



General Assembly

Distr.: General
11 September 2007

Original: English

Sixty-second session

Item 82 of the provisional agenda*

Criminal accountability of United Nations officials and experts on mission

Criminal accountability of United Nations officials and experts on mission

Note by the Secretariat

Summary

The report of the Group of Legal Experts on ensuring the accountability of United Nations officials and experts on mission with respect to criminal acts committed in peacekeeping operations (see A/60/980), made a number of recommendations designed to overcome obstacles that exist in holding such personnel accountable for crimes committed during peacekeeping operations.

Of primary concern was the fact that if a crime is committed in a host State and that State is unable to prosecute an alleged offender or hold an offender accountable, there is a need to rely on other States to do so. If other States have not extended the operation of their criminal laws to apply to crimes committed in a host State — then there is a jurisdictional gap and the alleged offender is likely to escape prosecution. In order to close the jurisdictional gap, it is important that as many Member States as possible are able to assert and exercise criminal jurisdiction.

To provide a sound legal basis for the exercise of jurisdiction by States other than the host State, the Group of Legal Experts recommended the development of a new international convention to address jurisdiction and related issues. The Secretariat fully supports this recommendation. A convention would enable Member States to establish jurisdiction in as wide circumstances as possible, provide certainty in relation to the personnel who are subject to the exercise of such jurisdiction (the *ratione personae*) and provide certainty in relation to the crimes that are committed by those personnel over whom jurisdiction may be exercised (the *ratione materiae*).

* A/62/150.



The Secretariat supports a convention that requires Member States to exercise jurisdiction when the alleged offender is a national of that State or the alleged offender is in that State and the State does not extradite him or her. The Secretariat also supports a convention that requires Member States to consider establishing jurisdiction when the victim of the crime is a national or a stateless person who has his or her habitual residence in the territory of that State or the crime is committed by a stateless person who has his or her habitual residence in the territory of that State.

The Secretariat supports the adoption of a convention that covers crimes committed by all United Nations personnel (excluding military members of national contingents who are subject to the exclusive jurisdiction of the sending State) who are in the area of a United Nations operation irrespective of the department, office, programme, fund or specialized agency with which they are engaged.

The Secretariat also supports a convention that applies to all crimes and is not limited to crimes against the person or to crimes involving sexual exploitation and abuse. The convention should not, however, attempt to list such crimes but should use a generic approach such as defining crimes by reference to a level of punishment in the country that is in a position to assert jurisdiction.

The Secretariat notes that only Member States have the legal capacity to conduct criminal investigations and to prosecute alleged offenders. Therefore, the Secretariat supports a number of short-term measures aimed at emphasizing the role of Member States in relation to the exercise of criminal jurisdiction. These are:

(a) A General Assembly resolution strongly urging Member States to establish, as a minimum, jurisdiction over their nationals who commit serious crimes as they are known and defined in their existing domestic criminal laws, where that conduct also constitutes a crime under the laws of the host State;

(b) The Security Council including language in mission-specific resolutions encouraging countries contributing or seconding personnel to take appropriate preventative action, including the conduct of predeployment training, and to be in a position to hold persons who commit crimes accountable for that criminal conduct;

(c) The General Assembly, through the Special Committee on Peacekeeping Operations, requesting the Secretary-General to continue including similar language in the memorandum of understanding that is developed between the United Nations and a Member State contributing a formed police unit and that the relevant Member State agree to this inclusion;

(d) The Department of Peacekeeping Operations ensure that notes verbales sent to permanent missions seeking personnel such as military observers, individual contributions to the police component of a United Nations operation and seconded corrections officers, make Member States aware of the expectation of the Secretariat that any person who serves as part of a United Nations operation is to have received predeployment training in relation to the zero tolerance policy and is aware that certain conduct may amount to a crime for which they will be held accountable.

Explanatory notes

“United Nations officials” includes United Nations staff and United Nations Volunteers (who are assimilated to staff under the status-of-forces agreements).

The term “experts on mission” includes United Nations military observers, police and civilians and others who are afforded the status of an expert on mission. These categories may include, inter alia, military observers, military liaison officers, military advisers, arms monitors, members of formed police units, seconded individual United Nations police and seconded corrections officers.

Although the report of the Group of Legal Experts (A/60/980) discussed accountability only in relation to United Nations officials and experts on mission, this stemmed from the limits placed on the Group by its terms of reference. The title for the present note derives from the agenda item title before the Sixth Committee. However, for purposes of the present note, the Secretariat is of the view that the report’s recommendations should apply to all personnel in United Nations operations (including contractors and consultants) other than military members of national contingents. As Member States should already be in a position to exercise jurisdiction over military members of national contingents, the present note does not address such personnel.

Although the report of the Group of Legal Experts (A/60/980) discussed accountability in terms of peacekeeping operations, this stemmed from the limits placed on the Group by its terms of reference. For the purposes of the present note, the Secretariat does not limit accountability to persons participating in a peacekeeping operation. It is of the view that persons who participate in a United Nations operation should be held accountable. See, for example, part of the definition of “United Nations operations” in Article 1 of the 1994 Convention on the Safety of United Nations and Associated Personnel. A “United Nations operation” is defined by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control — where the operation is for the purpose of maintaining or restoring international peace and security.

The present note does not affect the operation of privileges and immunities and the role of the competent authority of the United Nations in determining whether the conduct was within the functions or mission of the alleged offender or in determining whether to waive any immunity under the relevant status-of-forces agreement, status of mission agreement, the 1946 Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on 21 November 1947.

Concerning the exclusion of military members of national contingents who are subject to the exclusive jurisdiction of the sending State, see article 47 (b) of the model status-of-forces agreement (A/45/594). The Model stemmed from a 1989 request by the General Assembly (resolution 44/49 of 8 December 1989) for the preparation of a model status-of-forces agreement between the United Nations and the host country. It was implicitly endorsed by the General Assembly in its resolution 52/12 B of 19 December 1997.

Contents

	<i>Paragraphs</i>	<i>Page</i>
Explanatory notes		3
I. Background	1–6	5
II. Introduction	7–19	6
A. The United Nations Secretariat can only go so far	14–16	7
B. Jurisdictional gap	17–19	8
III. Short-term measures: addressing the jurisdictional gap	20–25	8
IV. Longer term: a convention	26–53	9
A. Bases for jurisdiction	28–33	10
B. Scope <i>ratione personae</i>	34–36	11
C. Scope <i>ratione materiae</i>	37–41	11
D. Investigations	42–53	12
V. Rationale for the distinction between military observers and military members of national contingents	54–65	14
VI. Conclusion	66–68	16
VII. Recommendations	69–70	16
A. Short-term measures: addressing the jurisdictional gap	69	16
B. Long-term measures: a convention	70	17

I. Background

1. By resolution 59/300, the General Assembly endorsed the recommendations set out in the report of the Special Committee on Peacekeeping Operations (A/59/19/Rev.1, part two, chap. II, para. 40 (a)). In accordance with that endorsement, the Secretary-General appointed a Group of Legal Experts to examine ways of ensuring that United Nations officials and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, in accordance with due process.

2. The report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980) was transmitted to the General Assembly in August 2006 and presented to the Chairman of the Special Committee on Peacekeeping Operations for that Committee's consideration. The Special Committee recommended that the report be presented to the Chairman of the Fourth Committee for transmission to the Sixth Committee (A/60/19, para. 79).

3. By resolution 61/29, the General Assembly decided to establish an Ad Hoc Committee, open to all Member States of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of considering the report of the Group of Legal Experts, in particular its legal aspects.

4. In accordance with that resolution, the Ad Hoc Committee met at Headquarters from 9 to 13 April 2007.¹

5. During the work of the Ad Hoc Committee, a number of issues were raised, including the following:

(a) The extent of the problem of criminal activity and short-term measures that could be taken to address criminal accountability;

(b) If a convention was developed — the Secretariat's position in relation to the scope *ratione personae* and *ratione materiae*, and the bases for the exercise of jurisdiction;

(c) Investigations and capacity-building;

(d) Cooperation among Member States and between Member States and the United Nations;

(e) The feasibility and legal implications of expanding the scope of the convention to cover officials of specialized agencies;

(f) The rationale for the distinction between military observers and military members of national contingents.

6. The present note seeks to address these issues.

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 54 (A/62/54).*

II. Introduction

7. Any crime committed by persons participating in a United Nations operation is unacceptable.² The Secretariat does not and cannot condone criminal conduct.

8. The Ad Hoc Committee requested the Secretariat to provide information on the extent of the problem of criminal activity. While not all cases of misconduct constitute criminal activity, statistics in this area suggest that the problem is significant.³ In the 12-month period from January to December 2006, a total of 439 allegations of misconduct other than sexual exploitation and abuse⁴ were reported⁵ in missions led by the Department of Peacekeeping Operations.⁶

9. Such statistics are also available in relation to sexual exploitation and abuse.⁷ In the 12-month period from January to December 2006, for those missions led by the Department of Peacekeeping Operations, 357 allegations of sexual exploitation and abuse were reported to the Office of Internal Oversight Services (OIOS). Of

² The report of the Group of Legal Experts (A/60/980) was developed pursuant to General Assembly resolution 59/300, which recommended the establishment of a Group of Experts to advise on the means to ensure the accountability of United Nations staff and experts on mission in respect of criminal acts committed by them while serving in peacekeeping missions. The recommendations were made following the consideration of the report of the Special Committee on Peacekeeping Operations (A/59/19/Rev.1), which drew upon proposals made in a report by Prince Zeid Ra'ad Zeid Al-Hussein, the adviser to the Secretary-General on sexual exploitation and abuse by United Nations peacekeeping personnel ("the Zeid report") (A/59/710). Therefore, the focus of the Group of Legal Experts was on sexual exploitation and abuse that amounts to criminal conduct. However, as the Group noted (A/60/980, para. 8), its recommendations were not limited to such crimes but are applicable to all criminal conduct.

³ The Office of Internal Oversight Services (OIOS) and the Department of Field Support, with the Department of Peacekeeping Operations, have put into place mechanisms to collect statistics. Similar systems have not been put into place consistently across the United Nations system.

⁴ Among allegations included in this statistic are fraud, theft, assault, sexual harassment, breaches of United Nations rules and regulations, and traffic-related misconduct (including road traffic accidents such as driving while intoxicated or those accidents resulting in serious injury or death). While not all cases of misconduct will amount to criminal conduct, a number of cases did involve allegations of criminal conduct. In the past, allegations have also included crimes committed by personnel such as torture and murder.

⁵ As each entity maintains its own statistics on misconduct, there is no central repository of all misconduct allegations (referred to under the report of OIOS on strengthening the investigation function of the United Nations (A/58/708) as "Category I" and "Category II"). However, OIOS maintains statistics relating to serious misconduct it receives from entities throughout the United Nations system. Similarly, the report of the Secretary-General on special measures for protection from sexual exploitation and sexual abuse (A/61/957) notes all statistics relating to sexual exploitation and abuse, representing one form of serious misconduct, from entities throughout the United Nations system, United Nations staff members, as well as individuals outside the United Nations.

⁶ For purposes of the present note, the category of missions led by the Department of Peacekeeping Operations includes both special political missions led by the Department and peacekeeping missions.

⁷ Among allegations included in this statistic are those defined as sexual exploitation and abuse in the Secretary-General's bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13). While not all cases of sexual exploitation and abuse will amount to criminal conduct, a number of cases did involve allegations of criminal conduct, depending upon the jurisdiction, such as sexual intercourse with a minor, rape, prostitution and sexual assault.

these, 176 came from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).⁸

10. Additionally, there were 14 allegations of sexual exploitation and abuse in United Nations entities other than in missions led by the Department of Peacekeeping Operations.⁹ Of those, five were substantiated, five were unsubstantiated, and investigations are ongoing in three cases (one individual against whom an allegation was lodged left the United Nations before the investigation was completed).

11. But statistics do not tell the whole story — they do not reflect the psychological and physical damage that criminal conduct causes the victim, the victim's family and/or the community. Statistics do not illustrate the damage that criminal activity of all kind causes the reputation of every peacekeeper and the United Nations Organization as a whole. Statistics do not show how criminal conduct impacts on the fulfilment of the mandate and the success of a United Nations operation, as well as the threat to the physical security of United Nations personnel.

12. Whenever crimes are committed by persons participating in a United Nations operation, there will be an impact on the trust that the United Nations seeks from the local community. This breach of trust makes the work of the United Nations difficult to accomplish. Without the trust of the community, mandates will not receive full cooperation and may fail or take longer to achieve.

13. In a post-conflict environment, criminal conduct by persons participating in a United Nations operation contributes to the very problem the United Nations is there to address: to rebuild a community devastated by conflict and to uphold the rule of law.

A. The United Nations Secretariat can only go so far

14. The Secretary-General's bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13) sets out standards that demonstrate the United Nations zero tolerance policy in relation to such conduct. This zero tolerance policy is widely disseminated and is part of the standard of behaviour required of officials, experts on mission, consultants, military members of national contingents and United Nations Volunteers (see A/60/19, para. 65 and A/61/645, para. 40).

15. Education, predeployment and in-mission training campaigns further stress the zero tolerance policy. This is backed up by the establishment of Conduct and Discipline Units in Headquarters and United Nations operations to receive and coordinate complaints. The zero tolerance policy is further supported by regular patrolling of the mission area, the creation of out-of-bounds areas and the implementation of the United Nations and national discipline regimes.

⁸ MONUC is the largest peacekeeping operation in terms of authorized personnel strength.

⁹ See A/61/957, annex III; the reason for the number of allegations may be attributable to underreporting owing to the fact that some United Nations entities have not established accessible complaint mechanisms or mechanisms to collect statistics, as noted in footnote 3 above.

16. But the Secretariat cannot hold a person criminally accountable. The Secretariat cannot conduct a criminal investigation¹⁰ where it is alleged that the conduct engaged in by the persons participating in a United Nations operation may amount to a crime. Nor can the Secretariat prosecute an alleged offender. In the absence of an executive mandate where the United Nations is mandated to have law enforcement and prosecutorial powers, such as in Kosovo (Serbia) (see Security Council resolution 1244 (1999)) and Timor-Leste (see Security Council resolution 1704 (2006)), the exercise of criminal jurisdiction remains the responsibility of Member States.

B. Jurisdictional gap

17. If a crime is committed in a host State and that host State is unable to prosecute an alleged offender or make an offender accountable, there is a need to rely on other States to do so. If other States have not extended the operation of their criminal laws to apply to crimes committed in a host State, then there is a jurisdictional gap and the alleged offender is likely to escape prosecution.

18. The Secretariat cannot fill this jurisdictional gap. While the Secretariat has implemented measures to prevent crimes being committed, a comprehensive response to criminal conduct requires criminal accountability. Criminal accountability in such specific instances will only eventuate if the jurisdictional gap is filled by Member States.

19. Member States need to act to ensure that all United Nations personnel¹¹ are never effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, in accordance with due process.

III. Short-term measures: addressing the jurisdictional gap

20. Establishing, asserting and exercising criminal jurisdiction over crimes committed within the borders of another State is not new, nor is it a simple process. But that is not to say that there cannot be short-term measures to encourage Member States to address the jurisdictional gap.

21. The General Assembly could adopt a resolution strongly urging Member States to establish, as a minimum, jurisdiction over their nationals who commit serious crimes as they are known and defined in their existing domestic criminal laws, where that conduct also constitutes a crime under the laws of the host State.

22. The resolution could include a request encouraging Member States and the Secretariat to cooperate in the sharing of information, the gathering of evidence and ensuring the availability of witnesses. Such cooperation could assist facilitating the exercise of jurisdiction by the State of nationality.

¹⁰ For a discussion on administrative investigations conducted by the Secretariat, see paras. 50-53 below.

¹¹ For a discussion of the Secretariat's view that its recommendations should apply to all personnel in United Nations operations (including contractors and consultants) other than military members of national contingents, see explanatory notes and paras. 34-36 below.

23. This is a short-term measure, aimed at bringing to the attention of Member States their responsibility to hold their nationals accountable for the crimes they commit.

24. There are other short-term measures to emphasize the role of Member States in filling the jurisdictional gap, such as:

(a) The Security Council could include language in the mission-specific resolutions, encouraging countries contributing or seconding personnel to take appropriate preventative action, including the conduct of predeployment training, and to be in a position to hold such persons who commit crimes accountable for that criminal conduct;¹²

(b) The General Assembly, through the Special Committee on Peacekeeping Operations, could request the Secretary-General to continue to include similar language in the memorandum of understanding that is developed between the United Nations and a Member State contributing a formed police unit, and that the relevant Member State agree to this inclusion.

25. In addition, the Department of Peacekeeping Operations could ensure that notes verbales sent to permanent missions seeking personnel, such as military observers, individual police personnel or individual corrections officers make Member States aware of the expectation of the Secretariat that any person who serves as part of a United Nations operation is to have received predeployment training in relation to the zero tolerance policy and is aware that certain conduct may amount to a crime for which they will be held accountable. The notes verbales could also include a statement indicating the Secretariat's expectation that Member States are in a position to take appropriate action against the requested personnel who engage in criminal activity.

IV. Longer term: a convention

26. While implementation of short-term measures will continue to emphasize the role of Member States in filling the jurisdictional gap, it does not resolve all issues. In the longer term, the Secretariat fully supports the development of a convention that would:

(a) Enable Member States to establish jurisdiction in as wide circumstances as possible;

(b) Provide certainty in relation to the personnel who are subject to the exercise of such jurisdiction (the *ratione personae*);

(c) Provide certainty in relation to the crimes that are committed by those personnel over which jurisdiction may be exercised (the *ratione materiae*).

These issues are discussed below.

27. In addition, a convention could facilitate international cooperation (particularly in relation to extradition) and cooperation between Member States and

¹² This measure complements recent Security Council practice of including a similar provision for troop-contributing countries — see Security Council resolution 1745 (2007), para. 13; resolution 1756 (2007), para. 22; and resolution 1758 (2007), para. 9.

the Secretariat (particularly in relation to the use of material provided by the Secretariat to the Member States).¹³ It could address gaps that exist in matters concerning the conduct of criminal investigations, including securing the integrity of evidence to facilitate any potential prosecution.

A. Bases for jurisdiction

28. In order to close the jurisdictional gap, it is important that there be a number of jurisdictional bases upon which Member States could assert jurisdiction.

29. As the proposed short-term measures indicate, the Secretariat is of the view that Member States should establish jurisdiction over crimes committed by their nationals. (This is in addition to the establishment of jurisdiction by the State in which the crime occurred as the existence of such jurisdiction is not disputed (see A/60/980, para. 59)).

30. However, while many Member States may not need an international convention to assert and exercise criminal jurisdiction over their nationals, other Member States may need such an instrument. It is the Secretariat's view that a convention would facilitate Member States being able to assert and exercise jurisdiction in as wide circumstances as possible under international law.

31. In addition to establishing jurisdiction over its nationals, and consistent with concluded instruments, including the 1994 Convention on the Safety of United Nations and Associated Personnel,¹⁴ the Secretariat is of the view that a convention should include the need for Member States to consider establishing jurisdiction when either:

(a) The victim is a national or a stateless person who has his or her habitual residence in the territory of that State;

(b) Or the crime is committed by a stateless person who has his or her habitual residence in the territory of that State.

32. The Secretariat also fully supports a convention requiring Member States to establish jurisdiction on an "extradite or prosecute" basis for crimes committed by persons participating in United Nations operations.¹⁵ Crimes committed by persons participating in United Nations operations should not be viewed as merely domestic crimes. The fact that alleged offenders are individuals who have been placed in a position of trust in the host State to serve the international community, as well as the impact that crimes have on the image and credibility of the international mandate, warrants the establishment of jurisdiction on an extradite or prosecute basis.

33. In this regard, the Secretariat notes that the Convention on the Safety of United Nations and Associated Personnel includes the establishment of jurisdiction on the grounds of extradite or prosecute. It is arguable that similar considerations could apply to the establishment of jurisdiction over crimes committed by persons participating in United Nations operations as well as crimes committed against them.

¹³ For a discussion on investigations conducted by the Secretariat, see paras. 50-53 below.

¹⁴ United Nations, *Treaty Series*, vol. 2051, No. 35457, art. 10.

¹⁵ For a discussion on scope *rationae personae*, see paras. 34-36 below.

B. Scope *ratione personae*

34. The Secretariat is of the view that there is no major policy impediment as to why a convention could not apply to cover all persons participating in the United Nations operations, irrespective of the department, office, programme or fund with whom they are engaged.¹⁶ While the report of the Group of Legal Experts (A/60/980) limited the proposed coverage of the convention to officials and experts on mission in peacekeeping operations, this stemmed from the limits placed on the Group of Legal Experts by its terms of reference.

35. The same applies in relation to officials of specialized agencies. Again the Secretariat is of the view that the issue is not the nature of the department or agency with which the alleged offender is associated. The essential consideration is the location in which the alleged offender is operating. If the alleged offender is operating in a conflict or post-conflict environment where the criminal justice system may be impaired, the same rationale exists for closing any jurisdictional gap in relation to these personnel as applies to members of the United Nations operation.

36. In relation to persons participating in United Nations operations under Chapter VII of the Charter, while the draft convention proposed by the Group of Legal Experts excluded such persons from the coverage of the convention, the Secretariat is of the view that there is no reason to distinguish such missions from Chapter VI missions. The rationale for excluding such personnel from the Convention on the Safety of United Nations and Associated Personnel¹⁷ does not apply to a convention or resolution dealing with crimes committed by such personnel.

C. Scope *ratione materiae*

37. The Secretariat recognizes the difficulty in establishing a finite list of crimes that should be covered by a convention. What seems clear is that a convention should not be limited to crimes against the person; the recent investigation into gold smuggling and trafficking in weapons in MONUC highlights the need for a convention to apply to all serious crimes to ensure there is no jurisdictional gap.

38. The Secretariat recognizes that all Member States have enacted criminal laws to address conduct that is criminal as recognized by the particular State.

39. The Secretariat is of the view that the convention should not attempt to list the crimes to be covered, nor specify how crimes should be defined. Instead, the convention should cover crimes, as they are known and defined under the national law of the State asserting jurisdiction and that are punishable under that nation's law by at least two/three years' imprisonment.

¹⁶ For a discussion of the Secretariat's view that the recommendations should apply to all personnel in United Nations operations (including contractors and consultants) other than military members of national contingents, and the definition of "United Nations operation" and a discussion of the Secretariat's view that persons who participate in a United Nations operation should be held accountable, see explanatory notes.

¹⁷ United Nations, *Treaty Series*, vol. 2051, No. 35457, art. 2 (2).

40. A precedent for describing crimes to be covered by a convention in this manner is found in the United Nations Model Treaty on Extradition.¹⁸ Article 2 of that Model Treaty provides as follows:

Extraditable offences

1. For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least one/two year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least four/six months of such sentence remains to be served.

41. Any uncertainty about the crimes that have been given extraterritorial effect by a signatory to such a convention could be addressed by the convention, including a provision that requires Member States to notify the Secretary-General of such crimes.

D. Investigations

42. Criminal accountability will only ever eventuate if there has been a thorough and professional investigation that produces credible and reliable information that is admissible as evidence in the courts of the Member State exercising jurisdiction in relation to the alleged offender.

43. Where the police component of a United Nations operation has an executive mandate to exercise police powers (as in Kosovo (Serbia) and Timor-Leste), any criminal investigation may be conducted by the United Nations Police, either alone, or in conjunction with the host States' law enforcement authorities.

44. However, the Secretariat, whether it is the Department of Peacekeeping Operations, the Department of Field Support or OIOS or any other organizational element, does not have the legal capacity to conduct criminal investigations. In the absence of an executive mandate for the United Nations operation, it is only a Member State (whether it be the host State or another State) that has capacity to conduct a criminal investigation in accordance with its domestic laws and existing international cooperative arrangements.

45. As the Group of Legal Experts noted in its report, there are a number of advantages to the host States' law enforcement authorities conducting an investigation into alleged criminal activities (see A/60/980, para. 27). That is the place where the alleged crime occurred, and it is where the witnesses and evidence are located. The capacity-building role of the United Nations Police, where it exists, could facilitate this outcome.

¹⁸ See General Assembly resolution 45/116, annex. See also the United Nations International Drug Control Programme (now United Nations Office on Drugs and Crime) model bills dealing with witness protection, available from www.unodc.org/pdf/lap_witness-protection_2000.pdf and mutual assistance in criminal matters, available from www.unodc.org/pdf/lap_mutual-assistance_2000.pdf.

46. Many mandates for the police component of a United Nations operation focus on building capacity of the host State's police and law enforcement authorities. This involves training, coaching, mentoring and advising the local police and law enforcement authorities, rather than just observing. The enhanced focus on capacity-building may facilitate a credible and reliable investigation that is conducted in accordance with the law of the host State and international criminal justice and human rights norms and standards. This in turn could facilitate the exercise of jurisdiction by Member States as there would be a police investigation into the alleged criminal activity.

47. It is emphasized that with the exception of United Nations operations with an executive mandate, a criminal investigation remains the responsibility of the Member States and not the Secretariat or United Nations Police.

48. The Department of Peacekeeping Operations has identified a number of police and law enforcement projects for 2007 that are directly related to building institutional police capacity in post-conflict environments. This work is ongoing and has been developed independently of the recommendations contained in the report of the Group of Legal Experts (A/60/980). The capacity-building recommendations in that report do not raise any new funding issues.

49. It may be, as the report points out, that even with assistance from or oversight of the United Nations, the host State is unable to conduct a police investigation (A/60/980, para. 40). Alternatively, the mandate for the United Nations operation may not include a role for building capacity of the host country's law enforcement authorities. In either case, the only investigation that is conducted into the alleged criminal activity will be that conducted by the Secretariat.

50. As has been noted, the Secretariat does not have the legal capacity to conduct a criminal investigation.¹⁹ This does not mean that an investigation conducted by the Secretariat cannot produce a credible and reliable report that contains information in a verifiable form that is of sufficient weight to trigger a criminal investigation by the law enforcement authorities of a State that has jurisdiction to prosecute the matter. In its report, the Group of Legal Experts made a number of recommendations in this regard (A/60/980, para. 84) that are being considered by the Secretariat.

51. In addition, the report of the Office of Internal Oversight Services on proposals for strengthening OIOS sets out a number of recommendations that would strengthen and focus the role of OIOS in relation to investigations conducted by that Office (see A/60/901, paras. 79-97). Implementation of those measures are designed to enhance the capacity of the Secretariat to generate a report into allegations of criminal conduct that is of enough veracity to form the basis for the commencement of a criminal investigation by the relevant authorities of a prosecuting State.

52. Measures to enhance the capacity of OIOS are ongoing. The recommendations in the report of the Group of Legal Experts to enhance the capacity of OIOS do not raise any new or separate funding issues.

¹⁹ Executive authority rests with Governments. In this context, executive authority is the ability to exercise law enforcement functions, including arrest, search and seizure and conducting interviews in accordance with the authority vested by the Government.

53. In situations in which the State of nationality would be amenable to exercising jurisdiction, questions of mutual assistance in criminal matters arise. While bilateral and other schemes exist to facilitate cooperation between States, it is not inconceivable that a convention on criminal accountability of persons participating in United Nations operations would raise its own peculiarities, especially with regard to securing the integrity of the evidence. These would be matters that may require conventional rules to fill the investigation gap.

V. Rationale for the distinction between military observers²⁰ and military members of national contingents

54. One of the principle reasons for the distinction between military observers and military members of national contingents is the relationship between such persons and the United Nations.

55. Military observers are military officers assigned by the United Nations to perform missions or tasks for the United Nations. They are nominated by their Governments following a request by the Secretary-General and serve the United Nations in a personal capacity and not as representatives of their State.

56. Military members of national contingents, on the other hand, are provided by a sending State as representatives of that State. There is no individual arrangement between members of a national contingent and the United Nations; rather their conditions are covered by a memorandum of understanding between the United Nations and the troop-contributing country. Unlike military observers, military members of national contingents are provided as part of a contingent and are not selected on an individual or personal basis.

57. The relationship between the United Nations and military observers, and the role they perform resulted in military observers being classified as “experts on mission” (within the meaning of article VI of the 1946 Convention on the Privileges and Immunities of the United Nations)²¹ in the model status-of-forces agreement between the United Nations and the host country (see A/45/594, annex, para. 26).

58. The General Convention does not, however, include a definition of experts on mission. This issue was considered by the International Court of Justice in its advisory opinion of 15 December 1989 on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*²² on the extent of the immunities afforded to experts on mission.

59. The International Court of Justice observed that:

“[Section 22] does not, however, furnish any indication of the nature, duration or place of these missions. Nor do the *travaux préparatoires* provide any more guidance in this respect.”

²⁰ While the following discussion refers to military observers, it applies equally to all military personnel who are afforded the status of an expert on mission.

²¹ United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1); hereinafter called the General Convention.

²² *I.C.J. Reports*, 1989, p. 177.

60. In conclusion, the Court took the view that “the General Convention is applicable to persons (other than United Nations officials)²³ to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in [section 22 of the General Convention] with a view to the independent exercise of their functions”.

61. In accordance with this view, as military observers are persons “to whom a mission or task has been entrusted by the Organization”, the Secretariat has taken the view that the legal status of military observers is correctly classified as experts on mission.²⁴

62. As experts on mission, military observers are subject to different financial and accountability regimes as compared to their national contingent counterparts. Military observers are not entitled to carry weapons. In addition, they are specifically prohibited from seeking and accepting instructions with regard to the performance of duties from their Government or any other authority external to the United Nations Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9).

63. In relation to the exercise of jurisdiction of the host State over an expert on mission who is accused of committing a crime — there is a need to consider the coverage of the relevant status-of-forces agreement or status of mission agreement.²⁵ In accordance with paragraph 47 (b) of the model status-of-forces agreement, only “military members of the military component of the United Nations peacekeeping operation” are subject to the exclusive jurisdiction of their respective participating State in respect of any crimes committed in the host State. As military observers are provided on an individual basis, there is no concept of a participating State in relation to such persons (see paras. 54-61 above). This means that they do not fall within paragraph 47 (b) of the model status-of-forces agreement. Instead, military observers are covered by paragraph 47 (a) of the model status-of-forces agreement, which provides that the Representative/Commander shall conduct any necessary supplementary inquiry (to that of the host State) and then agree with the Government whether or not criminal proceedings will be instituted.

64. One result of this is that while military observers remain members of their national armed forces and subject to the military jurisdiction of their sending State, this jurisdiction is in addition to, and not to the exclusion of, the laws of the host State.

65. Any proposal to change the status of military observers will need a reconsideration of their role, their relationship with the United Nations and their legal status vis-à-vis the host State as set out in the status-of-forces and status of mission agreements.

²³ Officials are covered by art. V of the General Convention.

²⁴ Miller, A. J., “Legal aspects of stopping sexual exploitation and abuse in U.N. peacekeeping operations”, in *Cornell International Law Journal*, vol. 39, No. 71 (2006) states “even though the General Convention does not define experts on mission, it is clear that these individuals are U.N. agents but not U.N. officials”.

²⁵ This consideration is in addition to considering the existence and operation of immunities.

VI. Conclusion

66. Crimes committed by persons participating in United Nations operations impact not only on the victim and/or the host country, but also on the international community and the execution of the mandate. A comprehensive response to this problem requires offenders to be held accountable for their criminal conduct.

67. The Secretariat can only go so far; it cannot conduct criminal investigations or criminal trials, which remain the responsibility of Member States.

68. Member States are encouraged to take steps to facilitate the exercise of criminal jurisdiction over their persons participating in United Nations operations. In the longer term, a convention is supported, not only to provide a basis for the exercise of jurisdiction and clarification of a number of issues, but also to indicate to the international community the importance of holding persons participating in United Nations operations accountable for any criminal conduct.

VII. Recommendations

A. Short-term measures: addressing the jurisdictional gap

69. The Secretariat supports the following short-term measures aimed at emphasizing the role of Member States in relation to the exercise of criminal jurisdiction:

(a) The adoption of a resolution in which the General Assembly strongly urges Member States to establish, as a minimum, jurisdiction over their nationals who commit serious crimes as they are known and defined in their existing domestic criminal laws, where that conduct also constitutes a crime under the laws of the host State;

(b) The inclusion of language in mission-specific Security Council resolutions that encourages countries contributing or seconding personnel to take appropriate preventative action, including the conduct of predeployment training, and to be in a position to hold persons who commit crimes accountable for that criminal conduct;

(c) A request by the General Assembly, through the Special Committee on Peacekeeping Operations, that the Secretary-General continue to include similar language in each memorandum of understanding that is developed between the United Nations and a Member State contributing a formed police unit, and that each relevant Member State agree to the inclusion of such language;

(d) Action by the Department of Peacekeeping Operations to ensure that notes verbales sent to permanent missions seeking personnel, such as military observers, individual contributions to the police component of a United Nations operation and seconded corrections officers, make Member States aware of the expectation of the Secretariat that any person who serves as part of a United Nations operation is to have received predeployment training in relation to the zero tolerance policy and is aware that certain conduct may amount to a crime for which they will be held accountable.

B. Long-term measures: a convention

70. The Secretariat supports the adoption of a convention that:

(a) Requires Member States to exercise jurisdiction when the alleged offender is a national of that State or the alleged offender is in that State and the State does not extradite him or her;

(b) Requires Member States to consider establishing jurisdiction when the victim of the crime is a national or a stateless person who has his or her habitual residence in the territory of that State or the crime is committed by a stateless person who has his or her habitual residence in the territory of that State;

(c) Covers crimes committed by all United Nations personnel (excluding military members of national contingents) who are in the area of a United Nations operation irrespective of the department, office, programme, fund or specialized agency with which they are engaged;

(d) Applies to all crimes and is not limited to crimes against the person or to crimes involving sexual exploitation and abuse;

(e) Facilitates international cooperation and cooperation between Member States and the Secretariat.
