

PRIMER

PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

What are the privileges and immunities of the UN?

The UN and UN personnel have special privileges in the countries where they work, which could include exemption from paying taxes or special provisions for obtaining visas. They also have immunity from legal process, such as immunity from cooperating with law enforcement and, in certain cases, immunity from being arrested or tried in a court of law.

Why are privileges and immunities given to the UN and its personnel?

The privileges and immunities accorded to the UN are necessary for the Organization to fulfill its mandates of maintaining peace and security, protecting human rights and the rule of law, and solving the economic, social, cultural, and humanitarian problems of the world's indigent citizens. The framers of the UN Charter recognized that the Organization would not be able to perform its functions effectively if it were exposed to legal liability and interference by governments that wished to impede the UN and its personnel from carrying out their work.

Are privileges and immunities based in law?

Yes. The UN Charter bestowed privileges and immunities on the Organization and its personnel, and subsequent international treaties created binding legal obligations on Member States of the United Nations to respect these privileges and immunities.¹ These obligations are sometimes also incorporated into local laws in some countries, such as the United States. There are also other obligations that come from two-party or "bilateral" agreements that the UN signs with individual countries that host UN offices or missions, or with countries that contribute troops to the UN's peacekeeping operations.²

Are there different types of immunity?

Immunities fall into roughly three categories:

¹ The 1946 Convention on the Privileges and Immunities of the United Nations (General Convention) and the 1947 Convention on Privileges and Immunities of the Specialized Agencies (Specialized Convention).

² Other bilateral agreements discussing immunity include the Model Status of Forces Agreement, the Model Memorandum of Understanding, and various headquarters agreements.

1. **Organizational:** The UN itself is immune from legal process – the world body cannot be taken to court over any subject matter, in any country. This is true for all UN entities – including UN peacekeeping missions, funds and programmes such as the UN Children’s Fund (UNICEF), and technical or “specialized” agencies such as the World Health Organization (WHO).³ UN property and documents are also protected, and cannot be searched or confiscated, even by law enforcement, without the UN’s permission.
2. **High-level:** The highest-level people working for UN entities have the same status as diplomats, meaning that they cannot be charged with a crime or with most civil offenses. This immunity generally applies to everyone holding the position of “Assistant Secretary General” or higher, as well as the civilian and military heads of peacekeeping missions, and the heads of UN agencies. It also applies to the spouses and minor children of those officials.
3. **Functional:** The vast majority of UN personnel only have immunity for the things they say or do as part of their official duties; this is called “functional immunity.” This means that most personnel of the UN (called “officials” or “experts on mission”), including all the non-military personnel of peacekeeping missions, cannot be taken to court for anything they have said or done as part of their work duties.

Can immunity be waived?

Yes. Immunity was not intended to shield the United Nations or its personnel from responsibility for all of its actions, nor to shield perpetrators of crimes from external investigation or legal accountability. In fact, the Secretary-General has *“the right and the duty to waive immunity”* if *“the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.”*⁴

The UN can waive its own immunity in a particular case or matter, but the leadership (through the Secretary-General, the Director-General of an agency, or the group of Member States that make up the governing board of a UN entity) must explicitly issue that waiver. The same leadership may waive the immunity of any of its own personnel.

Is there immunity for sexual exploitation and abuse?

According to the UN, *“there is no immunity for sexual abuse.”*⁵ However, recall that the most senior UN officials (those treated like diplomatic envoys) have immunity from nearly all legal process; they cannot be taken to court when accused of committing sexual abuse unless and until, as noted above, the UN issues a waiver of an official’s immunity in a particular case.

³ The exception to this is one UN agency, the World Bank Group, which can be sued by individuals in civil cases. For a list of all the UN entities – UN organs, funds, programmes and specialized agencies, see <http://www.un.org/en/about-un/index.html>.

⁴ General Convention, §20, 23.

⁵ UN Noon Briefing, 14 February 2018.

In an official letter to AIDS-Free World, the UN clarified that *"criminal acts of sexual exploitation or abuse do not constitute official acts of a United Nations official or expert on mission. Accordingly, no functional immunity exists for such acts."*⁶ This seems to imply that no waiver is necessary. However, as a practical matter, even personnel who have only functional immunity are still shielded until the UN assesses and decides, case by case, whether functional immunity applies to a particular person in a particular instance: *"Allegations of criminal acts of sexual exploitation or abuse may, however, arise in the context of the performance of official functions, and the United Nations must, therefore, make an assessment of the circumstances surrounding the act and the immunity issue."*⁷ That means that even if an act such as sexual assault could never be an "official function," when a member of its personnel is accused of that act, the UN reserves the right to evaluate the circumstances of the allegation – for instance, to prevent UN personnel from facing police intimidation or government retaliation for their official duties, under the guise of an allegation of sexual assault. Because the UN reserves the right to decide whether immunity applies, we must assume that immunity applies until that assessment is made. The process of requesting the UN to assess whether immunity applies thus becomes very similar to the process of asking for a waiver of immunity.

Given that it can be waived, can immunity still have a negative effect on accountability?

The UN has asserted that *"[t]he duty to waive immunity, or to state in a formal manner that immunity does not apply, in response to allegations of criminal conduct is, as a matter of course, carried out expeditiously."*⁸ Yet even an "expeditious" waiver or assessment takes time, and is only issued at the end of an internally controlled process of "fact-finding" of indeterminate length. In time-sensitive cases such as sexual violence, these delays doom most investigations from the start. The UN personnel conducting the fact-finding are not trained, neutral law enforcement officers, and therefore cannot obtain search warrants or insist that non-UN persons answer their questions. Their involvement can introduce other serious problems at this point. For example, there is great potential for victims and witnesses to be threatened or coerced or for evidence to be altered or lost. Victims' and witnesses' testimonies could be challenged in court as less credible for having been told and re-told multiple times before being heard by law enforcement authorities. Thus, immunity when interpreted and applied this way can pose a barrier to justice.

Often, law enforcement may not know a crime has been committed because populations in the countries where UN personnel are posted are encouraged to report any wrongdoing directly to the UN. Other UN staff receive those formal complaints, interview victims, collect and preserve evidence,

⁶ Letter from United Nations Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Miguel de Serpa Soares, to AIDS-Free World Co-Directors, Paula Donovan and Stephen Lewis, 7 July 2017.

⁷ Id.

⁸ Id.

and conduct their own fact-finding and internal investigations to decide whether or not the UN believes that the events occurred. Even if law enforcement became aware of the allegations during this time, it may not be able to interview UN witnesses or alleged perpetrators, or access evidence collected by UN investigators, because of the UN's organizational immunity. If, at the end of this often very long process, the UN decides in the victim's favor, it may choose to refer the case to the government of the country where the alleged crime took place. If that government wished to try the case, it must then request either a waiver of immunity if the accused is a high-level official or a declaration that immunity doesn't apply if the accused is covered only by functional immunity.⁹

The conflicts of interest and resulting problems that arise from the UN's practices all form part of the UN's normal policies and procedures when its personnel are accused of sexual offenses. The vetting of claims, withholding of information, interference in police investigation, delays, and inevitable bias in favor of colleagues and the institution effectively shield the accused from legal accountability. This was not the intention of the Convention on Privileges and Immunities.

What about peacekeeping troops?

Peacekeeping troops – that is, military personnel but also some civilians and police troops sent by their governments to fill military roles – remain under the **"exclusive jurisdiction"** of the of their own countries. When the UN receives an allegation of sexual exploitation or abuse, its initial fact-finding includes determining whether and which troops may have been involved. The UN then refers the allegation to the relevant military authorities, because peacekeeping troops can only be prosecuted by the governments of their home countries, and not by the country in which they are serving.¹⁰

⁹ A snapshot of the process is captured in this "infographic" released by the UN:
http://www.un.org/en/peacekeeping/images/SEA_infographic_v10-02.jpg.

¹⁰ There is some variance in which personnel fit into this category. It includes all "military personnel of national contingents assigned to the military component of the UN peacekeeping mission" accused of "criminal offenses." (Model SOFA §27, 47), but it could also refer to the wider group of "Military members and any civilian members subject to national military law of the national contingent provided by the Government" (Model MOU §7.22).