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IMPROVING CRIMINAL ACCOUNTABILITY IN UNITED NATIONS PEACE OPERATIONS

William J. Durch
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REPORT FROM THE PROJECT ON RULE OF LAW IN POST-CONFLICT SETTINGS
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The Henry L. Stimson Center
1111 19th Street, NW
12th Floor
Washington, DC 20036

Telephone: 202-223-5956
Fax: 202-238-9604

www.stimson.org
email:info@stimson.org

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LIST OF ACRONYMS

ABA CEELI	American Bar Association Central European and Eurasian Law Initiative
ACABQ	Advisory Committee on Administrative and Budgetary Questions, United Nations
BOI	Board of Inquiry
CDU	Conduct and Discipline Unit, United Nations
CJAC	Criminal Justice Advisory Committee, United Nations (proposed)
CJB	Criminal Justice Branch, United Nations (proposed)
DPKO	Department of Peacekeeping Operations
DPA	United Nations Department of Political Affairs
DRC	Democratic Republic of the Congo
DSRSG	Deputy Special Representative of the Secretary-General
ECCC	Extraordinary Chambers in the Courts of Cambodia
FOPO	Future of Peace Operations Program
FPU	Formed Police Unit
FSAP	Financial Sector Assessment Program, IMF
GA	General Assembly, United Nations
IAAC	Independent Audit Advisory Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMF	International Monetary Fund
IPTF	United Nations International Police Task Force
JRI	Judicial Reform Index, ABA CEELI
MONUC	United Nations Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
MSA	Mission Subsistence Allowance
NGO	Non-governmental Organization
OCHA	Office for the Coordination of Humanitarian Affairs, United Nations
OHCHR	Office of the High Commissioner for Human Rights, United Nations
OIOS	Office of Internal Oversight Services, United Nations
OLA	Office of Legal Affairs, United Nations
ONUB	United Nations Operation in Burundi
OSCE	Organization for Security and Cooperation in Europe
PCC	Police-contributing country
PSO	Peace Support Operation
ROLCRG	Rule of Law Coordination and Resource Group, United Nations
SCSL	Special Court for Sierra Leone
SEA	Sexual Exploitation and Abuse
S-G	Secretary-General of the United Nations
SGB	Secretary-General's Bulletin
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SRSG	Special Representative of the Secretary-General
TCC	Troop-contributing country
TPIU	Trafficking Prevention and Investigation Unit (Kosovo)

UN	United Nations
UNAMID	African Union–United Nations Hybrid Operation in Darfur
UNAMSIL	United Nations Mission in Sierra Leone
UNAT	United Nations Administrative/Appeals Tribunal
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNIOSIL	United Nations Integrated Office for Sierra Leone (through 30 Sept. 2008)
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone (from 1 Oct. 2008)
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIT	United Nations Integrated Mission in Timor-Leste
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNPOL	United Nations Police
UNPROFOR	United Nations Protection Force (Croatia, Bosnia-Herzegovina)
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNTAET	United Nations Transitional Administration in East Timor
WFP	World Food Program, United Nations

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PREFACE

Since 2001, the Henry L. Stimson Center's program on the Future of Peace Operations (FOPO) has worked to promote sensible US policy toward and greater UN effectiveness in the conduct of peace operations—internationally mandated efforts that engage military, police, and other resources in support of transitions from war to peace in states and territories around the globe. Such places suffer from many deficits—in education, health, jobs, and infrastructure—but the greatest and most costly, in the long run, is their deficit in the rule of law and its impact on quality of governance, justice, and other goals of international security and aid institutions that want to promote sustainable peace and development. There is, however, no agreed definition of the term "rule of law." For purposes of this and other reports in FOPO's series on restoring post-conflict rule of law, we therefore choose to use the relatively comprehensive definition contained in the UN Secretary-General's August 2004 report on rule of law and transitional justice. It defines rule of law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[*]

Promoting and sustaining the rule of law in war-torn lands requires a multi-dimensional approach that extends beyond the reform and restructuring of local police, judicial, and corrections institutions to:

- Early provision of public security by the international community while local security forces are reformed and rebuilt;
- International support for effective border controls, both to curtail illicit trade and to promote legitimate commerce and government customs revenues;
- Curtailment of regional smuggling rings and spoiler networks that traffic in people and commodities to finance war and, afterwards, to sustain war-time political and economic power structures;
- Strict legal accountability for those who participate in peace operations, lest their actions reinforce the very cynicism and resignation with regard to impunity that their work is intended to reverse; and
- Recognition that corruption can drain the utility from any assistance program and undermine the legitimacy of post-war governments in the eyes of their peoples.

[*] United Nations, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, S/2004/616, 23 August 2004, para. 2.

This study, *Improving Criminal Accountability in United Nations Peace Operations*, is one of five produced by FOPO, each addressed to one of the bullets above. In 2004, major problems of sexual exploitation and abuse by UN peacekeepers in the Democratic Republic of the Congo and other operations became a public scandal for the United Nations. Before that story broke, FOPO had begun work on the problem of criminal accountability for personnel in peace operations. Because states retain disciplinary responsibility for their military forces in peace operations, that work focused on UN staff and experts on mission, a category that includes UN police. As operations become more deeply involved in assisting or substituting for local government, their personnel must themselves be subject to the rule of law, and be seen as subject to it by local peoples. FOPO found, however, that the tenuous reach of the law—any law—covering criminal acts by UN personnel on mission has left a legal and procedural vacuum filled only in part by administrative sanctions (such as fines, dismissal, and/or repatriation) for actions that would be felonies under most states' domestic laws. FOPO therefore looked into other options, some of which would require serious rethinking of criminal jurisdiction in and for peace operations.

This study and the other four described briefly, below, can be accessed online from the FOPO homepage on the Stimson Center website (www.stimson.org/fopo).

Early and Effective Policing and Other International Support for Rule of Law. The international community's ability to provide early and effective support for public security in new peace operations has fallen consistently short over the past decade, and in many respects continues to do so. This study investigates the sources of the problem and the evolution of UN policing in size, scope, and key operational tasks and concludes that future demand for rapidly deployable UN police can best be met with a standing UN police service and complementary police reserve force. The study is *Enhancing United Nations Capacity for Post-Conflict Policing and Rule of Law*, by Joshua G. Smith, Victoria K. Holt, and William J. Durch.

Borders. FOPO's border security study, *Post-Conflict Borders and UN Peace Operations*, is divided into two parts. For part one, author Kathleen A. Walsh surveyed more than 100 international border assistance and training programs. Her report, "Border Security, Trade Controls, and UN Peace Operations," found both a great deal of overlap and lack of coordination among these programs that, if remedied, could make them much more cost-effective. The second part of the study, "A Phased Approach to Post-Conflict Border Security," by Katherine N. Andrews, Brandon L. Hunt, and William J. Durch, lays out the requirements for coordinated international support to border security in post-conflict states that host international peace operations.

Spoiler Networks. During and after conflict, the smuggling of high-value commodities such as diamonds, precious metals, and timber sustains war and then impedes peace, feeding the informal economy, evading customs, lowering government revenues and slowing its institutional recovery. The UN Security Council has imposed targeted sanctions on some countries in an effort to disrupt such "spoiler" networks. It has also appointed small teams of investigators to monitor sanctions implementation, shed critical light on these networks, recommend measures to counter them, and thus contribute to building the rule of law. These Groups or Panels of Experts face challenges, however, both in the field and in getting the Security Council and UN member states to

implement their many practical recommendations. This FOPO study details these issues, highlights how implementing Panel recommendations could improve post-conflict rule of law, and makes its own recommendations about how the Panels could be better used. The study is *Targeting Spoilers: The Role of UN Panels of Experts*, by Alix J. Boucher and Victoria K. Holt.

Corruption. When building peace, failing to fight corruption at best renders other efforts less efficient and at worst makes them useless. As a contribution to the many efforts to contain and reduce pervasive corruption in post-conflict settings, FOPO reviewed what the world's specialists in corruption say about how to recognize and fight it in post-conflict circumstances, especially where international peace operations are deployed. The resulting study, *Mapping and Fighting Corruption in War-Torn States*, by Alix J. Boucher, William J. Durch, Margaret Midyette, Sarah Rose, and Jason Terry, reflects this meta-analysis of the English-language literature on the subject—a search for consensus and insight—rather than independent field research. Its principal contributions lie in its structured summaries of the literature surveyed and in how it uses that structured assessment to visualize both the patterns of post-conflict corruption and emerging best practices in fighting it.

All of these studies recognize that the United Nations cannot immediately "create" the rule of law in countries where it does not exist, or transform recalcitrant and abusive police into model protectors of the public trust in a few short months. Such efforts take time. Moreover, even well-equipped peacekeepers will have difficulty totally securing hundreds of miles of border in unfamiliar and rugged terrain against smuggling or spoilers. Nor is it likely that the best-coordinated international efforts can completely eradicate corruption in post-conflict circumstances. The UN and its partners can, however, provide critical assistance, guidance, and support on all of these issues, step by step, to fragile governments attempting to develop the capacity and legitimacy to effectively govern on behalf of their peoples. In short, the United Nations, its member states, and other international institutions and aid donors can help fragile states begin the rocky journey toward self-sustaining peace, good governance, and stable economic livelihoods. The common foundation on which such institutions and outcomes must be built is respect for and deference to the rule of law.

EXECUTIVE SUMMARY

In the past decade, the number of persons serving in UN peace operations has increased more than ten-fold, from roughly 12,000 to more than 115,000, with a further 12,000 authorized for deployment. In the wake of rapid mission growth and deployment into desperately poor and chaotic situations came growing reports of serious misconduct by military and civilian personnel alike. The misconduct story hit the UN hard in 2004, starting with its mission to the Democratic Republic of the Congo but with similar stories soon emerging from other operations as well. Although misconduct in complex peacekeeping has a long history, it was previously dealt with quietly through diplomatic channels. Quiet impunity, or impunity in any form, will no longer do.

The UN has undertaken substantial efforts since 2004 to build a system for reporting, investigating, and punishing misconduct. These efforts may be gaining traction: reported cases of sexual exploitation and abuse by peacekeepers have declined from their peak of 357 in 2006 to 83 in 2008, although allegations of other forms of serious misconduct—what the UN calls Category I offenses—appear to have remained roughly constant at 100 per year.

To date, the reforms have been largely limited to the administrative sphere: UN conduct and discipline units now serve in all UN operations; the investigative abilities of the Office of Internal Oversight Services (OIOS) have improved somewhat; the UN's internal system of administrative justice has been rebuilt; the UN has developed the ability to blacklist persons with records of serious misconduct; and states have been encouraged to develop the laws needed to prosecute nationals who serve in UN missions. While these are necessary and useful tools, the lack of criminal accountability remains, accompanied by the realization that these improvements are not enough, either as a punishment or a deterrent.

They are not enough particularly with regard to non-military personnel of UN operations, who are not covered by national military codes of justice or memoranda of understanding between the UN and individual troop-contributing countries that, since 2008, have included pledges to punish criminal behavior. Thousands of police deploy in formed units under MOUs between sending states and the United Nations. Thousands more individual officers deploy with no guarantees from their governments, although the United Nations considers them to be under the jurisdiction of their states of nationality. They enjoy functional immunity from local criminal jurisdiction as UN "experts on mission." The Organization's only recourse in the event of criminal or other unprofessional conduct is to send them home, whether the offense is excessive use of force or premeditated murder. Too often, actions considered felonies in most countries and deserving of lengthy jail time result in a penalty no greater than denial of a future UN job if committed in a peace operation.

This report therefore focuses its recommendations on UN officials ("staff," including more than 20,000 civilian personnel, over 1,000 of whom are armed close protection security officers) and "experts on mission" (including up to 17,000 UN police, nearly half of whom are armed), all of whom enjoy substantial functional immunity from local legal jurisdiction. The 1946 UN Convention on Privileges and Immunities did not anticipate UN staff working where “the legal

system was so devastated by conflict that it no longer satisfied minimum international human rights standards" that a waiver of immunity required (Zeid Report, 2005). Neither did the Convention anticipate substantial numbers of UN field staff and experts on mission deploying with automatic weapons. The General Convention was created to shield UN personnel against arbitrary state power; something more is now needed to shield local populations—and the UN itself—from the criminal actions of a small but significant number of UN personnel. Lack of criminal accountability poses a problem—of equity, hypocrisy, injustice, or just bad example—and the UN must address it.

The UN Secretary-General, the Special Committee on Peacekeeping Operations, and the General Assembly have been searching for better solutions to criminal accountability for several years, and in so doing have encountered a range of obstacles:

- State-related barriers include the failure of states' criminal justice systems to meet standards of international human rights law, thus preventing a waiver of immunity; absence of "dual criminality" (activities considered crimes in both the mission area and in the alleged perpetrator's state of nationality); and states of nationality that are unwilling or unable to prosecute the actions of their nationals abroad.

- Barriers arising from the operational environment include weaknesses in criminal justice institutions where peace operations deploy; destitute and vulnerable populations; limited mission recreational facilities; substantial cash living allowances for mission personnel; and difficulties gathering valid evidence in a timely fashion.

- Barriers arising from UN policy and practice include *institutional reluctance regarding criminal jurisdiction*, although a variety of UN institutions have wielded it; *individual reluctance to report criminal acts*, for reasons ranging from cultural norms that blame the victim to staff fears of retribution despite nominal "whistle-blower" protections; *lack of professional criminal investigative capacity*; *difficulties with timely case referrals to authorities*, as sole discretion on waiving immunity rests with the Secretary-General in New York, upon the advice of the UN Office of Legal Affairs; and finally, the *broad-spectrum nature of functional immunity* as applied to experts on mission "during the period of their missions," without distinction between behavior on and off duty.

Because many historical barriers to effective accountability result from UN rules and policies, they can in principle be surmounted by internal action, and the Secretary-General and Secretariat deserve credit for instituting corrective policies and innovations. These remain, however, means of working around the fundamental problems that make effective criminal accountability so elusive. The UN itself has no direct recourse for criminal action against any of its various categories of employees who commit crimes while serving in the field.

To change this situation, solutions that hold hope of reducing present hypocrisy while increasing the criminal justice capacity applicable to UN peacekeeping—though politically difficult—must be addressed.

There are two potentially workable venues of criminal jurisdiction for the problems outlined above: the sending state/state of nationality and the mission host state. Before taking either approach, however, several supporting areas require attention:

- "All necessary means" and the scope of functional immunity. Chapter VII mandates often authorize "all necessary means" to carry out many mission functions. Mandate language is the touchstone for mission operations and as such has implications for the interpretation of functional immunity. Broad interpretation of broad language could produce lethal use of force that a reasonable third party would deem excessive but that is nonetheless construed by the mission or the individual wielding it as "necessary." Non-public rules of engagement (military) and directives on use of force (police) do not have the same exemplary value for the host state or its population, and more carefully drawn mandates could further mission goals without turning functional immunity into de facto impunity.

- Integrated reporting of misconduct and independent investigative capacity. UN investigators outside the realm of the war crimes tribunals have lacked subpoena powers and other tools for conducting effective and timely criminal investigations. A Criminal Investigations Service should be created within the OIOS Investigations Division that derives the necessary powers for effective criminal field investigations from the collaborative justice system recommended below. Preliminary investigations of Category I misconduct should proceed as though the results will support a criminal prosecution.

- Ensuring a level playing field with respect to criminal justice. The UN should ensure that all alleged wrongdoers among its staff face equitable legal treatment whether due process occurs within the state of nationality or a mission host state. Repatriating personnel to states whose criminal justice systems are more criminal than just would subject UN personnel to unequal treatment *because* they are UN personnel. The UN therefore needs a means of evaluating states' criminal justice systems for compliance with international human rights standards in investigation, detention, and judicial due process.

With attention given these areas, we would recommend that the UN adopt a two-step approach to fair and effective criminal justice for non-military UN mission personnel. Step one would accord primary jurisdiction to the sending state/state of nationality, if it meets relevant conditions regarding extraterritoriality and criminal justice system performance, and has agreed to prosecute well-founded allegations of criminal behavior. Should the state of nationality fall short on one or more of these points, step two would assign responsibility for criminal investigation and prosecution to a collaborative criminal justice mechanism of the United Nations and the host state, to be stipulated in the mission mandate passed by the UN Security Council and reinforced by the Status of Mission Agreement with the host state.

Given the quality of justice systems in most mission host states, implementing step two would, in virtually all cases, require that the United Nations be prepared to act as the principal partner in the administration of criminal justice for mission personnel. Such a role for the UN would benefit host states beyond the relatively short-term realization of justice for persons otherwise beyond the state’s legal reach, since criminal justice for mission personnel, as effected under step two, would

exemplify rule of law for the host state. For purposes of step two, the host state criminal justice system could be normed to international human rights standards by using, as a point of reference, the widely-vetted model codes for criminal law and procedure produced by the joint efforts of the Irish Centre for Human Rights and the US Institute of Peace, in collaboration with the Office of the UN High Commissioner for Human Rights and the UN Office on Drugs and Crime. The model codes could also be used for international planning, pre-deployment training, and assessment of host state capacity, as well as negotiation of the Status of Mission Agreement. They could facilitate coordination of collaborative criminal justice efforts with the rule of law capacity-building elements of the mission, other international agencies and development donors, and national professional associations.

Step two would require a UN criminal justice support capacity running in parallel, and to some extent sharing support structures, with the recently revamped UN internal justice system. The proposed support capacity should be able to borrow personnel from deployable (standing or standby) rule of law capacities either now in existence or being developed in the UN itself and by regional organizations and UN member states. This support capacity would require new elements for Headquarters and field missions:

- Criminal Justice Support Structure: UN Headquarters. We propose to add, within the new UN Office of the Administration of Justice, a Criminal Justice Support Division. Within the division would be a Central Criminal Case Registry to back up the primary court registries of the collaborative criminal justice system in the field, and a Criminal Justice Field Support Service, with three sections. The first section would manage modest rosters of trial judges and defense attorneys. (Prosecuting attorneys and the staff who manage the primary collaborative-court registries should be full-time UN staff.) The second would draft policy and standard operating procedures for the field; coordinate with OHCHR regarding UN criminal justice system assessments; participate in the initial assessment of a mission host state's criminal justice system; and liaise with the wider UN community of practice on criminal justice issues. The third section would coordinate logistical support for the personnel responsible for implementing the new criminal justice support system in mission areas. At the apex of the Headquarters structure would be a Criminal Justice Advisory Committee (CJAC), modeled on the Independent Audit Advisory Committee that oversees the operations and budgets of OIOS and helps to maintain its functional independence within the UN system. On matters of substance, both the Headquarters and field elements of the criminal justice support system would answer to CJAC and thence to the General Assembly, rather than the Secretary-General. This reflects a deliberate effort to introduce checks and balances vis-à-vis the administrative apparatus of the Secretariat. CJAC would approve policies and procedures for the criminal justice support system, after review by the UN's Rule of Law Coordination and Resource Group, which consists of Under-Secretaries-General of all the major elements of the United Nations with a functional interest in rule of law. This step would ensure broad and high-level input into the development of policies and procedures without compromising the new system's independence.

- Criminal Justice Support Structure: Field Missions. Independence of operation would be even more strictly emphasized in the field, where a proposed office of Civil Provost would

> be created, initially for host states with major missions (Congo, Liberia, Sudan, and Haiti), at a UN rank (Director level 2) that is comparable to the head of a major component in a UN peace operation. The provost's office would be supported logistically by the peace operation's logistics and communications teams, but would be answerable only to the CJAC. The provost would be the principal operational point of contact with the host state's criminal justice system for purposes of implementing the collaborative criminal justice system. Using preliminary reports from OIOS on likely Category I misconduct, the provost would decide whether the case involved a serious criminal offense for which a full forensic investigation would be warranted. The provost also would decide, with input from the assessment section at Headquarters, whether to repatriate, or to prosecute in partnership with the host state. The provost would, in other words, sit as a filter in the stream of conduct reports that now flow directly to the Head of Mission for disposition (dismissal or referral to Headquarters). This proposal would radically change how the United Nations processes alleged criminal behavior in the field. It is, however, necessary if the United Nations ever hopes to move at the "speed of crime."

Because the provosts would wield such power, they should be subject to a rigorous system of accountability. Their annual performance appraisals should derive from a "360-degree review" process in which three near-peers in rank from other UN missions interview the provost's colleagues, staff, and stakeholders, including host state counterparts, and draft an appraisal for review and approval by the CJAC. The CJAC should have the power to remove a provost who is not performing according to the highest standards of competence, integrity, and impartiality.

The proposed collaborative criminal justice system should offer all accused access to professional legal counsel at the UN's expense, but with freedom to choose other counsel. A right of appeal should be built into the system, but appeals should be held in the host state so that local parties can see justice done. Sentences should be carried out under contract with the state of nationality, if its corrections system meets international standards, or with third states, building on precedents established by UN war crimes tribunals, under pre-negotiated arrangements.

The new structures and processes that we propose in this report would require a modest expansion of the UN peacekeeping support account budget, and support from the donor community that focuses on rebuilding host state criminal justice capacity. The monetary cost should be weighed against the benefits they could bring not only to the United Nations but to the people UN peace operations are mandated to help and protect, and potentially to the justice systems of mission host states, the effectiveness of which is crucial to rebuilding the rule of law.

Closing loopholes that allow UN personnel to evade responsibility for their actions is, at minimum, an obligation the UN owes itself to preserve organizational integrity, owes to the civilians it should be protecting, and owes to its member states. The Organization should demonstrate uncompromising support for human rights and the highest standards of due process. Ending impunity for its own personnel is a tremendous opportunity for the United Nations to offer a good example in a critical sector, in the very places that need it most.

— 1 —
INTRODUCTION: ACCOUNTABILITY ISSUES IN PEACE OPERATIONS

The number of United Nations peacekeeping and peacebuilding missions around the world has surged in this decade, as has the number of personnel deployed in such missions. The vast majority of these individuals are committed and professional in their efforts to bring peace to nations scarred by conflict. Nonetheless, accounts of misconduct by personnel in UN peace support operations (PSOs) have surfaced periodically over the years, especially when demand for operations has spiked and operations have involved increasingly challenging, complex tasks in substantially lawless environments.

In prior peacekeeping surges into such environments, instances of misconduct have ranged from selling fuel and supplies on the local black market to complicity in human trafficking. Misconduct has not been unique to any particular economic stratum or region, but has involved personnel from developed as well as developing countries, and operations in Europe, Asia, Africa, and the Americas.[1]

Historically, the United Nations preferred to deal with issues of misconduct quietly and bilaterally, especially regarding military personnel, since UN member states retain command and disciplinary authority over the troops that they contribute to UN operations. In 2002–03, however, the UN Secretary-General (S-G) issued behavioral guidelines and directives for field missions.[2]

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[1] In the UN's operation in Cambodia (1992–93), for example, at least 40 UN police were repatriated for disciplinary problems. James A. Schear and Karl Farris, "Policing Cambodia: The Public Security Dimensions of U.N. Peace Operations," ch. 3 in Robert B. Oakley, Michael J. Dziedzic, and Eliot M. Goldberg (eds.), *Policing the New World Disorder: Peace Operations and Public Security* (Washington, DC: National Defense University Press, 1998). In Bosnia (1992–95), "Sarajevans relied on the black market that flourished thanks to corrupt soldiers serving in UNPROFOR, the United Nations peace-keeping force. Coffee, cigarettes and gasoline stolen from UNPROFOR depots appeared on the black market [at] 10 or 20 times their original value." PBS Frontline, "Romeo and Juliet in Sarajevo," written and directed by John Zaritsky, produced by Virginia Storring. Original air date: May 10, 1994, www.pbs.org/wgbh/pages/frontline/programs/transcripts/1217.html. In 2000–2001, members of the UN's International Police Task Force in Bosnia frequented bars where women were held in sexual servitude. Officers investigating such violations of UN policy reportedly were subject to retaliation by their peers. UN officials, moreover, could not name any instances in which home countries had pressed charges against repatriated police. Human Rights Watch, "Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution," November 2002, ch. 10. www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf. At about the same time in Kosovo, brothels, bars, and related establishments involved with human trafficking—and hence, organized crime—began to multiply along with the international military and civilian presence in the territory. In early 2001, UNMIK, the UN temporary administration in Kosovo, issued regulations against trafficking, established a Trafficking Prevention and Investigation Unit (TPIU), and drew up a list of local establishments that were "off limits" for international personnel. By the end of 2002, ten UNMIK police had been repatriated in connection with trafficking. Amnesty International, "Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo," May 6, 2004, ch. 6. web.amnesty.org/library/Index/ENGEUR700102004. See also, Sarah E. Mendelson, "Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans," Center for Strategic and International Studies, February 2005. www.csis.org/media/csis/pubs/0502_barracksbrothels.pdf

[2] United Nations, *Special measures for protection from sexual exploitation and sexual abuse, Secretary-General's Bulletin*, ST/SGB/2003/13, 9 October 2003. The bulletin was issued in response to a request from the General Assembly (A/RES/57/306, 22 May 2003), which was inspired in turn by a report by the UN Office of Internal

Still, for several years, these were not well-enforced in practice. Since 2005 (as related in greater detail in Chapter 2), more concerted enforcement efforts have been made, although available sanctions for violation of UN guidelines remain limited to administrative measures, such as fines, dismissal, and/or repatriation, for actions considered felonies under most states' domestic laws.

The authors of this study argue that, to maintain credibility and effectiveness as both a role model and an operational partner in keeping the peace and rebuilding war-torn societies, the United Nations needs to be able to ensure that criminal penalties are enforced for criminal acts committed by personnel deployed in PSOs. The Organization is at the forefront of efforts to reform and democratize the governance of states wrecked by conflict and to promote respect for human rights. Both goals require transparency in government and the accountability of public officials to the people they serve. The UN's promotion of human rights, transparency, and accountability under the rule of law appears hypocritical when the Organization itself has difficulty enforcing transparency and accountability within its own ranks. Mission personnel who commit crimes against local populations harm the very people who are the intended beneficiaries of UN operations, and in so doing, they also undermine trust in the Organization. Trust, once lost, is difficult to regain. Every incident that tarnishes the UN's reputation thus damages its potential to promote positive change in states emerging from conflict.

We are under no illusion about the difficulty of implementing the recommendations made in this study toward greater criminal accountability for UN mission personnel. The UN Secretary-General, the Special Committee on Peacekeeping Operations, and the General Assembly have been searching for better solutions to criminal accountability for several years, and in so doing have encountered a range of obstacles, from issues of sovereignty, jurisdiction, and the "legal personality" of the United Nations, to questions of governments' legal authority, functional capacity, and willingness to investigate and prosecute those accused of criminal activities while serving in UN peace operations. This study engages all of these issues and suggests a way forward. Its proposals are intended to stimulate debate about a broader domain of solutions that may benefit both the United Nations and respect for the rule of law where UN peace operations deploy.

This chapter reviews the recent history of allegations of misconduct by UN personnel. Chapter 2 summarizes UN efforts to confront it. Chapter 3 details institutional and other obstacles to the implementation of more effective accountability measures. Finally, Chapter 4 offers proposals to create consistent mission criminal accountability while supporting improvements in the criminal justice capacity of the states where UN PSOs operate.

ALLEGATIONS OF MISCONDUCT: 2004 ONWARD

The misconduct issue came to a boil in 2004 when several dozen members of the UN mission in the Democratic Republic of the Congo (MONUC) were accused of serious sexual exploitation and/or abuse (SEA) against members of the local population. MONUC earned particular notoriety for stories of staff members using pitifully small lures—one US dollar, two eggs, a glass of

Oversight Services (OIOS), *Investigation into sexual exploitation of refugees by aid workers in West Africa*, A/57/465, 11 October 2002.

milk—to induce sexual favors. But such problems extended to other operations as well, including those in Haiti and Liberia.[3] The Secretary-General's June 2008 report on SEA in UN missions observed, moreover, that "reports from other organizations suggest chronic underreporting of allegations of [SEA]."[4]

SEA constitutes one type of what the United Nations defines as "Category I" misconduct. Consistent with the Staff Rules and Regulations, the Secretary-General has "broad discretion in determining what constitutes serious misconduct and in imposing disciplinary measures" in instances where misconduct is substantiated.[5] However, according to the UN Office of Internal Oversight Services (OIOS), such misconduct includes "serious or complex fraud; other serious criminal act or activity; abuse of authority or staff; conflict of interest; gross mismanagement; waste of substantial resources; all cases involving risk of loss of life to staff or to others, including witnesses; [and] substantial violation of UN regulations, rules, or administrative issuances." Lesser, "Category II" issues include "personnel matters; traffic-related inquiries; simple thefts; contract disputes; office management disputes; basic misuse of equipment or staff; basic mismanagement issues; infractions of regulations, rules, or administrative issuances; [and] simple entitlement fraud."[6]

Parsing through SEA allegations is difficult for several reasons. Allegations against soldiers have received the most press attention perhaps in part because military personnel outnumber other personnel in UN operations by a wide margin. In 2005, UN reports suggested that the proportion of UN staff implicated in abuse was higher than the proportion of military personnel, but in subsequent years, allegations against military mission personnel were proportionally much higher than those against other mission personnel. Publicly available data are also somewhat inconsistent from year to year and leave issues about the disposition of some cases unanswered. The Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS) also have one reporting chain for allegations of misconduct not related to SEA, while the independent OIOS has another reporting chain, specifically for SEA. As late as mid-2008, the

[3] A fourteen-year-old Haitian girl told the BBC that she and her eleven-year-old friend had sex with local peacekeepers in exchange for "jelly, sweets, and a few dollars." (Mike Williams, "Fears over Haiti child 'abuse'," *BBC*, 30 November 2006, news.bbc.co.uk/2/hi/americas/6159923.stm.) An internal UN document in Liberia placed mission staff at a local club "where girls as young as 12 years of age are engaged in prostitution, forced into sex acts and sometimes photographed by UN peacekeepers in exchange for $10 or food or other commodities." (Colum Lynch, "U.N. Faces More Accusations of Sexual Misconduct: Officials Acknowledge 'Swamp' of Problems and Pledge Fixes amid New Allegations in Africa, Haiti," *Washington Post*, 13 March 2005, www.washingtonpost.com/wp-dyn/articles/A30286-2005Mar12.html?sub=AR.

[4] United Nations, *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, A/62/890, 25 June 2008, para.13

[5] United Nations, *Status, basic rights and duties of United Nations staff members, Secretary-General's Bulletin*, ST/SGB/2002/13, 1 November 2002; *Regulations Governing the Status, Basic Rights, and Duties of Officials other than Secretariat Officials, and Experts on Mission, Secretary-General's Bulletin*, ST/SGB/2002/9, 18 June 2002; and *Practice of the Secretary-General in disciplinary matters and possible criminal behavior, 1 July 2007 to 30 June 2008*, A/63/202, 31 July 2008.

[6] United Nations, *Information requested in paragraph 17 of General Assembly Resolution 62/247. Report of the Secretary-General*, A/63/369, 22 September 2008, paras. 19, 20. (Paragraph 17 references, in turn, GA Resolution 59/287 of April 2005, in which the GA emphasizes that OIOS "is the internal body entrusted with investigation in the United Nations"; decides that "in cases of serious misconduct and/or criminal behaviour, investigations should be conducted by professional investigators"; establishes various mandatory reporting mechanisms for misconduct; and directs the S-G to "protect staff members who report misconduct within the Secretariat against retaliation.")

two entities "continued to work on the harmonization of data and terminology."[7] Reports to the General Assembly (GA) on misconduct tally "allegations," which can involve multiple individuals, but when tallying completed investigations, reports refer to "cases" or individuals. Input and output numbers are thus incommensurate.[8]

The field environment is a difficult one in which to gather evidence. OIOS has reported that gathering actionable evidence against armed personnel sufficient to make a disciplinary case is harder than obtaining evidence, particularly complainants' testimony, against other mission personnel. OIOS reported on some contingent commanders' "reluctance" to cooperate with its investigations and some complainants' reports of bribery or intimidation.[9] But following the first round of investigations of the SEA scandal in MONUC, DPKO did ask at least one troop contributing country to repatriate and prosecute a military contingent commander, and later sent a formed police unit back home after less than two months in the mission.[10] Subsequently, it has dismissed and repatriated other contingent commanders and troops, banning them from any further participation in UN operations.

Serious misconduct by even one peacekeeper is unacceptable given their responsibilities and obligations, and the distressing stories of abuse emerging from peacekeeping missions have led to better training, better reporting, and improved investigatory capacity but still need, as we argue in Chapter 4, better mechanisms for ensuring fair adjudication of criminal cases substantiated by professional field investigations. Whether the United Nations has been doing an adequate job of investigating is difficult to determine without comparative data. At the end of 2005, for example, the first year in which the UN system took concerted efforts against serious field misconduct, 138 preliminary investigations were completed against a total 340 SEA allegations.[11] These efforts substantiated 48 allegations against UN staff, 4 against UN police, and 37 against UN military personnel. Given numbers of those respective categories of personnel deployed in 2005, that meant one substantiated allegation for every 300 UN staff personnel deployed in UN peace operations; one per 1,800 police deployed; and one per 1,700 military personnel. (Non-military, non-police personnel accounted for 16 percent of peacekeeping mission personnel in 2005 but 54 percent of substantiated allegations.)[12]

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[7] A/62/890, para. 14.

[8] A/62/890, paras. 8 and 9, and fn1: "For the purposes of this report, the term "investigations" is used to refer to the number of individuals identified in investigation report. There is therefore no match between the number of allegations received and the number of individuals for whom an investigation has been completed, since one investigation report may cover several individuals."

[9] United Nations, *Report of the Office of Internal Oversight Services [OIOS] on its investigation into allegations of sexual exploitation and abuse in the Ituri region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo[MONUC]*, A/61/841, 5 April 2007, paras. 13–15.

[10] United Nations, *Nineteenth report of the Secretary-General on MONUC*, S/2005/603, 26 September 2005, para. 59.

[11] From February 2008 onward, allegations of harassment or abuse of authority may be reported directly to OIOS by "aggrieved individuals or third parties with direct knowledge of any alleged misconduct…" under the S-G's Bulletin, *Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority*, ST/SGB/2008/5, 11 February 2008.

[12] As of 31 December 2005, UN peacekeeping deployed about 12,400 civilian personnel, 7,200 UN police, and 60,100 troops and military observers. UN Department of Public Information, "Background Note," DPI/1634/Rev.55, January 2006, www.un.org/Depts/dpko/dpko/archive/2005/bn1205e.pdf.

SEA allegations against peacekeeping personnel in 2006 remained relatively steady at 357, and most of these allegations clustered in the first quarter of the year, including a large number registered in Bunia, capital of the DRC's troubled Ituri region, where only 1 of 217 allegations was substantiated.[13] Even setting Bunia aside, however, the proportion of investigations and substantiated allegations plummeted: 66 investigations of military personnel resulted in 13 substantiated cases; 12 investigations of UN staff netted 2; and 4 investigations of UN police netted 1, for an average substantiation rate of 20 percent for completed investigations and just 5 percent substantiation compared to total allegations.[14]

In 2006, 103 allegations of other Category I misconduct were reported to the new UN Conduct and Discipline Unit (CDU) at Headquarters. In 2007 there were 112. Although the Secretary-General's annual report to member states summarized about 30 disciplinary actions taken in each of those years, the reporting does not specifically identify these as instances of discipline for serious misconduct, so these reports represent a substantiation rate of roughly 30 percent for non-SEA cases in both years.[15]

SEA allegations dropped sharply in 2007, to 127, and the completed investigation rate jumped. Investigations of 9 UN staff substantiated 6 allegations; investigations of 9 UN police substantiated 2; and investigations of 118 military personnel substantiated 113, for an overall substantiation rate of 89 percent.[16] The data on disposition of serious misconduct allegations suggest that the United Nations may be doing a better job confirming at least military misconduct—perhaps with the assistance of troop contributing country (TCC) investigators.

The SEA rate for 2008 continued to drop to 83 allegations, down from 127 in 2007. Investigations of 8 UN staff, 11 UN police, and 61 military personnel yielded substantiated reports on 4, 8, and 58 personnel, respectively. With 80 completed investigations and 70 of those substantiated, the substantiation rate remained high at 88 per cent.[17] Overall misconduct may remain an important problem, but 2008 figures have not been reported as of this writing. A report of the Secretary-General in August 2008 indicated, however, that "the number of disciplinary cases received at Headquarters for the first four months of 2008, many from peacekeeping missions, was greater than the combined total received in 2006 and 2007," although it did not differentiate between Category I and II offenses.[18]

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[13] A/61/841, paras. 13-15. OIOS encountered numerous obstacles to its investigations in Bunia, mid-January to mid-February 2006, resulting in the full substantiation of just one of 217 SEA allegations gathered against 75 peacekeepers. "Despite what collectively was a clear pattern of exploitation, it became virtually impossible to substantiate specific instances of sexual exploitation and abuse by conclusive evidence. In many of these cases, the accused peacekeeper was no longer in Bunia. Many complainants became frightened at the prospect of being confronted with the subjects of investigation or were pressured or intimidated by young prostitutes not to cooperate with OIOS. Some complainants lost interest … when they learned that they would not receive financial compensation for their cooperation."

[14] *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, A/61/957, 15 June 2007, Annex IV.

[15] *Practice of the Secretary-General in disciplinary matters and possible criminal behavior, 1 July 2006 to 30 June 2007*, A/62/186, 7 August 2007, paras. 15-43; also, same series, A/63/202, 31 July 2008, paras. 15-48.

[16] A/62/890, Annex V.

[17] United Nations, *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, A/63/720, 17 February 2009, para. 13 and Annex VI.

[18] United Nations, *Administration of justice at the United Nations, Report of the Secretary-General*, A/63/314, 20 August 2008, para. 9.

BEYOND THE SCANDALS: A DEEPER NEED FOR MORE ACCOUNTABILITY

The elements of a peace operation that work most directly to establish public safety and security for ordinary people, while working to restructure or reintegrate into society the forces that fought the late war, are the international military and police. Although we look at the scope of misconduct for all personnel in UN operations and although some of the UN's responses to misconduct apply to all personnel, military units deployed with UN operations answer to their own national authorities and national military codes of justice.[19] In contrast, individuals serving as UN non-military personnel—which includes UN Police, appointed as "experts on mission," and civilian staff, also called "officials"—are less consistently, and perhaps not at all, subject to the jurisdiction of their home states while on deployment. UN police particularly bear great responsibility to model what a decent and professional police service could be.[20] Such personnel should be held responsible for their actions in the field; and even be held to a higher standard than at home, as the United Nations is obliged to uphold the highest tenets of international humanitarian and human rights law.[21]

Extending effective criminal jurisdiction over UN officials and experts on mission, the objective of this report, is a goal repeatedly expressed by the GA and S-G alike. Yet administrative reforms made to date, as detailed in the next chapter, and results obtained to date suggest that more is needed to ensure criminal accountability for criminal behavior amongst personnel serving in UN PSOs. Lack of such full accountability jeopardizes the very venture of peacebuilding.

[19] Although not all troop-contributing countries have independent codes of military justice "operating in peacetime" (International Commission of Jurists & Columbian Commission of Jurists, *Military jurisdiction and international law: Military courts and gross human rights violations*, vol. 1, 24 February 2004, 154), the Zeid Report observed that "[t]here is no possibility of host state jurisdiction over military members of national contingents." United Nations, *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, A/59/710, para. A.27.

[20] A companion Stimson study looks in some detail at the cost and feasibility of creating a standing UN police and rule of law service that would manage a professionally-trained and rapidly deployable UN police reserve. Joshua G. Smith, Victoria K. Holt, and William J. Durch, *Enhancing United Nations Capacity for Post-Conflict Policing and Rule of Law*, Report No. 63 (Washington, DC: Henry L. Stimson Center, 2007).

[21] This latter obligation to uphold the highest international standards of behavior is stressed in the S-G's guidance for UN support to rule of law, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance,* April 2008, p. 2; see also UN GA Resolution A/RES/63/119, 11 December 2008 (published 15 January 2009), op. para. 2.

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UN RESPONSES TO ACCOUNTABILITY CHALLENGES

As signs emerged of widespread and systemic problems in both the behavior of personnel in UN peace operations and in the accountability mechanisms available to deal with it, the Organization began to take initial, albeit uneven, corrective steps. The United Nations Interim Administration Mission in Kosovo (UNMIK) established a Trafficking Prevention and Investigation Unit and designated certain local businesses as off-limits to its personnel—but not until early 2001, more than a year and a half into the mission.[22] MONUC itself adopted a code of conduct in 2002 "specifically on sexual exploitation and abuse," although senior mission officials did little to enforce it until allegations became public two years later.[23] In mid-2003, DPKO issued Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers ("Directives"), which laid out, among other things, the penalties that substantiated infractions could entail, including withholding of benefits and per diem or loss of employment. Bear in mind that these are penalties for misconduct up to and including what would be considered serious felonies in most domestic criminal law codes.

In October 2003, then Secretary-General Kofi Annan issued a "Secretary-General's Bulletin," *Special measures for protection from sexual exploitation and sexual abuse,* which defined these terms, detailed the precise behavioral prohibitions that applied to UN staff, and outlined the responsibilities of senior staff for preventing and responding to SEA.[24] This document, widely known among peace operations personnel simply as "the S-G's Bulletin" (although it is one of many in the "SGB" document series) provided needed clarity for UN staff, although implementation was sluggish. Its provisions were not adopted as a uniform standard of conduct for all peacekeeping staff nor made legally binding on all categories of non-military peacekeeping personnel, including UN Volunteers, UN consultants, and contractors with the UN, until May 2006, 32 months after issuance.

In mid-April 2004, MONUC appointed its first Personnel Conduct Officer, who was "immediately" apprised of a story about to run in the *Independent* (London) about SEA involving MONUC soldiers and displaced persons in Bunia, in northeast DRC. The Special Representative of the Secretary-General (SRSG) appointed an ad hoc investigative team, which developed and handed over 68 "incident" reports to a larger team brought in from OIOS. In July, the S-G appointed H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein, then the Permanent Representative of Jordan to the United Nations and a former civilian peacekeeper, as his adviser on the SEA problem; his subsequent investigations would result in a landmark report the following March that is discussed at length, below.

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[22] Bruce Oswald and Sarah Finnin, "Combating the Trafficking of Persons on Peace Operations," in *International Peacekeeping: The Yearbook of International Peace Operations* 10, 2006: 22.
[23] Jane Rasmussen, Personnel Conduct Officer, MONUC, "MONUC Sexual Exploitation and Abuse, End of Assignment Report," 25 February 2005, 1. www.un.org/depts/dpko/lessons.
[24] *Secretary-General's Bulletin,* ST/SGB/2003/13.

Table 1
DPKO Administrative Actions and Disciplinary Measures

"Following receipt of the recommendations of the Board of Inquiry and the final decision of the Head of Mission, . . .the commander or other supervisor responsible for the maintenance of discipline shall take appropriate administrative and/or disciplinary action. Such actions may be one or more of the following:

1. Removal from command
2. Redeployment (which might follow retraining)
3. Removal of benefits and concessions
4. Repatriation
5. Suspension of leave
6. Withholding or recovery of Mission Subsistence Allowance
7. Written censure, possibly revoking eligibility from future employment with the UN."

UN-Wide Administrative Actions and Disciplinary Measures

"Staff rule 110.3 provides that disciplinary measures can take one or more of the following forms (i.e., more than one measure can be imposed in each case):

(a) Written censure by the Secretary-General;
(b) Loss of one or more steps in grade;
(c) Deferment, for a specified period, of eligibility for within-grade increment;
(d) Suspension without pay;
(e) Fine;
(f) Demotion;
(g) Separation from service, with or without notice or compensation in lieu thereof;
(h) Summary dismissal."

Sources: UN Department of Peacekeeping Operations, *Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers*, DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994, July 2003, IX, para. 23, and United Nations, *Practice of the Secretary-General in disciplinary matters and possible criminal behavior, 1 July 2007 to 30 June 2008*, A/63/202, 31 July 2008, para. 10.

Meanwhile, the OIOS team completed its investigation of the 68 incident reports and reported to the General Assembly (GA) in January 2005. Owing to problems with evidence and testimony, OIOS was able to compile just 20 case reports, one involving an international UN staff member and nineteen involving peacekeepers from three contingents, the commanders of two of which had resisted or interfered with the investigation. Only six cases could be "fully substantiated" under the circumstances, but the investigators found a dramatically evident climate of abuse that continued even as the investigation went forward.[25]

About the time that the OIOS team issued its report, the UN Secretariat's Executive Committees on Humanitarian Affairs and on Peace and Security jointly established a Task Force on Protection from Sexual Exploitation and Abuse, co-chaired by DPKO and the Office for the Coordination of Humanitarian Affairs (OCHA). The task force has since focused on building common understanding among senior management of their responsibilities in preventing SEA and has

[25] United Nations, *Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, A/59/661, 5 January 2005, paras. 38–39, 44.

worked "to create a stronger support environment" for dealing with it at both DPKO Headquarters and in the field.[26] The task force also drafted guidance on the application of the S-G's Bulletin and developed a draft policy statement and draft comprehensive strategy for providing assistance and support to victims of SEA by UN personnel.[27] The strategy was based on more than a year of consultations with the various departments and agencies of the UN system, with individual member states, with non-governmental organizations, and with other interested parties. The General Assembly adopted the strategy by resolution and requested that it be implemented throughout the UN system.[28] Pursuant to the GA's request, a Secretary-General's report on lessons learned, best practices, and recommendations and an update on the development of a victim's assistance guide are expected in 2010.[29]

In addition to providing assistance to victims, the strategy specifies that the UN should provide basic medical treatment to complainants, even before substantiation of any allegation made.[30] The strategy further includes a promise that the UN would facilitate resolution of paternity claims by SEA victims and that children born as a result of SEA would receive UN assistance to address the medical and social consequences "directly arising from sexual exploitation and abuse."[31]

THE ZEID REPORT

In March 2005, the UN's Special Committee on Peacekeeping Operations ("Special Committee") received the results of Prince Zeid's investigations, which addressed in detail the factors contributing to the problem of SEA in peacekeeping missions and offered equally detailed recommendations for resolving it.[32] The report focused on four main categories of obstacles and potential reforms: the then-prevailing rules on standards of conduct; investigative capacity and processes; organizational, managerial, and command responsibility; and individual disciplinary, financial, and criminal accountability. It also laid out the complex and potentially confusing array of rules and regulations that applied to different classes of UN mission employees (see Annex Table A-1) and noted that the ability of states to prosecute their nationals deployed with peace operations depended upon "fortuitous" circumstances and that this situation was "unsatisfactory."[33]

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[26] United Nations, *Comprehensive report prepared pursuant to General Assembly resolution 59/296 on sexual exploitation and sexual abuse, including policy development, implementation and full justification of proposed capacity on personnel conduct issues*, A/60/862, 24 May 2006, para. 10.
[27] United Nations, *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, A/60/861, 24 May 2006, para. 16.
[28] United Nations, *Report of the Ad Hoc Open-ended Working Group on Assistance and Support to Victims of Sexual Exploitation and Abuse*, A/AC.274/2007/1, 3 August 2007, para. 14(b). See also United Nations, *General Assembly Resolution*, A/RES/62/214, 7 March 2008.
[29] A/RES/62/214, para. 4. See also *Report of the Special Committee on Peacekeeping Operations and its Working Group*, A/63/19, 24 March 2009, para. 60.
[30] A/RES/62/214, Annex, para. 6.
[31] Ibid., para. 8.
[32] United Nations, *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, A/59/710, 24 March 2005.
[33] A/59/710, para. 88. Prof. Laura Dickinson, School of Law, University of Connecticut, in correspondence with the authors on 25 July 2006, observed that UN member states "rarely initiate [disciplinary] proceedings" against their nationals deployed with peace operations, for reasons including lack of extraterritorial jurisdiction, lack of political will, and weaknesses in UN investigative capacity.

Two of the Zeid Report's more notable recommendations proposed new, dedicated capacities—one for investigation of alleged transgressions that would constitute "serious misconduct" under UN regulations, and one to oversee conduct and discipline issues.

UN Investigative Capacity

Arguing that effective investigations require participation of individuals with specialized expertise, the Zeid Report called for establishment of a permanent UN professional investigative capacity. The report also argued that although mission-led investigations would likely suffice for less complex cases, provided they made use of "modern scientific methods of investigation," a permanent professional investigative team should have responsibility for severe and complicated investigations. The report stated that such a body should have use of some of the "administrative machinery" of DPKO, yet, to promote fair and objective analysis, it must remain independent of both DPKO and mission command structures. To shield the investigative body from influence by the individuals it investigates, the Zeid Report recommended that the team's findings go directly to the S-G (or the S-G's Deputy), with copies to the Under-Secretary-General for Peacekeeping Operations and the relevant head of mission. The investigative body should also have sufficient authority to command mission cooperation with its investigations.[34] The report also "suggested" (because this recommendation was directed at member states and not the Secretariat),

> that the Special Committee recommend to the General Assembly that the model memorandum of understanding contain a provision requiring each troop-contributing country to nominate a military prosecutor who is available to travel on short notice at mission expense to participate in any Department of Peacekeeping Operations investigation into allegations of sexual exploitation and abuse or similar grave offenses against a member of its contingent.[35]

Such participation would facilitate the development of evidence usable by the troop contributing country's own military justice system in pursuing and prosecuting substantiated allegations of wrongdoing. Comparable provisions should appear in MOUs for formed police units (FPUs). There are no comparable MOUs at present governing secondments of individual police or other non-military personnel by governments to UN operations, and most mission staff are contracted as individuals by the United Nations. It is unlikely that every state of nationality with personnel in UN peace operations would be able to keep a prosecutor on standby for assignment to cases in UN missions. Complying with the criminal investigative requirements of all UN staff contributing countries, particularly where criminal investigations are the prerogative of an investigating judge, could prove quite difficult for even the most professional of UN investigators. We return to these and related issues in Chapter 4.

[34] "Modern scientific methods" would include fingerprinting, fiber analysis, and blood and DNA testing. A/59/710, paras. 31–32.

[35] A/59/710, para. 34. While the Special Committee has yet to recommend the Zeid Report's suggested course of action, it requested in its 2009 report that the Secretariat "consider generating force military police units, which will be required to conduct investigations of acts of misconduct, from the countries which contribute the troops to a particular mission." A/63/19, para. 57.

As noted earlier, missions are now required to refer all SEA allegations directly to OIOS, which provides reports to DPKO on the outcome of all investigations.[36] OIOS procedure is to record and evaluate all allegations it receives, prioritize allegations for investigation or, if there is insufficient evidence available, dismiss them. It then conducts a preliminary investigation.[37] DPKO in turn provides feedback on the results to the relevant peacekeeping mission and ensures that member states receive notice as well, even when allegations are not substantiated.[38] OIOS also has responsibility for handling and investigating all other allegations of serious misconduct, including acts related to procurement mismanagement and corruption.[39]

To meet the demands of its expanded responsibilities as peacekeeping operations have grown in size and number, the field presence of OIOS has grown as well. From July 2005 to December 2007, OIOS headquarters staff tasked solely with peacekeeping oversight increased by one third and the number of OIOS auditors resident in peacekeeping and political missions increased by nearly one half. Resident investigators were placed in UN missions in Côte d'Ivoire, Sudan, Liberia, the DRC, and Haiti, as well as in the since-closed mission in Burundi. In spring 2008, OIOS proposed to redeploy investigators from field operations to several regional hubs (New York, Vienna, and Nairobi), a move that finally was approved in spring 2009, on the strength of the argument that regional hubs would make it easier to attract qualified staff, and would be more efficient and cost-effective. Although this would place more professional distance between OIOS and mission personnel, the multi-pronged case made for evidence collection—that the hubs' were sufficiently close to missions to allow for rapid response teams with specialized skills; that small staffs remaining in large missions would ease the transition; and that initial evidence is often part of a larger, more extensive investigation—would not apply in time-sensitive cases of SEA or other serious crime.[40] Regional relocation is likely to reduce OIOS cognizance of and responsiveness to criminal activities in the missions.[41]

Some argue that criminal investigation is not (and, implicitly, should not be) part of the OIOS mandate.[42] We would argue the opposite: that the UN should not limit reforms in this area to just shifting the task of administrative investigations of misconduct to OIOS; a permanent, professional, in-house capacity for criminal investigations is needed.

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[36] Pursuant to United Nations, *General Assembly Resolution*, A/RES/59/287, 21 April 2005.
[37] A/61/957, para. 6.
[38] A/60/861, para. 7; United Nations, *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, Addendum*, A/61/668/Add.1, 22 December 2006, para. 8.
[39] One such OIOS investigation led to the indictment of an UNMIK staff member for embezzlement of $4.3 million, all of which was recovered and returned to the mission. www.un.org/Depts/oios/pages/id_at_work.html.
[40] United Nations, *Budget for the support account for peacekeeping operations for the period from 1 July 2009 to 30 June 2010, Report of the Secretary-General*, A/63/767, 16 March 2009, paras. 662–687, and United Nations, *Strengthening the capacity of the United Nations to manage and sustain peacekeeping operations, Report of the Advisory Committee on Administrative and Budgetary Questions*, A/63/841, 1 May 2009, para. 175
[41] A/63/767, para. 702.
[42] United Nations, *Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in Peacekeeping Operations*, A/60/980, 16 August 2006, para. 84 (h–i). See also *Report of the Ad Hoc Committee on criminal accountability of United Nations personnel and experts on mission*, 1st session, A/62/54, 9–13 April 2007, para. 2.

UN Conduct and Discipline Oversight Capacity

The Zeid Report also called for the development of a dedicated capacity at DPKO Headquarters to oversee issues related to misconduct and abuse, proposing that this capacity address all cases of misconduct involving military members, civilian police, and civilian personnel. The report recommended that this capacity be tasked to advise personnel and mission leadership alike on all matters of conduct and discipline; ensure the coherence of administrative and disciplinary procedures; and lead a process of reviewing existing policies and developing strategies for addressing the remaining problems.[43]

DPKO enacted this recommendation almost immediately, using redeployment of existing posts, general and temporary assistance funds, and secondments of personnel to create a Conduct and Discipline Unit within the Office of the Under-Secretary-General in November 2005. Authorized to have 10 persons, the unit was fully staffed by April 2006.[44] With the 2007 restructuring of DPKO into two departments—a DPKO being responsible for policy, planning, strategic guidance, and military, police, and related rule of law matters, and a Department of Field Support (DFS) responsible for personnel, finance, communications, and logistics—the Conduct and Discipline Unit now functions, with dedicated resources, as part of the Office of the Under-Secretary-General in DFS, with a staff of 8 professionals.[45]

THE "COMPREHENSIVE STRATEGY"

Shortly after the release of the Zeid Report, the Under-Secretary-General for Peacekeeping Operations asked OIOS to survey the state of discipline throughout DPKO field missions. The subsequent OIOS report, issued in March 2006, found that each mission exhibited some clear areas of weakness. The two main problems highlighted were inadequate guidance on Department policies and procedures at DPKO Headquarters, and insufficient resources and skills among the missions to implement and enforce conduct standards.[46]

Also in response to the Zeid Report, the Special Committee on Peacekeeping Operations offered more specific recommendations that formed the basis of a comprehensive DPKO strategy to reduce SEA in all peacekeeping missions.[47] DPKO's comprehensive strategy is a "three-pronged" approach involving prevention, enforcement, and remedial action to repair damage wrought by the misconduct of UN staff.

Prevention

The Department has made prevention a central focus, and its efforts emphasize the need to clarify the rules and standards of conduct applicable to UN personnel and to make them uniformly

[43] A/59/710, para. 42.
[44] A/61/841, para. 32.
[45] A/63/767, annex II, A/63/841, para. 95.
[46] United Nations, *Report of the Office of Internal Oversight Services on the global review of discipline in field missions led by the Department of Peacekeeping Operations*, A/60/713, 8 March 2006, and A/60/862, paras. 4–5.
[47] Periodic reports have assessed DPKO's progress toward implementing each of the Special Committee's recommendations. At the time of writing, the latest Special Committee report was the *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2009 substantive session*, A/63/19, released 24 March 2009.

binding. DPKO has also tried to ensure that all mission staff are aware of the UN's rules and standards. Toward this end, the 2003 "Directives" were to be revised to reflect lessons learned since then as well as requirements set out in an earlier S-G report to the GA addressing the unique concerns of refugee or displaced women and on the prevention of human trafficking.[48] Other steps have been taken to expand the reach of the S-G's Bulletin, among them amending all legal agreements with civilian peacekeeping personnel and the guidelines for TCCs to make clear their obligation to abide by the standards laid out in the Bulletin.[49] DPKO has also developed a code of conduct video for use in induction and pre-deployment training that explains those standards which are also being translated into all official languages of the UN and into twelve languages of TCCs. DPKO staff also now receive mandatory ethics training as part of a broader, ongoing management training program.[50]

Through the Conduct and Discipline Unit, DFS is working to apprise mission leadership of their specific obligations and responsibilities under the S-G's Bulletin and to integrate their performance of those duties into the existing performance appraisal system.[51] The Department has been developing a comprehensive directive for senior mission leadership to offer clear guidance on measures for combating SEA that they are expected to implement,[52] and missions will soon receive standard operating procedures for handling misconduct cases. One important purpose of these procedures is to "ensure that misconduct data informs ... staffing decisions" related to UN peace support operations, and to prohibit the recruitment, hiring, reassignment, or promotion of individuals found guilty of serious misconduct. Similarly, any hiring or reassignment would be suspended for individuals under investigation for misconduct until the investigation has concluded.[53] With the approval of the UN Policy Committee, DPKO planned to release an amended policy directive regarding the appointment of senior leadership and to develop job profiles to clarify the experience and expertise required for senior positions.[54]

The UN also has established conduct and discipline units in nearly all of its peacekeeping operations and in a number of political/peacebuilding missions. Comprising over 60 professional staff in 14 operations in 2008, the units conduct training on UN standards of conduct and receive all initial allegations of misconduct in missions, allocating allegations to Category I or II and making recommendations for onward investigation by OIOS or the relevant mission component (Special Investigations Unit for civilian staff; Internal Affairs Unit for police; or Provost Marshall for military personnel).[55] The teams report directly to the mission head and are responsible for promptly informing her or him of all allegations of serious misconduct lodged against a member

[48] A/60/862, para. 37. United Nations, *World Survey on the Role of Women in Development, Report of the Secretary-General*, A/59/287, 3 September 2004, 4.
[49] See Annex Table A-1.
[50] United Nations, *Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Addendum*, A/60/640/Add.1, 29 December 2005, paras. 32-33 and A/61/668/Add.1, para. 63(a).
[51] A/61/668/Add.1, paras. 27-30.
[52] A/61/957, para. 29. The Senior Leadership Induction Program is now mandatory for all staff deployed to UN missions at or above the D-2 level.
[53] A/61/668/Add.1, para. 13.
[54] A/61/668/Add.1, paras. 27.
[55] United Nations, *Comprehensive report of conduct and discipline including full justification of all posts, Report of the Secretary-General*, A/62/758, 20 March 2008, paras. 23–28.

of the mission.[56] They pass on allegations to relevant investigative authorities, and inform victims and the local population as to the investigations' results. The teams are supposed to liaise with all components of their respective missions, for example, with mission Gender Advisors and Child Protection Advisors, to promote a coordinated response, and to create public information campaigns designed to inform local people of their rights and avenues for redress.[57] As these teams have now been operating for at least two years, it may be an appropriate time for an independent panel to conduct an initial assessment of their effectiveness.

The UN is working further to increase the availability of capable and dependable individuals to serve in UN field missions. It has acknowledged, for example, the absence of a clear professional career path for field mission personnel. One remedy put before the GA by the UN Secretariat proposed to establish a 2,500-person standing capacity of civilian peacekeeping personnel.[58] Related efforts have included creation of a professional development framework with targeted training programs and opportunities for gaining professional experience.

Enforcement

DPKO efforts to improve enforcement of UN conduct standards have emphasized mission mechanisms for receiving complaints and tracking follow-up action. All heads of missions have appointed staff members to serve as "focal points" to oversee receipt and processing of complaints. Procedures stress confidentiality, including designation of private rooms for hearing complaints, telephone hotlines, secure email addresses, and locked drop boxes. The focal points are instructed to take stock of local cultural and political-economic circumstances in designing strategies that will be accessible to and match the needs of local populations.[59] Once again, assessment of the effectiveness of these procedures, especially from a public perspective, would be appropriate at this point.

DFS and DPKO have been constructing a database for tracking and reporting on all allegations of misconduct lodged against any staff member of a peacekeeping mission. The web-based "CyberArk" system will allow authorized users in Headquarters and in the missions to monitor the types of misconduct alleged and the rate of reporting of each type, as well as maintain a list of persons banned from future UN employment owing to substantiated misconduct.[60] The UN is also considering collecting DNA samples from all peacekeeping personnel for use in any investigations in which they are involved during their deployment.[61]

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[56] A/60/862, paras. 38-53.

[57] As of mid-2008, conduct and discipline teams were in place in UN missions in Côte d'Ivoire, DR Congo, Liberia, Kosovo, Haiti, Jammu and Kashmir, Sudan (UNMIS and UNAMID), Burundi, Sierra Leone, Central African Republic and Chad, Iraq, Lebanon, Nepal, and Afghanistan. A/62/890, para. 20.

[58] United Nations, *Reforming the Field Service category: Investing in meeting the human resources requirements of United Nations peace operations in the twenty-first century*, A/61/255/Add.1, 22 August 2006, para. 25.

[59] A/60/862, para. 19.

[60] A/62/758, para. 21.

[61] After the December 2006 high-level UN meeting on sexual exploitation and abuse, Prince Zeid observed that, "There was some discussion within the Secretariat about DNA sampling which I personally believe is absolutely appropriate, … the idea being that anyone who serves in the field provides a sample of their DNA and on completion of duty that sample is returned to them. It makes investigations easier and it is a considerable deterrent." "UN hosts meeting aimed at tackling problems of sexual abuse by field personnel," *UN News Service*, 4 December 2006.

None of these measures, of course, amounts to enforcement in the sense normally understood in the phrase "law enforcement," because the United Nations has not, as yet, been accorded such enforcement powers by its member states in peacekeeping settings. We return to this issue below in our review of the UN's groups of legal experts commissioned to address the subject, and in Chapter 3, in the discussion of barriers to more aggressive jurisdictional changes.

Remedial Action

Remediation efforts include new standard operating procedures for publishing information regarding allegations of misconduct, particularly SEA, and the results of investigations into such allegations. Guidelines include information on how to inform local populations about the UN's zero-tolerance policy regarding sexual misconduct and on how to lodge complaints with field missions.[62]

The UN is also finalizing a strategy for providing medical or mental health services to victims of sexual abuse. Pending implementation of that plan, missions have instructions to refer victims to "medical and psychosocial" services available locally and to cover the costs of those services from their existing budgets.[63]

In addition, reforms reflect UN recognition that minimizing the day-to-day challenges of living and working in a complex peacekeeping operation can contribute to reduced misconduct. In a January 2008 report on welfare and recreation needs throughout UN peace operations, the S-G noted that:

> Instances of failure of peacekeeping personnel to measure up to the prescribed standards of conduct not infrequently have to do with social and psychological challenges that face them in the broken societies amidst which they live and work. The proportionally higher incidence of misconduct among categories of personnel who are deployed individually and, therefore, are unable to draw on social reinforcements, and moral checks and balances that go with deployment as formed bodies, is an example.[64]

The 2008 report includes recommendations for increasing welfare and recreational opportunities, including the establishment of a commissary, or comparable "post exchange," in each mission; increased access to the Internet for email and personal use; and development of minimum standards for welfare and recreational facilities.[65] The review of mission needs is the latest step in a series of UN efforts to improve living conditions in peacekeeping missions as one part of a strategy to improve conduct and discipline overall.[66]

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[62] A/61/668/Add.1, para. 8.
[63] A/60/862, paras. 23-24. The utility of referring victims to locally available services likely would be limited by the scarcity of such services in settings where peace support operations exist.
[64] United Nations, *Comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel*, A/62/663, 24 January 2008, para. 45.
[65] A/62/663, paras. 30, 32, 39, and 51.
[66] A/62/663 para. 2. DPKO, for example, developed and disseminated standard operating procedures on establishing welfare and recreation facilities in 2006 and 2007. A/61/957, para. 26.

Are these measures having an impact? SEA allegations appeared to have dropped by two-thirds between 2006 and 2007 and another one-third between 2007 and 2008, but other allegations of serious misconduct held steady in 2007 and rose in the first half of 2008. The system put in place since 2005, although better at culling bad apples, can impose nothing more than administrative sanctions and, in the case of UN police, cannot reach even that far, merely repatriating suspect individuals or units. The restructured UN system of internal justice, slated to start functioning in late 2009, will, however, both professionalize internal justice and potentially offer a bureaucratic home to UN personnel who would support the hybrid system of criminal justice proposed for peacekeeping operations in Chapter 4.

BROADER RESTRUCTURING OF THE UN ADMINISTRATIVE JUSTICE SYSTEM

In trying to build administrative tools to fight misconduct, the UN's peacekeeping department(s) were working in a larger institutional context that can only be described as dysfunctional—and was so described in the report of the Redesign Panel on the United Nations system of administration of justice, a six-member expert group mandated by the General Assembly in April 2005 and appointed by the Secretary-General. The Panel began its work in February 2006 and issued its report and recommendations five months later. What it recommended was the wholesale restructuring of the UN internal justice system for the first time in six decades. Unlike preceding reports of the Secretary-General on the subject, it did not attempt to tweak this or that detail of the system, and it did not mince words.

> An overwhelming majority of stakeholders consulted by the Redesign Panel believe that the present system, established early in the life of the Organization over half a century ago and based largely on a peer review mechanism in which participation is voluntary, has outlived its relevance. The time has come to overhaul the system rather than seek to make marginal improvements. Staff members, including staff unions and managers, voiced strong support for a professional, independent and adequately resourced system of internal justice that guarantees the rule of law within the United Nations. The Redesign Panel stresses that the effective rule of law in the United Nations means not only the protection of the rights of staff members and management, but accountability of managers and staff members alike.
>
> [E]stablishing a professional system of internal justice is essential if the United Nations is to avoid the double standard—which currently exists—where the standards of justice that are now generally recognized internationally and that the Organization pursues in its programmatic activities are not met within the Secretariat or the funds and programmes themselves. These international standards include the right to a competent, independent and impartial tribunal in the determination of a person's rights, the right to appeal and the right to legal representation. . . . That the administration of justice in the United Nations lags so far behind international human rights standards is a matter of urgent concern requiring immediate, adequate and effective remedial action.[67]

The Redesign Panel stressed, further, that "reform of the internal justice system is a sine qua non for broader management reform of the Organization. A large part of the current management

[67] United Nations, *Report of the Redesign Panel on the United Nations system of administration of justice,* A/61/205, 28 July 2006, paras. 6, 9, 11.

culture in the Organization exists because it is not underpinned by accountability. Accountability can be guaranteed only by an independent, professional and efficient internal justice system."[68]

The Panel proposed the creation of

> a new, decentralized, independent and streamlined system by strengthening the informal system of internal justice, by providing for a strong mediation mechanism in the Office of the Ombudsman and by merging the offices of the Ombudsman of the United Nations and its funds and programmes; by establishing a new, formal system of justice that replaces advisory boards with a professional and decentralized first-instance adjudicatory body that issues binding decisions that either party can appeal to [a new UN Appeals Tribunal]; and by guaranteeing "equality of arms", thus ensuring for all staff members access to professionalized and decentralized legal representation.[69]

Shortly after the Panel's report was released, the Deputy Secretary-General received feedback on its recommendations from 47 offices in the Secretariat and other UN funds and programs. The Staff-Management Coordinating Committee (a consulting body set up under the UN Staff Rules) met for a week in early 2007 to consider this feedback, leading to a nearly-complete endorsement of the Redesign Panel's proposals, expressed in a note from the Secretary-General to the General Assembly in late February. The Assembly in turn endorsed the restructuring in early April.[70]

For the purposes of this report, these changes set several important precedents. First is the creation of a professionalized UN justice system with a two-tiered administrative judiciary—the UN Dispute Tribunal and the UN Appeals Tribunal—located within a new Office for the Administration of Justice headed by a senior management-level official (D2 level). Second is the principle of decentralization—judicial panels and supporting registries will be established in New York, Geneva, and Nairobi. Third is the notion that judges will travel, if necessary, to preside over hearings in cases arising in regions lacking full-time panels. Fourth, UN peacekeeping operations and special political missions are recognized as having special needs; indeed, a major emphasis throughout the reform has been the global and increasingly field-based nature of the UN's work. (Twenty-one new positions were proposed to be added to the staffs of missions in the DRC, Sudan, Liberia, and Timor-Leste, nine relating to a reinforced Ombudsman function, nine dedicated to staff legal assistance, and three for legal/disciplinary advice to heads of mission). Finally, the new system reaffirms the primary investigative role of the Office of Internal Oversight Services regarding allegations of serious misconduct.[71]

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[68] A/61/205, para. 13.
[69] A/61/205, para. 14.
[70] United Nations, *Report of the Redesign Panel on the United Nations system of administration of justice, Note by the Secretary-General*, A/61/758, 23 February 2007, paras. 2–4; and United Nations General Assembly Resolution, A/RES/61/261, decided 4 April 2007 and published 30 April 2007. The GA stressed that the new system was to be "consistent with the relevant rules of international law and the principles of the rule of law and due process…." (Op. para. 4)
[71] A/61/758, paras. 18, 20; and United Nations, *Administration of Justice, Report of the Secretary-General*, A/62/294, 23 August 2007, paras. 103, 108, and 153, and Annex VII.

The new system is to have broad scope, applying to all staff of the Secretariat plus UN funds and programs.[72] It also will apply to "non-staff personnel," including United Nations Volunteers, consultants, and individual contractors. It will not, however, encompass employees of contractors, "type II gratis personnel" (who are seconded and paid by governments), or military or police personnel of peace operations. Altogether, the new system of administrative justice will apply to an estimated 100,000 persons worldwide. It was to have come into effect in January 2009 but delays in hiring and other issues led the Fifth Committee to reset the start date to 1 July 2009.[73]

GROUPS OF LEGAL EXPERTS ON CRIMINAL ACCOUNTABILITY

Two months after the General Assembly approved the mandate of the Redesign Panel, it endorsed the recommendation of the Special Committee on Peacekeeping that the Secretary-General establish a group of legal experts "to prepare and submit to the General Assembly… a comprehensive report" on (a) "… the best way to … ensure that … United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unduly penalized, in accordance with due process;" (b) "… whether, and if so how, the standards in the Secretary-General's Bulletin … could bind [military] contingent members … prior to the conclusion of a memorandum of understanding" with a troop contributing state; and (c) " … ways of standardizing the norms of conduct applicable to all categories of peacekeeping personnel …" with particular attention to SEA.[74]

With these controversial marching orders, two groups of experts were appointed in succession. The first five-member group addressed topic (a) while the second three-member group (with two members carried over from the first) addressed topics (b) and (c). The first group was appointed in October 2005 and finished its work in March 2006, but its report was not published until the following August with a footnote attributing the delay to "additional technical and substantive consultations"—a diplomatic way of flagging extensive infighting within the Secretariat and/or among member states on the language and content of the first group's report. Work on topics (b) and (c) did not even begin until issues in the first report were resolved. The second group was appointed in September 2006 and its report was published the following December. A "Note by the Secretariat" published in September 2007 endorsed most of the first group's recommendations, while the work of the second group led to major conduct and discipline-related revisions in the basic Memorandum of Understanding (MOU) signed by the United Nations with each country that contributes military units to UN peacekeeping.

Report of the First Group of Legal Experts

In its August 2006 report, the first Group of Legal Experts favored giving the host state jurisdictional priority for prosecution of misconduct cases against UN mission personnel,

[72] Funds and programs included are the UN Children's Fund (UNICEF); Development Program (UNDP); High Commissioner for Refugees (UNHCR); Population Fund (UNFPA); and Office for Project Services (UNOPS).
[73] A/62/294, paras. 11 and 14–17; also United Nations, *Administration of justice: further information required by the General Assembly*, A/62/748, 14 March 2008, para. 7 and General Assembly Resolution 63/253, 17 March 2009, para. 27.
[74] United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Group, 2005 substantive session (New York, 31 January-25 February 2005), 2005 resumed session (New York, 4-8 April 2005)*, Supplement No. 19, A/59/19/Rev.1, para. 40 (a–c). UN General Assembly Resolution, A/RES/59/300, 22 June 2005.

acknowledging potential judicial and legal incapacities but urging against a presumption of inadequacy in all cases. The Group also urged that the international community consider an international convention that would require states to exercise extraterritorial jurisdiction over their nationals who participate in UN PSOs, particularly in those cases where one or more elements of the host state's criminal justice system were not up to the task.[75]

Emphasis on Host State Jurisdiction over Mission Personnel

The Group offered four chief reasons for promoting host state primacy in prosecution: (1) it is standard practice for states to prosecute crimes committed in their territory; (2) holding trial in the country in which an alleged crime was committed, and therefore in which the relevant witnesses and evidence are usually located, avoids the additional costs and logistical challenges that would arise from holding a trial elsewhere; (3) UN personnel receive privileges and immunities to work in states other than their own on the basis of an obligation to respect local laws and therefore must be held accountable if they violate local laws; and (4) trying UN personnel in the host state lets the local population see justice being served and demonstrates the UN's commitment to implementing the rule of law.[76]

The Group recommended a number of ways to use existing local apparatus in prosecuting while preserving respect for international human rights norms. This included a model for shared state jurisdiction that would use elements of the host state criminal justice system that meet international standards (investigative institutions, for example) and elements of the sending state criminal justice system, otherwise.[77] The Group also suggested ad-hoc arrangements with host states to try UN personnel, if they at least temporarily adopted practices and procedures that met international standards, and hybrid international tribunals that would be part of the domestic legal system but have "international elements" involved in investigations, prosecution, adjudication, or detention of accused persons—wherever the domestic criminal justice system was weak or failed to meet standards of international humanitarian law.[78]

The idea of hybrid tribunals, also considered in the Zeid Report,[79] appears to have some traction in the discussion on improving accountability of PSO personnel outside military contingents and possibly formed police units. Hybrid tribunals can have the benefit of stimulating buy-in of the local population and make the court appear less like a mechanism imposed by outside will and design. Involving local elements furthermore can facilitate long-term development of local judicial capacity by giving local parties an opportunity to gain experience and expertise through their work with the hybrid courts. Because they would use existing domestic judicial facilities, hybrid courts could also give internationals involved in judicial reform additional insight into the

[75] A/60/980, summary and paras. 27, 62.
[76] Ibid., para. 27.
[77] Ibid., paras. 40-42. The *contributing state*, *sending state*, or *state of nationality* of a staff member or expert on mission with a UN peace support operation is that country which could prosecute the person in question as a national or permanent resident
[78] The Group noted that this could be seen as a double standard of prosecution—one for UN personnel and another for host country nationals—but noted that military personnel already are subject to separate jurisdiction and that even a double standard is preferable to the de facto impunity allowed by current practices. Ibid., paras. 29, 30 and 33.
[79] A/59/710, para. 89.

specific needs and traditional practices that reform efforts should take into account in a particular mission area.[80]

It is indeed vital to utilize the legal structures and traditions of host states to the extent possible, and hybrid courts can be one tool for doing so, but experiences of peace operations in recent years suggest the challenges inherent in this approach: Four major UN missions with 10,150 non-military personnel serve in locales where "rule of law institutions have ceased to operate" (DRC, Liberia, and Côte d'Ivoire) or "are largely dysfunctional" (Haiti).[81] Since these characterizations were made in 2006, the United Nations and African Union have deployed an additional 5,000 police and civilian mission personnel in support of the AU-UN Hybrid Mission (UNAMID) in the largely lawless conditions of Darfur.[82] Local justice institutions in such situations would in all likelihood fail any objective assessment of their abilities to meet international human rights standards at any stage of the criminal justice process.

Efforts to strengthen justice institutions in post-conflict states with the goal of helping them meet standards of international human rights law therefore should be central tasks of peacebuilding, and DPKO has taken initial steps to compile good practices for doing so.[83] The recommendations offered in Chapter 4 of this paper also affirm the importance of building up and partnering with local institutions of justice, recognizing that post-conflict criminal justice institutions are often severely dysfunctional and may have been severely impaired before the conflict, and potentially even a source of conflict.

Advocacy of Extraterritorial Jurisdiction

The approach of the first Group of Legal Experts to the problem of host state deficiencies in criminal justice was to propose that "all States should establish jurisdiction over serious crimes against the person, in particular those involving sexual exploitation and abuse, committed by their nationals in peacekeeping operations."[84] To provide a "sound legal basis" for non-host states to exercise legal jurisdiction over UN personnel who are alleged to have committed crimes while employed with DPKO field missions, the Group called for an international convention obligating states parties to establish extraterritorial jurisdiction over their nationals and generating agreement that states parties will "extradite or prosecute" individuals who are alleged to have committed a crime. The Group asserted that crimes, particularly sexual crimes, committed by

[80] Hybrid courts to date have been created mostly to deal with violations of international law, and have both strengths and weaknesses, as a number of legal scholars have noted. For a sampling of that work, see Etelle R. Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform," *Arizona Journal of International and Comparative Law* (23, 2) 2006:347–435; Sarah M. H. Nouwen, "Hybrid Courts: The hybrid category of a new type of international crimes court," *Utrecht Law Rev.* (2,2), 2006: 190–214; and Laura Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* (97, 2) 2003: 295–310.
[81] Scott N. Carlson, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study*, Report for the DPKO Peacekeeping Best Practices Section, March 2006, Section 2 (footnote 4). United Nations, "Peacekeeping Operations Background Note," 30 June 2007, www.un.org/Depts/dpko/dpko/bnote.htm.
[82] United Nations, *Report of the Secretary-General on the on the deployment of the African Union-United Nations Hybrid Operation in Darfur,* S/2008/781, 12 December 2008, paras. 17–43.
[83] *Primer for Justice Components in Multidimensional peace Operations: Strengthening the Rule of Law,"* comp. Scott N. Carlson (New York: UN DPKO, December 2006). Reforming judicial processes is also a foundational step toward reducing corrupt government practices. Alix J. Boucher, William J. Durch, Margaret Midyette, Sarah Rose, and Jason Terry, *Mapping and Fighting Corruption in War-Torn States* (Washington, DC: Stimson Center, March 2007).
[84] A/60/980, para. 47.

peacekeeping personnel in states emerging from conflict warranted a response similar to that given crimes considered violations of international law. The Group acknowledged that a convention would likely take a long time to enter into force and would only bind those who signed it. Ad interim, it noted, the GA could pass a resolution calling on UN member states to establish jurisdiction over crimes committed by their nationals in peacekeeping operations, and the United Nations could make willingness to exercise such jurisdiction a criterion for recruitment of peacekeeping personnel.[85]

The September 2007 Note by the Secretariat supported the concept of a convention on extraterritorial jurisdiction and also the extension of such jurisdiction to all UN personnel "in the area of a United Nations operation," not just to mission personnel.[86] Globally, laws on extraterritoriality for non-military personnel, and knowledge of them, are at present a patchwork. In January 2008, the General Assembly passed a resolution that urged all member states to adopt extraterritorial jurisdiction for UN officials and experts on mission and requested information from member states on laws already in place.[87] Over the next eight months, the Secretary-General received information on extraterritorial jurisdiction laws for 28 states, 26 of whom already have laws in place that conceivably would apply to UN officials and experts on mission for ordinary crimes (see Annex Table A-2).[88] Additionally, at the behest of the Swiss government and the International Committee of the Red Cross, 17 states recently have agreed to the Montreux Document, which, while not legally binding, lays out universally applicable laws regarding accountability for private military and security contractors, as well as best practices, which include legislating extraterritorial jurisdiction.[89] As encouraging as such responses may be from 37 countries (excluding overlap), nine of the top ten police-contributing countries (Bangladesh, Nepal, Pakistan, Nigeria, Ghana, India, Senegal, Malaysia, and the Philippines), which sent over half of the 10,300 UN police deployed in March 2009, did not submit information to the Secretary-General and are not participants in the Montreux Document.

The September 2007 Note argued that the Secretariat did not and could not have criminal jurisdiction, or even the capacity to conduct criminal investigations; that these are legal capacities reserved for its member states. Elements of the United Nations other than the Secretariat have exercised criminal jurisdiction, however, either by treaty or by UN Security Council resolutions invoking Chapter VII of the UN Charter.[90] Although the international tribunals for Rwanda and

[85] Ibid., paras. 45(e), 53-57, and 64-65.
[86] United Nations, *Criminal accountability of United Nations officials and experts on mission, Note by the Secretariat*, A/62/329, 11 September 2007, summary and paras. 16, 18, and 44.
[87] United Nations, *Criminal accountability of United Nations officials and experts on mission, General Assembly Resolution*, A/RES/62/63. 8 January 2008, paras. 3,10.
[88] United Nations, *Criminal accountability of United Nations officials and experts on mission, Report of the Secretary-General*, A/63/260, 11 August 2008.
[89] *Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict*, 17 September 2008, www.icrc.org/web/eng /siteeng0.nsf/htmlall/montreux-document-170908. Eight other states have joined the Document since its release.
[90] See, for example, United Nations, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome*, A/CONF.183/10, 17 July 1998, entry into force of the Rome Statute of the ICC, 1 July 2002 (www.icc-cpi.int/Menus/ICC/Home); see also United Nations, *Security Council Resolutions*, S/RES/827, 25 May 1993, establishing the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY); S/RES/955, 8 November 1994, establishing the United Nations International Criminal Tribunal for Rwanda; S/RES/1244, 10 June 1999, establishing the United Nations Interim Administration Mission in Kosovo;

the Former Yugoslavia had jurisdiction only over violations of international law (e.g., war crimes and crimes against humanity), the executive mandates of UN transitional administration missions in Kosovo and Timor-Leste gave them jurisdiction over ordinary crime within their areas of operation that was applied to mission personnel. We weigh the implications of these precedents, in Chapter 3, for operations lacking such comprehensive "executive" mandates.

Report of the Second Group of Legal Experts

In its December 2006 report, the second Group outlined several methods for making the standards in the S-G's Bulletin binding on members of national military contingents "in the period prior to the conclusion of a memorandum of understanding or other agreement or action by a troop-contributing country that incorporates those standards in a legally effective way under its national laws."[91] This Group also examined the feasibility and utility of standardizing broader norms of conduct applicable to all categories of peacekeeping personnel. The Group argued that it was "neither necessary [n]or practical" to create a single set of norms to govern the conduct of all categories of peacekeeping personnel since, even if the same standards were applied to all categories of mission personnel, procedures for discipline and consequences for violations would continue to vary across the categories.[92]

On the other hand, the Group thought that standardizing norms of conduct in some areas could be useful and offered "options" for standardizing norms related to any issue that could "prejudice the operation of a peacekeeping mission and/or adversely impact on the credibility of the United Nations," SEA being one.[93]

The Group concluded by supporting the creation of a standard guide that would outline behavioral expectations for all categories of peace operations personnel. The first approach to achieving this was to amend one of the documents that peacekeepers receive currently as guidelines on UN standards of conduct and integrity, "We Are United Nations Peacekeepers." (The other such guide for peacekeeping personnel is the "Ten Rules: Code of Personal Conduct for Blue Helmets," referred to simply as the "Ten Rules."[94]) The Group recommended minor changes to "We Are United Nations Peacekeepers" that could make it applicable to all PSO personnel, and suggested changing the title to "We Are United Nations Peace Operations Personnel." The Group's second proposed approach was to develop a new document that would contain at least the subset of norms common to all categories of UN personnel; it would replace the two current documents.[95] Designed as a pocket guide, the new set of guidelines could be issued as a Secretary-General's Bulletin to lend it "certainty of status"—which the Group found

S/RES/1272, 25 October 1999 (establishing the United Nations Transitional Administration in East Timor; and S/RES/1315, 14 August 2000, establishing the Special Court for Sierra Leone.

[91] United Nations, *Making the standards contained in the Secretary-General's bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel*, A/61/645, 18 December 2006, para. 1(a).

[92] Ibid., para. 46 and note 27.

[93] Ibid., para. 47.

[94] A/59/710, para. A.19.

[95] A/61/645, paras. 53-59.

lacking in existing conduct guidelines—and to reinforce a sense of common purpose among all mission members.[96]

The UN has moved forward with the Group's first approach. The Special Committee endorsed the expanded conduct standards, recommending they be added to a revised model MOU for troop contributors. The MOU establishes the terms and conditions for all contributions of personnel, equipment, and services related to formed military units (military contingents). The General Assembly in turn accepted the Special Committee's recommendations. Henceforth, the UN will seek guarantees from the relevant government to: ensure that all national contingent members receive pre-deployment training on UN conduct standards; ensure that commanders of national contingents "take all reasonable measures" to enforce the conduct standards and report infractions to the mission Force Commander; play a cooperative and constructive role in any investigations launched concerning a member of its national contingent; exercise disciplinary and legal jurisdiction over contingent members with respect to acts of misconduct; and keep the UN informed of actions taken upon repatriation of personnel and the status of progress in each case.[97]

We note that rules for locally-hired mission staff ("national staff") need to account for the particular circumstances of local nationals working for the UN. The S-G's Bulletin strongly discouraged sexual relationships between "UN staff and beneficiaries of UN assistance, since they are based on inherently unequal power dynamics."[98] That the bulletin does not *prohibit* such relationships might reflect the fact that UN missions include substantial numbers of national staff, increasingly including national professional officers. It is to be expected that locally hired staff of UN missions should have greater freedom than international personnel to develop relationships with members of the host population. But the fact that they come from the same population does not negate all concern for exploitative relationships. Indeed, a joint report in 2002 from the UN High Commissioner for Refugees and the United Kingdom office of the NGO Save the Children found that "male national staff" members of humanitarian agencies were the subject of most allegations of exploitation from the refugee populations they served.[99] It might therefore be useful to explain clearly what it means to be a "beneficiary of UN assistance," which could help to clarify, in turn, the expectations of local and international staff alike, and to provide reasonable guidelines on relationships between national staff and non-staff nationals, whether associated with the mission (for example, as contractors) or not.

UN TRANSITIONAL ADMINISTRATION, THE BRAHIMI REPORT, AND THE "MODEL CODES" PROJECT

Much of the debate about conduct and discipline in UN operations revolves around the issue of jurisdiction, and the elephant in the room during most discussions is the question of jurisdiction

[96] Ibid., para. 50.
[97] United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, New York, 11 June 2007*, Annex, A/61/19 (Part III), 12 June 2007. A/RES/61/267B, para. 2.
[98] ST/SGB/2003/13, para. 3.2(d).
[99] United Nations High Commissioner for Refugees and Save the Children-UK, *Note for Implementing and Operational Partners: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October - 30 November 2001*, 26 February 2002, www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/6010f9ed3c651c93c1256b6d00560fca.

for the United Nations itself. There is a precedent for such UN criminal jurisdiction in the two UN executive missions in Kosovo and East Timor. Indeed, because of an early and critical problem faced by both missions—the unexpectedly contentious issue of "applicable law"—the UN's head of mission in both places *became* the law: Albanian Kosovars (90 percent of the population), rejected the Serbian laws under which they had been systematically oppressed for more than a decade, while East Timorese rejected the colonial Indonesian law that had been imposed upon them for the previous quarter-century. The United Nations stepped into its temporary governing role without a criminal code or code of criminal procedure of its own to apply in lieu of the rejected historical codes. This greatly hampered these operations in their early months, and both Heads of Mission resorted to issuing binding regulations based on their mandates alone, as the need for rules became apparent. Had functional codes of criminal law and procedure, police procedures, and detention procedures been available when those missions first deployed, and been built into their mandates by the Security Council, these codes could have enabled quicker fixing of local legal codes and procedures with the assistance of the UN missions, adapting the codes to international human rights and humanitarian law standards. Their use could have enabled these operations to be more effective, faster, while maintaining a greater aura of local legitimacy and competence.

In response to these experiences—detailed in cables to UN Headquarters in support of the work of the Panel on United Nations Peace Operations (the Brahimi Report[100])—the Panel called for the development of an "interim legal code" for use by future such UN missions. It would be designed specifically to bridge the gap between initial anarchy and the development of a national legal code on the basis of which local governance could resume. The Panel reasoned that a readily available interim code, as part of a "common United Nations justice package," would also allow for pre-training of mission personnel and thus expedite the process of setting up a transitional administration.[101]

A very reluctant UN Secretariat shunted this challenge from its Office of Legal Affairs to the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, to which the General Assembly offered funds for one half-time person to oversee the entire task—a recipe for a quiet bureaucratic demise.[102] In August 2001, however, the United States Institute of Peace in Washington and the Irish Centre for Human Rights at the National University of Ireland in Galway took up the gauntlet and, in collaboration with OHCHR and the UN Office on Drugs and Crime (UNODC), initiated the *Model Codes for Post-Conflict Criminal Justice Project* ("model codes project").[103]

As the project developed, discussion of the need for pre-packaged legal codes shifted from a focus on their utility in UN transitional administrations to their potential value in reforming post-

[100] The informal name refers to the Chair of the panel, UN Under-Secretary-General Lakhdar Brahimi. United Nations, *Report of the Panel on United Nations Peace Operations*, A/55/305-S/2000/809, 21 August 2000.
[101] Ibid., paras. 83, 81.
[102] William J. Durch, Victoria K. Holt, Caroline R. Earle and Moira K. Shanahan, *The Brahimi Report and the Future of Peace Operations* (Washington, DC: Henry L. Stimson Center, December 2003), 34–36.
[103] Vivienne O'Connor and Colette Rausch, eds. with Hans-Joerg Albrecht and Goran Klemencic, *Model Codes for Post-Conflict Criminal Justice, Volume 1: Model Criminal Code* (Washington, DC: United States Institute of Peace Press, 2007).

conflict criminal law and procedure more generally—in other words, what started conceptually as a tool to facilitate temporary international governance became a set of best practices or international baselines for national law and practice, although it might still well-serve its initial objectives.[104] The drafters of the model codes drew from their collective experience in post-conflict legal reform to make the codes useful to the specific needs of post-conflict states and to provide adequate guidance on implementation. Deciding that the project's time would not be well spent by developing laws to govern every type of offense included in standard criminal codes, the project focused on the types of offenses prevalent in post-conflict states and on offenses that existing laws likely would not have adequately covered.[105]

The model codes are designed to support a range of reform tasks in post-conflict states. The authors describe the utility of the model codes in several hypothetical scenarios, which include: supporting long-term plans to modernize an entire legal framework; filling specific gaps in state laws or procedures so as to bring them into compliance with international human rights standards; and providing baselines for states wishing to establish a new chamber, tribunal, or court for tackling pressing crime problems such as human trafficking, organized crime, or political bribery.[106] Those involved in the model codes project do not presume that the codes provide the best or sole option for revising legal codes or procedures, but that they represent sample laws or a "useful example" that could be used in conjunction with other sources or as a starting point for debate in the drafting of new legal provisions.[107]

The complete model codes package will consist of four integrated texts: (1) a fundamental criminal or "penal" code setting out what acts constitute crimes, general principles of criminal law, guidelines for personal criminal responsibility, and appropriate penalties; (2) a model code of criminal procedure, setting out rules and procedures for investigating and adjudicating criminal cases; (3) a model detention act on laws and procedures for detaining individuals, both pre-trial and post-conviction; and (4) a model police powers act outlining the powers and duties of police services regarding both criminal investigations and maintenance of public order.[108]

Members of the model codes project team devoted considerable effort to avoiding reformers' tendencies to impose one set of rules or beliefs on others in a patronizing manner or with indifference to cultural variances. In order to facilitate the codes' suitability to a broad range of countries, the project's three-phase process engaged a diverse assortment of practitioners and scholars. In the first phase, a core group engaged in consultative meetings that produced the first set of draft model codes. The second phase began with a peer review involving over 300 experts with varying legal backgrounds, from criminal law scholars to defense lawyers, and from human rights advocates to police officials. Discussions incorporated a wide range of cultural and legal perspectives, such as a meeting "focusing on Islamic countries" that "reviewed the substance…from a Shari'ah law perspective;" a roundtable in Bangkok that "examined the

[104] Ibid., 6–7.
[105] Ibid., 10. For the purpose of basing a UN criminal justice system on the model codes, the latter includes a list of criminal offenses sufficiently comprehensive to cover offenses that would occur in UN field operations.
[106] Ibid., 11–16.
[107] Ibid., 9.
[108] Ibid., 8. See also, by the same editors, *Volume II: Model Code of Criminal Procedure* (Washington, DC: United States Institute of Peace Press, 2008).

potential utility of the codes and their compatibility with Asian legal systems;" and consultations at the International Corrections and Prisons Association Annual General Meeting. The second phase also included fieldwork consultations in Timor-Leste, Kosovo, and Nepal—with a focus on learning lessons from the latter nation's experience as one of the five leading PSO troop-contributors—as well as in Liberia and Southern Sudan "to test the potential usefulness" of the model codes. Scholars and practitioners representing rule of law and human rights institutions in eleven African nations were convened to discuss the model codes at an initial roundtable discussion in Abuja, Nigeria, with a follow-up discussion in London. The third phase integrated suggestions and observations generated during the first two phases and expanded the associated commentaries to enhance the "usability" and "reader's understanding" of the codes.[109]

Between present circumstances and UN implementation of such mechanisms are a number of structural obstacles that must be surmounted if the United Nations is to develop effective means of enforcing criminal penalties on mission members who—as determined by due process—deserve the imposition of such penalties. We treat these obstacles in Chapter 3.

[109] United .States Institute of Peace, "Model Codes for Post-Conflict Criminal Justice," project history, www.usip.org/ruleoflaw/projects/codes.html.

— 3 —
CONTINUING BARRIERS TO BETTER CRIMINAL ACCOUNTABILITY IN UN PSOS

The barriers to effective criminal accountability of international civilian staff and experts on mission in UN PSOs arise partly from issues within individual states—host states and states of nationality—partly from the environments in which these missions operate, and partly from within the UN system itself. While UN reform efforts have achieved some progress in overcoming those barriers, there remain significant systemic and situational accountability deficits surrounding the Organization's peacekeeping endeavors. This chapter looks at each of these in turn.

STATE-RELATED BARRIERS

The criminal justice systems in states hosting PSOs, as previously noted, are often weak or completely collapsed. Because of the de facto requirement that UN personnel only be subject to judicial processes that satisfy basic international human rights standards, the capacity gaps common in post-conflict states further reduce the likelihood that mission hosts will be able to support UN accountability strategies. Both reason and rhetoric imply that the UN does not want to turn over its staff to a legal system known to perpetrate abuses against defendants. The Zeid Report states, "In respect of staff and experts on mission, the lack of a legal system in some peacekeeping areas that meets minimum international human rights standards makes it difficult for the Secretary-General to waive the immunity of staff accused of serious crimes in the mission area." The report also explains that the UN *Convention on the Privileges and Immunities of the United Nations* did not anticipate UN staff working in places where

> the legal system was so devastated by conflict that it no longer satisfied minimum international human rights standards. In such cases it would not be in the interests of the United Nations to waive immunity because its Charter requires it to uphold, promote and respect human rights. In other words, it would not be in the interest of the Organization for the Secretary-General to permit a staff member to be subjected to a criminal process that did not respect basic international human rights standards.[110]

The General Assembly has since emphasized that criminal accountability must be grounded in international human rights standards. In a 2009 resolution, the Assembly

> *Strongly urges* States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process; [and]

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[110] A/59/710, para. 67(b), 87. See also Françoise Hampson,, *Administration of Justice, Rule of Law and Democracy: Working Paper on the Accountability of International Personnel Taking Part in Peace Support Operations*, prepared for the United Nations Economic and Social Council, E/CN.4/Sub.2/2005/42, 7 July 2005, para. 62.

> *Requests* the United Nations, when its investigations into allegations suggest that crimes of a serious nature may have been committed by United Nations officials or experts on mission, to consider any appropriate measures that may facilitate the possible use of information and material for the purposes of criminal proceedings initiated by States, bearing in mind due process considerations.[111]

While the problem with the host state is often lack of capacity, with the state of nationality it may be lack of jurisdiction or greater interest in extricating than prosecuting its national(s). The Zeid Report noted that troop-contributing countries were reluctant "to admit publicly to acts of wrong doing . . . ,"[112] and that this reluctance also can apply to police personnel and other nationals on UN duty. For example, an FPU whose members were alleged to have killed two demonstrators without cause in Kosovo in February 2007 was repatriated by its government before the UN investigation was completed, contrary to UN requests, and further investigations by national authorities were unproductive.[113] If national investigations are completed, they may lead to what critics call "sham trials."[114]

Occasionally the United Nations has received feedback on national disciplinary processes. Out of 221 cases of substantiated allegations against military personnel between 2005 and 2008, however, the United Nations received feedback from member states on national disciplinary actions taken in only 13 percent of them.[115] A substantial portion of the substantiated allegations, 50 percent, appear to involve one member state with 111 repatriated uniformed personnel, on which consecutive annual S-G reports indicate that criminal proceedings are "ongoing" or "under review."[116]

Even if there were a better record of prosecution by states of nationality, the United Nations should only waive staff immunity or otherwise release a staff member to the custody of the state of nationality if it knows that the criminal justice system of that state meets international human

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[111] A/RES/63/119, op. paras. 2, 10.
[112] A/59/710, para. 67 (a).
[113] The lethal rubber bullets fired in this incident by members of the Romanian FPU were manufactured in 1991and had a manufacturer's "use-by" date of 1994; they were thus more than 5 times past their expiration date when fired. The rounds had likely hardened over time, and were used at close range. Moreover, a UN special prosecutor found that neither of the victims had posed a threat when shot, leaving a "reasonable suspicion that such shooting was criminal." Matt Robinson, "Hardened rubber bullets killed Kosovo protesters," *Reuters*, 18 April 2007, 13:09:19 GMT. Two years after the Kosovo shootings, no criminal action had been taken against the officers in question. "An investigation by a military prosecutor in Romania was not…able to identify the perpetrators." Public Statement, *Amnesty International*, AI index: EUR 70/001/2009, 9 February 2009.
[114] Examples of such trials include those of "senior Indonesian commanders responsible for operations in East Timor in 1999," who were "indicted for crimes against humanity after investigation by UN prosecutors and investigators." "In February 2000 the United Nations Security Council encouraged Indonesia 'to institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law.' None of these criteria has been met." Ian Martin, head of the UN mission that conducted the August 1999 balloting in East Timor, in the preface to David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (New York: International Center for Transitional Justice, August 2003). Cohen condemned "the failure of political will in the attorney general's office and the highest levels of the Indonesian government to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed in East Timor." His report has been characterized by researchers for the library of the Australian parliament as "the most thorough examination of the Jakarta trials." Susan Harris Rimmer and Juli Effi Tomaras, "Aftermath Timor Leste: Reconciling competing notions of justice," E-Brief, updated 21 May 2007, www.aph.gov.au/library/intguide/law/timorleste.htm.
[115] A/60/861, para. 8; A/61/957, para. 9a; A/62/890, para. 9a; and A/63/720; para. 11.
[116] A/62/890, para. 9a, and A/63/720, para. 11.

rights standards. Acquiring this knowledge could necessitate evaluation by the UN of the criminal justice systems of every member state, potentially an enormous undertaking. Fortunately, there are a number of candidate approaches to this task already developed by respected institutions, some within the UN system itself, which we discuss further in Chapter 4.

BARRIERS ARISING FROM THE OPERATIONAL ENVIRONMENT

Despite measures taken by the United Nations since 2005 to deter, investigate, and punish unethical and criminal behavior within peacekeeping missions, allegations of misconduct continue to arise. Substantiation rates are greatly affected by conditions in the field, by the resources available to undertake investigations, and by the UN's above-noted inability to hold any subject of investigation who may be deemed a flight risk or to extend disciplinary action beyond the expiration date of an individual's contract. Indeed, military contingent members and others who may be under investigation for reputed Category I offenses are routinely rotated home at the end of their tours, regardless of whether the investigation has been completed.[117]

On the other hand, implementation of good unit discipline and measures supporting welfare and recreation for military contingent personnel, as recommended in the Zeid Report, might have a significant impact on the incidence of SEA. One military contingent in Bunia, the capital of Ituri, was responsible for staffing isolated checkpoint/bivouacs that were poorly separated from the population and offered little or no in-camp recreation facilities. Most of the allegations that OIOS investigated came from this contingent. Another contingent that implemented the Zeid Report recommendations, from perimeter fencing to recreational facilities, withheld modest "mission allowances" from its troops. That contingent experienced few allegations and these were "all unsubstantiated."[118] Mission-supported recreational alternatives are thus vitally important to more than just good morale, as a recent S-G report on the subject emphasized by setting minimum standards for welfare and recreation facilities across missions.[119] On the other hand, individual mission personnel cannot as readily be fenced off from the local population when off-duty and personal allowances for members of formed units are rather minimal by comparison with the Mission Subsistence Allowance (MSA) paid to UN international staff and individual experts on mission. MSA ranges from $1,620 per month in Western Sahara, where most UN military observers live in UN-provided base accommodations, to about $5,400 per month in Chad. MSA is set so as to reflect not only local costs of living but "adverse conditions of life and work" in the mission areas, as there is no other mechanism "which would compensate staff for such factors as security and safety issues, poor medical conditions and restrictions on movement…."[120]

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[117] United Nations, *Special measures for protection from sexual exploitation and sexual abuse and comprehensive report prepared pursuant to General Assembly resolution 59/296 on sexual exploitation and sexual abuse, including policy development, implementation and full justification of proposed capacity on personnel conduct issues, Report of the Advisory Committee on Administrative and Budgetary Questions,* A/61/886, 7 May 2007, para 5.
[118] Ibid., paras. 16–18.
[119] United Nations, *Welfare and recreation needs of all categories of personnel and detailed implications, Report of the Secretary-General,* A/63/675, 13 January 2009, paras. 5, 15–16. A minimum standard for welfare and recreation facilities in all UN peacekeeping and special political missions is proposed, to create a "level playing field" (a particularly apt measure, in this instance) across missions, appropriately scaled to mission size.
[120] United Nations, *Report of the Office of Internal Oversight Services on the audit of mission subsistence allowance polices and procedures,* A/59/698, 10 February 2005, para. 9.

The dual-purpose nature of MSA is clear from a study conducted in 2006 on behalf of DPKO Best Practices to assess the impact of UN peacekeeping missions on local economies, which confirmed that, in the five missions for which data were available, staff elected to receive, on average, just over half of their MSA in cash, wiring the rest to bank accounts outside the mission area.[121]

Even so, the size of cash payments could increase behavioral risk in areas deficient in legitimate recreational opportunities for mission personnel, because most mission areas are rife with exploitative opportunity: an atmosphere of corruption that conflict has left in its wake; a large number of destitute, unemployed and/or displaced people willing to exchange favors for pittances of money or foodstuffs;[122] and entrepreneurs willing to skirt local laws that are at best loosely-enforced. To change this dynamic requires not only alternative means of livelihood and enhanced personal security for the local population, but greater respect for the rule of law on the part of economic and political elites, and the rapid rebuilding of a functional, effective, and self-sustaining system of criminal justice. There may be no better way to alter such operational environments, and retain mission integrity over the longer term, than for the values embodied by the mission to match the values that it works to inculcate in host state governance, including criminal justice.

BARRIERS ARISING FROM UN POLICY AND PRACTICE

UN barriers to criminal accountability arise from institutional reluctance regarding criminal jurisdiction; individual reluctance to report criminal conduct in the field; the lack of in-house professional criminal investigation capacity or a process for timely referrals of criminal cases to national authorities; and issues related to functional immunity and its interpretation, especially for experts on mission and, within that category, UN police.

Institutional Reluctance Regarding Criminal Jurisdiction

The capacity of the United Nations to impose criminal responsibility on its peacekeeping personnel remains bounded by current interpretations of its authority as intrinsically limited to the administrative sphere. The Organization has, however, wielded extensive power—including criminal justice authority—under Security Council mandates in Kosovo and East Timor. In these operations, the United Nations demonstrated that its legal personality under international law permits it to function as a governing body, creating interim systems of ordinary criminal laws and the judicial bodies to enforce them. It would seem far less an affront to local sovereignty were a UN mission offer to assist local authorities to assert effective jurisdiction over UN mission personnel, especially where a major mission goal is to help the local criminal justice system build local capacity to meet international standards of due process, fairness, and effectiveness. In this century, the latter responsibility has been incorporated frequently into UN mission mandates by the Security Council.

[121] Michael Carnahan, William Durch, and Scott Gilmore, *Economic Impact of Peacekeeping Final Report* (New York: UN Department of Peacekeeping Operations Best Practices Section, March 2006), 19. Also A/61/841, para. 31.
[122] A/61/841, summary and paras. 26, 31.

Individual Reluctance to Report Criminal Acts

There are a number of impediments to gaining useful information from victims and witnesses of misconduct by UN personnel. Regarding rape and other sexual crimes, victims of any cultural background will likely feel anxiety over discussing a crime of such personal nature; cultural norms that blame the victims of sexual abuse or proscribe discussion of sexual topics with strangers or members of the opposite sex worsen that anxiety. Women who survive SEA often are presumed to have collaborated with or befriended their attackers and consequently are abandoned by their families, spouses, or communities. Even families or spouses who understand the nature of the crime may hide or abandon the victim to avoid community stigma or the long-term consequences, such as loss of income or the health care costs associated with pregnancy or sexually transmitted diseases.[123] Women therefore see a benefit to not reporting the crime and hiding the after effects for as long as possible. Different interpretations among cultures of the very concept of rape can mean that individuals might not even be aware of a right to report its occurrence.[124] Or they may have so little faith in corrupt justice systems to investigate and prosecute rape that few see the point.[125] Poor dissemination of information also typically means that local communities lack awareness of the regulations that apply to members of peacekeeping missions and of the proper procedures for reporting violations.[126] Victims of abuse who mistrust their local authorities should feel that they have a safe channel through which to register complaints directly with the mission. Providing such channels can or should be the joint task of mission of the Conduct and Discipline Units and the office of the mission Ombudsman, or a branch of the latter office tasked specifically to deal with public queries to and complaints about the mission. Getting the word out about the availability of a neutral complaint channel should be the joint task of the CDU, Ombudsman, and the mission office of public information with its radio facilities and programming, in particular.[127] Such measures also go a long way toward helping any mission gain trust and credibility among the local populace; whereas the absence of means by which to report abuses undermines not just the credibility of the mission but of the UN as a whole.

UN staff members also have been reluctant to provide any information implicating their superiors in wrongdoing for fear of retribution or other negative consequences in the workplace.[128] The best-publicized case of retaliation occurred with the International Police Task Force (IPTF) in the Bosnia and Herzegovina mission (UNMIBH) in 2000, when a staff member emailed 50 high-ranking officials, including the SRSG, and urged UNMIBH to investigate misconduct based on documented interviews with victims and detailed explanations of her colleagues' involvement with rape and trafficking.[129] In 2002, a British tribunal ruled that the whistleblower was

[123] Human Rights Watch, "The War within the War: Sexual violence against women and girls in the eastern Congo," June 2002, 64–67. www.hrw.org/legacy/reports/2002/drc/Congo0602.pdf
[124] Sarah Martin, "Must Boys Be Boys? Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions," Refugees International, October 2005, 22. www.refugeesinternational.org/sites/default/files/MustBoysbeBoys.pdf
[125] Human Rights Watch, "The War within the War," 80.
[126] A/60/861, para. 19.
[127] A/62/890, para. 18–19. Designing complaint and record-keeping mechanisms for the field is one of the functions assigned to working group two of the Task Force on Protection from Sexual Exploitation and Abuse established jointly in 2005 by the Executive Committee on Humanitarian Affairs and the Executive Committee on Peace and Security.
[128] Hampson, *Administration of Justice*, E/CN.4/Sub.2/2005/42, para. 92.
[129] Human Rights Watch, "Hopes Betrayed," 54.

subsequently unfairly fired by her contractor, DynCorp.[130] Since that time the Secretary-General has created a UN Ethics Office to ensure whistleblower protection,[131] but NGO reports argue that inconsistent policies across UN agencies impede progress toward such protection.[132]

Criminal Investigations Capacity and Timely Case Referrals

Peacekeeping missions have not customarily employed professional criminal investigators, and staff deployed from the OIOS investigations division do not as yet meet that standard. But there are bigger institutional obstacles than these to UN participation in criminal prosecutions. "Since criminal prosecution is outside the jurisdiction of OIOS, the client office, OLA [UN Office of Legal Affairs], must work with the local authorities to refer a case and determine the appropriate measures of prosecution, restitution and recovery of damages."[133]

OIOS' frustration with this process of broad deliberation surfaced in its August 2008 report on the activities of its ad hoc Procurement Task Force, where "34 recommendations that remain unaddressed include some matters which involve referrals of cases to national authorities . . . a number of these recommendations have not been implemented expeditiously. This is a significant concern for OIOS, as failure to act promptly could inhibit any prospect for recovery of damages and prosecutions in cases where such action is appropriate."[134]

The Secretary-General's Note in reply stressed that, "While OIOS may have completed its investigations and finalized the related report, the final determination of whether any rules have in fact been breached is made by the Secretary-General and his programme managers, followed by internal justice proceedings where applicable." The Note also emphasized that

> decisions relating to whether a particular action constitutes misconduct rest with [the Secretary-General] and are taken after consideration of the totality of the facts and in consultation with all concerned units of the Organization ... Any such recommendation must first go through a careful evaluation process which encompasses an analysis of policy considerations, as well as those of a legal nature, involving all concerned units of the Organization, before any such referral is made. The final decision in all cases of referral rests with the Secretary-General and, once a decision is made to refer, the Office of Legal Affairs promptly implements such referral.[135]

This is, of course, not a process designed to catch criminals in the act or to protect a crime scene from disruption or witnesses from intimidation. It is also not a process for which the facts of the case suffice to determine the advisability of referral for prosecution to state law enforcement

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[130] Human Rights Watch, "Hopes Betrayed," 55. Barry James, "Firing of former officer unfair, court rules: Whistleblower protection upheld in UN Bosnia police case," *International Herald Tribune*, 8 August 2002.
[131] United Nations Secretariat, *Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, ST/SGB/2005/21, 19 December 2005.
[132] Government Accountability Project, *Comparison of the UN, UNDP, WFP, and UNICEF whistleblower protection policies*, 25 March 2008, 1.
[133] United Nations, *Report of the Office of Internal Oversight Services on the activities of the Procurement Task Force for the period from 1 July 2007 to 31 July 2008*, A/63/329, 25 August 2008, para. 43.
[134] A/63/329, para. 43.
[135] United Nations, *Report of the Office of Internal Oversight Services on the activities of the Procurement Task Force for the period from 1 July 2007 to 31 July 2008, Note by the Secretary-General*, A/63/329/Add.1, 15 September 2008, paras. 3, 6, and 18.

authorities. Policy and institutional interests play a large role, including the protection of UN privileges and immunities (which are the focus of the following section). And by comparison to the volatile situations faced by investigators in UN field missions, the OIOS Procurement Task Force itself moved with what was, relatively speaking, rather deliberate speed.

In late 2008, the General Assembly weighed in on the need for expeditious Secretariat decisions to refer cases for national prosecution. Resolution 63/265,

> *Recognizes* that investigations of fraud, corruption and misconduct in procurement are often time-sensitive; [and] *Stresses* the importance of effective implementation, including referrals to national authorities and recovery actions where appropriate, of the accepted recommendations of the Office of Internal Oversight Services . . . .[136]

If the Secretary-General and OLA retain sole authority over the disposition of recommended criminal referrals by OIOS, it is not clear how the Organization can achieve the kind of reaction times that criminal cases from the field may require, nor is it clear how the system can avoid the appearance and reality of potential conflicts of interest arising from the lack of separation of powers at the top, where the chief administrator office (and chief political appointee) makes decisions that, in a national government, would often be the prerogative of an independent prosecutor, investigating judge, or District Attorney more divorced from high politics and better able to reach a decision based on case facts, quality of evidence, and applicable law.

There is, finally, the practical consideration that the typical UNPOL tour of duty, averaging six to twelve months, may mean that accused personnel finish their tour before an investigation is over, returning home without any sanction since the UN, at present, has no means of detaining them in the mission area while investigations are completed, and no grounds for pursuing an investigation once an individual has separated from UN service. In principle, however, a criminal investigation could continue in collaboration with the state of nationality, if the latter's laws have extraterritorial reach and it has pressed charges of its own based on preliminary UN investigative findings.[137]

Functional Immunity and Limits of UN Jurisdiction

Personnel working for UN peace operations fall into a number of different categories of varying legal status. For those categories that could potentially be subject to host state laws, the Organization appears to lack clear guidelines and consistent practice with respect to waiving staff member privileges and immunities, as necessary, to permit criminal proceedings against personnel charged with crimes.

General Assembly interest in questions related to accountability and the internal administration of justice led to a series of documents from the Secretariat in 2008 that clarified the employment status, legal status, and disciplinary liabilities of various categories of personnel associated with

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[136] United Nations, General Assembly, On *the Report of the Office of Internal Oversight Services on its activities*, A/RES/63/265, 6 March 2009, paras. 15, 20.
[137] Hampson, *Administration of Justice*, E/CN.4/Sub.2/2005/42, para. 60. *Also* Laura Dickinson, University of Connecticut, correspondence with authors, 25 July 2006.

UN peace operations. The first category, UN officials, are persons who hold a letter of appointment from the Secretary-General; they are also referred to as UN staff or staff members.[138] Basic privileges and immunities for all UN staff are established in Article 105 of the 1945 UN Charter, which states that UN officials shall "enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion [sic] with the Organization."[139]

The *Convention on the Privileges and Immunities of the United Nations* ("General Convention"), adopted by the General Assembly in February 1946, entered into force the following September and fleshed out the intent of Article 105. Under Article V, Section 18, of the General Convention, all UN officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." In addition to such functional immunity, Section 19 says that senior UN officials (the Secretary-General, Under-Secretaries-General, and Assistant Secretaries-General) are to enjoy "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." The Secretary-General has the "right and the duty" to waive the immunity of any UN official "in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity."[140]

UN Staff Regulations,[141] set by the General Assembly stress that,

> In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.[142]

Thus the Secretary-General determines both the scope of privileges and immunities for UN staff and whether there are grounds for their waiver. Commentary in the Secretary-General's Bulletin on "Status, basic rights and duties of United Nations staff members" does not specify the scope or address the process by which waiver is decided.[143]

Article VI, Section 22 of the General Convention also grants functional immunity to a second category of personnel:

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[138] ST/SGB/2002/13, Part III-B, Commentary, paras. 1–3.
[139] *Charter of the United Nations* and *Statute of the International Court of Justice*, 26 June 1945, Art. 105, Section 2.
[140] United Nations, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Article V, Sections 18 and 19. Nationals of the host state employed with UN peace support operations (apart from those paid on an hourly basis) typically have a limited functional immunity from host state jurisdiction based on the provisions in the relevant SOFA. Hampson, *Administration of Justice*, E/CN.4/Sub.2/2005/42, paras. 25, 40. For further discussion on immunity and jurisdiction, see Andrew Ladley. "Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations." *Politics and Ethics Review* 1, no. 1 (2005), 81-90.
[141] "Rules" for UN staff and non-staff personnel (such as experts on mission) are promulgated by the Secretary-General pursuant to the Regulations, to amplify and implement them.
[142] United Nations, *Staff Regulations*, ST/SGB/2007/4, 1 January 2007, p. 12, Regulation 1.1(f) .
[143] ST/SGB/2002/13, p. 14.

> Experts (other than officials coming within the scope of Article V) performing missions for the United Nations" ("experts on mission"). These persons shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: (a) Immunity from personal arrest or detention and from seizure of their personal baggage; (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.[144]

Article V, Section 23 gives the Secretary-General the same right and duty to waive the immunity of experts on mission under the same conditions as for UN officials. Note, however, that experts' immunity from personal arrest or detention applies "during the period of their missions" and not just while they are performing their mission, a proviso that covers travel but may also be construed to apply to off-duty activities while on mission, i.e., anytime they are deployed with a PSO. Different interpretations of the meaning of functional immunity for experts on mission may account for apparent inconsistencies in the use of the waiver for comparable instances of alleged misconduct: A rape charge against two UNPOL officers with the UN operation in East Timor resulted in a decision to declare immunity inapplicable because rape definitively lies outside the realm of official functions. However, rape allegations against UNPOL in Kosovo—and even other rape cases involving UNPOL in East Timor—resulted in waivers rather than decisions that immunity does not apply.[145]

Experts on mission are but one category of "non-staff personnel" performing personal services for the Organization that have at least tangential import for PSOs. Other categories include "Officials other than Secretariat Officials"; consultants, individual contractors, and individuals engaged under service contracts; and United Nations Volunteers.[146] "Other officials" are hired by "the legislative organs" rather than the Secretary-General and "perform specific functions . . . on a substantially full-time basis." They include the Chair of the Advisory Committee on Administrative and Budgetary Questions (or ACABQ, the committee of member state representatives that reviews all spending requests going before the Fifth Committee of the General Assembly, including peacekeeping budgets); the Chair and Vice-Chair of the International Civil Service Commission (which makes recommendations to the GA on staff salary scales, sets rates for UN per diems and geographic cost of living adjustments, and advises on other conditions of service)[147]; and inspectors of the Joint Inspection Unit.[148]

A consultant "is an individual who is a recognized authority or specialist . . . engaged by the United Nations under temporary contract in an advisory or consultative capacity. . . ." An

[144] United Nations, *Convention on the Privileges and Immunities*, Article VI, Section 22. Emphasis added.
[145] Frederick Rawski. "To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations." *Connecticut Journal of International Law* 18, no. 103 (2002), 119–120.
[146] A final category of "daily paid workers" was to have been phased out by the end of 2008. A/62/748, paras. 9 ff, 40.
[147] International Civil Service Commission, "What Does the ICSC Do?" icsc.un.org/about2.asp.
[148] Self-described as "the only independent external oversight body of the United Nations system mandated to conduct evaluations, inspections and investigations system-wide," the Joint Inspection Unit consists of not more than 11 inspectors aided by a small secretariat. It originated in 1966 and thus predates the much larger Office of Internal Oversight Services (OIOS) by about 30 years. Joint Inspection Unit, "About JIU," www.unjiu.org/en/index.htm.

individual contractor is "engaged by the Organization . . . for the performance of a specific task or piece of work against payment of an all-inclusive fee." Consultants and contractors may be given status as experts on mission under the General Convention.[149]

UN Volunteers serving in UN PSOs are not considered UN employees but provide important functional expertise to PSOs.[150] UNVs usually receive functional immunity via the provisions of a specific Status of Mission or Status of Forces Agreements (SOMA or SOFA) with the host state. The October 1990 UN "Model SOFA" stipulates that expert on mission status within the meaning of Article VI of the General Convention may be conferred upon any "civilian personnel other than United Nations officials whose names are identified for the purpose notified to the Government by the Special Representative/Commander."[151]

Military forces serving as peacekeepers, while not covered by the General Convention, receive immunity from host state jurisdiction under the SOFA that the UN signs with the host state. They are subject exclusively to the jurisdiction of their contributing state.[152] As mentioned previously, in addition to the SOFA, the UN signs an MOU with each state contributing a military unit or a formed police unit to a mission.

Although the UN signs an MOU with FPU contributing states, FPU members are considered by the United Nations to be experts on mission. Although armed, they may or may not be covered by the equivalent of a national code of military justice.

Individual UNPOL and UN military observers are also accorded the status of experts on mission. Recent reports of the Secretary-General on conduct and discipline have noted that, because police personnel (including FPU personnel) and military observers do not function under consulting contracts with the United Nations, they are "accountable to the Organization for the proper discharge of their functions" but have "no recourse" to the UN's administrative justice system and it has no recourse to them. As they "remain under the jurisdiction of their own country," the UN's disciplinary options extend "at most to effecting their repatriation."[153] If MOUs for FPUs follow the revised MOU for troop contributors, then at least FPU contributors will pledge to follow up allegations of misconduct—if criminal jurisdiction over their police extends overseas.[154]

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[149] A/62/748, paras. 9–10.

[150] In late 2008, roughly 7,500 UN Volunteers were serving the Organization; roughly 75 percent come from developing countries. Nearly one-third, about 2,200, are posted to UN PSOs. See "UN Volunteers: What We Do," www.unv.org/what-we-do.html.

[151] United Nations, *Model status-of-forces agreement for peace-keeping operations*, A/45/594, 9 October 1990, para. 26.

[152] Hampson, *Administration of Justice*, E/CN.4/Sub.2/2005/42, paras. 16, 28.

[153] A/62/758, paras. 14–15.

[154] As Hampson observes, "the possibility of prosecution by the sending State . . . depends on whether the State has laws in place which . . . permit the prosecution of police officers for acts committed abroad. 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." *Administration of Justice*, E/CN.4/Sub.2/2005/42, para. 40.

Especially for members of police services below the national level (i.e., provincial or local), or former police officers hired for UN service through private contractors (as is the case for US-origin UNPOL), the flat assertion by the Secretariat that all such individuals "remain" under their national jurisdiction begs the question of whether there *is* functioning national jurisdiction.

Only in 2008 did the United Nations begin to survey its member states regarding the extent of their extraterritorial criminal jurisdiction. By August 2008, the Secretariat had received replies from just 28 member states, including one major PCC (Jordan, which at that time contributed 8 percent of deployed UN police). The other 27 reporting states together contributed just 10 percent of deployed police.[155] Thus, as of August 2008, the Secretariat lacked national jurisdictional data from 85 percent of its member states regarding 82 percent of its deployed police. The Organization has declared the primacy of sending state jurisdiction without knowing whether that jurisdiction exists for a majority of contributing countries, in effect gambling that the necessary jurisdiction and political will be available if and when disciplinary action is needed.

Consigning the issue of police discipline entirely to police-contributing countries (PCCs) likely minimizes friction between the Organization and PCCs, but it raises serious questions about the UN's ability to manage its growing police presence in the field, especially where police bear arms under Chapter VII (enforcement or quasi-enforcement) mandates. This arrangement also leaves populations in host states *not only vulnerable to but without even administrative redress* in cases of UN police misconduct.

PROGRESS AND PROSPECTS IN SURMOUNTING THE BARRIERS

Because many historical barriers to effective accountability for peacekeepers result from UN rules and policies, they can in principle be surmounted by internal reforms. The Secretary-General and Secretariat deserve credit for instituting many of the needed policy changes that fall clearly within their scope of authority. Clarification and better publicizing of conduct standards, incorporating enforcement of conduct standards as a category in performance evaluations of mission leadership, and designation of staff tasked solely to address conduct and discipline issues—these types of reforms were necessary and long overdue.

The UN's current solutions remain, however, means of working around the fundamental problems that make effective criminal accountability so elusive. Amidst substantial reforms, troubling truths linger. The UN itself has no recourse for legal action against any of its employees who commit criminal and sometimes heinous acts. Mission host states cede jurisdiction to troop-contributing states over military peacekeeping personnel. States of nationality of other UN mission personnel may or may not be able or willing to initiate legal action against those of their nationals accused of serious misconduct while in UN service.

The next chapter examines options for surmounting the current barriers to better criminal accountability. The UN itself has looked into options similar to some of those we examine. Our goal is to raise the bar on the analysis of potential accountability solutions, because impunity for

[155] UN DPKO, "Contributors to Peacekeeping Operations: Monthly Summary of Contributions (Military Observers, Police and Troops) as of 31 July 2008," www.un.org/Depts/dpko/dpko/contributors/2008/jul08_1.pdf.

criminal acts in peacekeeping missions is unquestionably intolerable. Yet the victims of such criminal acts have had to tolerate such impunity for a long time. If there is any hope of changing this profoundly unjust situation, solutions that are politically difficult but hold hope of reducing present hypocrisy while also increasing the criminal justice capacity of peacekeeping, such as host states' jurisdictional authority, should receive serious consideration.

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PROPOSALS TO INCREASE UN MISSION CRIMINAL ACCOUNTABILITY WHILE BUILDING LOCAL JUSTICE CAPACITY

Although the United Nations has taken significant steps to increase the administrative accountability of its peace operations personnel and to extract pledges of compliance with UN guidelines and behavioral norms from troop-contributing countries, significant numbers of personnel on mission remain beyond the reach of any effective criminal justice system. For an organization whose missions are mandated to uphold the rule of law and, with growing frequency, to help rebuild war-damaged criminal justice systems, such de facto impunity reaches beyond irony, and even hypocrisy, to undermine fundamental principles that UN peace operations aim to implement in the places where they deploy: respect for the law and equal justice under the law. In this chapter, we suggest approaches to remedy this situation that range from relatively easy internal reforms to politically difficult but feasible—and operationally essential—investments to change how the United Nations approaches criminal behavior in peace operations. The larger investments aim at ensuring that substantiated criminal behavior results in exposure to effective criminal justice mechanisms, such that UN missions *model* the rule of law and *deter* crimes committed by law enforcement, leading by example. This requires, in turn, readily available and competent mechanisms for the investigation, prosecution, trial, and punishment of such behavior that meet standards of international humanitarian and human rights law. Any justice system that imposes criminal liability on UN field personnel should be known to meet these standards, and this knowledge should be generated in a consistent and transparent manner. Helping states meet those standards is already the express goal of UN efforts to support rule of law internationally, and is the express obligation of states that have ratified the International Convention on Civil and Political Rights (ICCPR, Art. 14). Such standards should apply no less to any criminal justice process applied to UN peace operations mission personnel. [156]

There are essentially two options for dealing with alleged criminal behavior by non-military personnel that does not rise to the level of war crimes or crimes against humanity, in other words, that involves "ordinary" crime: the justice system of the host state and the justice system of the sending state/state of nationality.

Neither option is likely to work in every case. A host state's criminal justice institutions are likely to have been seriously weakened as a direct or indirect result of war (facilities or records destroyed, personnel scattered or killed, salaries unpaid, or supplies, power, fuel, or vehicles unavailable). States of nationality, on the other hand, may lack extraterritorial jurisdiction, the capacity to deploy field investigators globally and in a timely fashion, or the will to prosecute effectively. Finally, the host state, state of nationality, or both may fail to meet standards of

[156] United Nations, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*, April 2008, para. 1, www.peacebuildingcommission.org/files/index.php?act=category&id=44.

international human rights and humanitarian law in their approaches to criminal investigation, detention, trial and/or incarceration. The United Nations cannot knowingly repatriate or subject mission personnel to face such deficient criminal procedures without itself violating the standards that it claims to uphold.

This chapter assumes that, where a preliminary investigation has substantiated serious misconduct on the part of UN mission personnel, it would be the *default position* of the Secretary-General and OLA to *approve* case referral either to the accused's state of nationality or to the mission host state, based on the facts of the case, the quality of evidence gathered in the preliminary investigation by OIOS, and state's ability to meet relevant standards of due process and fairness, with expeditious determination of whether functional immunity applied in the case and expeditious waiver where necessary to avoid obstructing the cause of justice.

Building on those assumptions, this chapter presents a two-step approach to overcoming obstacles to fair and effective criminal justice for non-military UN mission personnel. Step one would accord primary jurisdiction to the sending state/state of nationality, if it meets conditions regarding extraterritoriality and criminal justice system performance, and has agreed to prosecute well-founded allegations of criminal behavior. Should the state of nationality fall short on one or more of these points, we propose that responsibility for criminal prosecution revert to a partnership of the United Nations and the host state, to be stipulated in the mission mandate passed by the UN Security Council and reinforced by the Status of Mission Agreement with the host state. Because most war-torn host states will have difficulty meeting international criminal justice standards in the early years of their recovery from war, implementing step two would, in virtually all cases, require that the United Nations be prepared to be the principal partner in the administration of criminal justice for mission personnel when jurisdiction defaults to the host state. Such a role for the UN should produce important benefits to mission host states far beyond the relatively short-term realization of justice. Criminal justice for mission personnel, as effected under step two, would exemplify rule of law for the host state, and could do so most effectively by using the widely-vetted model codes for criminal law and procedure discussed in Chapter 3 to modernize the content and process of the host state criminal justice system, as applied to UN personnel. The model codes could also serve as consensus baseline criteria for international planning, pre-deployment training, assessment of host state criminal justice capacity, and negotiation of the Status of Mission Agreement. Capacity-building elements of the mandate should endeavor to apply those changes made to accommodate criminal justice processes for UN mission personnel to the host state justice system at large. Such a justice and security system renewal effort would, of course, require the close cooperation of host state authorities, national professional associations, other international agencies, and development donors.

Step two would require a UN criminal justice support capacity running in parallel with, and to some extent sharing support structures with, the revamped UN internal justice system discussed in Chapter 2. The proposed support capacity also should be able to borrow personnel from deployable (standing or standby) rule of law capacities either now in existence or being developed in the UN itself and by regional organizations and UN member states.

Before we address these proposals in detail, we turn to some prior issues that the United Nations and its member states should address in order to lay important legal and procedural groundwork for better mission criminal accountability.

ISSUE AREAS TO ADDRESS FIRST

Several supporting areas require attention in order to improve prospects for enforcing criminal responsibility amongst persons serving in UN peace operations. These relate to the mandate language and its potential effects on the scope of functional immunity; the need for better-integrated reporting capacity and independent investigative capacity with regard to alleged serious criminal misconduct; the UN's approach to "ordinary" crime; and the need to ensure a level playing field for UN personnel with respect to criminal justice.

"All Necessary Means" and the Scope of Functional Immunity

Selectively until the late 1990s and more or less routinely since that time, the UN Security Council has given peace support operations—those carried out under UN leadership as well as those carried out under other flags—authority under Chapter VII of the UN Charter, the enforcement chapter, to use "all necessary means" or similar language to carry out some or all of their mandate.[157] Although it can be argued that such generic language may be limited in its effect either by subsequent clarification in the mandate itself, guidance issued to the SRSG or Force Commander by DPKO (or the relevant comparable policy or decision-making body of a non-UN implementing partner organization), Rules of Engagement (for the military), or Directives on Use of Force (for armed police), the language contained in the mandate per se is the touchstone according to which missions function. The history of UN operations has in general been one of cautious interpretation of mandates. That need not always be the case, however, and broad interpretation of broad language could lead to use of force by an operation or individuals within it that a reasonable observer would deem excessive in its aim or effect.[158] Here, we are more concerned with individual or small group action, and armed police in particular, which would include all UN FPUs, and some individual UNPOL. Their actions can have lethal consequences, as the 2007 Kosovo incident (discussed in Chapter 3) demonstrated. Yet with overall mandate language authorizing "all necessary means," whether any use of force is excessive, let alone criminally excessive, may be open to debate.[159]

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[157] Variations include "all necessary action," "the necessary action," and "all necessary measures." For brief discussion see Frederic L. Kirgis, "Security Council Resolution on Multinational Interim Force in Haiti," *ASIL Insights*, March 2004, www.asil.org/insight128.cfm. The first phrase is found in Resolution 145 (1960) for UN operations in the Congo; the second in Resolution 1769 (2007) authorizing deployment of the AU-UN Hybrid Force in Darfur, Sudan; and the third in Resolution 1529 (2004) authorizing the MIF for Haiti.

[158] Such, one may argue, was the case in Mogadishu, Somalia, in July 1993, when helicopter gunships of the US-commanded Quick Reaction Force launched a no-warning missile strike against leading members of the faction of Mohammed Farah Aideed, at a place called Abdi House. That fatal strike, which missed Aideed but killed at least 20 Somalis, led to an upsurge of violence against US and UN targets in Somalia; led to the deployment of US Special Forces to hunt for Aideed; and led to the fatal commando raid chronicled by Mark Bowden in *Blackhawk Down* (New York: Signet Books, 1999). On the Abdi House raid, see Keith B. Richburg, "In the War on Aideed, the US Battled Itself," *Washington Post*, 6 December 1993, A1. The Abdi House raid was conducted under the rules of war, not peace enforcement, as US Army doctrine would soon after define it. (See US Army Field Manual FM100-23, *Peacekeeping Operations*, December 1994.) At the time of these incidents, however, neither the United States nor the United Nations had written doctrine adequate to effectively guide the use of force in Somalia.

[159] Note that when use of excessive means has mass effect, such conduct can in principle rise to the attention of enforcement instruments of international law such as the International Criminal Court.

In short, Security Council language should take greater care with authority that can be warped beyond Council intent yet not beyond the ordinary meaning of the language itself, especially at the individual level. Mandate language has important implications for the application and waiver of functional immunity. An individual UN police officer authorized to bear arms as a member of a UN peacekeeping mission could argue, for example, that lethal use of firearms was "necessary" under a particular set of circumstances, including firing into a crowd that the officer claimed to have presented an imminent personal threat, although to an objective observer no threat would have been apparent. Other excessive uses of force could be similarly justified. It would be better if mandates explicitly authorized use of force proportionate to circumstance, or used some other closely-defined language that enabled a mission to meet its objectives without simultaneously allowing virtually any action to be encompassed within the protective envelope of functional immunity, transforming it into effective impunity. Military rules of engagement and police directives on use of force can mitigate the problem but are not usually public documents, and do not carry the same exemplary value for the host state or its population as does the public mission mandate. A loosely worded mandate can in principle also be a source of judicial appeal for those who do violate the letter or intent of the mission's rules on the use of force.

Integrated Reporting and Independent Investigative Capacity

Greater clarity in mandates must be matched by a fully-integrated system for reporting and tracking the disposition of all allegations of Category I misconduct by UN mission staff and experts on mission, and also by first-class criminal investigative capability "in the first instance." Reporting has improved with the creation of Headquarters and field mission conduct and discipline units, databases, and evolving collaboration in data sharing between the UN's Department of Field Support and its Office of Internal Oversight Services. But while UN personnel have undertaken criminal investigations in support of war crimes tribunals, and the OIOS Procurement Task Force has gathered evidence later used in cases of procurement fraud tried in American criminal courts, UN investigators outside the realm of the tribunals have lacked subpoena powers and other tools for conducting effective and timely criminal investigations.[160] Investigation of ordinary crimes committed within the environs of a peace operation could be carried out more swiftly given on-site availability of professional criminal investigators with the requisite authority, training, and equipment.

The UN has already taken important steps to create better monitoring and complaint receipt procedures. These include authorizing OIOS to investigate serious allegations of misconduct and creating, in 2006, the centralized Community of Practice network database on conduct and discipline issues linking DPKO/DFS and the missions.[161] In April 2008, the General Assembly confirmed that OIOS is the United Nations' resource for investigating more serious, or Category I, staff offenses.[162]

[160] Colum Lynch, "U.N. Cites $20 Million in Fraud; Corruption Is Alleged in Congo, Kenya, Greece and New York," *The Washington Post,* 21 October 2008, A13.
[161] A/63/260, para. 78.
[162] UN General Assembly, *Strengthening Investigations,* A/RES/62/247, 3 April 2008, paras. 10-11.

OIOS would be our choice as the institutional home of the professional investigative service recommended by the Zeid Report.[163] A Criminal Investigations Service should be created within the OIOS Investigations Division. Its job would be to generate the evidence necessary either for UN-assisted host state court proceedings or, working with investigators from the state of nationality, to enable that state's courts to properly hear and adjudicate cases against UN staff and experts on mission who are its nationals or claim it as a state of residence. Liaisons and spokespersons for the investigative service should maintain appropriate levels of transparency in investigative matters vis-à-vis DPKO Headquarters, mission management, mission personnel, and the local population, to demonstrate the professional quality of investigations and to reinforce both UN personnel and public perceptions of accountability within UN missions, while maintaining confidentiality of pre-trial evidence.

OIOS already has responsibility for investigating, managing, and reporting on all allegations of serious misconduct, including cases of sexual exploitation and abuse. At present, however, all determinations of potential criminal misconduct and decisions to refer cases involving UN officials or experts on mission to national authorities for potential prosecution rest, as noted in Chapter 3, with the Secretary-General, as advised by OLA, taking into consideration not only the facts of the case but policy considerations and the interests of the Organization. To engage actively and credibly in the area of criminal justice, the facts of the case must take precedence over other considerations in decisions to investigate, waive immunity, or support prosecution.

Second, if there is suspicion or allegation that a crime has been committed that falls within the purview of the investigative service, the preliminary investigation should proceed as though the results will feed into a criminal prosecution. Where investigations are conducted on behalf of sending states whose criminal justice systems use investigating judges, an MOU should be implemented with those states authorizing OIOS to act on behalf of the judge unless he or she is sent to the mission area in a timely manner. There is recent precedent for such measures in the revised standard MOU with troop-contributing countries, which gives the sending state ten working days to notify the United Nations of its intent to investigate an allegation of serious misconduct, after which time that government is considered "unwilling or unable" to undertake the investigation, and the UN may itself begin an administrative investigation.[164] Because of the time-sensitive nature of some criminal evidence, OIOS investigators should be authorized, in a mission's mandate, to undertake preliminary criminal investigations upon first report of potential criminal behavior, especially potential Category I misconduct. For the same reason, at least some OIOS investigators should continue to be based within missions rather than entirely withdrawn to major OIOS "hubs" in New York, Geneva, and Nairobi, so that evidence is professionally managed and safeguarded from the start.

UN authority to investigate could be reinforced via MOUs with police-contributing countries, as suggested by the report of the second UN group of legal experts,[165] and by the mission SOFA or Status of Mission Agreement (SOMA) with the host state. Although the relevant section of the legal experts' report refers to accountability of military contingents, similar language could be

[163] A/59/710, para. 32.
[164] A/61/19 (Part III), Article 7 quarter, "Investigations," para. 3a.
[165] A/61/645, paras. 24-25.

incorporated with regard to civilian personnel. As the experts group report notes, "compliance with the standards of conduct set out in the [Secretary-General's] bulletin could then be regarded as an operational matter since it defines the way in which the Council intended the mission to discharge its mandate."[166]

A database of reliable information on the investigatory requirements and evidentiary standards applicable in UN member states could supplement the investigative MOU to alleviate the risk of procedural discrepancies that could make evidence gathered inadmissible in trial court. Or the MOU could recognize the uniquely difficult circumstances of criminal investigations in the field and specify standard investigative procedures that may be undertaken prior to the arrival of sending state investigative personnel that would be accepted as valid by the sending state's justice system.

Third, UN investigative personnel must have centralized, secure databases to support the investigation and prosecution of UN mission staff and experts on mission accused of criminal offenses. Information regarding substantiated administrative allegations of serious misconduct and criminal convictions should be added to the DPKO-DFS Cyberark database (described on p. 14, above) and the departments should arrange for two-way data sharing—with appropriate data security and confidentiality safeguards—with other UN operating agencies, funds, and programs that maintain similar databases.

The UN's Approach to "Ordinary" Crime

In the face of member state inability or unwillingness to investigate, prosecute, and punish appropriately those found guilty of crimes while on UN field duty, the United Nations must either bear the resulting damage to mission and organizational reputation or have recourse to processes capable of meting out more than administrative justice to mission personnel. Previous UN forays into criminal justice have focused on international crimes—war crimes or crimes against humanity, as in the case of International Criminal Tribunals for the Former Yugoslavia and for Rwanda. "Ordinary" crimes have been brought within the writ of a UN-affiliated tribunal when committed on a massive scale, as were sexual exploitation and abuse of minors and destruction of property in Sierra Leone. The Special Court for Sierra Leone (SCSL), which addressed these as well as international crimes committed in that country from 1996 onward, was the product of an agreement between the United Nations and the government of Sierra Leone. It has both international and national staff.[167]

The UN transitional administrative authorities in Kosovo (UNMIK) and East Timor (UNTAET), were heavily involved with managing the administration of justice for ordinary crimes in their respective areas of responsibility through processes of investigation, appointing and training judges and lawyers, and advising on prosecutions, appeals, and sentencing. In Kosovo, mixed tribunals of local and international jurists handled the most politically and ethnically sensitive

[166] A/61/645, para. 29.
[167] *Statute of the Special Court for Sierra Leone*, Art. 5.

cases to ensure fair trials, and UNTAET courts handled criminal cases as well.[168] These transitional authorities were given executive mandates by the UN Security Council under Chapter VII of the UN Charter, owing to the absence of legitimate governing authority.[169]

The international tribunal in Lebanon, created in response to the 2005 terrorist attack that killed former Prime Minister Rafiq Hariri and 22 others, was founded in principle in a bilateral agreement with the government of Lebanon. Due, however, to political controversy over the nature of the tribunal, its legitimacy, and the perceived threat that it posed to state sovereignty, the agreement was never ratified in the Lebanese parliament.[170] The Security Council decided to proceed with the tribunal regardless of ratification, since the agreement was based on Chapter VII enforcement authority and could be enacted through a Chapter VII resolution, with the provision that the Security Council would respond to circumstances if the government resolved the internal political deadlock before the tribunal was established.[171] The UN court was not operational until March 2009, and it found in April that there was insufficient evidence to hold and try the four suspects.[172]

In every instance, the UN has carefully outlined the respective court's jurisdictional authority—temporally, territorially, and to varying degrees with regard to personalities. UN assistance to and partnering with the criminal justice system of a state hosting a UN peace operation—as proposed below—also should be narrowly drawn, applying only to UN mission staff and experts on mission, within the boundaries of the country or countries in which the mission is mandated, and lasting only as long as the mission mandate continues (although there would be a clear argument for extending necessary authorities and budgets to complete criminal trials underway when a mission's larger mandate expires).

In every court in which it has been involved and through every stage of the criminal justice process, the UN consistently has upheld international human rights standards. Every applicable court statute demands that the court establish protective measures for victims and witnesses and that it uphold rights of the accused. SCSL, which faced challenges operating in the same location where crimes occurred, revised its rules of procedure and evidence and established a Victims and Witness Support Unit to provide short- and long-term protection, counseling, and rehabilitation for adult and child witnesses.[173]

Neither the UN nor any international tribunal has ever had statutory authority to issue the death penalty. Whether the United Nations ought to repatriate individuals to states of nationality that

[168] United Nations, *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2001/983, 18 October 2001, paras. 17-22. UNTAET, "First sentence carried out," Daily Press Briefings, 25 August 2000. www.un.org/peace/etimor/DB/DB250800.HTM. UNMIK, *Pillar 1 Police and Justice, Presentation paper*, June 2004, p. 14-22.
[169] United Nations Security Council Resolution 1272, S/RES/1272, 25 October 1999, and Resolution 1244, S/RES/1244, 10 June 1999.
[170] Samar El-Masri, "The Hariri Tribunal: Politics and International Law," *Middle East Policy*, Vol. XV (No. 3), Fall 2008, 80,89.
[171] Ibid., 89. UN Security Council, *Resolution 1757*, S/RES/1757, 30 May 2007, para 1(a).
[172] "Lebanon releases Hariri suspects," BBC, 29 April 2009. http://news.bbc.co.uk/2/hi/middle_east/8024463.stm.
[173] Eric G. Berman and Melissa T. Labonte, "Sierra Leone," in *Twenty-First Century Peace Operations*, ed. William J. Durch (Washington, DC: United States Institute of Peace, 2006), 195.

make active use of the death penalty, including for crimes of which UN personnel might be accused, could pose a difficult decision for the Organization.[174] The UN Human Rights Committee (the committee of individual legal experts, as distinguished from the Human Rights Council of UN member states), tends to regard capital punishment as contravening international law.[175] The United Nations may therefore wish to enter into MOUs with member states carrying the death penalty on their books, stipulating the state would agree not to impose it on UN mission personnel, thereby facilitating repatriation to and prosecution by sending states whose criminal justice systems otherwise perform acceptably with respect to standards established in international human rights law.

Ensuring a Level Playing Field with Respect to Criminal Justice

Under any approach to better criminal accountability, the United Nations would want to ensure that all alleged wrongdoers among its staff receive equitable legal treatment whether due process occurs within a mission host state or their state of nationality. The UN Charter asserts the Organization's commitment to promoting "human rights and fundamental freedoms,"[176] and a Head of Mission for any PSO should have formal reassurance that releasing or repatriating an accused person to a particular state's jurisdiction will not lead to abuse of human rights or humanitarian law. Repatriating UN staff to states whose criminal justice systems are more criminal than just would not only violate fundamental Charter principles but subject UN personnel to differing standards of justice *because* they are UN personnel. An accountability system that allows the human rights of some staff to be so trampled would itself be manifestly unjust, and could reduce willingness of even well-intentioned UN personnel to serve under conditions in which such circumstances might occur. The UN would therefore need some means of evaluating states' criminal justice systems for compliance with acceptable international standards of investigation, detention, and judicial due process.

Given the large number of sending states/states of nationality involved in UN peace operations, it would be resource- and time-conserving to have straightforward, if indirect, indicators on which the Organization could perform a first-order "triage" of criminal justice systems. In addition, in considering waiver of immunity and/or repatriation of staff for serious offenses, the United Nations would need to consider the extent to which budgetary limitations in the state of nationality would delay justice unduly, and leave it unable to act on good intentions or implement due process within an acceptable period of time.

COURT OF FIRST INSTANCE: SENDING STATE/STATE OF NATIONALITY

Although, when examined from the viewpoint of territorial sovereignty, a host state would appear to have the strongest legal claim to jurisdiction over any potentially criminal actions of international mission personnel working on its territory, in practical, political, and legal terms a post-conflict state may be in the worst position to enforce such a claim, unassisted, for many of

[174] UN General Assembly, *Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, A/RES/44/128, 15 December 1989.
[175] "Liberia death penalty violates international law, says UN human rights body," *UN News Service*, 26 August 2008. "UN voices serious concerns about US execution of a Mexican national," *UN News Service*, 8 August 2008.
[176] *Charter of the United Nations*, preambular paragraphs, Purposes (para. 3), and Article 55, among others.

the reasons already stated. Host state interests therefore may lie in ensuring that some other entity does hold such personnel accountable for their actions. Following the precedent of the General Assembly's strong encouragement of member states to pursue extraterritorial jurisdiction with regard to their nationals serving in UN missions who are subject of substantiated allegations of serious misconduct,[177] step one of a system of accountability for UN officials and experts on mission would offer the state of nationality primary criminal jurisdiction, subject to certain enabling conditions. First, the behavior in question must be a crime both in the state of nationality and in state in which it occurs (a condition of extradition in the Model Criminal Codes).[178] Second, the laws of the state of nationality must have the necessary extraterritorial reach. Third, the state of nationality must have given written assurances to the United Nations that it would in fact exercise its jurisdiction with respect to any crimes or offenses committed by its nationals while on service in UN peacekeeping operations, and provide feedback to the United Nations on its follow-up in the case. Fourth, the criminal justice system of the state of nationality must function in accord with relevant standards of international human rights law. If these conditions are met, the United Nations would take the necessary steps to repatriate the person in question.

Enabling conditions one through three are fairly straightforward to judge: laws and jurisdiction exist or they do not; written assurances have been given or they have not. However, assurances given are not the same as assurances fulfilled, and process would do well to set consequences for non-compliance, which is, at present, non-consequential. Thus, nationals of states that fail to comply with their own assurances of vigorous investigation and prosecution, if warranted, should be barred from service in UN peace support operations until the situation is rectified. Exceptions could be made for those persons who agree, as a condition of service, to accept the jurisdiction of the host state (as part of the collaborative criminal justice mechanism suggested in step two) in the locale where they serve. Such a stance may risk the suspension of participation by significant national contributors of troops or police, but the United Nations needs to be clear that de facto impunity will not be tolerated and is ultimately counterproductive to the missions of its peace operations. Better, in other words, to have no example than a bad example.

Condition four, however, is the most difficult to define with precision and may need to be interpreted such that "impeccable" is not the only acceptable performance standard. The authors would not presume to set a single, hard and fast standard, which in practical terms may need to combine objective and subjective considerations in order to be workable. We also understand that the very act of stipulating standards and judging even relative compliance with them could prove controversial amongst many states, yet states are evaluated, ranked, measured, and indexed in many different fields by many different institutions—including members of the UN system—on a regular basis, including measures of good governance, openness, and human rights performance.

[177] United Nations, *Criminal accountability of United Nations officials and experts on mission,* A/RES/62/63, 8 January 2008, para. 3.
[178] O'Connor and Rausch, *Model Criminal Code*, 43–46.

Evaluating Criminal Justice Systems of States of Nationality

One option would be an intergovernmental body. The controversial UN Human Rights Council appears to have taken a non-discriminatory step in the right direction in spring 2008, when it initiated its Universal Periodic Review process, by which all UN members' human rights performance records are to be reviewed every four years. Not only does the Council seek reports from member states themselves, but also creates a composite report on each state reviewed from reporting from independent human rights "experts and groups known as 'Special Procedures', human rights bodies and other UN entities" and also reports from "other stakeholders," including non-governmental organizations and national human rights institutions.[179]

Progress in measuring various attributes of member states has been done consistently and over a longer time by various UN agencies, funds, and programs. For more than a decade, for example, the annual Human Development Report published by an arm of the UN Development Program has presented indices, based on objective measures of human welfare, that reflect the human condition in every UN member state. Over the years (and after some initial protest) these reports have come to be accepted measures that governments can use as incentives to show improvements in human development (health, education, longevity) of their peoples, that donors can use to target their resources, and that civil society groups can use to prod governments into action or use as evidence of the success of previous advocacy efforts.

Teaming the Office of the High Commissioner for Human Rights (OHCHR), based in Geneva, with the UN Office on Drugs and Crime (UNODC), based in Vienna, might be another way to accomplish the evaluation task. OHCHR and UNODC, each with substantial field experience as well as experience in supporting development of the model criminal code and model code of criminal procedure, are qualified and respected bodies to assess the degree to which critical elements of domestic justice systems (as reflected in Figure 1) meet designated international standards and how quickly or easily they might be brought up to standard with international assistance. OHCHR could maintain the database of results on behalf of both organizations and for the use of the new UN criminal justice support mechanisms described in the next section.

Certain compilations of national capacities and behavior are also available from reputable official and unofficial sources that could reduce the burden of evaluation by pre-clearing certain states, focusing evaluative efforts on certain elements of the justice systems in other states, and marking others as in need of substantial reform or restructuring to meet international standards.

A perhaps surprising number of criminal justice assessments have been undertaken already on a voluntary basis by private initiatives such as the American Bar Association's Europe and Eurasia program, known as ABA CEELI. Its survey methodology combines 30 indicators into a Judicial Reform Index that provides initial assessment and measures progress for countries receiving technical legal assistance through the program.[180] Enacted in 2001 and built on key documents in

[179] Office of the UN High Commissioner for Human Rights, "Basic Facts about the [Universal Periodic Review], www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.

[180] Scott Carlson and Julie Broome. *Judicial Reform Index: Overview*, American Bar Association Europe and Eurasia Program (ABA CEELI), 2002. www.abanet.org/rol/publications/judicial_reform_index.shtml. CEELI reviews

international law,[181] the index is viewed as a broader and more objective alternative to narrative assessments, while still accurately assessing capability in areas such as judicial independence and criminal code revision. It has the added benefit of being relatively easy to update systematically on a regular basis for the 19 participating countries.[182]

The International Monetary Fund developed its Financial Sector Assessment Program (FSAP) in 1999 and has since assessed the financial stability of and recommended policy changes for more than 140 countries, or three-quarters of its member states, two-thirds of whom agreed to make the assessments publicly available.[183] Article IV of the IMF's Articles of Agreement gives the organization its mandate to conduct bilateral surveillance of member states' compliance with a code of conduct,[184] but the scope of surveillance has expanded significantly in practice beyond the original intent of monitoring exchange rates. The 2007 Decision on Bilateral Surveillance recognized this shift, broadening the IMF's responsibility to include assessing the effects of domestic monetary, fiscal, and financial policies on global stability as measured by a diverse set of financial indicators.[185]

UNODC and the Organization for Security and Cooperation in Europe (OSCE) developed a detailed protocol, the Criminal Justice Assessment Toolkit, which focuses on four thematic sectors of the justice system: policing, access to justice, custodial and non-custodial measures, and cross-cutting issues such as victim and witness protection and international cooperation. The comprehensive assessment tool allows the agencies to design interventions that integrate UN standards and norms and recognize areas that require training of local justice personnel.[186] The UN could use such readily available measures to assess the criminal justice systems of its member states and, with the advent of the Universal Periodic Reviews by the Human Rights Council, all member states will be subject to new levels of scrutiny in the criminal justice sector.

DPKO may also look for validated proxy measures—short cuts that might reliably indicate which states have sufficiently adequate criminal justice systems to be considered ready recipients of nationals accused of serious misconduct while on UN mission. The same measures could identify states needing more thorough analysis before a repatriation decision is made, and, finally, it could identify states that most likely would fail even a cursory of assessment of their systems.

There are two such indices from well-respected sources that use current and multi-source data to measure applicable rule of law and human rights performance. They are, first, the World Bank

reportedly took about two months to complete, at a cost of about $200,000 apiece. Authors interview with ABA CEELI review participant.

[181] United Nations, *Basic Principles on the Independence of the Judiciary*, A/40/32, 29 November 1985, and A/40/146, 13 December 1985. Council of Europe, *Recommendation No. R(94)12*, 13 October 1994. Council of Europe, *European Charter on the Statute for Judges*, DAJ/DOC (98) 23, 8-10 July 1998.

[182] Carlson and Broome, *Judicial Reform Index: Overview*. JRIs for each participating country are publicly available on ABA CEELI's website. www.abanet.org/rol/europe_and_eurasia/.

[183] International Monetary Fund, "IMF Surveillance: A Factsheet." www.imf.org/external/np/exr/facts/surv.htm.

[184] IMF, Articles of Agreement of the International Monetary Fund, Article IV, Sections 1 and 3..

[185] IMF, Bilateral Surveillance over Members' Policies, Executive Board Decision, 15 June 2007. www.imf.org/external/np/sec/pn/2007/pn0769.htm#decision.

[186] United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, 1. www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.

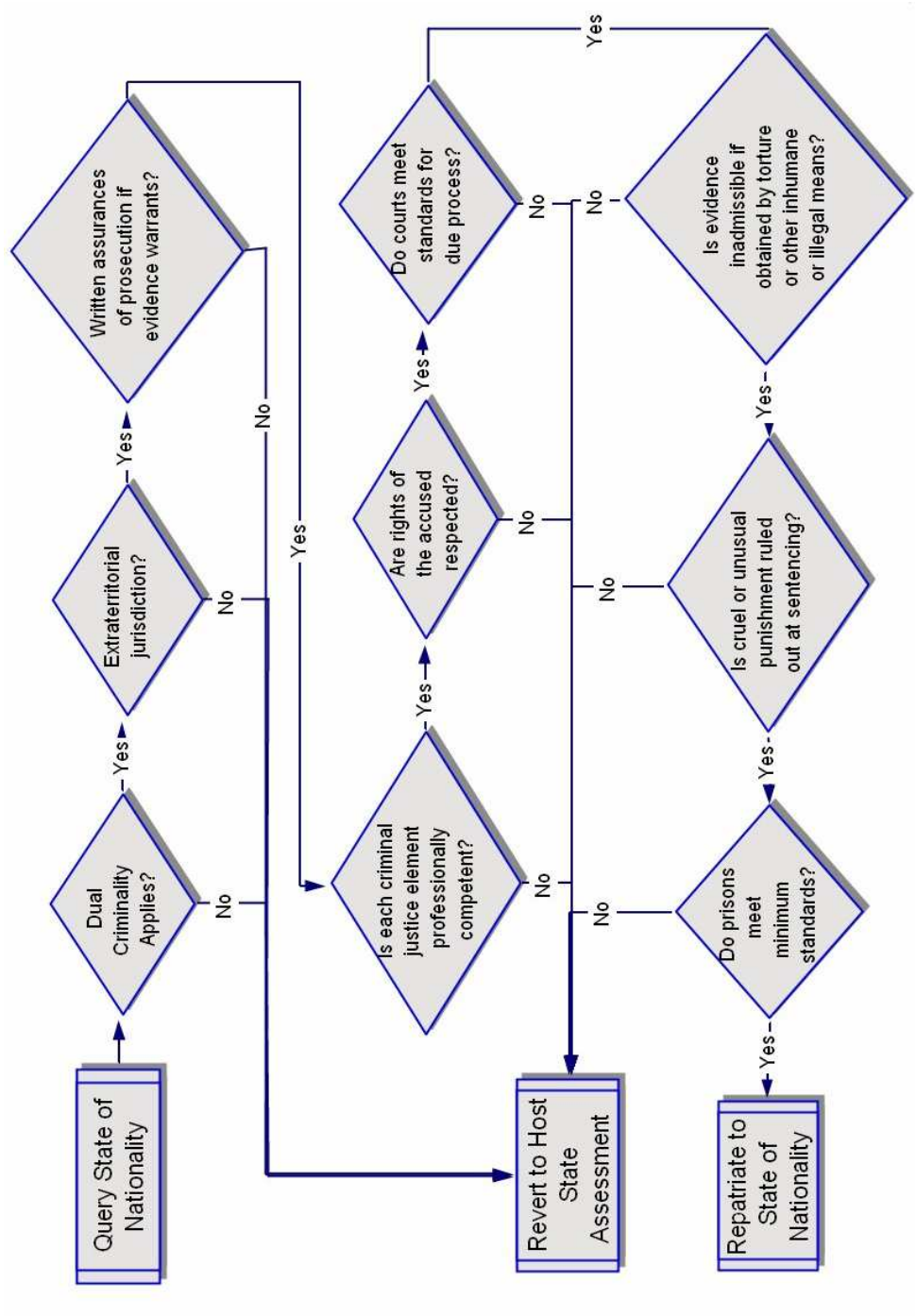
Worldwide Governance Indicators project[187] which since 1996 has been rank-ordering states on the basis of several indicators that reflect the project's statistical consolidation of a large number of public datasets on governance effectiveness, rule of law, control of corruption, and public voice and accountability. The second dataset derives from the well-regarded Freedom House measures of civil and political rights, which the organization has been generating since the early 1970s. Recently, Freedom House has begun to release the data on the underlying variables used to develop its simpler and better-known indices. The underlying measures of greatest utility here assess the functionality of government, and the state of rule of law, personal rights, and freedom of expression. Both organizations' indices offer indirect indications of the likelihood that a state's criminal justice system would function at acceptable levels of procedural competence and respect for human rights and due process.

The compilation of Governance Indicators and Freedom House data is fully laid out in Annex Table A-3, which divides states into three groups, the high-performance group being those states that rank at or above the median in both sets of indicators. This is a relatively low bar—a state only needs to be in the top half of governance and human rights performers—but the membership suggests a set of states to which it would be relatively safe to repatriate UN personnel.

The second group includes states below the composite 50th percentile on the Governance indicators or below the composite median ranking by Freedom House. Countries in the third group consistently fall below the median on both institutions' indicators. The correlations between these two sets of data are very high (88 percent), giving us confidence in our inferences regarding criminal justice from these more general governance and human rights scores. For purposes of judging whether to return an accused mission member to his or her state of nationality, the United Nations could return them to any of the 84 states in the first group with relatively high confidence of fair treatment. Conversely, it would be justified in assuming that any of the 80 countries in the third group would substantially fail a criminal justice assessment and thus justified in deciding not repatriate without further analysis. The 28 countries in the second group would require assessment before the Organization could be assured that their systems adequately conformed to international standards. Parts of many are in fact likely to conform, but the World Bank indicators tend to rate one segment of this group higher, while the Freedom House indicators tend to rate a different segment higher, further grounds for a closer look. Ideally, assessments would be conducted in advance of need, so that justice is not delayed when an alleged crime occurs. A stepwise approach to such assessments is depicted in Figure 1.

[187] World Bank Institute, Development Research Group, "Worldwide Governance Indicators for 2006," www.govindicators.org. (The Bank does not use these data for official purposes. The application for the data suggested above is the sole responsibility of the authors.)

Figure 1: UN Field Mission Criminal Justice Cascade Process



Implications of "Sending State First"

The designated body for overseeing a cascading justice system should focus initially on building a knowledge base of existing extraterritorial jurisdiction laws for all countries, beginning with those that contribute the most peacekeeping personnel, since extraterritoriality will likely become an issue in pursuing prosecution of personnel.

The process of convincing states to change their laws could be laborious and difficult in some cases. Even if a contributing state did have extraterritorial jurisdiction, there would remain the risk that its commitment to assert jurisdiction over its nationals reflects a desire to *avoid* their prosecution elsewhere and to engage in at best sham prosecutions at home. The UN must be willing to enforce conditionality in such instances, refusing nationals from such states that fail to fulfill their promises of prosecution where cases are well-founded. Such action need not include individual job-seekers from that state but it is likely that a government so affronted would find means of preventing its citizens from making application for UN positions, or penalizing those who accepted positions.

When sending state extraterritorial jurisdiction is unavailable, or the sending state's justice system fails to pass muster in one or more important ways, or its past performance in prosecuting individuals remanded to it has been poor, and the host state criminal justice system is in tatters, the alternative is a UN-augmented system of accountability that collaborates with the host state criminal justice system to generate the necessary jurisdiction and legitimacy, while building both example and institutional capacity for the host state itself to use and sustain.

COURTS OF LAST RESORT: UN-HOST STATE COLLABORATIONS

Even where states of nationality meet all conditions for repatriation and trial on the basis of evidence gathered by professional UN investigators, there will be value in the UN mission and the host state having a collaborative arrangement on law enforcement and criminal justice vis-à vis mission personnel. Accused persons, for example, may be deemed a flight risk, mandating detention until such time as they may be taken into custody by representatives of the state of nationality. At present, UN missions have neither means nor authority to detain their own personnel in the context of criminal investigations, unless those missions' mandates include executive authority. Moreover, it is almost certain, given the large number of nationalities represented among non-military personnel in UN peace operations, that a fair number of states will fail to meet one of more of the four proposed conditions for repatriation, from jurisdiction to prosecute, to a poor record of compliance with international human rights law.

It is therefore not hard to foresee instances in which applying criminal justice to mission personnel would require moving to step two and drawing upon the sovereignty and the criminal justice system of the host state to create a collaborative system of criminal justice applicable to the mission. Although, as Annex Table A-3 indicates, post-conflict states hosting UN peace operations are likely to score poorly on World Bank governance indicators and Freedom House human rights indicators, every host state has attributes—such as jurisdiction supportive of criminal justice—that a non-executive UN mission does not. In a collaborative relationship the United Nations can, in turn, offer the host state and its various stakeholders access to modernized

criminal law codes and codes of procedure and, with the host state's concurrence, can offer a model of jurisprudence the implementation of which could help point the state's criminal justice system toward fair play, effectiveness, and professionalism that will both increase the state's domestic legitimacy and make it more attractive to international trade and investment.

Improving criminal justice performance of the host state has increasingly been the business of contemporary UN peace operations, as Table 2 indicates. The more quickly local criminal justice capabilities grow, the more the host state will be able to offer collaborative resources to the United Nations in a joint effort to enforce criminal law within the mission, and the sooner the state reaches the point where it can meet international human rights standards of performance without international assistance.

The Security Council mandate for a mission should define the UN's responsibilities in support of mission-directed criminal justice, acting under Chapter VII of the Charter if necessary. The mandate should also require that the SOMA with the host state provide for its collaboration with the United Nations on criminal justice matters for non-military mission personnel, recognizing the necessity that such collaboration and all actions taken under its aegis conform to applicable standards of international human rights law. The UN's model SOMA should provide for such collaboration. A detailed assessment of the host state criminal justice system, in which host state personnel should participate, should be undertaken to establish the baseline for an MOU with the host state.[188] The SOMA should state that criminal jurisdiction over UN personnel will revert solely to the host state when a periodic assessment of its law enforcement and criminal justice institutions concludes that its personnel, institutions, and procedures meet minimally acceptable international standards in all four major components of criminal justice. Such assessments should be conducted by OHCHR or UNODC. Where jurisdiction reverts, the SOMA should preserve the right of the accused to have legal assistance of his or her choice, including from the state of nationality, the host state, or the UN itself.

The MOU would delineate the specifics of jurisdictional and procedural matters related to the workings of jointly-staffed elements of the host state criminal justice system that are applicable to UN mission personnel.

Table 3 illustrates elements of an assessment of the host state system through four critical phases of the criminal justice process: investigation (including interrogation of witnesses); filing of charges and pre-trial detention or a supervised alternative; adjudication and appeal; and sentencing and corrections. Table 3 is a highly summarized version of the assessment process recommended in the UNODC and OSCE *Criminal Justice Assessment Toolkit*.[189] Host state

[188] A thorough assessment of the host state's criminal justice system is among key tasks to be accomplished prior to deployment of a new operation if UN criminal justice support of any kind is indicated by the mission mandate or the provisions of a peace agreement. To be effective, even partial support to local justice must take into account the condition and workings of the entire system. For some missions, assessments may take place after initial deployment if a mandate does not initially include criminal justice support but later expands to do so. In the revised concept of support for mission-focused criminal justice, all UN technical assessment missions would include an assessment of host state criminal justice.

[189] UNODC, *Criminal Justice Assessment Toolkit*, www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.

performance on these substantive and procedural elements would both help to focus a capacity-building program as well as tell UN planners where and at what level they could expect to build early and effective collaborative relationships with host state personnel and institutions in meeting the mission's criminal justice requirements.

Table 2: UN Mandates in Operations With Rule of Law Components since 1999

Mission	Country or Territory	Dates	Specific Reference to Reforming Police	Specific Reference to Reforming Judicial System*	Specific Reference to Reforming Prison Systems*
UNMIK	Kosovo	1999 – present	X	X	
UNAMSIL	Sierra Leone	1999 – 2005	X		
UNTAET	Timor-Leste	1999 – 2002	X	X	X
ONUC	DR Congo	1999 – present	X		
UNMISET	Timor-Leste	2002 – 2005	X	X	
UNMIL	Liberia	2003 – present	X	X	X
UNOCI	Côte d'Ivoire	2004 – present	X	X	
MINUSTAH	Haiti	2004 – present	X	X	X
ONUB	Burundi	2004 – 2006	X	X	X
UNMIS	Sudan	2005 – present	X	X	
UNMIT	Timor-Leste	2006 – present	X	X	X
UNAMID	Darfur, Sudan	2007 – present	X		
MINURCAT	Chad/CAR	2007 – present	X	X	X

* Includes references to judicial and/or penal reform contained in Secretary-General Reports, in instances where Security Council Mandates explicitly endorse the plan in the Report.

Sources: Security Council Resolutions and Secretary-General Reports for each mission listed.

Criminal Justice Support Structure: UN Headquarters

A design for Headquarters' support of UN-host state collaborative criminal justice endeavors must address not only rational bureaucratic structure and the operational needs of the field but also issues of policy, budgeting, and administrative performance review. Moreover, it must do so in a manner that creates a level of functional independence equal to or greater than that of the UN's restructured and professionalized system for internal administrative justice, or OIOS, while maintaining accountability. The following discussion sketches such a structure for Headquarters, and then turns to equivalent issues that would apply in the field.

Table 3: Assessing the Host State Criminal Justice System

Capacity Assessed	Sub-Elements	Functions or Personnel Assessed
Investigations	Investigators	Competence
		Integrity
	Process	Timeliness
		Solid chain of custody for evidence
		Accused access to competent legal advice
		Interrogations free of torture of other inhumane/degrading treatment
Detention, Charges	Habeas Corpus	Timely charges; time-limited detention without charges.
	Conditions of detention	Adequacy of food, water, space, sanitation, security.
	Alternatives to detention	Bail system, monitored house arrest
Adjudication (Court of first instance and appeals court)	Competence of personnel	Judges and Magistrates
		Prosecutors
		Defense lawyers
		Court Registry
	Integrity of personnel	Judges and Magistrates
		Prosecutors
		Defense lawyers
		Court Registry
	Due Process Standards	Defense discovery process
		Presentation and challenge of evidence in open court
		Availability of (and right of defense to call) witnesses
		Right to cross-examine witnesses
		Courts dismiss evidence obtained by illegal or inhumane means
		Sentencing practices
		Appeals process
Sentencing and Corrections	Conditions of sentence	Absence of cruel or unusual punishment
	Conditions of imprisonment	Meeting minimum international standards for humane treatment of prisoners

Figure 2 is our proposal for a Headquarters support structure. At the apex, we propose a Criminal Justice Advisory Committee, modeled in part on the UN's new Internal Justice Council and in part on the Independent Audit Advisory Committee (IAAC). The Internal Justice Council nominates and reviews judges for the UN's internal justice system and is charged with drafting a code of conduct for UN administrative law judges, both tasks that would be appropriate functions for the Council's criminal justice counterpart. The IAAC oversees OIOS and its budget, and includes reviews of roughly one-half of the budget (or about $25 million per year) that is routed through the Peacekeeping Support Account.[190] Similar budgetary responsibility should be accorded the Criminal Justice Advisory Committee, which, like the IAAC, should be appointed by the GA and meet several times a year.

The new committee should provide policy oversight for a Criminal Justice Support Division proposed to be created in New York as part of the UN Office of the Administration of Justice. That Office, charged to begin functioning 1 July 2009,[191] is headed by an Executive Director (see Figure 2). The new Division should be headed by an official who reports administratively to the Executive Director but reports on substantive matters to the Criminal Justice Advisory Committee.

Within the new Division there should be a Central Criminal Case Registry and a Criminal Justice Field Support Service. The former would be a central, backup repository for all case-related records generated by or on behalf of the collaborative criminal justice efforts carried out in mission areas, to include investigative reports, photographic and other digitized evidence, court proceedings, and all administrative records, which should be automatically backed up to the central registry as soon as they are generated and whenever modified.

The Field Support Service would comprise a Rosters Section, Criminal Justice Assessment and Standards Section, and Civil Provosts Support Section. The Rosters Section would be responsible for global recruiting and vetting of trial judges and defense attorneys for appointment to collaborative justice endeavors, according to standards of competence and experience approved by the Criminal Justice Advisory Committee. Some should be on full-time retainer while others could be on stand-by status. All could be part of the Standing UN Rule of Law Capacity (ROLCAP) and Senior Reserve Roster proposed in an earlier Stimson Center study of UN peacekeeping rapid deployment needs.[192] On provision of defense attorneys, the Rosters Section would liaise with the Office of Staff Legal Assistance, whose principal focus is representing and supporting staff in administrative proceedings by or against the United Nations. Since offenses of which staff may be accused can rise to Category I and serious crime, the scope of legal assistance available may reasonably rise to criminal defense in field settings. It could be difficult, however,

[190] The duties of the Internal Justice Council were established by General Assembly Resolution 62/228, 6 February 2008, para. 37. The terms of reference of the Independent Audit Advisory Committee were established by General Assembly Resolution 61/275, 31 August 2007. The IAAC is a subsidiary body of the General Assembly; the IJC is not.
[191] United Nations, *General Assembly Resolution*, A/RES/63/253, 17 March 2009. The starting date was postponed from 1 January 2009 to facilitate clearance of case backlogs from the former system of internal justice and to allow time to complete hiring of personnel in the new justice support structures.
[192] Joshua G. Smith, Victoria K. Holt, and William J. Durch, *Enhancing United Nations Capacity for Post-Conflict Policing and Rule of Law*, Report 63 (Washington, DC: Stimson Center, 2007), ch. 6.

for a staff attorney to shift gears, unless the legal context of collaborative criminal proceedings were normed, as suggested below, to a common legal and procedural framework.

The Rosters Section should also develop partnering arrangements with member states and regional organizations that have standing or standby entities designed to support rapid deployment of rule of law experts abroad, especially judges and defense lawyers. Prosecuting attorneys, collaborative-court clerks, and the managers and staff of the New York-based registry should be full-time UN personnel: the clerks, managers, and staff for continuity and security, and the prosecuting attorneys for rapid availability to participate in assessing whether the evidence gathered substantiates a Category I offense that should be criminally prosecuted. As discussed below, major missions should have a resident prosecuting attorney, and one additional staff prosecutor might be posted at each office of the Office of Administration of Justice.

The Assessment and Standards Section would be responsible for maintaining liaison with other elements of the UN system that amount to a community of practice on criminal justice issues. This would include, at a minimum, the Criminal Law and Judicial Advisory Section of the Office of Rule of Law and Security Institutions in DPKO; the Bureaus for Crisis Prevention and Recovery and for Democratic Governance at the UN Development Program; OHCHR; UNODC; the Office of Legal Counsel in the UN Office of Legal Affairs; and the Rule of Law Unit, which supports the Under-Secretary-General-level Rule of Law Coordination and Resource Group (ROLCRG).

This Section would work with OHCHR and UNODC to serve as a secondary repository for the criminal justice system assessments recommended above, and participate in Technical Assessment Missions to states that are newly-mandated to host a complex UN peace operation. Such participation would provide better understanding of what the United Nations would need to contribute to a new collaborative criminal justice endeavor.

Such requirements should not be drawn up ad hoc with each new mandate, although each new mission will have its unique elements to which collaborative efforts would need to adjust. Critics of the international tribunals for the Former Yugoslavia and for Rwanda, and for the hybrid tribunal for Sierra Leone, note that high costs, long delays, and some dubious practices derived from a lack of well-thought-out, written operating procedures. Had the architects of those courts taken time to standardize procedures in writing, the tribunals might have been much more efficient and much more effective.[193]

[193] Beth K. Dougherty, "Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone," *International Affairs* (London), 80, 2 (March 2004), 313. Penelope Van Tuyl, *Effective, Efficient, and Fair? An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone* (UC Berkeley: War Crimes Studies Center, 2008), 52–53.

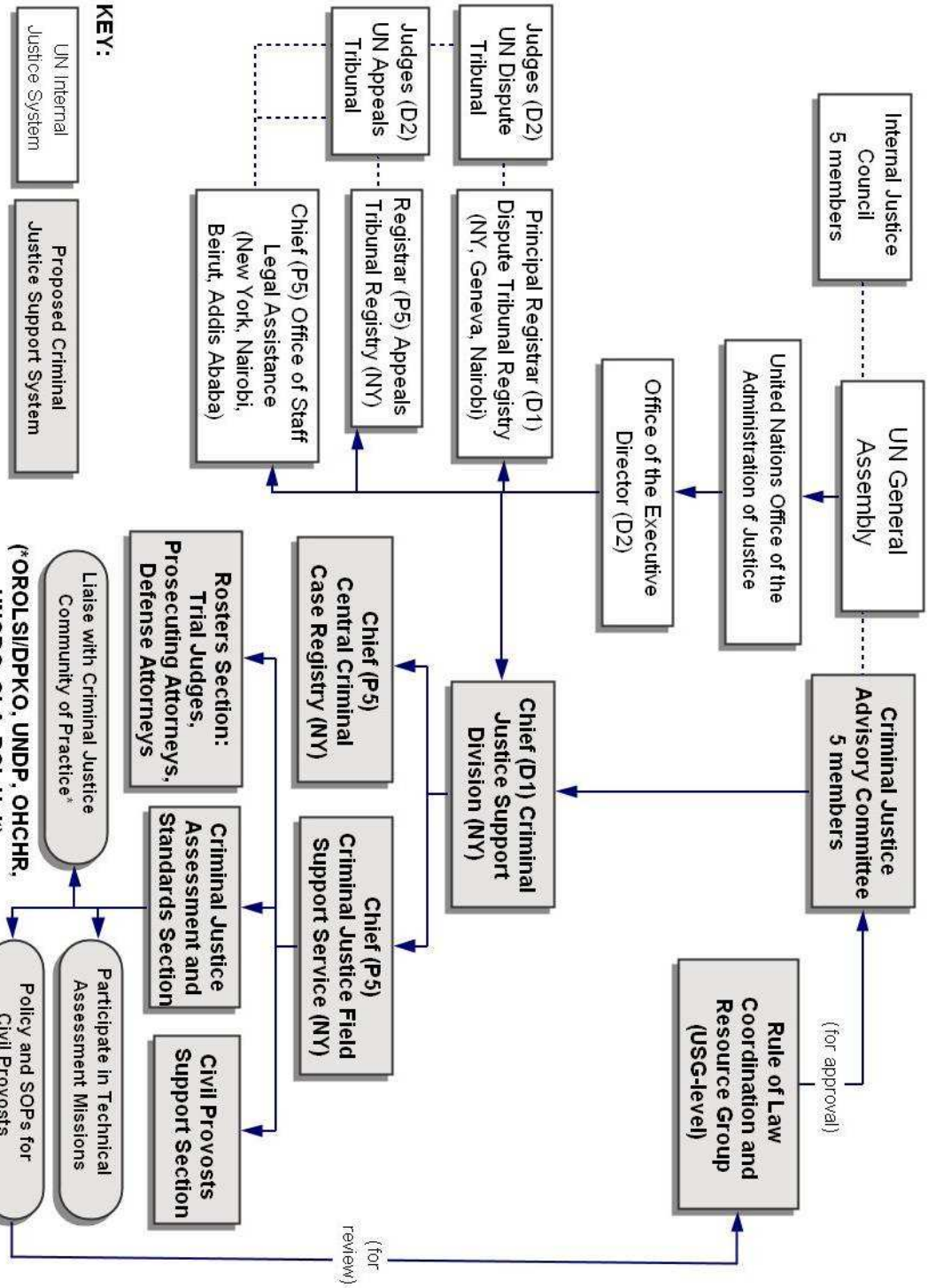


Figure 2: Proposed Criminal Justice Support Structure, UN Headquarters

We therefore recommend that the proposed Assessments and Standards Section be responsible for drafting new UN policies, standard operating procedures, and guidelines for collaborative criminal justice processes. Draft documents should be submitted for review by ROLCRG (effectively, for review by the entire UN community of interest in criminal justice matters), and after taking ROLCRG's views into account, submitted for approval by the Criminal Justice Advisory Committee. This last step is included to reinforce the independence of the proposed system: the UN's departments and agencies should have a say in the development of policies and procedures that may affect their people in the field, but not, in this case, the final say.

The Civil Provosts Support Section would be responsible for coordinating with the UN Department of Field Support and the UN Logistics Base at Brindisi, Italy, to specify support requirements for the new criminal justice elements attached to UN peace operations and to ensure that they are adequately supported in terms of transport, office space, office and communications equipment, and other logistical essentials, and that the peacekeeping support account reflects these needs, much as it does for OIOS. This section would also be the New York routing point for any substantive queries from criminal justice support personnel in the field.

The personnel footprint of the Criminal Justice Support Division is difficult to estimate but could range from 10 to 15 professional staff, plus 6 to 10 support staff, at Headquarters, billed to the Peacekeeping Support Account but with an independent review provided to the ACABQ by the Criminal Justice Advisory Committee, as is done by the IAAC.[194]

Developing Applicable Criminal Law and Procedure

The first UN Group of Legal Experts favored, for purposes of enforcing criminal accountability, the use of those individual elements of a state's criminal justice system that meet international standards, substituting elements from the state of nationality or a third-party state for those of the host state that failed to meet international standards.[195] In our view this would produce an unwieldy edifice of jerry-built structures that could only with great difficulty produce equal and efficient justice across UN peace operations. Better, we think, to have at least one constant across missions, and that, in our view, should be the availability of the USIP-Galway-OHCHR model criminal code, code of criminal procedure, police act, and corrections manual discussed earlier, to use as templates by which to modernize host state criminal codes and procedures for purposes of collaborative criminal justice. Host state criminal law and procedure would be trimmed or extended by the application of the model code templates, and this process should be one element of the MOU that creates the collaborative setup. If the model codes also evolve into the general template used by UN missions for purposes of technical legal advice and capacity-building, then the United Nations would be applying to its own personnel the same rules and processes that it

[194] United Nations, *Administration of Justice, Report of the Advisory Committee on Administrative and Budgetary Questions,* A/63/545, Annex I. For comparison, established posts for the Office of the Administration of Justice, beneath the Executive Director and the Director-level post to manage the New York registry, include 1 professional and 1 support post to assist the Executive Director; 8 professional and 8 support posts for the three Dispute Tribunal registries and the Appeals Tribunal Registry; and 7 professional and 3 support staff for the five locations of the Office of Staff Assistance, for a total of 16 professional and 12 support. There will be three full-time and two half-time judges for the Dispute Tribunal and seven judges for the Appeals Tribunal. The UN's informal justice system, centered on the Office of the Ombudsman, is larger, at approximately 27 professionals and 17 support personnel.
[195] S/60/980, paras. 29–30, 40–42, 44(b).

would be urging the host state to apply to its own citizenry. Were the larger international donor community also to buy into the model codes framework, the result could form the basis for better-coordinated justice and security sector reform efforts.

Using the model codes to generate commonality between the mission and host state criminal justice systems would be better than simply using the codes "out of the box" for the mission itself, even though there could be certain procedural advantages to doing so, for example, identical training regimes for those entrusted with enforcing the law within and across missions. But the differences across missions when using the corrective template approach should be sufficiently minor that UN and host state personnel could adapt with minimal additional training—UN personnel because the basic approach will be familiar, and host state personnel because the result will be built from their national codes.

The transparent application of modernized, rights-respecting codes and procedures, as accepted by the host state, could exert a powerful legitimizing influence on behalf of the mission and host state institutions that are in the process of reform. Transparency should include ample opportunities for the public to view collaborative justice proceedings so as to build their public credibility and to pressure local courts to achieve a standard of transparency that may be previously unheard of in the host state.

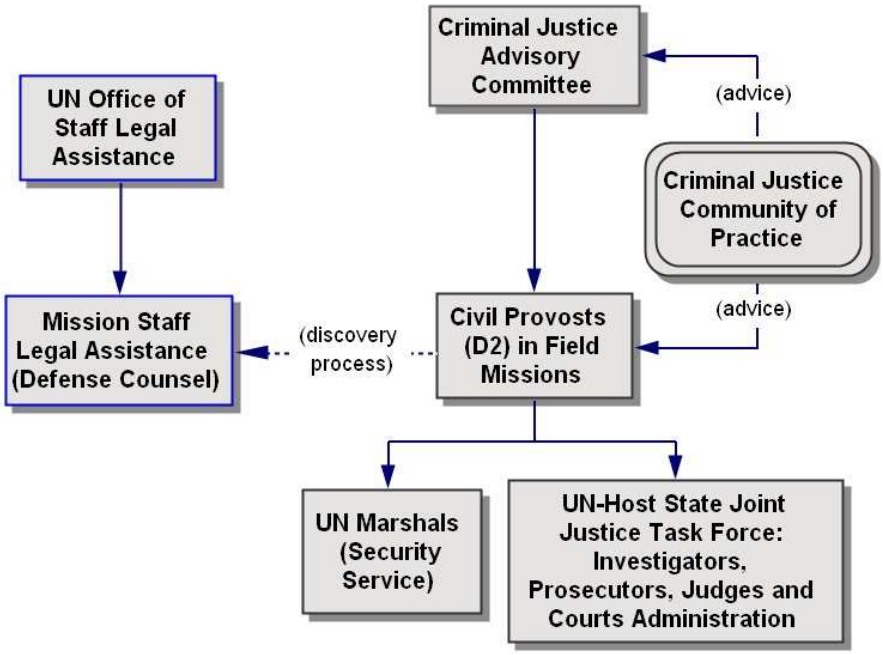
Criminal Justice Support Structure: Field Missions

The field presence for collaborative criminal justice (see Figure 3) could initially mirror that of the pilot internal justice field presence, which focuses on three major missions—Congo, Liberia, and Sudan[196]—but we would suggest adding a fourth mission—Haiti. Each of these four pilot efforts should host a collaborative criminal justice element led by a Civil Provost at the D2 level—comparable in rank to the heads of other major mission components (military excepted, as the Force Commander usually holds the rank of Assistant Secretary-General; but the proposed criminal justice element would not be responsible for military-related justice). The job title is intended to evoke the functions of a Provost Marshal (the head of military police, lawyers, and corrections), that is, the individual who would marshal resources on the UN side of the collaborative criminal justice effort and also work with OIOS forensic field investigators.

The Civil Provost would be the principal operational point of contact with the host state's criminal justice system. The division of labor between the United Nations and the host state in respect of mission criminal justice, UN support requirements, and processes of collaboration will have been based on the pre-deployment mission area assessment and subsequent negotiation of SOMA and MOU. It is not unusual that a mission deploys before a SOMA/SOFA has been finalized, and in such cases, inauguration of the collaborative system would be delayed. It should be in the host state's interest not to delay the completion of either document, on the merits, but political conditions in quasi-post-conflict situations can be mercurial, and it may be necessary to make at least some other assistance conditional on the completion of negotiations.

[196] A/63/545, para. 14.

Figure 3: Proposed Criminal Justice Support Structure in Missions

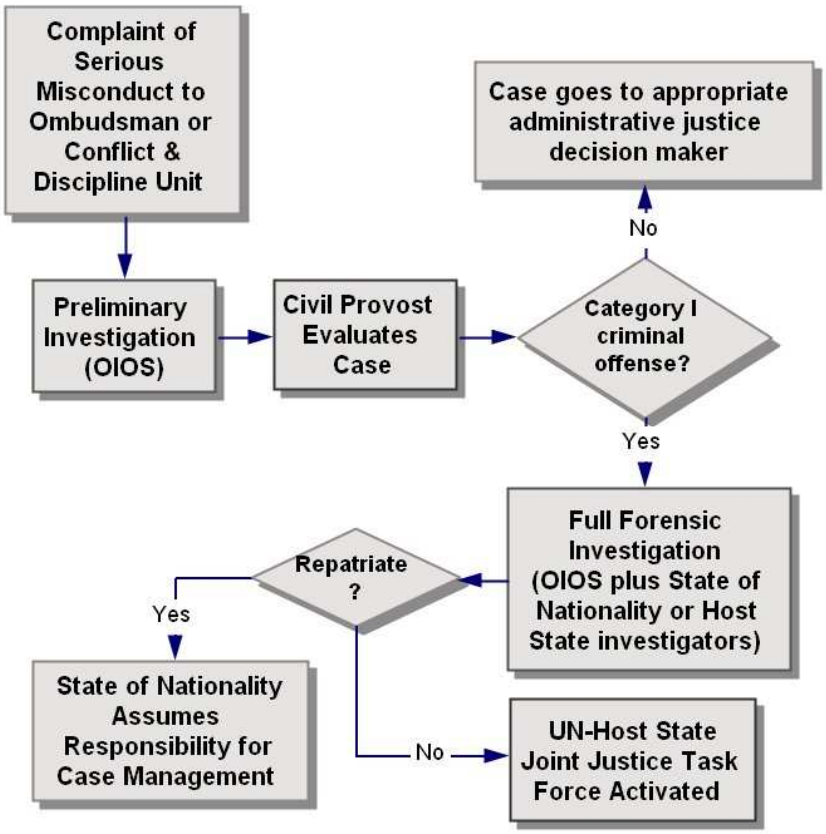


Under the system prevailing until July 2009, the mission Conduct and Discipline Unit made an initial determination of seriousness, based on the preliminary OIOS investigation, and its recommendation was confirmed or not by the Head of Mission, who determined whether an alleged offense was pursued past his or her desk and whether the alleged offense rose to the level of serious criminality. If so, the Secretary-General and Office of Legal Affairs determined whether immunity applied to the situation, if so, whether it should be waived and repatriation arranged.

In a major proposed departure from that practice (see Figure 4), we propose that the Civil Provost decide whether preliminary investigation points to a serious crime having been committed. If it does, and if an alleged perpetrator is named in the investigation, the provost would also decide whether to detain him or her if flight risk warrants it; whether to invite collaboration of the state of nationality with a view to repatriation and prosecution there, based on its meeting the four conditions outlined above; or whether to activate a Joint Justice Task Force with the host state.

In civil law settings, the provost would function as UN investigating judge, managing the work of OIOS criminal investigators and cooperating with any counterpart sent by a qualifying state of nationality. Where the state of nationality fails to qualify, the provost would work with a host state counterpart in building a case for trial. Actions of the provost related to use of the collaborative criminal justice system would always be taken in the presence of and with the consent of a host state-designated counterpart. In implementing various elements of the collaborative criminal justice process, however, the United Nations would be in the lead initially and until both sides agree that the host state has rebuilt its capacity sufficiently to take the lead.

Figure 4: Proposed Criminal Justice Support Process in Missions



Pre-trial detention of any sort, even house arrest, would be a departure for United Nations missions lacking an executive mandate, and where exercised would draw heavily upon powers conferred by the SOMA and MOU with the host state. House arrest may suffice if electronic monitoring devices, especially GPS-enabled, were used and closely monitored.[197] Post-conflict host state detention facilities are usually one of the least-functional elements of a post-conflict justice system, brimming with pre-trial detainees, and almost certain to fail a standards assessment. The physical detention alternatives—either prefabricated or more costly, longer-lived facilities—would place the UN in the uncomfortable position of providing "luxe" accommodations for its miscreants before anything improves for the multitudes already moldering in local confinement, even though their plight is not of the UN's doing. To supervise a restricted movement regime, serve as transport or trial escorts, and provide courtroom security in collaboration with host state counterparts, we suggest that the office of the Civil Provost include

[197] For discussions of electronic monitoring [EM] and issues that it raises, see James M. Byrne and Donald J. Rebovich, eds. *The New Technology of Crime, Law and Social Control* (Monsey, NY: Criminal Justice Press, 2007), reviewed by Timothy P. Cadigan in *Federal Probation*, 71,1 (June 2007), 54–55; J. Robert Lilly, "Issues Beyond Empirical EM Reports," *Criminology & Public Policy*, 5,1 (February 2006), 93–102; and Rita Haverkamp, Markus Mayer, and René Levy, "Electronic Monitoring in Europe," *European Journal of Crime, Criminal Law, and Criminal Justice*, 12, 1 (2004), 36–45.

three to four UN Marshals. These functions would combine elements of corrections and close protection, so the Marshals' logical home base would be the UN Department of Safety and Security, which hires and trains Safety and Security as well as Close Protection Officers for UN missions. The Marshals could be either international or national staff. Detention facilities would also require logistical and administrative support, a further argument for electronically monitored movement restriction whenever feasible.

The office of the provost should also have a full-time records clerk, to maintain the kernel of a criminal court registry; other personnel could be added as workload requires. In a large mission such as MONUC, which has generated the largest number of serious misconduct cases, the registry may best start with the assumption that it will have steady business, and begin with as many as three clerks and a full-time deputy prosecutor.

The UN's revamped system of administrative justice is designed to give UN personnel greater access to professional legal counsel. Such counsel thus far posted to missions will be specialists in administrative matters. Once again, large missions should have at least one staff criminal defense counsel. An accused person should, however, have the right to choose other legal assistance, including from his or her state of nationality or from the host state—which might be the preference of mission staff who are hired locally.

A right of appeal should be built into the system, but appeals hearings should be conducted in the host state, not at a remote location, as remote action is not transparent to local observers, and acquittals on appeal may seem especially suspicious if granted at a distance.

Sentences, once affirmed by the appeals process, should be carried out under contract with the state of nationality, if its corrections system meets international standards, or with third states, building on precedents established by UN war crimes tribunals.[198] The UN Office of Legal Affairs should pre-negotiate custodial arrangements with appropriate countries that meet international standards for corrections facilities and procedures.

In order to properly inform UN civilian staff of the new system of accountability affecting them, all contracts for employment of civilian staff should include specific language explaining the mission's approach to criminal accountability and the employee's recognition of and consent to host state jurisdiction with UN lead participation. Such consent would become a condition of employment, reinforced by reference to the mission mandate, SOFA/SOMA, and MOU.

The UN should resist the temptation to dual-hat the mission's rule of law capacity-building team as potential criminal litigators. That team should instead remain focused on the task of training and mentoring their local counterparts; those relationships should not be interrupted. Moreover, as they complete training, capable local personnel could be assigned to the Joint Justice Task Force to gain operational experience.

[198] The tribunal for the Former Yugoslavia has Bilateral Agreements for the Enforcement of Sentences with Slovakia, Estonia, the United Kingdom, Portugal, Ukraine, Belgium, Denmark, Germany, France, Sweden, Austria, Norway, Finland, and Italy (www.un.org/icty/legaldoc-e/index.htm). The tribunal for Rwanda established similar agreements with Sweden, France, Italy, Mali, Swaziland, and Benin (www.unictr.org/ENGLISH/agreements/index.htm).

To ensure that the chief criminal accountability officer in a peace operation is also accountable for his or her professional performance, and because the Civil Provost would report directly to no one in the field, we propose that the provosts' annual performance appraisals be derived from a "360-degree review" process in which three near-peers in rank from other UN missions would interview the provost's colleagues, staff, and stakeholders, including host state counterparts, and draft an appraisal for review and approval by the Criminal Justice Advisory Committee. The Committee should have the power to remove a provost who is not performing according to the highest standards of competence, integrity, and impartiality. As a UN official, the provost should, in turn, enjoy access to the UN's informal and formal administrative grievance procedures.

Implications of a Collaborative Criminal Justice Capacity with the Host State

The effectiveness and legitimacy of each peace operation, as well as the UN's legitimacy as a whole, will be augmented by the creation of a reliable, comprehensive system of criminal justice for UN civilian personnel. At present, when UN mission personnel commit crimes, the local population is likely to experience no sense of justice or closure, because usually no local procedure for criminal accountability is available or utilized to bring miscreant UN staff to justice. This can lead to popular frustration and even opposition to the UN and its mission. So the present lack of access to justice processes both locally transparent and transparently just is not only morally untenable but politically counterproductive, a poor example to host publics and governing elites alike.

Many host states might welcome the added international attention to UN mission members' transgressions and parallel efforts to rebuild and/or reform the local criminal justice system that would facilitate a growing partnership with UN criminal justice elements. This arrangement could be attractive especially to reform governments not composed of the leaders of former fighting factions (the Johnson-Sirleaf government in Liberia being an example). Local buy-in could also arise from the perception (and the emerging reality) of international personnel, held visibly to account for crimes, serving as an example of what local law enforcement and criminal justice could become, since UN practice and UN training would be using the same legal template, namely the adapted model codes.

While host state capacity is being built up, the UN mission should be able to offer the state various kinds of functional support, aiming to create a local criminal justice system nearly parallel to that of the mission; a system that could incrementally embrace the standards that capacity building efforts hope to inculcate on a sustainable basis.

Tensions necessarily exist between international actors and local populations wherever peace operations deploy; certainly any international intervention in a host state's legal system, no matter how badly it is in need of reform and development, will bring issues of pride and identity and images of paternalism and neo-colonialism to the fore. As regards to the criminal accountability of non-military UN mission personnel, it can be predicted that host states would universally prefer that such staff be investigated and prosecuted under host state laws in host state courts, asserting a sovereign power to punish those who deliberately harm their people or interests, rather

than see them shuffled off to their states of nationality. International capacity building support for host state systems and procedures to hold international personnel responsible for their misdeeds on host state soil, in collaboration with the United Nations, would therefore offer considerable net benefit to the host state.

CONCLUDING THOUGHTS

The pros and cons of each step of the proposed approach to increased accountability for UN personnel in peace operations must be weighed carefully and the potential implications of each fully analyzed. The first step proposed here appears perhaps as the more politically tenable of the two, yet it carries the necessary burden of UN assessment of member states' criminal justice systems. It is also arguably inefficient, requiring a great deal of effort to conduct and to update periodically the credentials of all member states' justice systems, as broad indicators are unlikely to prove satisfying to states who find themselves in the lower half of any ranking system. The partnering of the UN and the host state in the second step could be a difficult proposition for which to gain UN member state support, but as an option that would apply to all non-military peacekeeping personnel, it is the step that arguably offers greater assurance of ending legal impunity and deterring the behavior that impunity encourages. Resulting opportunities for operational collaboration with host state criminal justice system personnel and institutions would reinforce UN arguments about ending impunity locally by ending it for those who preach against it, as well.

The new processes that we propose in this report would require a modest expansion of the UN peacekeeping support account budget, and support from the donor community that is focused on rebuilding host state criminal justice capacity. Yet such reconstruction is often already a goal of UN PSOs and the added monetary cost of the proposals made here should be weighed against the benefits they could bring not only to the United Nations but to the peoples whom UN peace operations are mandated to help and to protect, and potentially to host state systems of criminal justice, the fairness and effectiveness of which are crucial to rebuilding the rule of law in war-torn places. Closing loopholes that allow UN personnel to evade responsibility for their actions is at minimum an obligation the UN owes itself to preserve organizational integrity, owes to the civilians it should be protecting in its areas of operation, and owes to member states. The Organization should demonstrate uncompromising support for human rights and the highest standards of due process. Ending impunity for its own personnel is a tremendous opportunity for the United Nations to offer good example in a critical sector, in the very places that need it most.

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ANNEX

Table A-1: Legal Tools Applicable to Different Personnel in UN Peace Operations

UN missions engage several different categories of civilian personnel, to whom different rules and conventions apply.[1]

	UN Staff (UN Officials)[2]	UN Police (experts on mission)	UN Volunteers	Consultants and Individual Contractors
Convention on the Privileges and Immunities of the UN (General Convention)[3]	X[4]	X[5]	X[6]	
Secretary-General's Bulletin, "Special Measures for Protection from Sexual Exploitation and Sexual Abuse," ST/SGB/2003/13, Oct. 2003	X	X[7]	X[8]	X[9]
Staff Regulations and Rules[10]	X			
"Ten Rules: Code of Personal Conduct for Blue Helmets" and "We Are United Nations Peacekeepers"		X[11]		
An "Undertaking"[12]		X		
Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission[13]		X		
DPKO, Department's Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers[14]		X		
UN Volunteers Conditions of Service[15]			X	
Status of Forces Agreements and Status of Mission Agreements (SOFA/SOMA)[16]	X	X	X[17]	
Standard Contract for Consultants and Individual Contractors, (ST/AI/1999/7)				X[18]

Endnotes to Table A-1

[1]This chart is grounded in *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse of United Nations Peacekeeping Operation*s [The Zeid Report], A/59/710, March 24, 2005, and several notes and reports of the Secretary-General issued in 2008 that detail scope of the UN's new system of administration of justice and its impact on various categories of personnel who serve in UN peace operations. The table omits discussion of military contingents, which remain under the exclusive disciplinary jurisdiction of their respective sending states, and discussion of military observers, who sign an individual undertaking with the United Nations and have the status of experts on mission, but also remain under the jurisdiction of their respective states and military codes of justice.
2 UN officials are persons who hold a letter of appointment from the Secretary-General; also referred to as UN staff or staff members. United Nations, *Status, basic rights and duties of United Nations staff members, Secretary-General's Bulletin,* ST/SGB/2002/13, 1 November 2002, Part III-B, Commentary, paras. 1–3.
[3] United Nations, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, entry into force September 1946, Article V, Sections 18 and 19, and Article VI, Sections 22 and 23.
[4] Officials at the level of Assistant Secretary-General and above may be accorded the privileges and immunities of diplomatic envoys in accordance with international law. General Convention, Section 19.
[5] "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations" ("experts on mission"). These persons shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: (a) Immunity from personal arrest or detention and from seizure of their personal baggage; (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations." General Convention, Article VI, Section 22. (Emphasis added.)
[6] UN Volunteers may enjoy privileges and immunities as officials of the United Nations "when specifically provided for in such agreements as status-of-forces agreements and the standard basic assistance agreements of the United Nations Development programme." United Nations, *Criminal accountability of United Nations officials and experts on mission, Report of the Secretary-General,* A/63/260, para. 64.
[7] ST/SGB/2003/13 applies "to all staff of the United Nations" but civilian police and military observers, who are experts on mission, not staff, agree in the "undertakings" that they sign with the UN to be bound by the prohibitions specified in the Bulletin. A/59/710, para. A.18.
[8] DPKO advises mission heads to have UN Volunteers sign an agreement stipulating that any violation of the prohibitions outlined in ST/SGB/2003/13 "will constitute serious misconduct that could result in immediate repatriation. A/59/710, para. A.38.
[9] A/59/710, para. 16, and United Nations, *Administration of justice: further information required by the General Assembly,* A/62/748, 14 March 2008, para. 21.
[10] ST/SGB/2002/13, 1 November 2002, also United Nations, *Staff Regulations*, ST/SGB/2007/4, 1 January 2007.
[11] These two documents are coupled with mission-specific guidelines for UN police officers.
[12] A contract signed by UN police and military observers agreeing that they will be bound by all mission standard operating and administrative procedures, policies, directives and other issuances.
[13] United Nations, *Regulations Governing the Status, Basic Rights, and Duties of Officials other than Secretariat Officials, and Experts on Mission, Secretary-General's Bulletin*, ST/SGB/2002/9, 18 June 2002.
[14] UN Department of Peacekeeping Operations, *Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers*, DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994, July 2003.
[15] United Nations, *Conditions of service for international UNV volunteers*, August 2006, http://www.unv.org/fileadmin/docs/conditions_of_service/UNV_COS_09_2008.pdf.
[16] United Nations, *Model status-of-forces agreement for peace-keeping operations, Report of the Secretary-General*, A/45/954, 9 October 1990.
[17] See note 6.
[18] The standard agreement signed by contractors indicates that individuals hired as consultants or contractors are subject to local laws of the host country, unless they are required to travel on behalf of the Organization, in which case they are accorded the status of experts on mission. A/59/710, paras 17, A.40.

Table A-2: Extraterritorial Jurisdiction Laws and Applicable Criminal Codes and Legal Systems

Country	Extraterritorial jurisdiction laws	Applicable Criminal Code			Legal System		
		State of Nationality	Host State	International Law	Civil	Common	Mixed*
Argentina	Yes	x					x
Australia	Yes	x				x	
Austria**	Yes	x	x		x		
Belgium**	Yes	x	x	x	x		
Bosnia-Herzegovina	Yes			x	x		
Brazil**	Yes	x		x	x		
Canada	No***					x	
Cyprus	Yes	x	x				x
Czech Republic	Yes	x			x		
Estonia	Yes	x			x		
Finland	Yes	x	x		x		
Germany	Yes	x			x		
Greece	Yes	x	x		x		
Ireland	Yes (limited)	x				x	
Jordan	Yes	x					x
Kenya	Yes	x					x
Korea, Rep. of	Yes	x			x		
Liechtenstein	Yes		x		x		
New Zealand	Yes	x			x		
Norway	Yes	x	x				x
Poland	Yes	x			x		
Qatar	Yes	x	x				x
Serbia	Yes	x			x		
South Africa	Yes	x				x	
Switzerland	Yes	x	x		x		
Tunisia	Yes	x	x				x
United States	Yes	x				x	
Yemen	Yes	x					x

Notes: The countries in this list responded to the S-G's request for information on existing national extraterritorial jurisdiction laws. 'Applicable Criminal Code' refers to the content of those extraterritorial jurisdiction laws and whether an action must be a crime in the state of nationality, in the host state where the crime occurred, and/or under international law. 'Legal system' categorizes the countries according to their use of civil law, common law, or mixed legal systems.
* Mixed legal systems may incorporate elements of civil, common, tribal, or religious law.
** Austrian laws state that the crime must be illegal in either the national criminal code OR that of the territory in which the crime was committed. Belgian and Brazilian laws state that the crime must be punishable in the host state territory and national OR international law. Other states require dual criminality in their own laws and the laws of the host state.
*** Exceptions are allowed for serious violations of Canadian or international law.
Sources: United Nations. *Report of the Secretary General on criminal accountability of United Nations officials and experts on mission.* A/63/260, 11 August 2008. Central Intelligence Agency, "The World Factbook Field Listing - Legal System." www.cia.gov/library/publications/the-world-factbook/fields/2100.html.

Table A-3: Indicators on States' Governance and Human Rights Performance, and Status Regarding International Covenant on Civil and Political Rights				World Bank Governance Indicators (WBGI) for 2007 (higher percentile = better-governed)				Freedom House (FH) Freedom in the World: 2008 (higher score = more freedom)				
Country Name	2007 Gross National Income per capita (World Bank, purchasing power parity dollars)	Number of Police Contributed to UN Operations (UN DPKO, 12/08)	ICCPR	Rule of Law	Control of Corruption	Voice & Accountability	WBGI Composite (average)	Rule of Law	Personal Rights	Freedom of Expression	FH Composite (average)	Host of peacekeeping operation (PKO) or special political mission (SPM) (10-11/08)
(1) States at or above median rank on WBGI and FH composite indicators												
Denmark	36300	3	r	99	99	100	99	15	15	16	15.3	
Switzerland	43870	6		100	98	100	99	15	15	16	15.3	
Iceland	33960	1	r	99	100	96	98	16	16	16	16.0	
Finland	34550	8	r	97	100	98	98	16	16	16	16.0	
New Zealand	26340	25	r	98	98	97	98	15	15	16	15.3	
Norway	53320	25	r	100	95	99	98	16	16	16	16.0	
Sweden	36590	50	r	98	99	97	98	16	16	16	16.0	
Luxembourg	63590		r	96	97	98	97	16	16	16	16.0	
Netherlands	39310	22	r	93	97	99	96	15	16	16	15.7	
Austria	38140	3	r	97	94	94	95	15	15	16	15.3	
Canada	35310	112		96	96	93	95	15	16	16	15.7	
Australia	33340	75	r	95	95	93	94	14	15	16	15.0	
Germany	33530	53	r	94	93	95	94	15	15	15	15.0	
Ireland	37090	19		94	93	95	94	15	15	16	15.3	
United Kingdom	33800	2	r	93	94	94	93	14	15	16	15.0	
Belgium	34790		r	91	92	96	93	15	15	16	15.3	
France	33600	118	r	90	89	91	90	13	15	15	14.3	
Andorra	..			89	89	92	90	15	15	16	15.3	
United States	45850	72	r	92	91	85	89	14	15	16	15.0	
Liechtenstein	..		r	89	86	92	89	16	16	16	16.0	
Barbados	..		r	88	90	87	88	16	15	16	15.7	
Malta	..		r	91	85	88	88	15	15	16	15.3	
Bahamas	..			85	91	84	87	15	15	16	15.3	
Portugal	20890	193		82	84	90	85	15	15	16	15.3	
Palau	..	2		81	..	89	85	15	13	16	14.7	
Chile	12590	22		88	90	77	85	15	15	16	15.3	
San Marino	..			81	..	88	85	16	16	16	16.0	
Spain	30820	60		85	84	83	84	14	15	16	15.0	
Japan	34600			90	85	75	83	15	13	13	13.7	
St. Lucia	9430			77	83	89	83	12	14	15	13.7	
Estonia	19810			84	81	83	82	14	14	16	14.7	
St. Kitts and Nevis	13320			77	79	86	81	12	14	15	13.7	
Cyprus	26370			83	75	85	81	15	15	15	15.0	PKO
St. Vincent & Grenadines	7170			77	79	82	80	13	14	15	14.0	
Slovenia	26640	6		75	78	84	79	14	12	15	13.7	
Antigua and Barbuda	17620			83	89	64	79	12	13	13	12.7	
Monaco	..		r	81	..	73	77	15	14	15	14.7	
Hungary	17210	2		73	71	86	76	13	14	16	14.3	
Dominica	7410			71	74	82	76	15	15	16	15.3	
Uruguay	11040	17		63	81	76	73	15	15	16	15.3	
Italy	29850	30		61	71	87	73	12	15	15	14.0	
Israel	25930	1		73	75	70	73	10	11	14	11.7	PKO
Mauritius	11390			74	70	73	72	13	12	15	13.3	
Czech Republic	22020	13		74	65	78	72	14	15	16	15.0	
Cape Verde	2940			67	74	75	72	14	13	15	14.0	

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Country Name	2007 Gross National Income per capita (World Bank, purchasing power parity dollars)	Number of Police Contributed to UN Operations (UN DPKO, 12/08)	ICCPR	Rule of Law	Control of Corruption	Voice & Accountability	WBGI Composite (average)	Rule of Law	Personal Rights	Freedom of Expression	FH Composite (average)	Host of peacekeeping operation (PKO) or special political mission (SPM) (10-11/08)
Samoa	3930	21		82	64	67	71	13	12	14	13.0	
Botswana	12420	3		70	80	62	70	13	11	14	12.7	
Greece	32330	2		69	66	76	70	13	13	15	13.7	
Tuvalu	..			84	54	72	70	15	14	16	15.0	
Korea, Rep. of	24750	1		75	68	67	70	13	12	14	13.0	
Kiribati	2240			76	61	69	69	15	13	15	14.3	
Latvia	16890			66	66	74	68	12	13	16	13.7	
Costa Rica	10700			62	69	74	68	13	13	16	14.0	
Slovak Republic	19340			60	65	77	68	12	14	16	14.0	
Lithuania	17180	1		63	62	75	67	14	13	16	14.3	
Grenada	6910	3		58	69	71	66	12	15	15	14.0	
Micronesia, Fed. States. of	3270			72	43	81	65	15	14	16	15.0	
Nauru	..		np	62	50	81	64	15	14	15	14.7	
South Africa	9560	158		57	67	69	64	12	12	15	13.0	
Poland	15330	7		59	61	72	64	13	14	16	14.3	
Vanuatu	3410	14		68	63	60	64	10	11	16	12.3	
Namibia	5120	25		57	63	64	61	10	9	15	11.3	
Marshall Islands	..			54	36	88	60	15	13	16	14.7	
Croatia	15050	19		55	59	61	58	11	13	14	12.7	
Belize	6200		r	54	51	68	58	12	13	15	13.3	
Bulgaria	11180	8		51	53	66	57	12	12	14	12.7	
Ghana	1330	687		52	56	62	57	12	10	14	12.0	
Trinidad and Tobago	22490		r	49	55	66	57	10	13	15	12.7	
Romania	10980	50		50	56	61	56	12	12	14	12.7	
Seychelles	15450			58	60	47	55	11	11	9	10.3	
India	2740	640		56	47	59	54	9	10	13	10.7	
Panama	10610			50	49	63	54	9	12	15	12.0	
Suriname	7640			49	52	58	53	9	10	15	11.3	
Brazil	9370	12		43	52	59	52	8	12	15	11.7	
Turkey	12350	257		53	59	42	52	8	10	12	10.0	
Lesotho	1890			47	55	52	51	11	9	14	11.3	
Mali	1040	78		46	45	56	49	9	9	15	11.0	
Montenegro	10290			48	44	55	49	8	11	12	10.3	
Sao Tomé and Principe	1630		np	44	41	60	48	12	10	15	12.3	
Argentina	12990	29		39	43	57	47	10	13	14	12.3	
Serbia	10220	11		35	46	56	46	9	13	14	12.0	
Bosnia and Herzegovina	7700	18		40	45	53	46	10	10	11	10.3	
Jamaica	6210	21		32	39	65	45	8	11	15	11.3	
El Salvador	5640	41		29	57	50	45	7	10	15	10.7	

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Country Name	2007 Gross National Income per capita (World Bank, purchasing power parity dollars)	Number of Police Contributed to UN Operations (UN DPKO, 12/08)	ICCPR	Rule of Law	Control of Corruption	Voice & Accountability	WBGI Composite (average)	Rule of Law	Personal Rights	Freedom of Expression	FH Composite (average)	Host of peacekeeping operation (PKO) or special political mission (SPM) (10-11/08)
(2) States at or above median on either WBGI or FH composite indicators												
Singapore	48520	21		95	96	35	**75**	8	12	9	9.7	
Qatar	..			80	82	28	**63**	4	4	8	5.3	
Kuwait	..			71	72	34	**59**	7	5	9	7.0	
United Arab Emirates	..			70	82	23	**58**	3	4	7	4.7	
Bhutan	4980			64	80	24	**56**	5	8	7	6.7	
Bahrain	..			69	73	25	**56**	3	7	9	6.3	
Oman	..			72	73	19	**55**	4	5	6	5.0	
Jordan	5160	1006		65	67	27	**53**	6	8	9	7.7	SPM
Malaysia	13570	259		65	62	31	**53**	6	8	8	7.3	
Madagascar	920	48		47	57	48	**50**	9	9	10	9.3	
Sri Lanka	4210	94		56	57	36	**50**	6	9	8	7.7	
Macedonia, FYR	8510			41	51	54	**49**	8	10	11	9.7	
Brunei Darussalam	..			60	64	17	**47**	6	8	6	6.7	
Benin	1310	155		36	40	57	44	12	10	15	**12.3**	
Mexico	12580			34	49	49	44	7	11	14	**10.7**	
Senegal	1640	514		45	38	48	44	10	9	14	**11.0**	SPM
Mongolia	3160			44	34	53	44	12	12	15	**13.0**	
Dominican Republic	6340			37	32	55	41	10	11	15	**12.0**	
Peru	7240			27	48	49	41	8	10	15	**11.0**	
Tonga	3650			64	13	46	41	11	12	12	**11.7**	
Guyana	2880		r	35	32	51	40	8	9	15	**10.7**	
Albania	6580			28	37	50	38	10	9	12	**10.3**	
Solomon Islands	1680			24	33	54	37	8	12	13	**11.0**	
Bolivia	4140			18	39	50	35	7	9	15	**10.3**	
Ukraine	6810	78		28	27	45	33	10	11	13	**11.3**	
Philippines	3730	273		34	22	43	33	6	10	14	**10.0**	
Nicaragua	2520			22	23	45	30	7	9	14	**10.0**	
Ecuador	7040			15	20	41	25	6	10	15	**10.3**	

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Country Name	2007 Gross National Income per capita (World Bank, purchasing power parity dollars)	Number of Police Contributed to UN Operations (UN DPKO, 12/08)	ICCPR	Rule of Law	Control of Corruption	Voice & Accountability	WBGI Composite (average)	Rule of Law	Personal Rights	Freedom of Expression	FH Composite (average)	Host of peacekeeping operation (PKO) or special political mission (SPM) (10-11/08)
(3) States below the median on WBGI and FH composite indicators												
Georgia	4770			43	48	42	44	6	10	11	9.0	PKO
Tunisia	7130			60	60	13	44	4	8	4	5.3	
Morocco	3990			51	53	29	44	6	8	8	7.3	PKO
Tanzania	1200	9		42	43	44	43	10	8	11	9.7	
Thailand	7880	12		53	44	30	42	6	11	9	8.7	
Burkina Faso	1120	69		41	47	38	42	6	8	13	9.0	
Colombia	6640	7		36	50	39	42	7	10	12	9.7	
Saudi Arabia	22910			59	58	7	41	3	2	4	3.0	
Fiji	4370	49		46	42	32	40	7	10	11	9.3	
Mozambique	690			29	35	47	37	7	9	12	9.3	
Malawi	750	23		45	26	40	37	8	7	11	8.7	
Zambia	1220	183		31	34	40	35	8	7	11	8.7	
Rwanda	860	119		30	58	12	34	6	7	7	6.7	
Armenia	5900			40	30	30	34	6	9	8	7.7	
Maldives	5040			55	24	22	34	7	7	7	7.0	
Egypt, Arab Rep.	5400	134		52	36	12	33	4	7	5	5.3	PKO
Djibouti	2260	51		40	40	18	33	5	6	6	5.7	
Mauritania	2010	9		33	38	26	33	6	6	10	7.3	
Liberia	290			14	46	38	33	7	8	11	8.7	PKO
Indonesia	3580	164		27	27	43	32	7	9	12	9.3	
Lebanon	10050			30	31	34	32	5	9	12	8.7	SPM, PKO
Moldova	2930			30	29	37	32	8	9	10	9.0	
Uganda	920	123		38	25	33	32	6	7	11	8.0	
Gambia, The	1140	83	r	50	23	21	31	7	8	10	8.3	
Honduras	3620			20	29	41	30	7	9	12	9.3	
Algeria	7640			26	41	20	29	5	7	7	6.3	
Nepal	1040	809		31	30	23	28	6	7	10	7.7	SPM
Swaziland	4930			26	42	16	28	4	5	8	5.7	
Comoros	1150		np	19	29	35	28	8	6	10	8.0	
Papua New Guinea	1870			21	9	52	27	7	8	12	9.0	
Cuba	..		np	25	54	2	27	1	2	2	1.7	
Ethiopia	780	15		38	28	13	26	4	6	7	5.7	
China	5370	204	np	42	31	6	26	2	8	4	4.7	
Gabon	13080			33	21	25	26	6	5	10	7.0	
Kenya	1540	38		16	15	46	26	7	8	14	9.7	
Guatemala	4520			11	25	39	25	5	8	12	8.3	
Niger	630	225		20	18	36	25	8	6	10	8.0	
Vietnam	2550			39	28	7	24	4	8	5	5.7	
Timor-Leste	3080			8	17	44	23	6	9	12	9.0	PKO
Yemen, Rep. of	2200	95		18	33	17	23	4	5	7	5.3	
Paraguay	4380			16	14	37	22	6	10	12	9.3	
Iran, Islamic Rep. of	10800			21	37	8	22	3	4	5	4.0	
Bangladesh	1340	1102	r	25	10	29	21	6	9	7	7.3	
Sierra Leone	660	20		11	12	38	20	8	9	12	9.7	SPM
Syrian Arab Republic	4370			37	19	5	20	1	5	2	2.7	PKO

Table A-3: Indicators on States' Governance and Human Rights Performance, and Status Regarding International Covenant on Civil and Political Rights				World Bank Governance Indicators (WBGI) for 2007 (higher percentile = better-governed)				Freedom House (FH) Freedom in the World: 2008 (higher score = more freedom)				
Country Name	2007 Gross National Income per capita (World Bank, purchasing power parity dollars)	Number of Police Contributed to UN Operations (UN DPKO, 12/08)	ICCPR	Rule of Law	Control of Corruption	Voice & Accountability	WBGI Composite (average)	Rule of Law	Personal Rights	Freedom of Expression	FH Composite (average)	Host of peacekeeping operation (PKO) or special political mission (SPM) (10-11/08)
Pakistan	2570	813	np	20	21	19	20	3	6	5	4.7	PKO
Kazakhstan	9700			24	17	18	20	4	7	7	6.0	
Libya	14710	2		32	22	2	19	0	6	1	2.3	
Russian Federation	14400	76		17	16	20	18	4	7	8	6.3	
Nigeria	1770	917		9	12	32	17	5	7	11	7.7	
Cameroon	2120	147		13	16	21	17	2	4	7	4.3	
Azerbaijan	6260		r	23	11	15	16	4	8	6	6.0	
Eritrea	520			12	35	1	16	2	6	2	3.3	
Togo	800	26		19	14	14	16	4	6	8	6.0	
Cambodia	1690			14	8	24	15	2	6	10	6.0	
Guinea-Bissau	470		np	6	7	33	15	6	6	10	7.3	SPM
Kyrgyz Republic	1950	15		9	8	28	15	5	7	10	7.3	
Venezuela, RB	11920		r	3	10	31	15	5	8	9	7.3	
Burundi	330	31		10	9	25	15	4	6	8	6.0	SPM
Central African Republic	740	27		3	18	22	14	3	4	10	5.7	SPM, PKO
Tajikistan	1710	5		10	20	11	14	4	5	6	5.0	
Lao PDR	1940		np	17	13	6	12	2	5	4	3.7	
Belarus	10740			12	19	4	12	2	5	3	3.3	
Congo, Dem. Rep.	290	22		8	11	15	11	2	6	9	5.7	PKO
Haiti	1150			5	3	26	11	4	5	10	6.3	PKO
Uzbekistan	2430			13	14	3	10	0	2	1	1.0	
Angola	4400			7	6	16	10	4	3	8	5.0	
Cote d'Ivoire	1590	166		2	7	11	7	5	5	5	5.0	PKO
Chad	1280	26		6	5	9	7	1	3	7	3.7	PKO
Guinea	1120	90		4	3	13	6	4	6	8	6.0	
Equatorial Guinea	21230			10	2	4	5	1	3	5	3.0	
Korea, Dem. Rep.	..			15	0	0	5	0	2	0	0.7	
Afghanistan	..			0	1	14	5	3	5	5	4.3	SPM
Sudan	1880			4	5	5	5	0	0	4	1.3	PKO
Turkmenistan	..			7	6	1	5	1	2	2	1.7	SPM
Congo, Rep. of	2750			1	4	9	5	0	1	6	2.3	
Zimbabwe	..	111		2	4	8	5	1	1	5	2.3	
Iraq	..			1	2	10	4	0	4	5	3.0	SPM
Burma (Myanmar)	..			5	1	0	2	0	3	2	1.7	
Somalia	..			0	0	3	1	0	0	3	1.0	SPM

Notes: PPP GNI in italics is estimated from "Atlas Method" GNI and comparator countries (see online worksheet for details). Shaded cells reflect above-threshold sub-scores, and cells with bold numbers are above-threshold composite scores. We record national contributions to UN police in missions as of December 2008; reliable numbers for other civilian personnel are difficult to find. **ICCPR** = International Covenant on Civil and Political Rights (**np** = non-party to the treaty **r** = state has filed reservations regarding Article 14 on due process). The median for the WBGI composite indicator is the 45th percentile. The median for the FH composite indicator is 10.
Sources: World Bank Institute, Development Research Group, "Worldwide Governance Indicators for 2007," www.govindicators.org. (The Bank does not use these data for official purposes.) Freedom House, "Freedom in the World, 2008, www.freedomhouse.org/template.cfm?page=276.

ABOUT THE AUTHORS

William J. Durch is a Senior Associate at the Henry L. Stimson Center, where he co-directs the Future of Peace Operations program. His temporary secondments while at Stimson include serving as project director for the Panel on UN Peace Operations (the Brahimi Report) and as scientific advisor to the US Defense Threat Reduction Agency. Before joining Stimson, Dr. Durch was assistant director of the Defense and Arms Control Studies program at MIT, research fellow at Harvard's Center for Science and International Affairs, and foreign affairs officer in the US Arms Control and Disarmament Agency. He has taught at both Johns Hopkins SAIS and Georgetown. His recent publications include *Twenty-first Century Peace Operations* (USIP Press, 2006), *Who Should Keep the Peace?* (Stimson Center, 2006) with Tobias Berkman. He holds a doctorate in political science (defense studies) from MIT.

Katherine N. Andrews worked as a Research Assistant with the Future of Peace Operations program at the Henry L. Stimson Center from 2006 to 2008. Ms. Andrews' areas of research include improving accountability for civilian personnel with UN peace operations and monitoring US policy on UN- and regionally-led peacekeeping. Prior to the Stimson Center, she was the Peacekeeping Fellow at Refugees International, where she focused on strengthening both UN and US capacity for effective peacebuilding. She also spent two years working for the AmeriCorps national service program and has done volunteer work in Israel and the Palestinian Territories. She holds a bachelor's degree with honors from the University of North Carolina at Chapel Hill and is currently pursuing a juris doctor degree at the University of Pennsylvania Law School.

Madeline L. England is a Research Associate with the Future of Peace Operations program at the Henry L. Stimson Center. Her primary research area is the rule of law, with recent work focusing on security sector reform, accountability of peacekeepers, and doctrinal development of peace operations. Prior to joining the Stimson Center, she worked on human rights advocacy with a community-based organization in Sri Lanka. She also served as a Peace Corps volunteer in the Islamic Republic of Mauritania. Ms. England holds a bachelor's degree in Economics from Mount Holyoke College and a Master of International Affairs from Columbia University School of International and Public Affairs.

Matthew C. Weed worked as a Research Intern with the Future of Peace Operations program at the Henry L. Stimson Center from August 2006 to May 2007. He received a bachelor's degree in history and English from the University of California, Los Angeles, a juris doctor degree from Northwestern University School of Law, and a Master of Science in Foreign Service degree from Georgetown University.

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The *Future of Peace Operations* program builds a broader public dialogue on the role of peace operations in resolving conflict and building lasting peace. Peace operations comprise peacekeeping, the provision of temporary, post-conflict security by internationally mandated forces and peacebuilding, those efforts undertaken by the international community to help a war-torn society create a self-sustaining peace.

The program's goals are to advance, through research and analysis, the capacity of peace operations to promote the rule of law, protection of civilians, and regional security; enhance US peace operations policy by building bridges between the Administration, Congress, international organizations, and NGOs; and to advance UN reforms for peacekeeping and peacebuilding and to bring those reforms to the attention of key public and policy audiences.

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