

Criminal accountability of United Nations officials and experts on mission – implementation of UN General Assembly Resolution 62/63 of 6 December 2007

Australia welcomes the work being undertaken by the Secretary General and the Group of Legal Experts on ensuring the accountability of United Nations (UN) officials and experts on mission with respect to criminal acts committed in peacekeeping operations. In addition to the impact on victims, serious crimes committed by UN officials and experts on peacekeeping missions are a gross breach of trust. If the concept of the rule of law is to be more than rhetoric, the UN and Member States must lead by example to ensure accountability for serious crimes. Immunity should not be mistaken for impunity.

Operative Paragraph 3 of the resolution (jurisdiction over crimes committed by nationals)

In 2003, Australia amended the *Crimes (Overseas) Act 1964* (the Act) to extend the criminal laws of Australia's Jervis Bay Territory extraterritorially for the purpose of criminalising the behaviour of nationals serving as UN officials or experts on mission abroad. The Act provides jurisdiction over Australians who are immune from criminal prosecution in a foreign country by virtue of an agreement between Australia and the foreign country or between the UN (or a UN organ) and the foreign country. For example, the Act would apply extraterritorially to Australian Federal Police deployed as UNPOL who are covered by the immunities provided for in the Convention on the Privileges and Immunities of the UN.

Records from the Commonwealth Attorney-General's Department and the Office of the Commonwealth Director of Public Prosecutions indicate that, to date, there have been no prosecutions under the Act.

It should be noted that Australian Defence Force members are not covered by the Act, but are covered by separate legislation outlined below.

Where Australian Defence Force personnel serve as UN officials or experts on mission (such as Military Observers), they are subject to a system of military discipline established by the *Defence Force Discipline Act 1982* (DFDA). As the DFDA has extraterritorial effect, its provisions operate to ensure accountability at all times for ADF personnel deployed outside Australia, including those engaged in UN roles.

Offences under the DFDA can be broadly divided into three categories, unique military offences (such as insubordination), offences with a civilian equivalent (such as theft or assault) and imported criminal offences (known as territory offences). The imported criminal offences incorporate into the DFDA a range of offences criminalised under the *Crimes Act 1914*, the *Criminal Code Act 1995* and the criminal law of the Australian Capital Territory. The incorporation into the DFDA of such offences ensures that Australian military personnel are criminally accountable for a comprehensive range of offences. Ongoing Australian domestic law reform of these incorporated Acts ensures that the accountability of military personnel remains consistent with broader Australian civilian standards. Criminal accountability for all offences under the DFDA is further enhanced by the inclusion of ancillary offences of

attempt, incitement, conspiracy and accessory after the fact.

As provided for in the UN model status-of-forces agreement, members of national military contingents serving in peacekeeping missions are subject to the exclusive jurisdiction of the sending State. It is Australian state practice to seek immunity from local law or prosecution for these personnel. Dependant on the circumstances of Australian involvement, the immunity provided by a Status of Forces Agreement (SOFA) or Memorandum of Understanding (MOU) may range from limited military discipline jurisdiction immunity only through to complete immunity from local jurisdiction. Where a SOFA or MOU is in force to provide local immunity for military personnel, the DFDA is in place to ensure criminal accountability.

Operative Paragraph 4 of the resolution (cooperation with investigations and prosecutions):

Formal legal cooperation between Australia and other countries to facilitate investigation of UN officials and experts on mission is covered by Australia's *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act). The Mutual Assistance Act allows Australia to request and provide mutual assistance to any country on a discretionary basis. This process is assisted by 26 bilateral treaties and multilateral conventions that contain mutual assistance provisions to which Australia is a party.

No mutual assistance requests have yet been received from other States regarding the investigation of UN Officials or experts on mission.

The Mutual Assistance Act only makes provision for mutual assistance to be provided to other countries, and not to international bodies such as the UN. While Australia would be open to cooperating with the UN, our current legal frameworks require that any formal request to Australia for mutual assistance would need to be made through another country.

Outside the formal legal framework of the Mutual Assistance Act, it is possible for Australia to provide some assistance informally. An example of this is police-to-police assistance - cooperation provided by one country's police force to the police force of another country. The Australian Federal Police (AFP) reports one instance of providing information to the UN regarding a complaint made against an Australian national deployed overseas as an expert on mission. The complaint was dismissed. We are not aware of any other circumstances involving the accountability of UN officials or experts on mission for which assistance from the AFP has been sought or provided.

Australia's capacity to prosecute Australian nationals for alleged crimes committed whilst serving as UN officials or experts on mission abroad could be compromised in instances where the alleged offender flees to a country with which Australia does not have an extradition relationship. Australia is working on establishing workable and effective extradition agreements with other countries, and currently has modern bilateral treaties in place with 35 countries.

Australia's legislative framework aims to ensure there is no criminal jurisdictional gap where immunities have been granted to Australians in foreign countries.