

# Peacekeepers' Role in International Crime

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# Hypothesis

The Brazilian participation in UN peacekeeping operations can result in risks of international and national criminal responsibility of those involved.



# Purpose:

- To analyze the possibility of Blue Helmet criminal responsibility before International or national Courts and the need of legality improvement and doctrine appeasement.



# Specific objectives:

- To analyze the legal reasoning and doctrinal guarantees and immunities for peacekeepers (focus on Brazilians);
- To analyze the relationship among Contributing States (Brazil) – UN – Host-State and its relevant documents;
- To analyze national rationale for sending peacekeepers and their role in military operations of this type;
- To analyze national procedures for the exercise of its criminal jurisdiction (Brazilian case);
- To examine the possibilities of peacekeepers international criminal accountability.



# Historical context of the Brazilian participation in PKO

- Between 1946 and 1988
- Post 1988 – 2014
- Featured:
  - ONUMOZ; UNAVEM III; UNTAET; MINUSTAH; UNIFIL

[Quantitative and qualitative increase with greater responsibilities, new agents (especially civilians) and largest military contingents]



# Major normative bases concerning the guarantees and immunities of peacekeepers

- *Privileges and Immunities of the Staff of the Secretariat of the United Nations*, 1946;
- *Uniting for Peace*, 1950;
- *Protection of Peacekeeping personnel*, 1992;
- *Convention on the Safety of the United Nations and Associated Personnel*, 1994;
- *Safety and Security of humanitarian personnel and protection of United Nations and Associated Personnel*, 1999;
- *Scope of Legal protection under the Convention on the Safety of United Nations and Associated Personnel*, 2001, 2003 e 2003a;
- *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*, 2005 – Signed by the Brazilian government, but not yet considered by Congress.



# Major normative bases concerning the guarantees and immunities of peacekeepers

1. UN Charter
  2. Convention on immunities and prerogatives of the UN agents – 1946
  3. ICJ (1949)
  4. Safety Convention – 1994
  5. Res UNSC 1422/1487 (2002/2003)
  6. Standard SOFA
  7. Standard MOU
1. Art. 105
  2. UN formal Represented; Delegates; Under delegates; Advisors; Technical advisors; Secretaries of delegations. (\$ UN) and experts (representatives of State governments on temporary missions Officers) (\$ Member States)
  3. Inclusion of observers and experts, aim for the military (not rules)
  4. Inclusion on the list of representatives of the HOM, SRSG, HE (head of experts), HC (humanitarian coordinator) and HOPC (head of police component)



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  3. *ICJ (1949)*
  4. *Safety Convention – 1994*
  5. *Res UNSC 1422/1487 (2002/2003)*
  6. *Standard SOFA*
  7. *Standard MOU*
- Military (Blue Helmet)- not supported.
    - Cassese / Velasco - agents from CS
    - Condorelli - double agents
    - Zwanenberg - subordinated to the UN
  - Hence the need for formal implementation of SOFA and MOU
  - Standard MOU 1990
  - Standard SOFA 1991





# Basic framework of immunities

Function	Immunities	Legal Basis
SRSG, HOM, FC, HE, HC, HOPC, UN People	= diplomacy cases	1946 Convention and Standard SOFA (Sections 19 and 27)
Staff e EM, Civilian Policeman (HOM), (Agents)	Criminal, civil e tributary	1946 Convention (art. 5) and Standard SOFA (Section 26)
Policemen and formal civilians with SRSG	Criminal	Standard SOFA (Section 5 and 7)
Experts (Observers)	Civil e tributary	1946 Convention (art. 5)
Blue Helmets	Criminal (only CS)	Standard SOFA (Sec. 47, b)
Civilians (civil contingent) and Civilians (Military Contingent)	Criminal (originally at CS)	Standard SOFA (Sec. 47, b)
Volunteers	= Agents	Standard SOFA (art. 5 e 7)
Contractors	On Demand	Some Specific SOFA



# Increased categories

- UN volunteers
- Volunteer NGO
- Transnational staff

## Trends:

- ✓ Equate the Blue Helmets to diplomats, and ...
- ✓ Match civilians, contractors, volunteers to Blue Helmets (Engdhal and Knoops)



# Analysis of Relationship between Contributing States (Brazil) – UN

- Founder resolution PKO - not determinative
- Established by a Memorandum of Understanding (MOU)
- Analysis of the MOU as International Act
  - Intrinsic conditions (ability of agents sig, and mutual consent, lawful and possible object) - all satisfied;
  - Extrinsic conditions (drafting, ratification and publication record)
  - Brazilian rite of internalization of IA - Full (Mello) and executive (Medeiros)

According Brazilian doctrine – it should follow full rite.

- ✓ Decision has been taken (exclusively) by the MIR

“This addition makes the internationally valid Act, but with impaired internal enforceability” (Mello)



# Analysis of the relationship between UN – Host-State

- Established by the Status of Force Agreement (SOFA)
  - Questions of intrinsic condition - the legitimacy of the HS in internal conflicts
  - Failure to include mention of generating rights and obligations to third parties (in this case - CS-Brazil)
  - Independent negotiating the participation of CS
  - Delay formalization (SOFA remains the standard)

**Two bilateral relations rather than multilateral**



# Other regulatory documents of the PKO

- Procedures and Manuals
  - UN considers them "mandatory", but are not "International Acts" - so They have not been internalized.
  - UN (Integrated Operation) - not coalition, Alliance - strategic and operational level without formal relationship of commitment between CS;
- Rules of Engagement (Rules of Engagement)
  - Uncertainty as to the legal nature:
  - Some States have them considered as an international legal norm , other internalized legal norm (Belgium), others as an administrative act (order) -a majority - refuted by the legal framework as its deployment of IHL.



# Rules of Engagement - ROE

- Rare unclassified sources - only MINUSTAH UN didactic manual
  - 1.9 - Use of force, up to and including deadly force, against any person or group that limit or intends to limit the freedom of movement of members of MINUSTAH is authorized.
  - 1:13 - The use of force, up to and including deadly force, to prevent or put an end to acts of civil disorder is authorized.
  - 4:12 - The search, including the arrest of people for weapons, ammunition and explosives, is authorized

*As for ROE and SOP [Standard Operational Procedures], it should take up those issued by the FC as they were outlined under the DPKO, under careful consideration of other Secretariat bodies, from the beginning of planning. Thus, if necessary the use of force, it eliminated any single responsibility of the national quota (BRAZIL, 2006, P 3-7).*



# *Rules of Engagement - ROE*

- International proposed solution:

France - Change of *Statut Militaire*, providing national legality when operating outside France;

Canada - Declination legislative competence of ROE to the Prime Minister to give national legality to them;

United Kingdom - (still under review) - internal regulation that compliance with the ROE issued by the UN (Resulting in excluding internal accountability).

Brazil - internal rule for the military services.



# Brazilian Judicial approach

- If civilian peacekeeper in PKO-HOM – HS if agreement is criminal case
- If military peacekeeper - Military Contingent – National Military Court
- If Policeman - the intra-state Military Court
- If non-military crime – Military Court must decline of competence to Federal or Intra-state Justice
  - If peacetime crime, civil crime, outside the national territory, it is not a “military crime”.





# The (possible) international criminal liability for peacekeepers

- Evolution of International Criminal Law
- Few cases:
  - Analysis of National Courts (some)
  - Analysis of international Ad Hoc Criminal courts (non ICC case)
  - ICC analysis
  - Analysis of the possibility of the exercise of Universal Jurisdiction
  - Analysis of the possibility of Host State Courts cases



# Case analysis of National Courts:

Country	Year	Name	Where
Israel	1959	Major Malinki (killer at he field)	Palestine (GUILTY)
Canada	1996	Maj. Seward (sexual abuses)	Somalia (GUILTY)
Canada	1996	Sold. Brocklebank (torture)	Somália (NOT-GUILTY)
Belgium	1997	Cel Marshal (negligence with his personnel)	Ruanda (NOT-GUILTY)
Netherland	2004	1 SG Telic (shots at civilian people)	Iraque (GUILTY)
USA	2004	Reservi. Sivits (prisoners torture)	Iraque (GUILTY)
Netherland	2014		Srebrenica (1995) (GUILTY)

*The court ruled that the Dutch peacekeeping troops could have protected the 300-plus men and boys who were among thousands of Muslims - mainly women, children and elderly people - taking shelter in a Dutch compound inside the UN-declared safe haven of Srebrenica.*

*'What this means for future missions, I can't say'*



# Analysis of International Ad Hoc

## Criminal Courts - ICTY

- Primacy Jurisdiction even over SOFA and other treaties (including for blue helmets)
- Clarifying the Superior-Subordinate liability (delimitation of Objective – Ratner)
- Establishment of criteria: (Both Schabas and Cassese)
  - Order given which results in crime;
  - Not prevent or punish offenders.
- Innovations: war crime and against humanity attributed to soldiers and civilians (Eagle Vasiljevic Case - for military)
- Heads held responsible for strategic level (Delic Case)
- Blamed Operational Level (Tolimar Case)  
Civil blamed - permissive presence encouraged crime-  
RISK for blue helmets (Tadic Case) Schabas
- Rape as a crime against humanity



# Analysis of International Ad Hoc Criminal Courts - ICTR

- IHL fully applicable in internal conflict
- War crimes in internal conflicts
- Conceptual delimitation of genocide and its consolidation as a *serious crime*
- Omission as a war crime (Akayesu Case)



# International Criminal Court

- Delimitation "possible" serious crimes (war, genocide, against humanity, aggression)
- Complementary jurisdiction (purpose of universality)
- **No cases of peacekeepers accused of crimes**
- Its competence (*ratione temporis, loci, personae and materiae*) away slightly the possibility of charging the crime of Brazilian peacekeeper, ...
- However: MEMBER STATES (Brazil) HAVE TO guarantee due process ... Problem
- ATYPICAL CASE the Brazilian Penal Code - in this case could be raised complementarily.
  - *Some crimes* included in the list of serious crimes: torture, forced prostitution, sexual violence, disappearance of persons ...
  - Attention to cases ongoing at Brazilian Courts (torture accusation of abuse and the use of force)



# Universal Jurisdiction

- Small probability of complaint
- Crimes supported by *jus cogens* still in consolidation (apartheid? Terrorism?)
- It is not based on Treaty (International Jurisdiction) but in the pursuit of justice for serious and unpunished crimes
- “Almost never” - the accused peacekeeper should be in Brazilian territory for his trial (National Jurisdiction)... But, Brazil must judge in "reasonable time“.



# Jurisdiction by the Host State

- “Almost never”- SOFA
- Difficult cases - atypical cases unpunished - ordering the return to the *status quo ante* (return of peacekeeper for judgment)



# Close Remarks

Although the original criminal jurisdiction (for the majority of people at PKO) is Brazilian, it is necessary to support the exercise of that jurisdiction on solid foundations and with full enforceability in the country.

There are some doctrinal, legal and regulatory deficiencies that may involve the commitment of some of the required guaranteed, mainly in atypical cases of national laws.

Thus, the Brazilian participation in UN-PKO can result in national and international criminal liability risks, unlike the originally proposed and planned by the UN itself.





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Thanks!

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