

# UNaccountable: A Rejoinder to Devika Hovell

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‘We lied to each other so much, that in nothing we trust’

– Megadeth, ‘Trust’, *Cryptic Writings*, 1997

I enjoy discussions with Devika Hovell because we look at the same thing from very different perspectives. Hovell is a great theoretician, whereas I take more of a pragmatic – what some have termed ‘academic-activist’ – approach. And while there are many areas of similarity to our approaches, her nuanced and thoughtful critiques of my work add a depth for which I am grateful.

In her reply to my piece about sexual exploitation and abuse perpetrated by United Nations (UN) personnel, Hovell first seeks to unpack the relationship between the UN and local populations. She argues that the legal authority of the UN stems from trust and, specifically, from a fiduciary relationship between the UN and the population of states over which the UN is exercising some form of control. Hovell suggests that we should not look at the history of UN trusteeship over post-colonial states and, instead, should focus on the current position.<sup>1</sup> But the critiques of trusteeship as a form of empire have direct relevance for many of the UN’s current peace-building and state-building operations.<sup>2</sup> The UN assumed full sovereign powers in countries such as Timor-Leste and Kosovo and, in those modern versions of trusteeship, went beyond the hybrid-sovereign power status usually found in peacekeeping and state-building operations, based on an assumption that those populations could not even contribute to self-governance.

The UN’s presence in so-called ‘failed’ states – a term that reinforces imperialist notions about who is capable of self-governing – has all but replaced the state’s apparatus, leaving populations with no choice but to rely on the UN for all aspects of basic subsistence. In Haiti, the UN ‘stabilization’ presence continues a long history of

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<sup>1</sup> On the need to understand and take into account history of civilization, trusteeships and mandates, see Tzouvala, ‘Civilisation’, in J. d’Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (forthcoming 2019).

<sup>2</sup> For a critical perspective on trusteeship and the need to take into account this history in the modern day, see R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008).

outside interference in that country's internal affairs, interference that may be agreed to, or welcomed, by political elites but that has been overwhelmingly rejected by the population on the ground.<sup>3</sup> When Hovell insists that UN interventions are based on a relationship of trust that stems from a state consenting to the UN entering into its territory, she does not discuss who gives the consent and what effect this has on the legitimacy of that trust. In Haiti, political leaders elected by the populations have previously been removed and replaced by outside interventions. In such cases, where external actors impose leaders on local populations, there cannot be a serious suggestion that those rulers are consenting to the UN's presence on behalf of their populations.

If trust is central to the relationship between the UN and populations, then it is crucial to suggest ways of building trust. Hovell seems to assume that trust exists, without exploring the complexities in different contexts where trust may exist, may need to be built, or even may need to be rebuilt. Hovell and I agree that accountability may restore or cement trust between the population and the UN, which is why I propose pragmatic methods for upholding victims' rights in the here and now, using the systems that already exist in order to provide redress for victims and accountability for the perpetrators and organization and to build trust in settings where such trust has been systematically violated and requires significant rebuilding. One of the main reasons for that trust needing to be rebuilt is the cloak of impunity behind which many UN personnel operate, a cloak developed because the UN and its personnel are governed by frameworks and practices that focus on protecting them rather than the local populations. It is for this reason that I suggest we focus on the victim's rights, not on the protection of the perpetrator. I disagree with Hovell that such accountability frameworks will undermine the UN; they may lead to changes within the organization, but those changes are needed for the UN's work to be legitimate and effective.

The purpose of my article was to open discussions about actionable and evidence-based solutions. We all agree – academics and practitioners alike – that widespread impunity for sexual exploitation and abuse must be addressed, but too few practicable solutions are being proposed, let alone implemented. Hovell's discussions about the fiduciary relationship between the UN and local populations provides an interesting and strong normative underpinning when thinking purely about the relationship, but it does not address the question of how to provide redress for victims or even to build trust. Although, in other jurisdictions, a relationship between the state and indigenous persons has been found to be fiduciary, there is currently no method for bringing a claim in a domestic court against the UN for breaching its fiduciary duty because the fact that the UN has to work for other objectives such as those detailed in the UN Charter means that it is not just working on their behalf and, of course, the UN's immunity remains in play. It is very unlikely that a state could bring a case to the International Court of Justice on a breach of fiduciary duty. And, thus, we return to square one where victims do not have a mechanism for bringing a claim.

Hovell's discussions about trust, as she sets out early on, do support, challenge, strengthen and critique my arguments, for which I am grateful. Solutions must be

<sup>3</sup> See, e.g., Lemay-Hebert, 'Chapter 61: United Nations Stabilization Mission in Haiti (MINUSTAH)', in J.A. Koops *et al.* (eds), *Oxford Handbook of United Nations Peacekeeping Operations* (2015) 720.

rooted in both theory and practice, and as Hovell eruditely explains in her recent article for the *American Journal of International Law*,<sup>4</sup> too much of how lawyers approach international organizations is driven by reacting to current events without taking time to undertake 'normative theorizing'. This comes back to the different – sometimes complementary and sometimes competing – approaches that Hovell and I take towards our work. From a theoretical perspective, I disagree with her approach of viewing UN peacekeeping as a form of trust, and, instead, I view UN peacekeeping missions as sovereign or hybrid-sovereign powers. This approach is one that Nicolas Lemay-Hebert and I have developed and applied in the context of the Haiti cholera claims,<sup>5</sup> using Stephen Krasner's focus on authority and control rather than sovereignty when looking at what occurs within a state in order to determine which actor bears responsibility when there is a hybrid-sovereign power sharing.<sup>6</sup> This approach has parallels with human rights-based approaches, such as the effective control test that has been adopted when considering the extraterritorial scope of application of human rights.<sup>7</sup>

Bearing in mind my theoretical approach to the UN's relationship to local populations during peacekeeping operations, I want to respond to a very specific point in Hovell's piece: whether the UN's failure to prevent widespread sexual exploitation and abuse or to provide redress to victims of rape can amount to a violation of the UN Convention against Torture.<sup>8</sup> The starting point is whether sexual exploitation and abuse amounts to torture or ill-treatment. Hovell insists that sexual exploitation and abuse does not fall within the four purposes of torture as set out in Article 1 of the Convention against Torture. I disagree. Sexual exploitation and abuse may fall under Article 1 where the purpose of the torture is 'discrimination of any kind'. Gender-based violence is, by its very nature, discrimination, and violence against women has been defined as discrimination against women and as a human rights violation.<sup>9</sup> Therefore, the purpose and intent of the elements of the definition of torture are fulfilled if the act of sexual exploitation and abuse is gender specific or perpetrated against persons on the basis of their sex or gender. Where sexual exploitation and abuse is perpetrated as gender-based violence, then it can amount to torture, although, of course, the UN

<sup>4</sup> Hovell, 'Due Process in the United Nations', 110(1) *American Journal of International Law* (2016) 9.

<sup>5</sup> E.g., Freedman and Lemay-Hebert, "'Jistis ak reparasyon pou tout viktim kolera MINUSTAH": The United Nations and the Right to Health in Haiti', 28(3) *Leiden Journal of International Law* (2015) 507.

<sup>6</sup> S.D. Krasner, *Sovereignty: Organized Hypocrisy* (1999).

<sup>7</sup> See, e.g., *Al-Skeini and Others v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011.

<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

<sup>9</sup> See, e.g., UN General Assembly, Declaration on the Elimination of Discrimination against Women, UN Doc. A/RES/22/2263, 7 November 1967; Committee on the Elimination of Discrimination against Women, General Recommendation no. 35 on Gender-based Violence against Women, Updating General Recommendation no. 19, UN Doc. CEDAW/C/GC/35, 14 July 2017; Committee on the Elimination of Discrimination against Women, General Recommendation no. 19 on Violence against Women as Contained in Report of the Committee on the Elimination of Discrimination against Women, UN GAOR, 47th Sess, Supp. no. 38, UN Doc. A/47/38 (1993).

Committee against Torture examines all individual cases on their own details as to whether they fall under Article 16 (cruel treatment) or Article 1 (torture).

The UN Committee against Torture considers gender-based violence – whether committed by a state or by private actors – to qualify as a form of torture, owing to the ‘discrimination of any kind’ language in Article 1. In the context of peacekeeping operations, some actors commit sexual violence as part of their assaults on local populations, and, if UN personnel do so, then clearly the UN has obligations to prevent and remedy such acts. But, in most instances, UN personnel are perpetrating exploitation and abuse in a private capacity. In those circumstances, there is a clear link between the state and private actors that is illustrated by the ‘due diligence’ standard but rooted in the ‘consent’ and ‘acquiescence’ language of Article 1 of the Convention against Torture. Specifically, states parties to the convention are responsible for gender-based violence committed by state officials in all cases and also for gender-based violence committed by non-state or private actors in cases where state officials can be shown to have ‘consented’ to, or ‘acquiesced’ in, its commission. And that is where the theoretical approach to the UN’s presence in countries is crucial. If, as I suggest, we view UN peacekeeping missions as a sovereign or hybrid-sovereign power, then the UN will be bound in the way that states are bound. Where the UN has acquiesced to sexual exploitation and abuse by failing to prevent or provide redress for such actions – as has occurred for decades in relation to peacekeeping personnel – it has violated its obligations with regard to the prohibition against torture.