TO DREAM THE IMPOSSIBLE DREAM

Remarks by

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and Combating Sexual Exploitation and Abuse in Peace Operations

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Despite the lessons of World War II and the efforts of the community of nations to pursue peace, it is an undeniable fact that states continue to wage war against one another, or against their own people, in ways that threaten the security of other states. In recent years, non-state actors, armed to the teeth and utterly lacking in scruples, mercy or respect for settled principles of armed conflict and humanitarian law, have come to play an ever-larger role, posing additional challenges to world order and peace. The use of new kinds of technology and warfare, such as unmanned aircraft and ever-more-creative cyberaggression, have further complicated geopolitical relations. And it is all too apparent not only that animosities that go back millennia continue to resurface but that many of the hard-won gains in personal freedom and democracy give disturbing evidence of fragility even in countries that have known the yoke of oppression and totalitarianism.

These are worrying developments. While they transcend the direct scope of work of the International Society for Military Law and the Law of War, we cannot

disregard them, as they can easily thwart any progress we and others might make within our areas of expertise.

To combat these threats to security, states have, depending on the circumstances, acted alone, in coalition with others, or as part of UN military operations of one kind or another to advance a variety of laudable objectives, whether described as peacekeeping, humanitarian missions, or under some other rubric.

What I want to talk about for a few minutes are the UN missions undertaken through the Department of Peacekeeping Operations. Sadly, these missions have generated reports of criminal conduct, often of a sexual, assaultive nature, but also involving other kinds of criminality. The UN has taken a variety of steps to deter misconduct by those who work under its banner. The data available on the DPKO website, however, as well as recurring media reports, leave one with an uneasy feeling that whatever progress has been made is both limited and fragile.

What steps have been taken? Prince Zeid, who is wrapping us his tenure as UN High Commissioner for Human Rights, did excellent early work prodding the UN to get on top of troop disciplinary problems. Training has been improved, I understand. Efforts have been made to improve the reporting of incidents of wrongdoing and of the national authorities' investigative and punitive actions taken in response.

I'm afraid I am not overwhelmed by what I see coming out of New York. Let me give an illustration. In preparing for this panel I thought it might be worthwhile to explore the DPKO's public face – its webpage. According to the site, "[r]ecord-

keeping and data tracking of allegations of misconduct and subsequent actions started in 2006. In July 2008, the Department of Field Support launched the Misconduct Tracking System (MTS), a global database and confidential tracking system for all allegations of misconduct involving peacekeeping personnel." So the UN has become better over the last decade about disseminating information about misconduct. But it remains to be seen how efficacious "naming and shaming" is as a corrective measure when dealing with the Troop Contributing Countries on whom the UN necessarily relies. Why, for example, is the peacekeeper-misconduct tracking system confidential?

The DPKO's Standards of Conduct webpage includes the following, under the heading "Legal frameworks for deployed contingents":

> To improve transparency and accountability in the handling of cases of misconduct the Department of Peacekeeping Operations has requested that each Troop Contributing Country (TCC) provide the legal framework applicable to its contingent when deployed to a UN Mission.
>
> While the information contained in the Member State fact sheet is periodically updated, the United Nations does not guarantee that the information provided is correct, complete or up to date. The fact sheet reproduces content received from the Member States and, therefore, the United Nations is not responsible for the content nor can it guarantee its accuracy.

Following that language is a two-column chart listing the member states that have and have not submitted descriptions of the legal framework that governs their forces. Forty-two TCCs *have* submitted descriptions; seventy-six *have not*. The lopsided numbers – lopsided in the wrong direction – are troubling. Even worse is that the descriptions that *have* been submitted are either perfunctory or almost

certainly obsolete or both. The website forthrightly discloses that DPKO makes no effort to evaluate TCC submissions before moving states from one column of the chart to the other.

Another webpage provides a chart showing, by year, the number of misconduct -related communications sent by the UN to TCCs and the number of TCC responses. The former invariably exceed the latter. The accompanying legend fatalistically observes that communications "are only recorded by year, and cannot be filtered by category [*i.e.*, military, police, civilian] or nationality of personnel involved or by the mission in which the misconduct referred to in the communication occurred."

I can think of two steps that could be taken to improve matters without entirely altering the legal framework in which peacekeeping occurs.

One is to be more insistent on prompt and detailed reporting on disciplinary and punitive actions taken by TCC commanders and criminal justice authorities. Every country that has both a system for administrative discipline regarding minor offenses (the names differ from state to state) and a military justice system for serious offenses knows full well that it can be difficult to decide which of those mechanisms best fits the facts of a particular case. Everyone knows that there are judgment calls to be made as to which box a case should be put in – and everyone knows that when the traffic cop making that decision is a commander, there is a danger that leniency may trump other considerations. It is unrealistic to expect TCCs to be more meticulous on these decisions in the context of UN operations than they are when dealing with misbehavior outside that context.

A second step that could be taken, which I've floated in other settings, is to impose as a condition of mission participation a strict requirement that TCCs commit to affording timely notice of national disciplinary or criminal proceedings arising out of UN operations and facilitating attendance by trained legal observers who can intelligently report back to the UN on those proceedings.

There is precedent for observers in international practice. One example is truce supervision and observation duty. Looking in a very different direction, international fisheries regulation at times involves the use of "ship riders" who board and travel with foreign fishing vessels in order to monitor compliance (and document noncompliance) with applicable conservation regulations. The IAEA of course relies on inspectors to serve as an early-warning system for violations of governing international agreements.

My concept for improving contingent discipline is to grow a corps of senior, perhaps retired judge advocates, with the necessary language skills, who could attend trials, either on deployment or back in garrison, and submit intelligent, professional reports on the basis of which UN management could decide whether additional action is required. Suppose, for example, a peacekeeper's court-martial or administrative punishment proves to be a sham. Can you rule that out?

The UN has a range of sanction options at its disposal, including curtailing the deployment of an individual peacekeeper, a unit, or an entire contingent. It can also effectively debar named soldiers for whom there is substantial evidence of impermissible conduct. In theory, it can tell a TCC that it is no longer welcome to

provide troops, either for a defined period, a particular mission, or for good everywhere. These sanctions could in theory be made fairly subtle by such means as tailored conditions or, in effect, probationary terms.

Sounds great, right? Except that "beggars can't be choosers," and there are not that many states that can deploy troops that are properly trained, equipped, and commanded. It would be fascinating to be the fly on the wall at UN Headquarters when these tough issues come up. Can we really disqualify states *A*, *B* or *C*?

Now I'd like to shift gears a bit. As you can tell, I'd like to have more confidence in the UN system for ensuring peacekeeper discipline than I do. It may be that the organization is doing about as well as it can when it comes to ensuring peacekeeper discipline. There isn't an armed force on Earth that does not experience disciplinary issues – and that includes the Pontifical Swiss Guard at the Vatican.

If so, we have two choices. Either we get used to the idea, keep doing more or less what we are doing, perhaps with a few added lights and buzzers like a trial-observer system, or we break free of the constraints under which the UN and its peacekeeping operations have been operating all these years. That could mean any one of several things, none of which are at the moment considered suitable for discussion in polite company. They include (1) creating a new UN court (or modifying an existing forum) to try criminal cases involving peacekeepers; (2) expanding the jurisdiction of the International Criminal Court for the same purpose, (3) imposing direct UN discipline over national troop contingents, or (4) establishing a UN force in the literal sense.

On the first two of these, a concept of complementarity – familiar territory from the Rome Statute – might be desirable, so the first line of defense against misconduct would remain in national authority hands, subject to a UN or ICC trial if national authorities were to prove unwilling or unable to take the necessary measures. Expanding ICC jurisdiction to include non-war-crimes offenses by TCC personnel would be a tall order, but it would build on an existing structure, and one that is not so overwhelmed with cases that it could not find room for a few more.

Creating a UN TCC-personnel court would also be a tall order, politically speaking. Still, why rule it out? After all, there already is both a UN Dispute Tribunal and a UN Appeals Tribunal, although their jurisdiction is noncriminal and applies only to persons directly on the UN payroll. Could their jurisdiction be expanded?

What substantive military criminal law would either the ICC or a UN Peacekeeper Court apply in peacekeeper criminal cases? I think it ought to be the existing military law of the TCC, not some new body of law. This means that there might be divergent outcomes, but tying these proceedings to existing national law would be less invasive than creating a transnational body of military criminal law.

Is it time to pursue one of these admittedly radical paths? Not yet, but we as a group ought to treat these questions as fair game, and have them in the back of our minds as we continue to monitor contingent discipline and the limited measures for its improvement. Even the fact that proposals such as those I've noted are being discussed could help incentivize UN management to find ways to improve peacekeeper discipline.