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**ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY**

**Working paper on the accountability of international personnel taking part in  
peace support operations submitted by Françoise Hampson\* \*\***

**Summary**

This working paper defines the scope of the proposed study. It identifies the missions in question and the personnel who may be involved. It examines who is potentially subject to what jurisdiction and considers the impact of immunity. The paper then examines the operation of the system in practice. It makes general recommendations for changes in the system. The author suggests that the Sub-Commission may wish to request the Commission to appoint a Special Rapporteur to conduct a full study on this subject.

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\* The endnotes are circulated as received, in the original language only.

\*\* This document was submitted late because of the difficulty of conducting research in this area.

## CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction .....	1 - 3	4
I. SCOPE OF THE STUDY .....	4 - 12	4
A. The operations .....	4 - 6	4
B. The personnel .....	7	4
C. Accountability .....	8	5
D. Misconduct .....	9 - 12	5
II. METHODOLOGY OF THE STUDY .....	13 - 14	6
III. CATEGORIES OF PERSONNEL AND IMMUNITY .....	15 - 25	6
A. Members of national contingents .....	16	7
B. Military observers .....	17	8
C. CIVPOL .....	18	8
D. International civil servants .....	19 - 22	8
E. Other foreign staff .....	23 - 24	9
F. Local staff .....	25	9
IV. TYPES OF IMMUNITY .....	26 - 49	9
A. Host State immunity .....	27 - 38	9
B. Sending States and immunity .....	39 - 45	11
C. Immunity and third States .....	46 - 47	12
D. Jurisdiction of international criminal courts .....	48 - 49	12
V. CIVIL LIABILITY OF THE UNITED NATIONS .....	50 - 53	12

**CONTENTS (*continued*)**

	<i>Paragraphs</i>	<i>Page</i>
VI. HOW ALLEGATIONS OF MISCONDUCT ARE HANDLED .	54 - 84	13
A. Alleged criminal conduct .....	55 - 68	13
B. Disciplinary codes and proceedings .....	69 - 78	17
C. Ombudspersons .....	79	18
D. Ad hoc mechanisms .....	80 - 81	19
E. Office of Internal Oversight Services of the Secretariat ...	82 - 84	19
VII. GENERAL CONCLUSIONS WITH REGARD TO THE OPERATION OF THE VARIOUS SYSTEMS IN PRACTICE .	85 - 93	19
VIII. RECOMMENDATIONS .....	94 - 95	21

## **Introduction**

1. In its decision 2002/104, the Sub-Commission on the Promotion and Protection of Human Rights requested Françoise Hampson to submit a working paper on the scope of the activities and accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations (PSOs). In subsequent discussions during the fifty-fifth session, the scope of PSOs for the purposes of the paper was clarified.
2. It has not been possible to present the working paper before now owing to the difficulty of conducting research in this area (see further below).<sup>1</sup>
3. Nothing in this paper assumes the lawfulness of the operations discussed. Their existence, lawful or otherwise, is taken as a given.

## **I. SCOPE OF THE STUDY**

### **A. The operations**

4. The operations that are the subject of this paper include all operations created or endorsed by the United Nations, other than enforcement actions or Security Council-endorsed exercises of the collective right to self-defence.<sup>2</sup> Operations created by the United Nations include both those with a mandate under Chapter VI or Chapter VII of the Charter of the United Nations. They include operations to be carried out by United Nations forces ("blue berets") and those carried out by military forces not under United Nations command. They include traditional peacekeeping and so-called peace enforcement operations. They include operations which do not include a military component. Operations endorsed by the United Nations include operations authorized, lawfully or otherwise, by some other organization and subsequently endorsed by the United Nations, such as the Economic Community Ceasefire Monitoring Group (ECOMOG) sent to Liberia by the Economic Community of West African States (ECOWAS) and the International Security Force (KFOR) in Kosovo, provided that the operation endorsed by the United Nations was of a PSO type.<sup>3</sup>
5. This definition of the operations being examined does not remove all difficulties. For example, it is possible for two different forces to be engaged in operations within a State on different bases. In Afghanistan, for example, some forces are present, with the consent of the host Government, as fighting forces whereas others are present as part of the International Security Assistance Force (ISAF), a PSO. Another example would be the British contingent in Sierra Leone, which was present with the consent of the Government but which was not part of the United Nations-authorized force and was subject to British command and control.
6. Whilst this paper does not address international armed conflicts, many of the issues raised may also be of relevance in such situations.<sup>4</sup>

### **B. The personnel**

7. The range of personnel included in the paper is wider than that suggested by the title. The personnel include members of armed forces; "civilians accompanying the armed forces";<sup>5</sup> foreign civilians working for companies under contract to a military contingent; military

observers; civilian police (CIVPOL); international civil servants, including United Nations Headquarters employees, United Nations employees in the field and United Nations volunteers (UNVs); the staff of intergovernmental organizations, including specialized agencies, whether headquarters employees or employees in the field; the foreign staff of international non-governmental organizations (NGOs) and civilians (whether national or foreign) performing services for any of these categories of personnel.

### **C. Accountability**

8. The principal focus of this paper is not the possible vicarious liability of the United Nations as employer, or the general civil liability of the international organizations.<sup>6</sup> This will, however, be addressed in passing. The focus is rather on examining who has the responsibility to address criminal conduct or breaches of applicable disciplinary codes on the part of the employees described above.

### **D. Misconduct**

9. Allegations of misconduct can be divided into three categories: acts that are within the ostensible mandate of the mission, individual criminal acts, and acts that are disciplinary offences. Individual criminal acts are either (i) acts that are criminalized in the majority of States (e.g. rape; murder); or (ii) acts that amount to international crimes. In some circumstances, that may give rise to a problem where behaviour is in many States regarded as criminal but is not so regarded in the host State and is not an international crime (e.g. spouse rape).

10. In the case of acts within the ostensible mandate of the mission, there are two issues: (i) it may be clear that the mandate gives the authority, in certain circumstances, to take the action in question. The issue will be whether those circumstances existed at the relevant time (e.g. killing resulting from the use of potentially lethal force during the course of a confrontation with members of a PSO mission); (ii) actions where there may be doubt whether the mission has the mandate to take that action at all and, if it can, where there are doubts with regard to the manner in which it is done (e.g. the authority to detain).<sup>7</sup> Where acts are within the ostensible mandate of the mission, questions may arise regarding the liability under human rights law of the sending State in relation to military contingents. In relation to other personnel, it is not clear who might have responsibility under human rights law (see further below).

11. Where the individual engages in conduct in breach of a disciplinary or contractual code binding on them, they may be liable to punishment of a disciplinary or contractual nature. Whilst such conduct can include behaviour not of a criminal nature, it may overlap with criminal conduct (e.g. harassment). Where individuals engage in conduct of a criminal character, they ought to be subject to criminal proceedings. An individual may, however, be protected by functional immunity if the act in question was within the ostensible authority of the mandate (see further below). It is treated as self-evident that, where misconduct is criminal in character, it is not sufficient for the United Nations to offer compensation. It is also necessary to attempt to identify the suspected perpetrator(s) and then to bring criminal proceedings against them.

12. In virtually all PSOs there have been allegations of misconduct, but to varying degrees. This paper seeks:

- To determine whether it is possible accurately to evaluate the scale and seriousness of the problem;
- To identify what is supposed to happen;
- To determine whether what is supposed to happen actually happens in practice.

## **II. METHODOLOGY OF THE STUDY**

13. In order to evaluate the scale and seriousness of the problem and to determine what actually happens in practice, research was conducted into allegations of misconduct in PSOs since 1990. It is clear what is supposed to happen in theory. The difficulty lies in establishing what actually occurs on the ground. Information was gathered from official reports by the United Nations, from reports by sending Governments and from NGO reports and the media.<sup>8</sup> The trigger was an allegation of a violation of the rules. In each case, there was an attempt to identify whether administrative or criminal proceedings had ensued and whether there was any information available about the ultimate outcome. General accusations could not usually be followed up. The database that was created was therefore confined to specific allegations, even if the suspected perpetrator was not identified.<sup>9</sup>

14. There is no reason to believe that each United Nations mission has been evenly reported by NGOs and the media. Furthermore, since a significant number of reports come from sending States, alleged wrongdoings which result in action are more likely to be reported than an allegation where no action was taken. Since the responsibility of the sending State is most obviously engaged in the case of military personnel, it is likely that allegations against such personnel are better reported by sending States. There are also more reports about some kinds of individual criminal acts than others, such as offences of a sexual nature.<sup>10</sup> This makes it impossible to draw conclusions with regard to the scale and seriousness of misconduct. The evidence may, nevertheless, reveal possible patterns, such as the relative number of allegations made against members of armed forces or CIVPOL. It should, however, be remembered that there are significantly different numbers of different types of personnel in different missions.

## **III. CATEGORIES OF PERSONNEL AND IMMUNITY**

15. It is essential to analyse the different categories of personnel because that is likely to determine whether they are subject to a disciplinary or contractual code and whether they may benefit from some form of immunity. It will also affect the basis of any immunity which they may enjoy. Different categories of personnel have different chains of command.

**Table 1**  
**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

#### **A. Members of national contingents**

16. The first, and often the biggest component of PSOs are the members of national military contingents. They are employed not as individuals but as part of contingents. This means that the chain of command remains within the contingent. They are subject to the exclusive criminal and disciplinary jurisdiction of the sending State. They are protected by absolute immunity from host State jurisdiction, normally by a Status of Forces Agreement (SOFA; either bilateral SOFA or application of Model SOFA).<sup>11</sup> Even without any SOFA, they are protected by sovereign immunity.<sup>12</sup> Which categories of “civilians accompanying armed forces” are included (in the exclusive jurisdiction of the sending State) will depend on the law of the sending State. This makes the follow-up even more difficult, especially if there is a lack of will on the part of the sending State to take action. Where they are United Nations forces (“blue berets”), they should come under the ultimate command of the force commander. In international law, there is no legal obligation to obey the orders of the force commander. It is absolutely clear that in practice the majority of contingents reserve the right to consult their own capital, particularly in difficult operations, such as those in Somalia and Rwanda.<sup>13</sup>

## **B. Military observers**

17. Military observers (MOs) are recruited as individuals, and they have to be full-time serving members of armed forces.<sup>14</sup> They are recruited through the Government of the sending State. Under the sending State's legislation, its authorities should have criminal and disciplinary jurisdiction over them. Their status is that of experts on mission, based on the SOFA. This means that they enjoy immunity from the host State jurisdiction with regard to official acts.<sup>15</sup> They come under the command of the United Nations while on mission.<sup>16</sup>

## **C. CIVPOL**

18. CIVPOL officers are recruited as individuals, and they have to be serving or retired members of a national police force.<sup>17</sup> They are recruited through their sending State Governments. Whether they are subject to the disciplinary jurisdiction of the sending State may depend on whether they are still serving officers and on whether the police/gendarmerie code of discipline applies outside national territory.<sup>18</sup> Their status is that of experts on mission, based on the SOFA, and thus they are also protected by functional immunity from the host State jurisdiction.<sup>19</sup> They should come under the command of the CIVPOL commander, who will in turn be under the command of the Special Representative of the Secretary-General.

## **D. International civil servants**

19. United Nations international civil servants are of different categories. Very senior officials enjoy absolute immunity.<sup>20</sup> It is not clear whether this protects them from the exercise of criminal jurisdiction by third States, including their home State.

20. United Nations civil servants who are holders of the United Nations laissez-passer are "officials", and are protected by functional immunity.<sup>21</sup> It is not clear if the home State can bring proceedings against them, as their functional immunity appears to be universal, including from their home State jurisdiction.<sup>22</sup>

21. United Nations civilian staff members without the status of "officials" are protected by functional immunity.<sup>23</sup> They are regarded as experts on mission mainly based on a SOFA, and such functional immunity is only from the host State jurisdiction.<sup>24</sup> The tendency in recent missions is to treat more civilian staff as "officials" for this purpose. For example, UNVs are treated as "officials" in recent SOFAs.<sup>25</sup> All United Nations international civil servants are normally either directly or indirectly subject to the United Nations Staff Rules.

22. In PSOs, other intergovernmental organizations are normally present. Some of the foreign employees of IGOs are "officials" of the United Nations, if the organization they work for is within the "United Nations family". The status and immunities of other foreign members of IGOs depends on the memorandum of understanding (MOU) that is normally agreed between the organization and the host State. They are normally subject to a separate agency-specific code of conduct. Such codes and disciplinary proceedings are to some extent coordinated (the "common system").<sup>26</sup>



### **E. Other foreign staff**

23. Foreign staff working for NGOs normally enjoy no special status. This means that they are subject to the host State jurisdiction. Whether or not the home State law applies to them depends on the home State law with regard to criminal jurisdiction but, as a matter of practice, it is difficult for the home State to exercise jurisdiction over them. They may be subject to the disciplinary code of the NGO they work for, or in some cases it may be written in their contract that they are also subject to other codes. In the case of the NGO they work for being an implementing partner of one of the United Nations components or agencies, there may be some agreement to subject them to United Nations codes.

24. There are also foreigners employed by any of the people already mentioned, usually contractors, such as lorry drivers and security guards. They are usually employed under a contract between their employer and the other agency. In some cases, they may be discharging functions previously carried out by armed forces.<sup>27</sup> The disciplinary code to which they are subject depends on their contract. Whether or not the home State law applies to them depends on the home State legislation, but as a matter of practice, it is difficult for the home State to exercise jurisdiction over them.

### **F. Local staff**

25. All the above categories normally have national staff working for them (i.e. nationals of the host State). Those working for the United Nations or IGOs enjoy limited functional immunity, based on the SOFA, apart from hourly paid staff. Except for the above, they are subject to the host State jurisdiction.<sup>28</sup> They are normally subject to the disciplinary codes of the organization they work for.

## **IV. TYPES OF IMMUNITY**

26. Some measure of immunity serves an important purpose. It is designed to enable a person or organization to discharge its responsibilities independently. It is not supposed to act as a vehicle for impunity.

### **A. Host State immunity**

27. Different categories of personnel have different types of immunity from the jurisdiction of the host State under the General Convention, bilateral SOFA, Model SOFA or MOU.

#### **1. Full immunity**

28. Very senior United Nations international civil servants are entitled to full diplomatic immunity.<sup>29</sup> Members of a national military contingent are protected by absolute immunity from the host State jurisdiction, usually as provided in a SOFA.<sup>30</sup>

#### **2. Functional immunity**

29. Functional immunity or provisional immunity is an immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity or in the course of the performance of their mission in the case of experts on mission.<sup>31</sup>

30. Military observers, CIVPOL, the majority of United Nations international civil servants and some local personnel working for one of the above are protected by functional immunity, either by the General Convention or by the SOFA. Foreign personnel working for IGOs are protected by functional immunity, depending on the agreements between the relevant organization and the host State. Other foreign persons are normally not covered by immunity.

31. There remain uncertainties in the area of functional immunity. The meaning to be given to “during the course of their duty” is determined by the Special Representative of the Secretary-General. This has caused some confusion in the field. For example, in a case of rape involving the United Nations Transitional Authority in East Timor (UNTAET) the alleged perpetrator’s immunity was declared inapplicable due to the alleged act being outside of official functions.<sup>32</sup> On the other hand, in a case of murder involving the United Nations Mission in Kosovo (UNMIK), the suspect’s immunity was waived.<sup>33</sup> In the latter case, one would have expected the act to be outside the scope of the immunity.

32. Where immunity is not applicable, foreigners working under contract for one of the components above or foreign staff working for international NGOs are subject to the host State jurisdiction.

33. In many situations in which PSOs are deployed, there is no national authority with which to negotiate a SOFA (e.g. Somalia) or no agreement. There have been PSOs where the international component has gone in to the territory before negotiating the SOFA with the host State.<sup>34</sup>

34. Even where the exercise of host State jurisdiction is a theoretical possibility, it should be remembered that, in many of the types of situations in which a PSO is deployed, there is no functioning legal system. Impunity in practice is not solely attributable to the existence and exercise of immunity; it may be the product of the lack of a local legal system.

### **3. Waiver of immunity**

35. The absolute immunity of members of a national contingent is not normally subject to waiver.<sup>35</sup> Apart from that, other immunities can, in theory, be waived.

36. Immunities granted for military observers, CIVPOL, United Nations international civil servants and local personnel can be waived by the Special Representative of the Secretary-General (in the name of the Secretary-General), where he/she considers that immunity would impede the course of justice, and where it can be waived without prejudice to the interests of the United Nations.<sup>36</sup> In the case of his Special Representatives, the Secretary-General has a right and duty to waive.<sup>37</sup>

37. In case of personnel of IGOs, waiver of immunity is normally determined at the headquarters.

38. As previously noted, the function of immunity is not to give impunity. Particular difficulties arise where the United Nations is not simply present in a territory but is, in effect, acting as its Government.<sup>38</sup> Governments do not have immunity. On the contrary, human rights law requires that Governments should be capable of being called to account. Any proposals

designed to avoid the risk of immunity giving rise to impunity should distinguish between situations where the United Nations is, in effect, the Government and those in which it is present alongside some form of national Government.

## **B. Sending States and immunity**

39. Members of national contingents are subject to the exclusive criminal and disciplinary jurisdiction of the sending State. In some States, criminal proceedings against members of armed forces are conducted by court martial. In others, all nationals, including members of the armed forces, are subject to normal (i.e. civil) criminal jurisdiction, even for acts committed abroad. Where that is not the case, special legislation may provide for the possibility of normal criminal proceedings for acts committed abroad specifically in the case of members of armed forces.

40. For military observers and CIVPOL, there is no legal basis for immunity from the sending State's criminal jurisdiction. Military observers are serving officers of a national defence force and should be subject to the criminal and disciplinary jurisdiction of the sending State. For CIVPOL also, there is the possibility of prosecution by the sending State but that depends on whether the State has laws in place which permit the prosecution of all nationals for acts committed abroad or which permit the prosecution of police officers for acts committed abroad.<sup>39</sup> Generally, civil law countries are able to exercise criminal jurisdiction over nationals for acts committed abroad, while common law countries can only do so where there is express legislative provision to that effect. Military observers and CIVPOL, as experts on mission, are not entitled to immunity from their sending State criminal jurisdiction.<sup>40</sup> Wherever functional immunity is based on a SOFA, the sending State immunity question does not arise.<sup>41</sup>

41. There being no legal barrier to the exercise of criminal jurisdiction by the sending State does not, however, mean that such proceedings are likely. There may be a need for express legal provision and, above all, for the necessary practical arrangements to be put in place. There are also likely to be practical difficulties in having access to the victim, witnesses and other evidence.

42. United Nations international civil servants, who are entitled to functional immunity under article V of the General Convention, seem to be protected by the immunity against the exercise of their home State jurisdiction as well.<sup>42</sup> By contrast, some categories of United Nations civilian staff, such as UNVs or consultants, do not enjoy functional immunity in their home State, as their immunity is provided on the basis of the SOFA.<sup>43</sup>

43. Some foreign personnel of IGOs appear to have functional immunity from the courts of their national jurisdiction. For those appointed for a short term, immunity derives from an MOU, and immunity in the State of nationality will depend on its provisions.

44. Other foreigners, such as foreign staff of NGOs and foreign contractors, do not enjoy immunity. Depending on national legislation on extraterritorial jurisdiction and practical barriers, there is the possibility of their being prosecuted in their home State.

45. The right and duty to waive immunity in relation to a staff member's home State rests with the Secretary-General.

### **C. Immunity and third States**

46. In the exceptional case of the alleged misconduct taking the form of an international crime, any State is permitted to exercise jurisdiction in relation to a person located within that State's territory, based on universal jurisdiction, provided that the suspect is not protected by immunity. There is no known example of a third State claiming jurisdiction over a member of a PSO.

47. In addition to the usual questions regarding the applicability of immunity outside the host State, there may be questions of diplomatic immunity.<sup>44</sup> The same practical problems may be expected to arise as in the case of prosecution by the sending State.

### **D. Jurisdiction of international criminal courts**

48. Where an international or hybrid court is created under international law to address violations in a particular region or conflict, the scope of its jurisdiction will be determined by the statute of the court. Such courts may have jurisdiction over persons who would otherwise be protected by immunity.<sup>45</sup> The International Criminal Tribunal for the Former Yugoslavia, for example, examined the possibility of war crimes proceedings arising out of the North Atlantic Treaty Organization (NATO) operations in Kosovo.<sup>46</sup> The position is the same in relation to the International Criminal Court (ICC). It would appear that national courts are required to give effect to the personal immunity of senior officials.<sup>47</sup>

49. Practical problems are likely to arise in relation to the collection of evidence and access to the victims and witnesses. Political opposition to the ICC and limited resources may also act as deterrents.

## **V. CIVIL LIABILITY OF THE UNITED NATIONS**

50. As indicated at the outset, this will only be touched on briefly. Whether or not compensation is provided, there is still a need to identify and to bring criminal proceedings against suspected perpetrators of misconduct that is criminal in character. The issue of the civil liability of the United Nations as an employer may arise when civil wrongs are committed by its staff. The United Nations, as such, is immune from legal proceedings in local courts.<sup>48</sup> The United Nations generally provides compensation for civil wrongs through a Civil Claims Unit.<sup>49</sup> One case is unusual in that a complaint alleging wrongful arrest and unlawful detention was brought against the Special Representative of the Secretary-General personally, and not against the United Nations. A Japanese national made the claim against the Special Representative of the Secretary-General, the Minister of Justice of East Timor, the Prosecutor-General and a judge. The District Court in East Timor failed to rule that the matter was covered by diplomatic immunity, at least in the case of the Special Representative of the Secretary-General. The District Court awarded compensation and the matter was then appealed. The Court of Appeal overturned the decision by the District Court, based on an argument that such a complaint should be made against the United Nations instead of individuals working for the United Nations. The complainant was awarded compensation outside the court.<sup>50</sup>

51. In addition to claims against the United Nations, national contingents may establish mechanisms to deal with civil claims. For example, many of the national contingents serving in Somalia had some form of civil complaint system open to the local population.<sup>51</sup> Where such a system is put in place, the United Nations needs to know of the existence of such complaints, what information has been gathered regarding the complaint and what the contingent has done regarding the complaint, and should ensure that complainants are kept informed.

52. There may be the possibility of civil claims brought against the sending State in its own courts.<sup>52</sup>

53. The operation of civil claims seems to be less than transparent.<sup>53</sup> Where a PSO has a Civil Claims Unit, transparency depends on whether the procedures are translated into the local language and whether the public knows about it.

## **VI. HOW ALLEGATIONS OF MISCONDUCT ARE HANDLED**

54. It is necessary to emphasize that there is no way of knowing what proportion of actual misconduct results in some form of official complaint and what proportion of complaints appear in official documents. In the types of situation in which a PSO is deployed, there may be difficulties of communication, making it difficult to ensure that the population knows how to complain, difficulties in travelling, making it difficult to reach the place where complaints should be lodged, and, above all, a lack of confidence in any form of complaints procedure. This may be because the population never had the experience of effective accountability for governmental acts or their experience of the PSO may lead them to assume that effective accountability will not be delivered in practice, whatever the rhetoric. In addition, there may be a cultural reluctance to report certain types of crimes, particularly those of a sexual nature.<sup>54</sup> The only way of obtaining a more accurate picture would be if all missions included human rights monitors whose responsibilities included the seeking out of information of alleged misconduct by any PSO personnel. It should also be remembered that the victim of misconduct may not be a member of the local population but another member of the PSO.

### **A. Alleged criminal conduct**

#### **1. Internal proceedings**

55. The following account describes what is supposed to happen. When there are allegations of criminal acts by members of military contingents, military observers, CIVPOL officers or United Nations civilian personnel, such allegations are normally reported to one of the components of the mission. All the personnel of the mission are supposed to report allegations of serious misconduct by members of national contingents, military observers and CIVPOL to the Special Representative of the Secretary-General, who should conduct a preliminary investigation.<sup>55</sup> It is assumed that the same thing should occur in the case of allegations against civilian personnel, although there is no express provision in the Staff Rules. Based on the result of the investigation, the Special Representative of the Secretary-General may call a board of inquiry (BOI), which is comprised of at least three senior staff. Where the alleged perpetrator is a member of a national contingent, the BOI normally invites a representative from the contingent to sit on the board. The same applies for allegations against military observers and CIVPOL. The BOI will recommend appropriate action against the perpetrator if the allegation is

substantiated. The Special Representative of the Secretary-General will make recommendations on subsequent measures based on the BOI recommendations in the case of members of national contingents, military observers and CIVPOL.<sup>56</sup> Some uncertainty remains as to the power of the Special Representative of the Secretary-General at this stage (e.g. can he/she ignore a BOI recommendation? Can he/she waive immunity before BOI proceedings?<sup>57</sup> What happens if the allegation is against the Special Representative of the Secretary-General?). For members of armed forces, the Special Representative of the Secretary-General can make recommendations, but it is up to the national contingent to subject the alleged perpetrator to criminal/disciplinary proceedings.<sup>58</sup> For military observers, CIVPOL and United Nations civilian personnel, the United Nations can take disciplinary measures, but it lacks criminal jurisdiction over anyone. There are two main possibilities for criminal proceedings: proceedings in the host State and in the home State.

56. Where the victim is a member of staff of the United Nations, he/she may invoke the internal grievance procedure. That process is not the subject of the current study, but it should be noted that it has been said to give rise to a variety of difficulties. They include allegedly defective processes for investigating the facts, notably concerns over the independence of those responsible for the investigation, and a lack of oral hearings at which each party may call witnesses and cross-examine witnesses and of an appeal mechanism which accepts the facts as found by the other body and which does not hold oral hearings again. A concern is also expressed at the significant number of cases in which a person who has invoked the grievance procedure finds that his/her contract has not been renewed. This issue raises squarely the extent to which the United Nations itself should be bound by the requirements of due process in human rights law. If the Sub-Commission were to recommend that a study be conducted into accountability of international personnel, it would need to determine whether it should include the functioning of the internal grievance procedures within the United Nations and other international organizations, including the specialized agencies.

57. Other IGOs normally have their own system, which is similar to the one for PSO personnel. For “United Nations family” agencies (e.g. the Office of the United Nations High Commissioner for Refugees and the United Nations Children’s Fund, the “common system” has been developed, and proceedings are centralized in New York.<sup>59</sup> Other categories of personnel are normally treated in the same way as other foreigners present in the State. They may be subject to some form of disciplinary proceedings by virtue of a term in their contract.

## **2. External proceedings - host State**

58. When allegedly criminal acts may be within the official function of the alleged perpetrator and where the host State is contemplating bringing proceedings, issues of functional immunity may arise (see above). It may thus be necessary for the Special Representative of the Secretary-General either to declare immunity not to be applicable, or to waive the immunity. The borderline between the two (declaration of non-applicability of immunity and waiver of immunity) is not clear, and the decision is left to individual Special Representatives of the Secretary-General. In a case involving an alleged rape by a Jordanian member of CIVPOL, the Special Representative of the Secretary-General initially waived immunity and later said that immunity was not applicable.<sup>60</sup>

59. Even in cases where a host State is in a position to request permission from the Special Representative of the Secretary-General to exercise criminal jurisdiction, it may choose not to do so for a variety of reasons. The host Government may see it as returning a favour to the “saviours”.<sup>61</sup> It may feel incapable of asking for jurisdiction over nationals of powerful countries.<sup>62</sup> It may be misled by the SOFA and think that that confers absolute immunity, or it may lack the capacity to deal with cases involving difficult issues (immunity and waiver) before the already overstretched courts.

60. The problem is further exacerbated by the frequent rotation of personnel. Even if action against an alleged perpetrator starts, that person’s contract may be over before the action is completed.<sup>63</sup> For example, many of the CIVPOL officers serving for PSOs have one-year contracts, but some, such as Australian CIVPOL officers in UNTAET, had contracts for three months only.<sup>64</sup> The host State may become even more reluctant to request criminal proceedings against a CIVPOL officer if its perception of the United Nations accountability mechanisms is that nothing ever happens to personnel found guilty of criminal misconduct. There are provisions in the Directives issued by the Department of Peacekeeping Operations that prohibit alleged perpetrators from leaving the host State’s jurisdiction before all the proceedings are complete. The number of cases where alleged perpetrators leave the jurisdiction in mysterious circumstances before or during the proceedings against them is striking. The author has a report of at least five cases where suspects fled during the proceedings against them.<sup>65</sup> In one case, the alleged perpetrator was detained by the host authorities and had surrendered his passport at the time of his flight.<sup>66</sup>

61. The problems caused by rotation affect not only suspected perpetrators. Senior officials complain that staff involved in investigations, supervisors, members of BOIs and witnesses rotate during the proceedings, which makes the process slow and difficult.

62. There may be additional issues in the host State exercising criminal jurisdiction. There may be no functioning court system in the host State. The host State jurisdiction may not be compatible with human rights law, either because the criminal code itself is not compatible with it or because the way in which the criminal code is enforced is not compatible with it. Where the United Nations is acting in effect as the Government, there may previously have been special difficulties in calling State agents to account in the host State. In such cases, waiving the immunity of the alleged perpetrator either may not be an acceptable option for the United Nations, or doing so may not end in prosecution.

### **3. External proceedings - home State**

63. For members of national contingents, these are the only criminal proceedings they may face for acts that do not constitute international crimes. For military observers, CIVPOL and all United Nations civilian personnel who are under the disciplinary control of the United Nations, the maximum action the United Nations can directly take is repatriation. After repatriation, criminal proceedings may be brought in the home State (see earlier for possible problems with the rules on jurisdiction of the home State and practical difficulties in bringing proceedings).

64. There are four possible difficulties in securing the effective exercise of the criminal jurisdiction of the sending State: allegations may not be investigated sufficiently thoroughly; whether or not the investigation is effective, proceedings may not always be brought where they

should be and the charge may not adequately reflect the seriousness of what is alleged to have taken place; even where a person is convicted, the sentence or penalty may not adequately reflect the seriousness of what has been proved to have occurred. For members of national contingents, military observers and CIVPOL, the BOI files may be made available to the sending State for following up.<sup>67</sup> The sending State may be in breach of human rights norms in relation to these three issues.

65. Fourth, the follow-up mechanism on the part of the Special Representative of the Secretary-General is not sufficiently institutionalized and depends too much on the individual discharging the role. The United Nations is supposed to make inquiries as to what actions the sending State has taken for repatriated members of national contingents, military observers and CIVPOL.<sup>68</sup> In practice, there is evidence of a lack of follow-up. Apparently at least 90 per cent of repatriated CIVPOL officers' cases are not followed up by the United Nations.<sup>69</sup>

66. Part of the problem is that there is no obligation on the sending State to supply information with regard to disciplinary/criminal proceedings against repatriated officers. Another possible difficulty is the administrative burden that might be imposed by effective follow-up. It should be recalled, however, that any apparent lack of accountability is not only bad in itself but it seriously weakens the authority and credibility of the mission as a whole and undermines the possibility of securing accountability in the future within the host State. It gives the appearance that the United Nations is requiring States to accept practices to which it itself is not willing to conform. For these reasons, it needs to be made mandatory for any allegation, even one made direct to the national contingent itself, to be referred to the Special Representative of the Secretary-General and he/she needs to be required to follow up any allegation with regard to a member of a national contingent. In other words, he/she should be required to obtain information regarding the result of the investigation, whether charges have been brought and, if so, for what offence and the result of any such proceedings. To that end, it would be useful if national contingents were required to provide that information to the Special Representative of the Secretary-General.

67. For United Nations civil servants and staff of IGOs there are no "sending States" and this makes it even more difficult to follow up on the cases where the alleged perpetrators are dismissed. There are also practical barriers, such as evidence collection and access to witnesses/victims. Considering that one of the principal rationales for prosecution is to deter the commission of crime, the impact of any proceedings in the sending State may be less than if the suspect was prosecuted in the host State. That effect could be reduced, if it was required that the Special Representative of the Secretary-General be informed of such proceedings. He/she would then be able to publicize them in the host State. The sending State may not see very much interest in prosecuting its national after the suspect returns home, as the victim is far away from the place of prosecution.

68. Where a BOI finds that an accused person is responsible for criminal conduct, the United Nations ought to be able to ensure that that person is never again employed in a PSO, whatever the recommendations of the BOI.



## **B. Disciplinary codes and proceedings**

69. Acts of misconduct may include acts that are against disciplinary codes but which are not criminal in character. There are different disciplinary codes for different categories of personnel. Most of the organizations, from the United Nations, IGOs and NGOs, to companies working under contract, have disciplinary codes.

70. United Nations staff members are subject to the Staff Rules. Other United Nations civilian personnel, with fixed or short-term contracts, are normally also indirectly subject to the United Nations Staff Rules. Either their contracts provide such provisions or the Code of Discipline to which they are subject refers back to the Staff Rules. Staff of NGOs contracted as implementing partners for United Nations agencies may be subject to the disciplinary code of the United Nations agency, depending on their contract. Foreigners working for companies may be subject to some form of disciplinary code by virtue of the terms of their contract. Other foreigners may not be subject to any form of disciplinary proceedings.

71. For the United Nations, BOIs are the main disciplinary proceedings to which PSO mission personnel are subject. All allegations, against all the PSO personnel, of serious misconduct must be dealt with by BOIs.<sup>70</sup> BOI procedures are the same as those for criminal acts, as the BOI includes criminal acts in the “serious misconduct” category.<sup>71</sup> If claims against members of national contingents are substantiated, the only and maximum disciplinary measure BOIs can recommend is repatriation.<sup>72</sup> For military observers and CIVPOL, there are a range of actions that BOIs can recommend, including recovery of Mission Subsistence Allowance, redeployment and repatriation.<sup>73</sup> In relation to United Nations staff members, the penalties available are those set out in the Staff Rules.<sup>74</sup> Other United Nations civilian personnel are normally indirectly subject to the Staff Rules, and thus the penalties are the same as for staff members.

72. Allegations of minor misconduct against members of national contingents, military observers or CIVPOL are dealt with by the national contingent and senior officers of the military observers/CIVPOL. Whether a particular act constitutes serious misconduct or minor misconduct may not be obvious in some cases. In the case of the military and CIVPOL, that determination is done by the superiors who received the allegation.<sup>75</sup>

73. The Directives impose an obligation on all the people working for PSO missions to refer all allegations of serious misconduct to the Special Representative of the Secretary-General. However, there is little evidence that this obligation is known to personnel in the field, especially to local personnel.<sup>76</sup> An additional problem is that there may be no obligation on, for example, personnel working for IGOs to refer allegations of serious misconduct to anyone.

74. Transparent accountability for disciplinary offences is important. If it is perceived that the alleged authors of misconduct are left unpunished, that may undermine the credibility of the mission itself. It is particularly important where the misconduct has an impact on the host population and where they regard the misconduct in question as criminal in character. In places with no functioning judicial system, disciplinary proceedings may well be the only proceedings to deal with every kind of misconduct.

75. There are, however, certain concerns regarding disciplinary codes and proceedings. First, each IGO has its own disciplinary rules and mechanisms. This may contribute to the confusion in the host population as to what to expect. It may be unclear for some categories of personnel, such as UNV staff or personnel employed by an NGO but working for the United Nations, what code applies. In addition, foreigners who are not subject to disciplinary codes may be perceived by the host population as enjoying impunity.

76. Disciplinary jurisdiction by the perpetrator's home State usually exists over its armed forces, military observers, members of CIVPOL and seconded civil servants. For members of national contingents, their sending State's disciplinary jurisdiction is the primary one. It is easier for them to ensure disciplinary accountability, at least in theory, as contingents function within the national chain of command. Even in cases where the United Nations recommends disciplinary action against a member of a national contingent, its enforcement will be left to the contingent.<sup>77</sup> There is, again in theory, little problem in enforcing national disciplinary codes for military observers, as they are serving members of their national armed forces. Disciplinary proceedings for retired CIVPOL officers is dependent upon the applicability of the disciplinary code in such circumstances (see above).

77. It has been said, with regard to national disciplinary proceedings, that some CIVPOL officers and military personnel have been repatriated without any proper proceedings. This was apparently so in at least some cases in the International Police Task Force (IPTF) in Bosnia.<sup>78</sup> In practice, in many cases as soon as an allegation is made of serious misconduct, the member of CIVPOL concerned is repatriated by his national authorities or encouraged to return home voluntarily, without any form of proceeding taking place.<sup>79</sup> Some evidence is available regarding the practice of some contractors of persuading the alleged perpetrator of misconduct to resign voluntarily.<sup>80</sup>

78. Disciplinary charges may be brought where the conduct alleged ought to give rise to criminal proceedings. Conversely, in certain cases a disciplinary charge may in fact amount to a criminal charge, if the nature of the offence and of the potential penalties is of the requisite nature and gravity. Where disciplinary proceedings effectively determine a criminal charge, the due process guarantees of human rights law are likely to be applicable.

### **C. Ombudspersons**

79. The United Nations has set up other mechanisms that also deal with misconduct. An ombudsperson's office was set up in UNTAET and UNMIK, and the ombudsperson was authorized to receive complaints against all the people employed by the United Nations, as well as against personnel working for local authorities.<sup>81</sup> A local ombudsperson's office was also set up in other PSO missions, including in the United Nations Mission of Support in East Timor (UNMISSET).<sup>82</sup> Ombudspersons have the authority to receive complaints, investigate and make recommendations to the relevant authority, but lack the authority to enforce the recommendations.

#### **D. Ad hoc mechanisms**

80. In addition, in response to increasingly visible allegations of misconduct appearing in the media, there have been some ad hoc mechanisms in recent PSO missions. These include the Personnel Conduct Committee in the United Nations Mission in Sierra Leone (UNAMSIL)<sup>83</sup> and the Code of Conduct Committee in the United Nations Operation in Burundi (ONUB).<sup>84</sup>

81. Such mechanisms normally have the authority to receive and look into complaints and make recommendations to the relevant authority, but lack the authority to enforce the recommendations. An additional problem with such quasi-judicial mechanisms is that they are often very ad hoc and are set up in response to particular claims. They are consequently often not well known to the public. Many such mechanisms use people in high positions working part time for the mechanism.<sup>85</sup>

#### **E. Office of Internal Oversight Services of the Secretariat**

82. There is also the Office of Internal Oversight Services, established in 1994 to increase the strength of internal oversight within the United Nations. Part of its mandate is internal investigation. Reports of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority can be followed up by the Investigation Division of the Office. Such reports can be made by any individual, and the Office of Internal Oversight Services can also initiate its own investigation for serious cases.<sup>86</sup>

83. The Office has taken up investigations into serious misconduct by PSO personnel, such as sexual exploitation in the Democratic Republic of the Congo, and brought the reports to the attention of the General Assembly. It called for coercive action against the perpetrators of 20 substantiated cases, which was accepted by the Department of Peacekeeping Operations and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).<sup>87</sup>

84. The Office of Internal Oversight Services does not have criminal jurisdiction over any of the personnel. It can recommend various disciplinary and administrative actions against perpetrators of substantiated misconduct.

### **VII. GENERAL CONCLUSIONS WITH REGARD TO THE OPERATION OF THE VARIOUS SYSTEMS IN PRACTICE**

85. Significant changes have been made in the past few years to attempt to deal with criminal and disciplinary matters outside the mandate. The United Nations, however, does not appear to accept accountability for acts committed within the mandate. This poses particular difficulties in the case of PSOs where the United Nations is, in effect, the Government of the territory, or in the case of personnel other than military personnel.<sup>88</sup>

86. The problems in practice appear to include:

(a) Prevention: whilst the codes of conduct are in place, the institutional infrastructure to guarantee that all misconduct is reported and then acted upon is not yet in place. This issue is within the mandate of the Best Practices Unit of the Department of Peacekeeping Operations.<sup>89</sup> The Department has been making considerable efforts to clarify what is expected of personnel, such as the 2003 Directives, and it provides training on related issues, such as

gender awareness and HIV. Gaps nonetheless remain, such as the position of foreign civilian contractors providing services previously provided by military contingents or CIVPOL.<sup>90</sup> More needs to be done to specify precisely what powers are given by the mandate. Sending States should be required to guarantee that members of military contingents and CIVPOL have been adequately trained. Spot checks should be carried out to ensure that this in fact occurs. The training should include mission-specific information, such as the local age of consent and the local age of criminal responsibility. The focus should not be exclusively on misconduct of a sexual character;<sup>91</sup>

(b) Operationalization of the system: there is no guarantee that the Special Representative of the Secretary-General is informed of all allegations. There are two elements to this. Public information campaigns need to be part of each PSO to ensure that the population knows how to complain and can do so easily. This needs to take account of realities on the ground.<sup>92</sup> Second, every member of a PSO should be required to ensure that any complaint is referred to the Special Representative of the Secretary-General, even if it is dealt with elsewhere (e.g. within a national contingent).

87. The procedures to be followed need to be institutionalized.<sup>93</sup> A member of staff of the Special Representative of the Secretary-General should be required to follow up every allegation against a member of a military contingent, to discover the outcome of any investigation, whether proceedings have been brought and the result of such proceedings. Sending States should be responsible for bringing criminal proceedings against “civilians accompanying the armed forces” and civilians employed under a contract with a national contingent.

88. It should be the responsibility of the State providing members of CIVPOL to bring criminal proceedings against individuals found responsible by a BOI for what amounts to criminal conduct, where that is not done by the host State. The Special Representative of the Secretary-General should be required to follow up such cases.

89. Where other personnel are found responsible for serious misconduct by a BOI that recommends dismissal, that person should not be employed in the future in any other PSO. Where the misconduct constitutes a criminal offence and criminal proceedings do not take place in the host State, the person should be repatriated and proceedings should be brought in his/her home State.

90. It is recognized that these proposals would require some States to modify their rules on the exercise of criminal jurisdiction. The alternative would be for the United Nations to run its own criminal courts within the host State. That would be likely to give rise to very real difficulties in practice.

91. The obligations towards the complainant need to be clarified. There should be a requirement that the complainant must be informed of the results of the investigation and proceedings.<sup>94</sup> The only reference in the Directives is that the Special Representative of the Secretary-General may if necessary use the BOI report to appropriately inform the victim/individuals concerned of the action taken.<sup>95</sup> With regard to an investigation or proceedings within CIVPOL, the CIVPOL Commissioner also does not have an express responsibility to notify the complainant of the process or result of the investigation/proceedings, although it is apparently done usually as a matter of course.<sup>96</sup> In practice, in at least one mission,

that does not seem to have occurred.<sup>97</sup> This undermines the victim's trust in the proceedings themselves. This is crucial to instil the notion of accountability and of the rule of law in a post-conflict society.

92. There is a need to address the problem of reluctant witnesses, especially civil servants who are requested to testify against their superior. For various reasons, including the fear of suffering adverse consequences in the workplace, they may not be willing to give evidence to the investigating authority. United Nations officials believe that it is compulsory for all the civilian staff to give testimonies when called upon to do so by a BOI.<sup>98</sup> However, there is evidence that, even whilst confirming orally that they know the allegation to be true, they are not willing to give evidence to a BOI.<sup>99</sup> This suggests that United Nations personnel have little faith in the Organization's capacity to deal with allegations.<sup>100</sup> This may be related to a perceived lack of independence of the accountability mechanisms.<sup>101</sup>

93. The operation of the mechanisms in practice at present is not transparent and does not ensure effective accountability. In addition to being wrong, in and of itself, this also severely undermines the credibility and integrity of the mission. Creating or restoring the rule of law is usually an important part of the function of a mission. Such efforts are badly damaged when the United Nations is not seen to practice what it preaches.

### **VIII. RECOMMENDATIONS**

94. **The accountability of international personnel in PSOs raises a variety of complicated legal and policy issues. This working paper has examined how the system is supposed to operate. Even that gives rise to certain questions. In addition, issues which merit further study include:**

- **The ways in which the making of allegations through official channels could be encouraged;**
- **How sending States could be encouraged to exercise criminal jurisdiction;**
- **What can be done to avoid impunity on the part of foreign personnel who are neither members of military contingents nor members of CIVPOL;**
- **What follow-up mechanisms could be put in place and institutionalized;**
- **The operation in practice of internal disciplinary systems;**
- **How to improve the involvement of the complainant in the procedures; and**
- **Whether access needs to be provided to a human rights mechanism, either generally, where the United Nations, in effect, constitutes the Government in a territory, or specifically, in relation to the provision of effective remedies, and to address due process issues in internal disciplinary proceedings.**

**95. For these reasons the Sub-Commission may wish to consider requesting the Commission on Human Rights to appoint a special rapporteur to carry out such a study. It is likely to involve the need for a visit to New York and may involve the creation and sending out of questionnaires. It would also require the assistance of the Office of the High Commissioner for Human Rights.**

### Notes

<sup>1</sup> I should like to thank Ai Kihara-Hunt and Liz Griffin for assistance in the carrying out of the research and Ai Kihara-Hunt for assistance in the writing of the report.

<sup>2</sup> This only excludes the operation to liberate Kuwait following the Iraqi invasion of 1990.

<sup>3</sup> Initially, the NATO operation in Kosovo involved an international armed conflict. By the time KFOR was endorsed by the UN, the nature of the military operation had changed and it had become a PSO not carried out by UN forces.

<sup>4</sup> A significant problem has arisen in Iraq with regard to the accountability of foreign personnel employed by a company which is under contract to a government department other than the armed forces.

<sup>5</sup> For example civilian aircrew; this is a technical term in the law of armed conflict.

<sup>6</sup> The responsibility of international organizations is currently being examined by the International Law Commission (Mr. Giorgio Gaja, Special Rapporteur).

<sup>7</sup> The authority to arrest, detain, search and seize may be given to both armed forces and CIVPOL. The mandate may be far from clear. KFOR, for example, appears to base its authority to detain on the "all necessary means" formula in the mandate; SC/Res/1244, adopted 10 June 1999. It is not clear whether this provides sufficient legal basis for detention, particularly for States bound by the European Convention on Human Rights, article 5 of which lists exhaustively the only legitimate grounds of detention. No State participating in KFOR has submitted notice of derogation. The issue is currently before the European Court of Human Rights. In East Timor, INTERFET (International Force in East Timor) created a document to give themselves the authority to detain; Lt. Col. M. Kelly, INTERFET Detainee Management Unit in East Timor, SLAC 2000, <<http://www.jsmp.minihub.org/Reports/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20IN%20EAST%20TIMOR.pdf>>.

<sup>8</sup> I should like to thank the following students who gathered the data: Feruza Abdullaeva, Adalyat Abdumanapova, Mashhood Ahmad, Damelya Aitkhozhina, Aliyeva Bahija Alvan, Ahmad Amara, Kristin Antin, Adem Arkadas, Gunilla Backman, Karen Bailey, Rahel Befekadu, Treva Braun, Mariette Brennan, James Chamberlain, Abel Chikomo, Stephen Coakley, Colleen Dooner, Shawky Seif El Nasr, Karl Engman, Ayse Dicle Ergin, Renato Z Evangelista, Fiona Frazer, Karoline Gamre, Leena Ghosh, Anita Goh, Liz Griffin, Livia Hadorn, Stephanie Huber, Fumiko Itagaki, Jehangir Jilani, Clea Kahn, Rajat Khosla, Ai Kihara-Hunt, Charlie King, Brenda Knapp, Ama Kpetigo, Davinder Kumar, Martine Lemmens, Claire McEvoy, Rajakumari Michael, Jaqueline Msipha, Alan Msosa,

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<sup>9</sup> Kihara-Hunt A., PSO Accountability Database, <[http://www2.essex.ac.uk/human\\_rights\\_centre/psa-accountability/](http://www2.essex.ac.uk/human_rights_centre/psa-accountability/)>. The database is not currently accessible. Funding is being sought to put it on line.

<sup>10</sup> 101 cases out of 230 allegations, excluding allegations of widespread misconduct.

<sup>11</sup> United Nations Model Status-of-Forces-Agreement for Peacekeeping Operations, Report of the Secretary General, UN Doc. A/45/594, 9 October 1990.

<sup>12</sup> In certain States, notably common law jurisdictions, the exercise of criminal law jurisdiction is essentially territorial. This makes it essential that special arrangements are made to ensure that criminal proceedings can be brought against members of armed forces for acts committed outside national territory. Courts martial, on condition that they respect the rights of members of armed forces, therefore have an essential role to play if impunity is to be avoided. This needs to be taken into account when the Sub-Commission considers the issue of the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7).

<sup>13</sup> It is difficult to see how, being realistic, this problem can be solved. It is equally clear that this gives rise to very real difficulties in practice for force commanders; see Dallaire R., *Shake Hands with the Devil*, Arrow Books, London.

<sup>14</sup> This excludes retired officers. Selection Standards and Training Guidelines for United Nations Military Observers (UNMILOBS), First Draft, UN DPKO, 2002, p. 15.

<sup>15</sup> Model SOFA, *supra*, n. 11, para. 2.

<sup>16</sup> It is not clear to what extent, in practice, they take orders from national capitals; see text accompanying note 13.

<sup>17</sup> Selection Standards and Training Guidelines for United Nations Civilian Police (UNCIVPOL), First Draft, United Nations Department of Peacekeeping Operations, May 1997, <[http://www.un.org/Depts/dpko/training/tes\\_publications/books/civilian\\_police/selstand\\_civpol/selstand\\_civpol.pdf](http://www.un.org/Depts/dpko/training/tes_publications/books/civilian_police/selstand_civpol/selstand_civpol.pdf)>, pp. 6-8.

<sup>18</sup> In the normal course of events, States have to ensure that they can exercise jurisdiction over their armed forces for extra-territorial acts on account of the possibility of the commission of criminal acts during an international armed conflict. If they fail to make adequate provision, States will be in breach of their obligations under the Geneva Conventions. There may, however, be no expectation of their police forces or gendarmes serving outside national territory. The necessary provisions may therefore not exist.

<sup>19</sup> Model SOFA, *supra*, n. 11, para. 26; Convention on the Privileges and Immunities of the United Nations, adopted 13 February 1946 by the General Assembly of the United Nations, entry into force 17 September 1946, <[http://www.unog.ch/archives/un\\_priv.htm](http://www.unog.ch/archives/un_priv.htm)>, hereinafter General Convention, Article VI.

<sup>20</sup> Model SOFA, *supra*, n. 11, para. 24; General Convention, *supra*, n. 18, Article V, Section 19.

<sup>21</sup> *Ibid*, Article V, Section 18.

<sup>22</sup> Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion of 15 December 1989, ICJ Report 1989, p. 194; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion), 29 April 1999, ICJ.

<sup>23</sup> General Convention, *supra*, n. 18, Article VI, Section 22.

<sup>24</sup> Model SOFA, *supra*, n. 11, para. 2.

<sup>25</sup> Al-Hussein Z. R. Z., “A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations”, attached to UN doc. A/59/710, 24 March 2005, Annex.

<sup>26</sup> Simma B, *The Charter of the United Nations - A Commentary* (Oxford, Oxford University Press, 1995), pp. 1091-1094.

<sup>27</sup> E.g. conducting interrogation or running detention facilities in Iraq; Eunjung Cha A., and Merle R., “Line Increasingly Blurred Between Soldiers and Civilian Contractors”, *Washington Post*, 13 May 2004, A01.

<sup>28</sup> Model SOFA, *supra*, n.11, para. 25; GA/Res/76 (i), 7 December 1946.

<sup>29</sup> General Convention, *supra*, n.18, article V, section 19.

<sup>30</sup> Independently of the existence of SOFA, a question may arise regarding armed forces, whether they are entitled to sovereign immunity.

<sup>31</sup> General Convention, *supra*, n. 18, article VI.

<sup>32</sup> Database, *supra*, n. 9, Cases aet001 and aet002.

<sup>33</sup> *ibid*, Case mik009.

<sup>34</sup> To avoid this problem, recent UN deployments have only taken place once the State into which forces have been deployed agree to accept the provisions of the UN Model SOFA. Fleck D., *The Handbook of the Law of Visiting Forces* (New York, Oxford Press, 2001) p. 535.



<sup>35</sup> Where foreign forces are stationed on a long-term basis in another State, the SOFA may well provide for waiver. It is unlikely that waiver will be used in PSOs. There may be real concerns regarding the fairness of any possible proceedings, particularly if the deployment does not have the consent of the host State.

<sup>36</sup> General Convention, *supra*, n. 18, sections 20, 23; Model SOFA, *supra*, n. 11, para. 47.

<sup>37</sup> General Convention, *ibid*, article V, section 20.

<sup>38</sup> It should be noted that the Ombudsperson in Kosovo objected to the scope of the immunity which the SRSG had given to his mission, under his law-making capacity. Kosovo Ombudsperson Institution in Kosovo, “Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo”.

<sup>39</sup> Some states’ penal codes specifically mention that the State holds jurisdiction with regard to their police officers for their criminal acts committed abroad, e.g. the Swedish Penal Code; see generally note 12 above.

<sup>40</sup> Whether that is in fact the case depends on considerations previously discussed.

<sup>41</sup> Model SOFA, *supra*, n. 11, para. 2.

<sup>42</sup> See *supra*, n. 20-22 and accompanying text.

<sup>43</sup> Model SOFA, *supra*, n. 11, para. 2.

<sup>44</sup> *Case Concerning the Arrest Warrant of 11 April 2000, DRC v. Belgium*, ICJ Reports (2002) 121.

<sup>45</sup> E.g. the trial of Milosevic before the ICTY.

<sup>46</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia;  
<[www.un.org/icty/pressreal/nato061300.htm](http://www.un.org/icty/pressreal/nato061300.htm)>

<sup>47</sup> Note 44. This calls into question the decision of the tribunal in Sierra Leone, confirming the arrest warrant for Charles Taylor. The lawfulness of the arrest warrant may depend on whether the SCSL was sitting as an international or national tribunal. The ICJ is to examine this issue again in *DRC v France*.

<sup>48</sup> General Convention, *supra*, n. 18, article II, section 2; Model SOFA, *supra*, n. 11, para. 15.

<sup>49</sup> The standing claims commission, as provided in para. 51 of the Model SOFA, has never been established. According to a 1998 report by the United Nations Secretary-General on the third party claims process, the most commonly encountered damage claims include the non-consensual use and occupancy of property, personal injury, or property damage as a result of

<sup>50</sup> Amnesty International, “East Timor: Justice, Past, Present and Future”, 2001; Asia Press Club, “Houjin Dansei ni UNTAET ga Shazai, wakai seiritsu, hutou taiho meguru teiso juken” 1 February 2002, available at <[http://apc.cup.com/?no=93.0.0.33.0.0.0.0.0.0.](http://apc.cup.com/?no=93.0.0.33.0.0.0.0.0.)>.

<sup>52</sup> E.g. *Bici and Bici v. Ministry of Defence*, [2004] EWHC 786, para. 84 in which two Kosovars sought compensation from the United Kingdom Ministry of Defence for the wrongful act of a soldier.

<sup>54</sup> Van Kesteren J., Maythew P. and Nieuwebeert P., *Criminal Victimization in Seventeen Industrialized Countries: Key Findings from the 2000 International Crime Survey* (The Hague: Scientific Research and Development Centre, 2000).

<sup>56</sup> Military Directives, *ibid.*, para. 20-21; CIVPOL Directives, *ibid.*, para. 19-20.

<sup>58</sup> Military Directives, *supra*, n. 55, paras. 8, 28.

<sup>60</sup> Database, *supra*, n. 9, Case aet001 and aet002.

<sup>61</sup> International Alert, “Gender Justice and Accountability in Peace Support Operations, Closing the Gaps”, A policy paper by International Alert, 2004, p. 23.

<sup>62</sup> E.g. it was claimed that the new local authorities found it very difficult to ask for jurisdiction over a case caused by a UN civil servant. Timor Post, “Ribeiro’s Widow: There is No Justice”, May 5 2004.

<sup>63</sup> C. Rausch, *The Assumption of Authority in Kosovo and East Timor: Legal and Practical Implications*, in Dawn R., *Executive Policing, Enforcing the Law in Peace Operations* SIRPI Research Report No.16 (Oxford, Oxford University Press, 2002), p. 30.

<sup>64</sup> Personal communication with Australian CIVPOL officers.

<sup>65</sup> Database, *supra*, n. 9, Cases aet001, aet008, mik005, mik010, msi007. It is difficult to avoid the suspicion of collusion on the part of a variety of institutions in these cases.

<sup>66</sup> *Ibid*, Case aet008.

<sup>67</sup> Military Directives, *supra*, n. 55; CIVPOL Directives, *supra*, n. 55.

<sup>68</sup> Military Directives, *ibid*, para. 28, CIVPOL Directives, *ibid*, para. 31.

<sup>69</sup> E-mail communication with a Human Rights Adviser to the CIVPOL Commissioner, UNTAET.

<sup>70</sup> Military Directives, *supra*, n. 55, para. 14; CIVPOL Directives, *supra*, n. 55, para. 14.

<sup>71</sup> Military Directives, *ibid*, para.4; CIVPOL Directives, *ibid*, para. 4.

<sup>72</sup> Military Directives, *ibid*, paras. 24-25.

<sup>73</sup> CIVPOL Directives, *supra*, n. 55, para. 23.

<sup>74</sup> United Nations Staff Rules, Staff Regulations of the United Nations and Staff Rules, ST/SGB/2002/1, 1 January 2002, Rule 110.3.

<sup>75</sup> Both Directives, *supra*, n. 55, provide examples of major and minor misconduct, but the details are open to interpretation.

<sup>76</sup> In at least some cases, staff members were not given a copy of Directives on this matter. Local personnel may not even get verbal instructions either. The OIOS report on allegations of sexual exploitation and abuse acknowledges this; “Few military or civilian staff seemed aware of the directives, policies, rules and regulations governing sexual contact they were obliged to follow”, Investigation by the Office of Internal Oversight Services into allegation of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, A/59/661, 5 January 2005, p. 11.

<sup>77</sup> Military Directives, *supra*, n. 55, para. 28.

<sup>78</sup> Human Rights Watch, “Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution” 41 (2002).

<sup>79</sup> Chappell D. and Evans J., The role, preparation and performance of civilian police in United Nations Peacekeeping Operations, 1997, <<http://www.icclr.lawubc.ca/Publications/Reports/Peacekeeping.pdf>>, p. 154. Commissioner O’Rielly in UNPROFOR had cases investigated. If there was evidence of serious wrongdoing, he gave the alleged perpetrators a choice. They could choose to return home or he would institute proceedings which would result in the person being repatriated, with the offence (fraud) on their record. The alleged perpetrators had a 10-day period in which to engage an appeal process, which he had created.

<sup>80</sup> Database, *supra*, n. 9, Case ibh008, ibh011.

<sup>81</sup> UNTAET Daily Briefing, “Twenty Cases Examined by Ombudsperson”, 1 July 2001, <<http://www.reliefweb.int/w/rwb.nsf/0/a0e90ae0fac3f82785256a62005b5929?OpenDocument>>; Ombudsperson Institution in Kosovo website, “Ex officio Registration No.10/01”, <[http://www.ombudspersonkosovo.org/doc/reps/elion%20kuci\\_summary.htm](http://www.ombudspersonkosovo.org/doc/reps/elion%20kuci_summary.htm)>.

<sup>82</sup> UNMISSET website, “UNMISSET to support Timor-Leste’s Office of the Provodor for Human Rights and Justice”, <<http://www.unmisset.org/UNMISSETWebSite.nsf/0/a927b68a145c3c3f49256fee00271e64?OpenDocument>>

<sup>83</sup> UNAMSIL Press Release, “Special Representative of the Secretary-General launches UNAMSIL Personnel Conduct Committee”, 26 August 2002, <<http://www.un.org/Depts/dpko/unamsil/DB/26080>>

<sup>84</sup> PeaceWomen website, “Burundi: UN Mission Set up Units to Check Sexual Abuse”, 15 November 2004, <<http://www.peacewomen.org/un/pkwatch/News/04/ONUBConductUnit.html>>

<sup>85</sup> E-mail communication and phone interviews with a senior official who worked for several missions on disciplinary issues. This is true for BOI members as well. Military Directives, *supra*, n.55, para.17; CIVPOL Directives, *supra*, n. 55, para. 17.

<sup>86</sup> OIOS website, <<http://www.un.org/Depts/oios/investigations.htm>>

<sup>87</sup> OIOS Investigation, *supra*, n. 76.

<sup>88</sup> There may be some measure of sending State responsibility for the acts of military personnel under human rights law; see Human Rights Committee, general comment No. 31, CCPR/C/74/CRP.4/Rev.6, 21/04/2004, para. 10 and para. 10 above.

<sup>89</sup> The PBPU is involved in compiling the knowledge and experiences, analysing and advising on policies, training and public information regarding applicable laws and rules and proceedings against alleged authors of misconduct; PBPU website, <<http://www.un.org/Depts/dpko/lessons/>>

<sup>90</sup> DPKO, “Guidance and Directives of Disciplinary Issues for All Categories of Personnel Serving in UN Peacekeeping and Other Field Missions”, 19 March 2004, details available on PeaceWomen website, “Compilation of Guidance and Directives of Disciplinary Issues for All Categories of Personnel Serving in UN Peacekeeping and Other Field Missions”.

<sup>91</sup> About half of the cases registered in the database are related to other kinds of misconduct; Database, *supra*, n.9: 129 cases out of 230 cases registered (excluding general allegations) were not of a sexual nature. The majority of misconduct appears to relate to motoring offences; e-mail communication, *supra*, n. 85.

<sup>92</sup> UNAMSIL has set up a hotline through which local population can report sexual abuse or exploitation, but the line is criticized for not adequately taking account of the realities on the ground; P. Higate, *Peacekeeping and Gender Relations in Sierra Leone*, <<http://www.iss.org.za/pubs/Monographs/No91/Chap2.pdf>>, p. 49.

<sup>93</sup> A wide variety of issues appear to be left to the discretion of those involved; E.g. the determination of whether an act is a major or minor misconduct, the lack of the sending State’s reporting obligation on the action taken against repatriated personnel, notification of the progress of proceedings to the victim.

<sup>94</sup> The requirement to involve the complainant in the process of investigation and to inform them of the result is part of the right to an effective remedy under human rights law.

<sup>95</sup> Military Directives, *supra*, n. 55, para. 26; CIVPOL Directives, *supra*, n. 55, para. 29.

<sup>96</sup> E-mail communication, *supra*, n. 69.

<sup>97</sup> The author knows of a complainant of sexual assault who was not notified of the result of proceedings following her complaint.

<sup>98</sup> E-mail communication with a senior official who worked in the office of a Special Representative of the Secretary-General on disciplinary issues.

<sup>99</sup> Interviews with various personnel involved in peacekeeping operations.

<sup>100</sup> UN Wire, “Survey Finds U.N. Staff Fear Retribution For Reporting Misconduct”, <[http://www.unwire.org/UNWire/20040610/449\\_24749.asp](http://www.unwire.org/UNWire/20040610/449_24749.asp)>

<sup>101</sup> The only issue being addressed here is the problem of proceedings arising out of a PSO. There is known to be a more general, and related, problem within international organisations generally; para. 56 above.

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