

BRATISLAVA MODEL UNITED NATIONS 2013



UN General Assembly

Criminal Accountability of United Nations
Officials and Experts on Mission

Study Guide

Martin Mikloš

Letter from the President

Esteemed Delegates,

Let me welcome you to the 13th year of the Bratislava Model United Nations conference on behalf of the whole organizing team. We are delighted to see so many enthusiastic young people from all around the world meeting once again to discuss issues of global importance. The organizers have put tremendous effort into preparation of this remarkable event so that you can experience enriching debates in both your committees and the General Assembly, which I have the honor to preside over.

My name is Martin Mikloš and I am a student of the International Baccalaureate Diploma Programme at Gymnázium Jura Hronca in Bratislava. I gained my first experience with Model United Nations at this very conference two years ago, and since then MUN creates an inherent part of my life. I participated at several conferences as a delegate, so I understand the difficulties that you will be facing in the upcoming weeks. This year's BratMUN, however, is going to be the first time that I am presiding over such an event, so it will be a big challenge for me as well. Nevertheless, I believe that together, we will experience a rewarding conference.

It was difficult to choose an engaging topic for the General Assembly which would provide you, the delegates, with a unique opportunity to discuss issues you are not familiar with. The problem of criminal accountability of United Nations officials and experts on mission is one such topic.

It is a very serious issue which has not been solved in ten years, but most people are not aware of it. Proper preparation is therefore a must for every participant of BratMUN 2013. This study guide is meant to provide you with basic information on the topic and insight into the most important aspects of the problem. I encourage you to conduct your own research and investigation of the topic. To better understand the position of the country you are representing, I recommend looking at the web page of the Ministry of Foreign Affairs of your country and contacting their embassy in your own country. You should not be discouraged by the country you are assigned because everyone has something to say and can thus contribute to a fruitful debate.

I hope that your participation in BratMUN 2013 will be a beneficial and inspiring experience for all of you.

In case you have any questions about the topic or the conference itself, do not hesitate to contact me on martinmiklos@gmail.com

I am looking forward to seeing you all in October.

Martin Mikloš
President of the General Assembly

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Introduction

United Nations peacekeeping operations have for decades brought peace and stability to countries troubled by armed conflicts. Many peacekeeping personnel have given their lives for the hope of a better future, and their achievements and sacrifices must be remembered. Unfortunately, there will always be irresponsible individuals who dishonor those who have given their lives in the cause of peace. In particular, the revelations of sexual exploitation and abuse in a number of peacekeeping operations have done great harm to the name of peacekeeping. It was in this context that the importance of addressing the issue of criminal accountability of United Nations staff and experts on mission evolved.

Sexual exploitation and abuse by peacekeeping personnel is not a new phenomenon. Besides the United Nations, media and human rights organizations have documented the involvement of peacekeeping personnel in sexual exploitation and abuse in operations ranging from those in Bosnia and Herzegovina and Kosovo in the early 1990s to Cambodia and Timor-Leste in the early and late 1990s to West Africa in 2002 and the Democratic Republic of the Congo in 2004.¹

However, as the allegations in the Democratic Republic of the Congo surfaced, it became clear that the measures currently in place to address sexual exploitation and abuse in peacekeeping operations were manifestly inadequate and that a fundamental change in approach was needed. In many cases, the offenders remain unpunished because of existing jurisdictional gaps and often misleading and inappropriate regulations.

The impression of impunity of United Nations personnel undermines the legitimacy and trust from the local community. If not addressed, such conduct does great harm to the credibility of the whole Organization and its mandate in peacekeeping missions, and as such endangers the very purpose of the United Nations – maintaining international peace and security.

However, sexual exploitation and abuse are not the only acts which the General Assembly should be dealing with. In 2006, allegations relating to sexual misconduct amounted to the total of 357, of which, 176 allegations were reported from the mission in the DR Congo, but, a total of 439 allegations of misconduct other than sexual were reported as well.² Indeed, many allegations are related to traffic offences and crimes against property but also to crimes such as smuggling and trafficking or corruption, fraud and embezzlement. In fact, these crimes are not confined to peacekeeping environment only, but could occur at any operation under the auspice of the UN. For instance, in 2007, a staff member of the Secretariat was sentenced to 97 months in prison for crimes of fraud and conspiracy and ordered to pay restitution to the UN in the amount of US\$ 932'165,99.³

Such incidents demonstrate the need to hold all UN personnel as well as personnel of all specialized agencies criminally accountable for all serious crimes committed in all their operations and activities. It is up to the General Assembly to meet together and take a definite action toward the rule of law in the international community.

¹ A/59/710: p. 7

² A/62/329: pp. 6-7

³ A/63/202: p. 9

History and the United Nations Response

Secretary-General's bulletin

Since the scandalous revelations of sexual exploitation and abuse in many peacekeeping missions in the 1990s and early 2000s, the United Nations has taken a number of measures to effectively deal with such problems in the future. In 2003, the Secretary-General Kofi Annan issued bulletin ST/SGB/2003/13 on special measures for protection from sexual exploitation and abuse. Besides defining these two offences, it sets out numerous obligations and regulations for relevant UN bodies and personnel. The bulletin among others promulgates explicit prohibition of sexual activities with children and exchange of money, employment, goods or services for sex. In order to reveal any possible sexual misconduct, the bulletin further obliges all personnel to report any concerns or suspicions regarding sexual exploitation and abuse by a fellow worker to relevant authorities, and it directs that the local population is informed on the possibility of reporting suspected sexual misbehavior. In cases where there are no established reporting mechanisms, it is the responsibility of the head of department, office or mission to appoint an official to serve as a focal point for receiving reports. To ensure adherence of these rules, all relevant personnel are subject to disciplinary measures, including summary dismissal, if they fail to meet the standards listed in the bulletin.⁴ Responsibility of relevant authorities to inform the Secretariat on their investigations and the actions taken as a result of these investigations is established as well. The bulletin also puts emphasis on preventive measures, especially creating and maintaining of an environment that prevents sexual exploitation or abuse.⁵

Even though the bulletin demonstrates an early commitment of the UN in solving the problems of peacekeeping missions, it has multiple limitations of solving the overall issue of criminal accountability of UN officials and experts on mission. The bulletin applies only to staff of the UN and its separately administered organs and programs,⁶ and has thus no binding power over civilian, military, and police components of UN operations. Also, it addresses only problems of sexual exploitation and abuse, but crimes committed during UN operations are not limited to these offences. Accountability for other offences against the person or against property remains unresolved. Finally, the bulletin by its own force does not give mandate to any UN body to conduct criminal investigation, to prosecute and to hold a person criminally accountable.⁷ The exercise of criminal jurisdiction remains the responsibility of Member States. Even though the bulletin allows cases of sexual exploitation and abuse to be referred to national authorities for criminal prosecution if there is evidence in support of the suspicion that the act might have constituted a criminal offence,⁸ it is not a common happening, mainly due to a UN policy of not releasing documents that might be used by third

⁴ ST/SGB/2003/13: p. 2

⁵ Ibid. pp. 2-3

⁶ Ibid. p. 1

⁷ A/62/329: p. 8

⁸ ST/SGB/2003/13: p. 3

parties to make claims against the Organization.⁹ Nevertheless, as long as there exist jurisdictional gaps and disagreements between States, so long criminal accountability of UN personnel cannot be guaranteed.

Analysis of the problem

Having observed that the Secretary-General's bulletin failed to address the complexity of the issue, it was requested to make available a comprehensive report on advising on the best way to proceed so as to ensure that UN staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station. A number of studies was conducted which provided insight into the main problems relating to criminal accountability of UN personnel.

A report of the Adviser to the Secretary-General identified four main areas of concern. The first difficulty relates to the fact that the current rules on standards of conduct are not unified for all categories of peacekeeping personnel. Each component of the mission is governed by different rules and disciplinary procedures because they each have a distinct legal status. On top of that, many of the provisions are issued in a form of guidelines, which are not binding, and so the relevant parties may or may not follow them.¹⁰ Investigative capacities of individual missions are the second problem. Troop-contributing countries often complain that the evidence collected by UN administrative investigation is not sufficient under their national law for use in subsequent proceedings or it has not been gathered in a manner required by the law. However, peacekeeping missions do not have access to modern methods of investigation, and there are no expert personnel available to conduct it in a proper manner.¹¹ Third, a need for effective preventive measures was stressed. The United Nations is responsible for its operations, and it is thus its duty to minimize instances of misconduct and criminal behavior. Increasing awareness through proper training and outreach programs as well as using deterrents if necessary was recommended.¹² Finally, the importance of disciplinary and financial accountability was emphasized. Proper mechanisms should be established to ensure that all personnel are subject to disciplinary action, including immediate dismissal from service or termination of appointment. On top of that, violators should bear financial responsibility for the harm they have done to the victims and provide alimony for their abandoned children.¹³

The Group of Legal Experts analyzed legal obstacles that exist in holding UN peacekeeping personnel criminally accountable. Exercise of jurisdiction by the host State, i.e. the State where the mission is taking place and where the possible criminal conduct occurred, was described as the one having the greatest legitimacy, but it also faces several challenges. Countries in need of a peacekeeping mission often have dysfunctional legal system that prevents proper exercise of jurisdiction, especially if the alleged offender is enjoying immunity. In such cases it may not be in the interest of the UN to waive the immunity mainly

⁹ A/59/710: p. 14

¹⁰ A/59/710: pp. 10-13

¹¹ Ibid. pp. 14-17

¹² Ibid. pp. 17-23

¹³ Ibid. pp. 24-31

due to fear of breaking international human rights standards for instance torturing the suspect.¹⁴ However, exercise of jurisdiction by States other than the host State can be problematic as well. In absence of an international treaty or a bilateral agreement, extradition of alleged offenders and securing custody can be especially complicated if the host State's legal system is dysfunctional.¹⁵ Also, securing admissibility of evidence for use in another jurisdiction can form a barrier to holding a person criminally accountable. Even though the prosecuting state might be able to conduct its own investigation, it would be very difficult because the witnesses and evidence are located in the host State. If the State exercising jurisdiction wants to deploy investigative authority, it cannot do this without the consent of the host State, and even if the consent is granted, it may be subject to conditions hindering the process.¹⁶ Finally, the requirement by a prosecuting State for dual criminality may have an impact on whether a person is held criminally accountable. Many States may only exercise jurisdiction in relation to conduct in another State if the conduct also constitutes a crime where it was committed, i.e. there was dual criminality. This can be especially challenging when there are variations in the national laws of States in relation to what constitutes criminal conduct, and there are no internationally accepted definitions for each crime.¹⁷

Views of Member States

In 2007, representatives of Member States met in an Ad Hoc Committee to discuss the questions which had arisen from the two main reports, and to decide on measures necessary for solving these problems. However, the States were unable to find common ground on issues such as the scope of both *ratione personae* and *ratione materiae*, preferred jurisdiction, and investigative capacities among others.¹⁸ Concerning *ratione personae*, i.e. the personnel who are subject to exercise of criminal jurisdiction, it had been suggested that all UN personnel as well as personnel of all specialized agencies are held criminally accountable for their conduct, but disagreements with this attitude were expressed. Some delegations believed that all military personnel as well as all civilian police units should remain solely under the national jurisdiction of the contributing State and that they should be excluded from the scope of application of any future instrument.¹⁹ Regarding *ratione materiae*, i.e. the crimes over which jurisdiction may be exercised, it was proposed that they include also crimes such as murder, theft, fraud, and torture. However, the question of defining these crimes in a future treaty appeared to be a challenge. Some delegations spoke in favor of listing all relevant crimes, but this can be particularly problematic due to *a contrario* implications, and would thus potentially require amendments in the future. As opposed to that, others proposed generic defining of crimes by reference to level of punishment, but this might not be suitable for satisfying the double criminality requirements.²⁰ Order of preference of exercising jurisdiction

¹⁴ A/60/980: pp. 8-10

¹⁵ Ibid. pp. 10, 15-18

¹⁶ Ibid. pp. 21-22

¹⁷ Ibid. p. 9

¹⁸ A/62/54: p. 3

¹⁹ Ibid. p. 10

²⁰ Ibid. pp. 7, 11

appeared to be a controversial topic as well. Some States stressed the importance of the host State exercising jurisdiction and demanded that objective criteria are set to assess the ability of the host State to exercise its jurisdiction. Other countries pointed out the need to establish criteria to address the problem of possible competing jurisdictions of States other than the host State, particularly if there is a possibility that the convict might receive the death penalty in one of the countries.²¹ Finally, a conflict emerged whether in order to secure admissibility of evidence for criminal proceedings, the prosecuting State should be given greater investigative authority, the host State's capacity expanded, or mandate of the UN strengthened. Creation of a new international legal body was recommended as well.²² All these issues were left unresolved, therefore the international community remained divided for a long time on the proper approach to ensuring criminal accountability of all individuals employed by the UN.

General Assembly resolutions and further problems

It was not until December 2007 that the General Assembly adopted its first resolution (A/RES/62/63) addressing the criminal accountability. It may seem a short time to respond properly to such a complex issue, but as the secretary of state for foreign affairs and human rights of France said: "You see, the 200'000 women who have been raped in the DRC are expecting more concrete and timely results."²³ However, the resolution was meant only as a provisional, short-term measure attempting to address the jurisdiction gaps on a temporary basis.²⁴ It brings to the attention of Member States the importance of holding their nationals accountable for the crimes they commit, but the proposed action is very vague in its essence. The General Assembly in its resolution urges all States to consider establishing jurisdiction over their nationals serving as UN officials and experts on mission and take all appropriate measures that their crimes do not go unpunished.²⁵ Even though the resolution encouraged States to cooperate and stressed the importance of reaching consensus, it failed to solve the most serious problems, which were also the source of conflict in previous discussions.

Although the most serious instances of criminal conduct, mainly in peacekeeping missions, occurred by the year 2007, the problem was not eliminated completely. According to the BBC, the most serious scandals of sexual abuse were as follows:

- 2003 - Nepalese troops accused of sexual abuse while serving in DR Congo. Six are later jailed
- 2004 - Two UN peacekeepers repatriated after being accused of abuse in Burundi
- 2005 - UN troops accused of rape and sexual abuse in Sudan
- 2006 - UN personnel accused of rape and exploitation on missions in Haiti and Liberia
- 2007 - UN launches probe into sexual abuse claims in Ivory Coast²⁶

²¹ A/62/54: pp. 6-7, 12

²² Ibid. pp. 8-9, 12-13

²³ <http://www.asiantribune.com/?q=node/12046>

²⁴ A/62/329: pp. 8-9

²⁵ A/RES/62/63: p. 2

²⁶ http://news.bbc.co.uk/2/hi/in_depth/7420798.stm

Save the Children says the international community has promised a policy of zero-tolerance to child sexual abuse, but that this is not being followed up by action on the ground.²⁷ In 2008, 108 Sri Lankan peacekeepers serving in Haiti were accused of sexual exploitation and abuse of minors, but the UN was not equipped with enough power to take effective action.²⁸ In November that year, the DR Congo has asked the United Nations not to send any more Indian peacekeeping troops to the troubled east of the country because they have been continuously accused of gold trafficking and sexual abuse.²⁹ Yet, Indian troops still make up a quarter³⁰ of the total of almost 17'000 troops³¹ in the DR Congo. Overall, in 2004 and 2005, the Department of Peacekeeping Operations had received 445 allegations relating to sexual misconduct, of which 322 had been investigated. In 2006, 357 allegations had been received and 66 investigated.³²

In the period between 1 July 2007 and 30 June 2008, the UN has taken disciplinary measures against a significant number of its personnel, mainly in cases of abuse of authority and harassment, gross negligence, fraud and misrepresentation, sexual exploitation and abuse, and computer-related misconduct. In the same period, 3 cases were referred for criminal proceedings. One case related to charges of conspiracy and fraudulent acts in an attempt to fraudulently obtain visa to permit non-citizen to enter the United States. One staff member was arrested for smuggling narcotic substances into the United States using a diplomatic pouch, and one for charges of conspiracy and fraud amounting to almost US\$ 1 mil.³³

On top of that, in accordance with paragraph 10 of the GA resolution 62/63, the Secretary-General submitted information regarding cases referred to national authorities for criminal proceedings, covering the period from 6 December 2007 to 30 June 2008. It reported that credible allegations against two officials were referred to the State of nationality. One case related to an allegation of rape, another to an allegation of procurement-related crime. The UN has not received any information from the relevant States on the action taken, and no requests for assistance have been received. Also, one case of rape of a minor by an expert on mission was forwarded to the State of nationality, and the expert in question had already been repatriated to his State of nationality.³⁴

In the same manner, the GA adopted resolutions of similar language also in years 2008 to 2012, confirming measures adopted in previous resolutions. The Secretary-General, pursuant to paragraphs 15 and 16 of GA resolution 63/119, prepared a similar report in 2009. In the period between 1 July 2008 and 30 June 2009, allegations against three officials, each related to embezzlement, forgery or fraud, were referred to the State of nationality. In the same period, cases against two experts on mission were forwarded to relevant authorities. The first case related to counterfeiting money and the second to injuring two pedestrians, one

²⁷ http://news.bbc.co.uk/2/hi/in_depth/7420798.stm

²⁸ <http://www.asiantribune.com/?q=node/12046>

²⁹ <http://news.bbc.co.uk/2/hi/africa/7750564.stm>

³⁰ Ibid.

³¹ <http://news.bbc.co.uk/2/hi/africa/7750564.stm>

³² A/62/54: p. 7

³³ A/63/202: pp. 4-9

³⁴ A/63/260: pp. 1, 3, 16

fatally, while driving intoxicated. The UN has not received any feedback or request for assistance from the prosecuting States.³⁵

Pursuant to paragraphs 15, 16 and 17 of GA resolution 64/110, the Secretary-General reported that in the period between 1 July 2009 and 30 June 2010, the Office of Legal Affairs referred to the States of nationality the cases of five UN officials. The cases included allegations of improper firearm storage, fraud, conspiracy and embezzlement, and diamonds trafficking. Only one Member State provided information on its handling of the case. One State requested a copy of the UN investigation report in the case, and it was provided without prejudice.³⁶

Finally, pursuant to paragraphs 16 and 17 of GA resolution 65/20, information relating to the period from 1 July 2010 to 30 June 2011 was provided. During the period, cases of six officials and two experts on mission were referred to the State of nationality. The cases concerned allegations of sexual exploitation and abuse of a minor, fraud, blackmail, fuel theft, and assault and inappropriate use of firearms. The Office of Legal Affairs requested the States to inform of any action taken in relation to the cases. No information was provided, but two States sought certain clarification on the referred cases.³⁷

Even though the General Assembly adopted basically the same resolutions every year, it was to no avail. The problems continued and States were unable to find an effective response to them. The long term solution which would finally resolve the issue of criminal accountability of UN officials and experts on mission still has to be taken.

³⁵ A/64/183: pp. 1, 3, 11-12

³⁶ A/65/185: pp. 1, 3, 15-16

³⁷ A/66/174: pp. 1-2, 11-12

Present State of Affairs

Categories of personnel

The issue of criminal accountability of UN officials and experts on mission is a complex and complicated topic. One of the crucial conditions for a comprehensive solution is a proper understanding of its background and all its legal aspects. First, it is essential to examine the different categories of personnel and their legal status because that influences the ways they can be held criminally accountable. According to the United Nations, UN officials include UN staff and UN Volunteers. It is also understood that experts on mission include all UN military observers, police and civilians performing mission for the UN. Finally, military members of national contingents have their own distinct legal status in UN operations.³⁸

United Nations staff has the status and the privileges of officials under the Convention on the Privileges and Immunities of the United Nations (the General Convention). They enjoy functional immunity extending only to the performance of their official duties. The Secretary-General decides whether a staff member was performing official duties, and thus whether the functional immunity applies. If requested by a relevant authority of a Member State, the Secretary-General can also waive the immunity under certain conditions. In addition to the General Convention, staff members in peacekeeping operations are governed by the status-of-forces agreement (SOFA). SOFA is an agreement between a host country and a foreign entity (in this case the UN), stationing military forces in that country. It establishes the rights and privileges of foreign personnel, and is based on the model status-of-forces agreement prepared by the UN (A/45/594). Model SOFA grants additional powers to the head of the mission, to deal with allegations of criminal behavior and instructs on procedures to be followed in such cases. Each staff member is bound by the rules of conduct set out in the UN Staff Regulations and Rules, and other administrative instructions, such as Secretary-General's bulletins. Staff members who are found to have committed misconduct are subject to disciplinary procedures under the mentioned mechanisms. On top of that, some most senior staff members such as the Secretary-General and his Assistants and Special Representatives are granted full privileges and immunities of diplomatic envoys in accordance with international law by the General Convention. Such immunity is usually extended also to heads of missions, Force Commanders and other high-ranking members of the mission under current SOF agreements.³⁹

UN Volunteers sign contracts with the UN, which set out the conditions of their work. In addition, in recent years, they were granted the status of officials by individual SOFAs, and thus they enjoy the same privileges and immunities as UN staff. However, they are governed by different rules, namely the UN Volunteers programme's rules of conduct, but they are also required to sign agreements of compliance with directives such as Secretary-General's bulletins. UN Volunteers are subject to immediate dismissal for violations of the rules of conduct.⁴⁰

³⁸ A/62/329: p. 3

³⁹ A/59/710: pp. 10, 32-35

⁴⁰ Ibid. pp. 11, 40

Other individual contractors and consultants employed by peacekeeping operations have the status of neither staff members nor experts on mission, and are subject to the local law. They perform functions similar to staff but for shorter periods of time, and are bound by the standards specified in the administrative instruction called “Consultants and individual contractors” (ST/AI/1999/7). In case of failure to conform to the standards of conduct, their contract would be immediately terminated.⁴¹

Civilian police and military observers are governed mainly by individual SOFAs, but the model SOFA grants them the status and the privileges of experts on mission under the General Convention. They enjoy functional immunity, which can be waived by the Secretary-General under special conditions set out in the General Convention. They are recruited as individuals through the government of the sending State, and are thus subject to disciplinary and criminal jurisdiction of that State. However, both civilian police and military observers come under the command of the UN while on mission, and are thus subject also to disciplinary measures of the Organization. They sign an undertaking in which they agree to comply with all mission standards, namely “Ten Rules: Code of Personal Conduct for Blue Helmets” and “We Are United Nations Peacekeepers.” On top of that, the Department of Peacekeeping Operations issues mission-specific directives which contain additional guidelines on standards of conduct. All these directives establish a range of penalties, including immediate repatriation, which may be imposed on an expert found guilty of serious misconduct.⁴²

Finally, members of national contingents differ from military observers in that they are representatives of the contributing State, they have no individual arrangement with the UN, and they are under the command of their contingent.⁴³ They are granted absolute immunity from the host State jurisdiction by the SOFA, which cannot be waived by the Secretary-General. The SOFA also provides that only the troop-contributing country has criminal and disciplinary jurisdiction over military members of its contingent. The only thing that the UN could do is to recommend repatriation. Military members of national contingents are bound by the rules included in the Memorandum of Understanding (MOU).⁴⁴ MOU is an agreement between the UN and a troop-contributing country, based on model MOU of the UN, which establishes terms and conditions for contribution of personnel, and specifies standards of conduct and procedures in case of their breaking.⁴⁵ All MOUs include binding provisions on standards of conduct similar to those of experts on mission, but they are general in nature. There are also mission-specific guidelines being annexed to the existing MOUs, which contain specific instructions and detailed rules and prohibitions, but they are not binding on the States. Therefore, they may or may not be followed depending on the circumstances.⁴⁶

⁴¹ A/59/710: pp. 11, 40-41

⁴² Ibid. pp. 11, 36-38; E/CN.4/Sub.2/2005/42: p. 8

⁴³ A/62/329: pp. 14-15; E/CN.4/Sub.2/2005/42: p. 7

⁴⁴ A/59/710: pp. 11-12, 38-40

⁴⁵ A/61/19: p. 2

⁴⁶ A/59/710: pp. 11-12, 38-40

This table provides a summary of legal statuses of different categories of UN personnel.⁴⁷

Immunity and jurisdiction

	Types of personnel	Immunity from HS jurisdiction	Disciplinary authority	Criminal jurisdiction
a	Members of national contingent	AI	SS	SS/(TS)
b	Military observers	FI	UN/SS	HS/SS/(TS)
c	CIVPOL	FI	UN/SS	HS/SS/(TS)
d	Very senior United Nations official	AI	UN	x/(TS?)
e	United Nations official	FI	UN	HS/(SS)/(TS)
f	Non-United Nations official mission staff	FI	UN	HS/(SS)/(TS)
g	International IGO staff	FI/x	IGO	HS/(SS)/(TS)
h	Other foreign personnel	x	employer	HS/(SS)/(TS)
i	Local personnel working for a-g	FI/x	UN/employer	HS/(TS)
j	Local personnel working for h	x	employer	HS/(TS)

AI=Absolute immunity; SS=Sending State; HS=Host State; TS=Third State;
FI=Functional immunity; IGO=Intergovernmental organization

Investigation

In general, there is a complicated structure of investigating and handling with allegations of misconduct. When there are allegations of misconduct in a peacekeeping operation, they must be reported to representatives of the mission. The head of the mission is then obliged to conduct a preliminary investigation to indicate whether the report of misconduct is well founded. If this is the case, a Board of Inquiry is summoned, whose purpose is to establish facts and collect evidence for future proceedings. It then reports its findings to the Department of Peacekeeping Operations, which then decides on subsequent measures applicable to the given category of peacekeeping personnel. At this stage of investigation, it is often necessary for the Secretary-General to waive the immunity of the offender if the offence is substantiated. However, waiver of immunity requires proper examination of gathered evidence by the Office of Legal Affairs, which then gives recommendations to the Secretary-General whether to waive the immunity or not. Finally, the Department of Peacekeeping Operations can make recommendations to relevant parties on action to be taken against the offender. In cases of military members of national contingents, it can only recommend repatriation, while in cases of civilian police officers and military observers, the Department can also take certain disciplinary measures. In cases of UN staff, the Department reports the case to the Assistant Secretary-General for Human Resources Management, who studies it and decides whether to pursue the matter. If the case is pursued, it is submitted to a Joint Disciplinary Committee, which hears all parties and studies the evidence. The Committee then reports its recommendations to the Secretary-General, who

⁴⁷ E/CN.4/Sub.2/2005/42: p. 7

makes the final decision on what disciplinary measures to take,⁴⁸ including written censure, suspension without pay, fine, demotion, separation from service, or summary dismissal.⁴⁹

In addition, the Office of Legal Affairs reviews the cases once again in order to determine whether the misconduct could have amounted to a criminal behavior. If the suspicion that a crime was committed is plausible, the Office can refer the case for criminal proceedings either to the host State or the State of nationality because the UN does not have a mandate to hold a person criminally accountable. In both cases, problems of admissibility of evidence, conduct of own investigation process, and ability to exercise jurisdiction may arise.⁵⁰

On top of that, there is also the Office of Internal Oversight Services, established in 1994 to increase the strength of scrutiny within the UN, mainly in relation to personnel not taking part in peacekeeping operations. Part of its mandate is internal investigation, and it can also recommend various disciplinary and administrative actions against perpetrators of substantiated misconduct. However, the Office initiated its own investigation for serious cases such as sexual exploitation and abuse in the DR Congo, despite the fact that the Department of Peacekeeping Operations and its Board of Inquiry were conducting their own separate investigations in the area.⁵¹

As it was described, dealing with allegations is a lengthy and complicated process which is often very confusing. Many procedures are done duplicative and involve a lot of bureaucracy. It is obvious that the present situation only hinders proper administration of justice regarding UN personnel.

Jurisdiction

The possible challenges of the host State exercising criminal jurisdiction over alleged offenders have already been described, so it is important to look also at the legal basis for States other than the host State exercising its jurisdiction. International law traditionally recognizes five bases for a State to exercise jurisdiction where a crime is committed outside its territory. The first reason to exercise extraterritorial jurisdiction is nationality or active personality, where the State of nationality of the alleged offender is entitled to assert criminal jurisdiction over the conduct of its nationals abroad. This principle serves as a basis for a number of international treaties and agreements on extradition, but the establishment of jurisdiction on the basis of nationality by itself does not require a treaty. The second base is objective territoriality, where a State may assert jurisdiction over acts done outside its territory, but which have or are intended to have substantial effects within that State. In cases of serious crimes against the person committed by peacekeeping personnel, the host State is likely to be the only State on whose territory the effects of the crime are felt. However, exercising extraterritorial jurisdiction based on the principle of objective territoriality can be useful in serious cases of large-scale fraud and embezzlement, money laundering, or terrorist financing. The third reason is passive personality, where jurisdiction is exercised by the State

⁴⁸ A/59/710: pp. 35, 37-40; E/CN.4/Sub.2/2005/42: pp. 13-14

⁴⁹ A/63/202: p. 4

⁵⁰ E/CN.4/Sub.2/2005/42: pp. 14-18

⁵¹ *Ibid.* p. 19

of nationality of the victim of a crime committed by a non-national abroad. Even though the victims of serious crimes against the person committed in peacekeeping operations are usually nationals of the host State, exercise of jurisdiction based on passive personality principle can be helpful especially in cases where victims may be foreigners in the host State. However, the right of a State to assert such jurisdiction is not guaranteed in the absence of a treaty. The fourth is the protective principle, where jurisdiction is asserted on the basis of the impact of the conduct on key interests (especially national security interests) of the State concerned. However, this principle is of very limited significance to criminal accountability of UN personnel because their crimes are unlikely to affect key national interests of any State. The last principle for extraterritorial jurisdiction is universal jurisdiction. It enables a State to claim jurisdiction over persons whose alleged crimes were committed outside the boundaries of that State, regardless of nationality, country of residence, or any other connection with the prosecuting State. Universal jurisdiction is usually established over really serious crimes such as piracy, genocide, war crimes and crimes against humanity. However, the relevance of universal jurisdiction to crimes of UN personnel is very controversial because they are not crimes of such gravity, yet they are not ordinary crimes either.⁵²

Nevertheless, the extension of jurisdiction over crimes committed outside one's territory based on active personality principle already is a common part of many legal systems. A large majority of the countries which submitted information about the extent that their national laws establish extraterritorial jurisdiction to the Secretary-General stated that they are able to prosecute their nationals for crimes committed in another country. Those who stated that they do not exercise extraterritorial jurisdiction asserted that they always honor obligations which are bestowed on them by international treaties. This is particularly important in relation to mutual legal assistance and extradition cooperation between States, as most of the countries have not concluded any agreements on these issues between each other.⁵³

⁵² A/60/980: pp. 15-17

⁵³ See A/63/260, A/64/183, A/65/185, and A/66/174

Problems to be Addressed and Possible Solutions

Jurisdiction gaps

The main obstacle to holding UN officials and experts on mission criminally accountable is the existing jurisdiction gaps. In cases where the host State is unable to prosecute an alleged offender and hold him accountable and at the same time if other States have not extended the operation of their criminal laws to apply to crimes committed in other countries, then the alleged offender is likely to escape prosecution. It is therefore important that as many Member States as possible are able to assert and exercise criminal jurisdiction.

The priority should be given to the host State to exercise its jurisdiction in the first place because this has numerous advantages. There is little doubt about legitimacy of prosecution by the host State, regardless of the nationality of the offender or the victim. It is also the place where most of the evidence and witnesses are located, so holding trials in the host State would avoid problems of investigation, admissibility of evidence, and witnesses having to travel overseas. Holding the offender criminally accountable in the host State also gives the local population a greater sense of justice, which is an important commitment of the UN to the rule of law and respect for local code. Even if the host State is unable to exercise its jurisdiction properly, the UN should focus on support and capacity-building in the country, rather than seeking jurisdiction of other States. In cases where the legal system of the host State is still dysfunctional, the adherence of international human rights standards in criminal proceeding could still be enforced by Ad Hoc arrangements. The UN could assist the host State's prosecution in return for guarantee of satisfying proper treatment of the offender. The difficulty with this solution is that it creates double standards of treatment – one for local population and one for international personnel – and is thus a bad signal for justice. Yet, even creating double standards is better than leaving the offenders to escape punishment. The last approach to dysfunctional legal system is establishment of hybrid tribunals. Such a tribunal is usually a part of the domestic legal system, but international community is largely involved in its components. This provides sufficient expertise and ensures upholding human rights standards while following national legislation, and it does not create the perception of double standards. However, it is a costly measure, and the consent of the host State and its conditions may to a large extent limit the process.⁵⁴ Nevertheless, each UN operation faces different circumstances and conditions in the host State, so there should be no uniform treatment of the cases. Instead, it is recommended that objective criteria are set to assess whether the host State is able to exercise its jurisdiction properly.⁵⁵

To reduce the risk of impunity, States other than the host State should establish jurisdiction based on the principle of active as well as passive personality. In addition, the State where the offender is found and arrested should be able to exercise jurisdiction.⁵⁶ However, this can possibly create a situation where more States compete to exercise jurisdiction over the offender. It is therefore necessary to establish criteria in order to address

⁵⁴ A/60/980: pp. 10-13

⁵⁵ A/62/54: p. 12

⁵⁶ A/60/980: pp. 15-16

this problem.⁵⁷ On top of that, problems of extradition and admissibility of evidence arise when other States prosecute the offender. While the former can be solved by a large network of bilateral agreements or an international treaty on extradition, the latter would require amending national legislation or an overall improvement in investigative capacities.

Finally, it is possible that an international court or tribunal, possibly the International Criminal Court, could deal with crimes of UN personnel, but this appears to be a very doubtful and expensive solution. Jurisdiction of the ICC covers only international crimes of great gravity, and crimes committed by UN personnel are unlikely to fall under this jurisdiction. There are also many States which are not party to the Rome Statute of the ICC, so the court cannot assert its jurisdiction in many cases. Another option might be the establishment of a new judicial institution, but the problems of the uncertain level of States participation and applicable jurisdiction prevail.⁵⁸

Investigation

Another problem encountered in holding a person criminally accountable is the need to be able to gather sufficient evidence for a prosecution under the applicable law. It is necessary that all States willing to conduct investigation cooperate in order to gather sufficient evidence for criminal proceedings. Investigation done by the host State should be given priority due to access to witnesses and evidence. It is therefore essential that all steps are taken to support and facilitate this process, and assistance for strengthening investigative capacities is provided through the UNDP for example. However, there will be cases when other States will be the ones exercising criminal jurisdiction, so it has to be guaranteed that the evidence is gathered in a proper manner because these States usually do not have the right to conduct its own investigation in the area. On top of that, there is always administrative investigation by the UN taking place. Even though its main purpose is to gather evidence for consequent disciplinary measures, it might support future criminal proceedings done by Member States. It is therefore necessary that the evidence is gathered in a manner that would be admissible with national criminal proceedings. Recognition of the administrative investigation could be achieved by changing domestic law of Member States, but this seems almost impossible. Instead, an independent investigative body with sufficient power and mandate from the States could be established to ensure proper gathering of evidence. Such an institution would avoid duplicative investigation within the UN and it would be composed of professionals with access to modern investigative methods such as fingerprinting and DNA testing. To ensure transparency and admissibility, the States should be obliged to provide support at an expert level such as military lawyers or prosecutors, who would advise on the procedural requirements of their State.⁵⁹

⁵⁷ A/62/54: pp. 7, 12

⁵⁸ A/60/980: pp. 19-21

⁵⁹ A/59/710: pp. 14-17; A/60/980: pp. 21-25; A/62/54: pp. 12-13; A/62/329: pp. 12-14; A/C.6/63/SR.14: p. 8

Scope ratione personae

Regarding the personnel who should be held criminally accountable, it is recommended that all UN personnel as well as personnel of all specialized agencies are subject to disciplinary, financial and criminal procedures. All people involved secondarily in any crimes, for instance by destroying evidence or hiding the offender, should be held accountable as well. There is also need to ensure that military members of national contingents never escape justice. This could be achieved only if all categories of personnel working for the UN are subject to uniform and binding standards of conduct. However, each category of personnel is bound by different directives and agreements, and is subject to different disciplinary procedures. Therefore, the rules should be incorporated in status-of-forces agreements, memorandums of understanding, staff regulations, and contracts with individuals. They should provide for disciplinary action to be taken, including summary dismissal, and financial responsibility to be borne, especially in relation to any damage or harm caused. What is more, performance of managers and commanders in dealing with allegations should be reflected in their career, either by reward or punishment. Furthermore, each person should acknowledge in writing that they understand and comply with all these conditions. On top of that, ensuring that the offender is held criminally accountable should be achieved by obliging relevant authorities to provide feedback on results of investigation and prosecution, and actions taken in criminal proceedings. The UN should be responsible for implementing a system for collection of allegations, data gathered from investigation, and responses received from prosecuting States. Even though some countries have reservations against this attitude, it is necessary for proper administration of justice without creating the image of impunity and double standards.⁶⁰

Scope ratione materiae

Concerning the crimes for which UN personnel should be held accountable, it was endorsed many times that they are not limited to crimes against the person. Crimes against property, violent offences, sexual offences, and traffic offences should all be included in the application of rules and regulations governing UN personnel. However, it is impossible to create an exhaustive list of all such crimes, so it is recommended that a generic approach is taken when listing applicable crimes. If the level of severity of punishment is taken as a reference, it could possible solve also the problem of dual criminality requirement.⁶¹

⁶⁰ A/59/710: pp. 13, 17-31; A/60/980: pp. 10, 25; A/62/54: pp. 10-11; A/62/392: pp. 2, 11; A/C.6/62/SR.17: pp. 2-3

⁶¹ A/62/54: pp. 7, 11; A/C.6/62/SR.17: pp. 4-5; A/63/64: p. 9

Prevention and protection

There is a pressing need for all UN personnel to be held criminally accountable for their inappropriate behavior in all UN operations. However, the fact that there is such a need only emphasizes the importance of prevention and protection in order to eliminate instances of criminal behavior. The most important measure to be taken is raising awareness both among UN personnel and the local community. The responsible organs should organize mandatory pre-deployment training on the required standards of conduct and the detailed prohibitions, and such training should be repeated periodically also during the mission. This could be ensured by establishing a new body which would provide expert training teams circulating between individual UN operations, offering additional training and education, and carrying out supervision. In addition, each mission should institute measures appropriate to the specific conditions in that operation. It might be necessary to prescribe curfews and off-limits areas, establish mobile patrols, or confine troops to barracks when off duty, especially in very problematic areas. On top of that, missions should adopt certain measures to improve conditions of service for their personnel. This could include provision of low-cost recreational facilities or supporting contact with family members. Final requirement of prevention is an effective program of outreach to the local community, which would encourage individuals to report any misconduct of UN personnel. It is also important to explain to the population that such complaints would be dealt with confidentiality.⁶²

To prevent the possibility that any misconduct goes unreported, protection of victims and witnesses has to be ensured. Both Member States and the UN should take measures to create safe environment for witnesses and provide effective protection from possible retaliation and intimidation. Establishment of a new program for protection of witnesses should be considered, or cooperation with existing bodies such as the UNHCR should be promoted. Furthermore, the UN being responsible for all its operations has the responsibility to provide basic assistance to the victims of UN personnel. It is important to improve coordination with various relief agencies, humanitarian organizations and other NGOs in order to provide basic medical treatment, psycho-social assistance and support for victims who come forward and complain. Establishing a trust fund providing aid to the victims from voluntary donations as well as money collected from imposing financial sanctions on UN personnel should be examined as one of the possibilities.⁶³

Instrument

Many of the problems facing criminal accountability of UN personnel could be solved by discrete measures, but the issue requires a comprehensive action to be taken. It was proposed many times that creating a new international convention on criminal accountability would be the most effective solution, which would settle the matter even in the long run. An international convention will be able to close any of the existing jurisdictional gaps. It will

⁶² A/64/183: pp. 12-14; A/59/710: pp. 5, 17-20; A/65/185: pp. 18-20; A/66/174: pp. 13-14

⁶³ A/59/710: pp. 20-21; A/60/980: p. 24; A/63/54: pp. 7-10, 16; A/C.6/63/WG.1/WP.1: p. 2; A/65/185: p. 17; A/66/174: p. 13

make clear the circumstances of establishing extraterritorial jurisdiction, and it would ensure that establishment of jurisdiction is a binding obligation of the States. Such a treaty will also provide certainty and consistency in relation to the scope of personnel who are subject to exercise of jurisdiction (*ratione personae*) and crimes which are subject to such jurisdiction (*ratione materiae*). Furthermore, a convention could facilitate international cooperation particularly in relation to investigation, admissibility of evidence, extradition, mutual legal assistance, and transfer of criminal proceedings.⁶⁴

The General Assembly has in its hands all power to finally address the issue of criminal accountability. It is the responsibility of the GA to trigger negotiations on the new convention and cover all remaining problems. In particular, the GA has to pass amendments of present rules of conduct and adopt them in all relevant directives and treaties. It is also the role of the GA to establish effective reporting mechanisms, enforce training of personnel, ensure protection of witnesses and assistance to victims, and promote development and capacity-building.

⁶⁴ A/60/980: pp. 17-18; A/62/329: pp. 9-10, 17; A/62/54: pp. 3-4, 6-7, 13; A/C.6/63/WG.1/WP.1: pp. 1-2

Closing Remarks

The issue of criminal accountability of UN officials and experts on mission is a serious challenge for the General Assembly, and it requires attention of the whole world. It does not matter how influential is your country because everyone is important and everyone could make a difference towards the rule of law in the international community. The problem of such gravity requires absolute cooperation of every nation because the effectiveness of measures to be taken depends on the level of participation from Member States. An international convention is binding only on the States which are a party to it, so it is essential that a consensus is reached across the whole General Assembly if the problem of criminal accountability is to be solved once and for all. This is not a time to pursue private goals and interests of own countries. Delegations should not seek ways that they could disagree but ways that they can agree on a proposed solution. This is the time to put aside all differences and cooperate. This is the time to act not as individuals, but act once again as the United Nations!

Suggestions for Further Reading

- <http://www.un.org/en/ga/> Basic information about United Nations General Assembly
- <http://www.un.org/depts/oios/> United Nations Office of Internal Oversight Services
- <http://www.unrol.org/article.aspx?n=ola> United Nations Office of Legal Affairs
- <http://www.un.org/en/peacekeeping/about/dpko/> United Nations Department of Peacekeeping Operations
- <http://unbisnet.un.org/> United Nations Bibliographic Information System – especially useful tool for searching of any official documents or records of the UN.
- <http://www.un.org/depts/dhl/unms/> UN Member States: On the Record – very helpful for searching of any activities of your country.
- <http://www.un.org/law/criminalaccountability/> This webpage contains basic description of the issue of criminal accountability as well as links to all relevant documents of the UN covering the topic. Reports of the Secretary-General A/66/174; A/66/174/Add.1; A/65/185; A/64/183; A/64/183/Add.1; A/63/260; A/63/260/Add.1 contain a good overview of legislations of many Member States.
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/305/86/PDF/N0830586.pdf?OpenElement> A/63/54 Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission. It contains reactions of some States to various proposals.
- http://www.undp.org.vn/digitalAssets/32/32389_UN_Convention_on_Privileges_and_Immunities.pdf Convention on the Privileges and Immunities of the United Nations
- <http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Regulations%20JY9.pdf> ST/SGB/2009/6 United Nations Staff Regulations
- <http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Rules%20JY9.pdf> ST/SGB/2009/7 United Nations Staff Rules
- <http://www.undemocracy.com/A-45-594.pdf> A/45/594 Model status-of-forces agreement for peacekeeping operations
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/206/83/PDF/N0620683.pdf?OpenElement> A/C.5/60/26 (Chapter 9) Model memorandum of understanding

- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/380/34/PDF/N0738034.pdf?OpenElement> A/61/19 (Part III) Proposed amendments to the Model memorandum of understanding
- http://www.un.org/en/peacekeeping/documents/ten_in.pdf Ten Rules: Code of Personal Conduct for Blue Helmets
- http://www.un.org/en/peacekeeping/documents/un_in.pdf We Are United Nations Peacekeepers
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/246/38/IMG/N9924638.pdf?OpenElement> ST/AI/1997/7 Administrative instructions concerning consultants and individual contractors
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/550/40/PDF/N0355040.pdf?OpenElement> ST/SGB/2003/13 Secretary-General's Bulletin containing special measures for protection from sexual exploitation and sexual abuse
- http://www.un.org/depts/oios/wb_policy.pdf ST/SGB/2005/21 Secretary-General's Bulletin on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/445/36/PDF/N0844536.pdf?OpenElement> A/63/202 Report of the Secretary-General on practice of the Secretary-General in disciplinary matters and possible criminal behavior