal Oversight Services (OIOS) to conduct internal investigations, but the latter lacks criminal jurisdiction over personnel.²⁷ Following the MoU, investigations have to be conducted in cooperation with the TCC and under Article 7 quater investigations of the Model MoU, the TCC has the main responsibility over investigations into allegations. The OIOS merely has a secondary and assisting role. This leaves the UN with the hope that TCCs follow up on their obligations under the MoU to prosecute the peacekeepers suspected of wrongdoing.

The TCC’s ability to cooperate

Although TCCs thus bear the main responsibility for disciplinary actions, would the TCCs have the laws in place to prosecute peacekeepers for alleged human trafficking crimes? Would the justice system have enough strength on its own to determine the merits of a criminal case, and, the ability to enforce the decision? Such independence and capacity relate among other factors to the nature of the country’s regime, the degree of separation of powers (executive, legislative and judicial) and the level of corruption. Moreover, the TCC must have the resources to conduct investigations abroad and gather evidence and victim statements for a case to be substantiated.

Lastly, peacekeepers hold an abstract legal status: Whereas the UN has insisted that while exercising the mandate, peacekeepers are under its effective control,²⁸ the MoU clearly attributes responsibility for disciplinary actions to TCCs. In *the H.N. v. the Netherlands case*, which dealt with collective responsibility (rather than individual responsibility) of the Dutch bats’ actions in Srebrenica during the Bosnia-Herzegovina war, the District Court in The Hague had to deal with obtaining reparations for violations by peacekeepers.²⁹ The original judgement from the Court was that the Netherlands “bore no responsibility for the acts or omissions of Dutch bat”, since the actions of the Dutch contingents’ troops were under effective control of the UN, not the Netherlands,³⁰ thus showing the obstacles in attributing responsibility.

The TCC’s willingness to cooperate

Moreover, the TCCs might not be willing to take disciplinary actions. Bolkovac rightly asks: “Do you think that the Dutch government or the US government is going to send some investigator over to Afghanistan and go look for a sixteen year old girl that got [trafficked] by some soldier?”³¹ Even though the TCCs might have the responsibility to investigate into allegations, the MoU does not mention how thorough investigations should be conducted nor can it force the TCCs to continue with disciplinary actions.³² Far more likely, according to Bolkovac, is that the allegations will be watered down and if prosecutions take place this will concern minor crimes.³³ Furthermore, if the crime of human trafficking is surrounded with social stigma, this might make it more difficult to rally the political support to undertake action. If an act is not recognised to be a crime in the country where the peacekeeper comes from, the TCC might not see the necessity to prosecute.

CONCLUSION

Currently, human trafficking and UN peacekeeping are not sufficiently linked to hold wrong-doing peacekeepers accountable. Human trafficking applies only to UN peacekeepers to some degree, for example to TCCs who have integrated the Trafficking Protocol’s definition and criminalisation into national laws. The Trafficking Protocol is, however, too weak on its own and national legislation ought to compensate to ensure accountability. In the field of UN peacekeeping, there are numerous rules applicable to peacekeepers, but these rules contain limitations: Firstly, it is unclear what the applicability of these rules is, namely which rules apply to which type of peacekeepers (civilian or staff for example)? Secondly, human trafficking is barely mentioned and the current provisions cannot effectively cover human

²⁴ Model MoU, Annex H or DPKO Ten Rules (emphasis added)

²⁵ Office of the United Nations High Commissioner for Human Rights 2006, p.2.

²⁶ Ibid.

²⁷ Verdirame 2011, p.217.

²⁸ Dannenbaum 2010, p.115.

²⁹ *The Netherlands v. Hasan Nuhanović*. Judgement, 2013.

³⁰ Dannenbaum, p.121-122.

³¹ Bolkovac 2016, Interview.

³² Ibid.

³³ Ibid.

trafficking. Lastly, the enforcement of the rules is questionable.

Undoubtedly, there are political factors involved, perhaps even facilitated due to the legal lacuna. The UN's internal regulatory system lacks the enforcement mechanisms for its decisions, as the TCC holds jurisdiction over any further disciplinary action. Whether the TCC is willing or able to comply is questionable in some countries where the legal system might not be strong enough or corruption might lead to a lack of further action.

Accountability for UN peacekeepers for alleged human trafficking crimes is a vast field where much research still needs to be done. There is no clear answer as to what legal status peacekeepers have under international law. This poses obstacles in national Court cases. Furthermore, ensuring compliance with responsibilities under the MoU is important so as to guarantee that disciplinary actions will be taken against peacekeepers and to put an end to impunity for human trafficking crimes.

ROLE OF THE STUDENT

Alexandra van Walraven conducted this research in completion of her bachelor degree of the Leiden University Honours-College. The student has conducted research through primary and secondary sources (such as policy documents or interviews), determined the topic and worked out the structure, but with frequent advice and feedback of her supervisor, Ingrid Samset.

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