

Criminal accountability of United Nations Officials and Experts on Mission

Oral report of the Chairperson of the Working Group

Chairperson: Ms. Maria **Telalian** (Greece)

I. Introduction

1. On the recommendation of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission, the Sixth Committee decided, at its 1st meeting, on 8 October 2007, to establish a working group with a view to continuing the consideration of the report of the Group of Legal Experts established by the Secretary-General pursuant to resolution 59/300, focusing on its legal aspects, taking into account the views expressed in the Ad Hoc Committee.

2. At the same meeting, the Sixth Committee elected Ms. Maria Telalian (Greece) as Chairperson of the Working Group. The Committee also decided to open the Working Group to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

3. The Working Group decided that members of the Bureau of the Ad Hoc Committee would continue to act as Friends of the Chair during the meetings of the Working Group. However, in view of the unavailability of Martin Roger (Estonia) to serve in that capacity and in order to ensure the representation of all regional groups, the Working Group decided to invite Ms. Minna-Liina Lind (Estonia) to join the Friends of the Chair. Thus, Mr. El Hadj Lamine (Algeria), Mr. Ruddy Flores Monterrey (Bolivia), Mr. Ganeson Sivagurunathan (Malaysia) and Ms. Minna-Liina Lind served as Friends of the Chair. The Working Group paid tribute to Mr. Martin Roger (Estonia) for his valuable contribution as Rapporteur of the Ad Hoc Committee.

4. The Working Group had before it the report of the Ad Hoc Committee,¹ the report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980), and a Note by the Secretariat (A/62/329) on the subject.

II. Proceedings of the Working Group

5. The Working Group held 4 meetings, on 15 to 17 and 23 October 2007.

6. At the 1st meeting, the Working Group adopted its work programme and organized its work by addressing the various issues considered in the report of the Group of Legal Experts, together with the Note by the Secretariat, around the following clusters: (a) the scope *ratione personae*; (b) the crimes; (c) the bases for jurisdiction; (d) investigations; (e) cooperation among States and cooperation between States and the United Nations; (f) the form of instrument; and (g) the way forward. Part of the time was devoted to informal consultations on a draft resolution on the subject.

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

7. The following section of the present report constitutes an informal summary for reference purposes only not an official record of the discussions.

III. Informal summary by the Chair on the work of the Working Group

1. General comments

8. In their general comments, several delegations alluded to their statements made during the plenary debate on criminal accountability of United Nations officials and experts on mission which preceded the Working Group session (A/C.6/62/SR.6-7), reiterating in particular the importance of addressing the issues surrounding criminal accountability of such personnel. Several delegations also underscored the importance of avoiding duplication of efforts and the need to take into account related work in other bodies such as the Special Committee on peacekeeping operations, as well as the Ad Hoc Open-ended Working Group on assistance and support to victims of sexual exploitation and abuse. Reservations were registered by some other delegations regarding the use of definitions and terminology in the context of accountability which had been used elsewhere, especially in other instruments, including those to which their Governments were not party. Some delegations welcomed the approaches proposed in the Note by the Secretariat (A/62/329), in particular the distinction between short term and long term measures, noting that the former could be the focus of the Working Group at the current session, while the latter could be the subject of future consideration in the context of the Ad Hoc Committee.

2. Scope of application and scope *ratione personae*

9. In order to have a full appreciation of the gaps that exist and to properly identify the individuals who may be subject of concern for the subject, some delegations stressed the need for more segregated data, showing the kinds of personnel involved or alleged to be involved, whether military or civilian personnel; the types of crimes committed or alleged

to have been committed, and their seriousness; the extent to which investigations were conducted and information on the follow-up, if any; whether offences had been committed in the conduct of official duties or while off-duty; and the spatial spread of any commission of such crimes, whether committed only in the mission area, at headquarters or even in third States. Some other delegations did not view statistics of vital importance; the existence of a jurisdictional gap, which had correctly been established, was sufficient cause for action; they preferred instead to take a more principled approach which focused on the impact any incident, even if a singular one, would have on the victim, as well as the perception that any allegation had on the image and credibility of the United Nations. Yet some other delegations, while also taking a principled approach, saw merit in statistical data in understanding better the scope of the problem and its dimensions; what such numbers represented would assist in making appropriate interventions from the short and long term perspectives.

10. Some delegations expressed preference for limiting the mandate to addressing questions of criminal accountability arising only in the context of peacekeeping operations. The point was made that the term "United Nations operation" was vague and needed to be clarified or any reference to "operation" be deleted. Some other delegations favoured a broader approach, which would also cover other United Nations operations, including operations under Chapters VI and VII of the Charter of the United Nations, as well as personnel linked to such operations irrespective of their contractual status. Some delegations were also amenable to considering extending the scope to personnel of United Nations Funds and Programmes. Some delegations expressed the need to cover not only personnel in a United Nations operation in a host State but also those who may commit a crime in a third State while connected to a United Nations operation. Yet other delegations noted that the important consideration should be that whoever worked for the United Nations should not fall into a jurisdictional gap. In this regard, some delegations sought to cast the scope as widely as possible to cover, in principle, all United Nations personnel. It was viewed that the scope of application will have to be clearly defined in any negotiation of a legally binding instrument.

11. Commenting that there was no gap in regard to the military, some delegations stressed that military personnel working for the United Nations regardless of their classification as experts on mission should be excluded from the scope of application *ratione personae*. Like personnel belonging to national contingents, such personnel were subject to the exclusive jurisdiction of the troop contributing State. Accordingly, they should be governed by the same regime, namely be subject to the exclusive jurisdiction of the troop contributing State. It was also pointed out that civilian police personnel should similarly be excluded.

12. While recognizing that the inclusion of military observers and civilian police as experts on mission within the scope was a delicate matter, some other delegations underscored the need to proceed deliberatively without haste. It was noted that there were elements such as international cooperation in extradition and mutual assistance in judicial matters which may be relevant and useful even in situations concerning military personnel, including of national contingents. It was therefore suggested that such personnel should not be excluded *a priori*. A regime of cooperation could be envisaged that would cover matters of mutual assistance in respect of crimes committed by such personnel, alongside other issues to be addressed in a legally binding instrument.

13. In response to the request for a clarification of the statistical information, the Secretariat prepared additional information on the statistics of alleged misconduct committed by United Nations officials and experts on mission. In addition to the two sources of information already before the Working Group, namely the summary of statistics in paragraph 7 of the annex to the Report of the Ad Hoc Committee on the Criminal Accountability of United Nations Officials and Experts on Mission (A/62/54), as well as the statistics cited in paragraph 8 of the Note by the Secretariat (A/62/329)), the Secretariat circulated: a copy of the annexes to the *Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (A/61/957), providing statistics on certain types of allegations for the period 2006; and a set of three informal tables containing further information on misconduct for the periods 2006 and 2007 (1 January to 30 September 2007). A general distinction was drawn

between statistics for allegations of sexual exploitation and abuse (“SEA”) misconduct, and those for non-SEA misconduct.

14. The six annexes to the report of the Secretary-General related to SEA misconduct, for 2006. Annex I contained details on United Nations entities requested to provide information on allegation of SEA misconduct (annex I); the number (14) and nature of allegations by United Nations entities other than the Department of Peacekeeping Operations (annex II); and the status of investigations into allegations reported in 2006 for personnel of United Nations entities other than the Department of Peacekeeping Operations (annex III) (information from UNHCR, UNRWA, UNV and WFP). Annexes IV to VI provided information on allegations emanating from missions led by the Department of Peacekeeping Operations for 2006 (357), including the number of allegations reported in 2006, by peacekeeping mission (annex IV); the status of investigations into allegations reported in 2006 (annex V); and the nature of allegations, by personnel of the Department of Peacekeeping Operations (annex VI). Table 3, as prepared by the Secretariat, provided further statistics on SEA misconduct, for the period 1 January to 30 September 2007. Tables 1 and 2, as prepared by the Secretariat provided a breakdown of the allegations of misconduct of a non-SEA character for the 2006 (438) and the period 1 January to 30 September 2007 (416), respectively.

15. It was noted that it was important to draw a distinction between “allegations” of misconduct and “completed” investigations. Accordingly, while some of the annexes to the report of the Secretary-General (A/61/957) provided a breakdown of the allegations received, annexes V and VI provided information from the perspective of completed investigations (of the allegations received in 2006, 82 investigations had been completed). No statistics concerning completed investigations in the context of non-SEA allegations were available for the meetings of the Working Group.

16. Concerning the categories of individuals against whom allegations have been made, annexes V and VI provided a breakdown of completed investigations, involving allegations of SEA misconduct, by the categories “civilians”, “UN police and

corrections” and “Military”, without making any distinction between military observers and members of military contingents. However, it was subsequently clarified that of the 357 allegations of SEA misconduct received in 2006, in the context of missions led by the Department of Peacekeeping Operations, 12 allegations had been made against military observers. Of those, two investigations were completed. One case was found to be substantiated. Table 3, prepared by the Secretariat, indicated that out of the total of 99 allegations reported in United Nations peacekeeping operations between 1 January 2007 and 30 September 2007, 26 concerned civilian personnel (including United Nations staff, United Nations volunteers, contractors and consultants), 45 related to military who were part of national contingents (excluding military observers), none concerned military observers, 20 concerned the police component and 10 were unknown.

17. As regards non-SEA misconduct, it was indicated in Table 1 that of the total of 438 allegations reported in United Nations peacekeeping operations between 1 January 2006 and 31 December 2006, 240 concerned civilian personnel (including United Nations staff, United Nations volunteers, contractors and consultants), 135 related to military who were part of national contingents (excluding military observers), 8 concerned military observers and 55 concerned the police component. In Table 2, of the total of 416 allegations reported in United Nations peacekeeping operations between 1 January 2007 and 30 September 2007, 291 concerned civilian personnel (including United Nations staff, United Nations volunteers, contractors and consultants), 145 related to military who were part of national contingents (excluding military observers), 18 concerned military observers, 42 concerned the police component and 10 were unknown.

18. Concerning the types of conduct alleged, annexes II and VI listed allegations of SEA misconduct such as sex with minors, exploitative sexual relationships, sex with prostitutes and rape. Tables 1 and 2 listed several types of allegations of a non-SEA nature including abuse of authority, assault, complex fraud, conflict of interest, fraud, harassment, infractions of United Nations rules and regulations, misuse/mismanagement of United Nations resources, negligence, theft and traffic related misconduct. It was further noted that the Secretariat recorded statistics of allegations of “misconduct”, and

not “crimes” per se. For example, tables 1 and 2 included some categories such as “infractions of UN rules and regulations”, which would not necessarily constitute criminal conduct. Nonetheless, it was recalled that the Secretariat, in paragraph 8 of its Note, had made the point that “[w]hile not all cases of misconduct constitute[d] criminal activity, statistics in this area suggest[ed] that the problem [was] significant”.

19. On a query for information as to the geographic nature of the misconduct represented in the statistics, it was noted that the Organization maintained statistics with regard to the location of the alleged misconduct (i.e. whether in or out of the host country). At the same time, the vast majority of allegations emanated from within the area of the specific United Nations operation in question.

20. A discussion ensued following the presentation of the additional information. Delegations offered different interpretative perspectives to the data.

21. In response to a question regarding the meaning of the term “United Nations operation”, a representative of the Office of Legal Affairs of the Secretariat observed, as also reflected in the Note by the Secretariat (A/62/329; p. 3), that such term referred to operations defined by the competent organ of the United Nations, which are conducted under United Nations authority and control for the purpose of maintaining and restoring international peace and security.

3. Crimes (scope *ratione materiae*)

22. Some delegations underscored the need to bear in mind that the scope *ratione materiae* was organically linked to the scope *ratione personae*.

23. Several delegations favoured a generic approach rather than a listing of crimes for purposes of defining crimes *ratione materiae*. Such an approach, which would avert frequent recourse to amendment to update the list, could be based on the severity of punishment and the requirement for dual criminality. It was however pointed out that a

generic description based on severity of punishment alone would not be sufficient, especially in situations where particular conduct may not at all constitute a crime under the law of a particular jurisdiction. It was also suggested that crimes could be defined by using a combined approach comprising the generic approach and an indicative list of crimes. Attention was also drawn to the fact that the term "serious" crime was imprecise.

24. While acknowledging that the subject matter has gained notoriety because of allegations of sexual exploitation and abuse, some delegations saw no cogent reason for limiting the scope *ratione materiae* to crimes concerning assaults on the physical integrity of a person. In this connection, some delegations suggested the inclusion of crimes concerning property, embezzlement, trafficking, bribery and corruption, while also drawing attention to the need to avoid duplication of efforts since the United Nations Office on Drugs and Crime was also addressing questions concerning corruption of United Nations officials.

25. In response for additional clarification as to the import of the category "serious criminal activity", the Secretariat noted the usage of that term in the practice of the Secretariat as follows: In the Report of the Office of Internal Oversight Services on strengthening the Investigation functions in the United Nations (document A/58/708), the OIOS has classified high-risk, complex matters and serious criminal cases as Category 1, and provides a list of matters that would normally fall into this category. This list includes serious or complex fraud, abuse of authority, conflict of interest, gross mismanagement, waste of substantial resources, all cases involving risk of loss of life to staff or others, substantial violation of United Nations regulations, rules or administrative issuances and other serious criminal act or activity. Matters involving sexual exploitation and abuse were subsequently given the status of Category 1 cases. Examples of recent matters which constitute examples of "other serious criminal act or activity" have included stabbings, abduction, arson, and trafficking of drugs, weapons, gold, diamond, or humans.

26. It was noted that this characterization of “serious criminal act or activity” within the Secretariat does not bear on the characterization that each State may ascribe to particular conduct as constituting crime let alone one which is serious within its territory.

4. Bases for jurisdiction

27. Some delegations were of the view that priority should be given, to the extent possible, to the jurisdiction of the host State, in deference to the principle of territoriality. It was also noted that the exercise of jurisdiction by the host State would entail some advantages in terms of availability of evidence and witnesses, while also enhancing a sense for the victim that justice has not only been done but is seen to be done. The point was made that it should not be assumed too easily, without having any objectively determined criteria to assess the internal capacity of a State, that the host State would be unable to effectively and properly exercise its criminal jurisdiction.

28. According to another view, priority should be given to the jurisdiction of the State of nationality of the alleged offender (or the State of permanent residence, if the alleged offender is a Stateless person). This was more so considering the fact that the host State in such circumstances is frequently not in a position to effectively exercise its jurisdiction, and also bearing in mind the need to ensure adequate protection to individuals entrusted with international functions.

29. As regards the relationship between the bases for jurisdiction and the “extradite or prosecute” regime, the view was expressed that the appropriateness of establishing a regime based on the *aut dedere aut judicare* principle required further study. It was also noted that the questions concerning conflicting jurisdictions ought to be addressed in the event of the elaboration of a binding instrument.

30. Some delegations made reference to the link between jurisdictional issues and the question of immunity waiver, noting in particular that articles 22 and 23 of the 1946

Convention on the Privileges and Immunities of the United Nations set out the general criteria governing the waiver of immunities for officials and experts on mission. They also stressed the obligation to respect local laws and regulations. According to another view, the practice relating to the waiver of immunities of United Nations officials and experts on mission should be clarified and made more uniform; in this regard, it was suggested that, consistent with article 105, paragraph 3 of the Charter of the United Nations, guidelines could be elaborated by the Sixth Committee or the International Law Commission. Some delegations stressed that the existing regime on immunities should not be altered.

31. Regarding questions raised by delegations with respect to the waiver of immunities by the Secretary-General, attention is drawn to the explanations provided by the Office of Legal Affairs of the Secretariat, reflected in paragraphs 12 to 16 of the Annex to the Report of the Ad Hoc Committee on the Criminal Accountability of United Nations Officials and Experts on Mission (A/62/54).

5. Investigations

32. Some delegations underscored the need to strengthen the capacity of the host State to conduct criminal investigations. A suggestion was also made that the victim be informed, at least in general terms, on the measures adopted or any follow-up action taken as a result of an allegation. The need to update the relevant OIOS investigative manuals and protocols was also suggested as an option.

33. More information was requested from the Secretariat on the ongoing measures aimed at enhancing the capacity of OIOS in the field of investigations.

34. The Secretariat reported that in response to a request by the General Assembly addressed to the Secretary-General, proposals were being developed for strengthening OIOS. Those proposals were to be based on internal assessments, as well as a review conducted in 2007 by an external expert, and would be submitted at the sixty-second

session of the General Assembly. During the period 30 June 2006 to 1 July 2007, OIOS undertook several initiatives to improve operations, including: updating and expanding its investigation guidelines and standard operating procedures; and developing three working resource tools for OIOS staff worldwide: a jurisprudence library, a legislation library and a procedures and reference library.

35. Attention was also drawn to paragraph 8 in the annex to the Report of the Ad Hoc Committee which recorded the practical constraints that existed on the collection of data and subsequent production of statistics. It was reported that the Department of Field Support, in cooperation with the Communications and Information Technology Section, had finalized the development of a comprehensive Misconduct Tracking System (MTS). The new system, which had recording, tracking and reporting features, would be accessible to conduct and discipline personnel as well as to the OIOS.

6. Cooperation

36. The point was made that it was necessary to contemplate cooperation at different levels: Cooperation between States; cooperation between States and the United Nations; and cooperation between the relevant departments, funds and programs of the United Nations.

37. As regards cooperation between States, it was proposed to consider the drafting of a model bilateral convention on extradition or model clauses to be included in existing extradition treaties. It was also observed that the exercise of criminal jurisdiction by the State of nationality of the alleged offender would require cooperation between that State and the host State, namely in the field of investigations.

38. A suggestion was made that reporting mechanisms from States to the United Nations be developed in this field. The need for enhanced technical cooperation between States and the United Nations was also emphasized, notably in developing the host State's

capacity and providing adequate training to individuals deployed under the United Nations flag.

7. Form of instrument and way forward

39. The details concerning the form of a possible legal instrument to be adopted were deferred for consideration at a later stage.

40. There was a general wish in the Working Group to focus on the elaboration of a resolution, bearing in mind the recommendations in the Note by the Secretariat. Some delegations were of the view that, for the time being, the focus should be on the elaboration of short-term measures, leaving the elaboration of a binding instrument, as a long-term measure, for future consideration. Some delegations nonetheless reiterated their interest to elaborate such a convention. The view was also expressed that the possible amendment of the model Status of Forces Agreement, the Status of Mission Agreement, and the Memorandum of Understanding, and as appropriate, the hosting agreement, to address matters concerning criminal accountability of United Nations officials and experts on mission could be considered as an alternative to a convention. On the other hand, it was noted that the model SOFAs, SOMAs and MOU addressed a different category of personnel. It was also noted that the statistics revealing the nature of the problem would have implications on the final form of the instrument to be adopted.

41. Several delegations expressed support for some of the short term measures contained in the Note by the Secretariat (A/62/329), in particular the adoption of a General Assembly resolution strongly urging States to establish criminal jurisdiction over their nationals engaged in a United Nations operation who have committed serious crimes. It was stated that the wording of such a resolution should be carefully considered, and that the scope of the resolution should be clearly limited to conduct committed by United Nations officials or experts on mission in the context of a United Nations operation. A preference was also expressed for a resolution containing a more general language than that proposed by the Secretariat in its Note. It was noted in this regard that notions such

as “serious crime” or “United Nations operation” would need to be clarified since they did not offer sufficient guidance for States. The point was also made that some of the recommendations made as short term measures bear on the activities of other bodies and that it would be necessary to avoid overlap.

42. There was agreement in the Working Group to focus at this stage on some short term measures in order to address the problem of criminal accountability. Accordingly, I prepared a draft resolution incorporating elements containing short term measures on the basis of comments made by delegations in the Working Group, as well as the recommendations in the Note by the Secretariat. Work on the draft resolution has proceeded quite well, and is continuing in the context of informal consultations. It is my hope that the consultations will yield a positive result that will allow the General Assembly to send an urgent and strong message that States will not tolerate criminal conduct by United Nations officials and experts on mission.
