

The legal status of personnel involved in United Nations peace operations

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Abstract

This article examines the status of military and civilian personnel of sending states and international organisations involved in UN peace operations. It undertakes an assessment of relevant customary law, examines various forms of treaty regulation and considers topics and procedures for effective settlement of open issues prior to the mission. The author stresses the need for cooperation between the host state, the sending states and the international organisation in this context. He draws some conclusions with a view to enhancing the legal protection of personnel involved in current and future UN peace operations.

Keywords: accountability, immunity, multinational operations, peace operations, post-conflict peacebuilding, 1994 UN Safety Convention, status-of-forces agreement, status-of-mission agreement, UN Model SOFA.

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This article examines the status of military and civilian personnel of sending states and international organisations involved in United Nations (UN) peace operations in a host state; that is, the legal nature and consequences of their actions defined by law. It focuses on military operations *outside* of an armed conflict – situations in which international humanitarian law (IHL) does not apply. The status of such personnel in the host state is regulated in customary and treaty law, but there are certain inconsistencies and gaps which should be filled by best practice.¹ Generally speaking, the use of force in self-defence, including in defence of the mandate,² does not affect the legal status of peacekeepers. That status continues to apply even in exceptional situations, when they become involved in hostilities in an armed conflict, but in such situations status issues will most likely be superposed by rules of IHL. Peace operations are not directed against warring parties, yet peacekeepers may become parties on the side of states, or rarely on the side of non-state actors fighting as individuals or on behalf of an insurgent movement. When the level of a non-international armed conflict has been reached and peacekeepers become involved in it, the rules of IHL apply. Yet in such conflicts there is no combatant status and the specific protections of prisoners of war do not apply.³

This essay will first assess the customary status of military and civilian personnel participating in peace operations not amounting to an armed conflict, and will then look into various forms of treaty regulation, also exploring the gaps and shortcomings of those treaties. Finally, it will try to draw some conclusions for best practice and future regulation.

The status of military and civilian personnel participating in peace operations under customary law

Military and civilian personnel of sending states operating on the territory of a host state have a special legal status.⁴ They enjoy immunity from legal process in any other state, including the host state and transit states. Indeed, this immunity applies not only to heads of state or government or secretaries of foreign affairs *ratione personae*, but also to any organ of the state *ratione materiae*. James Crawford has noted ‘the development of the so-called restrictive theory of immunity, which holds that immunity is only required with respect to transactions involving the exercise of governmental authority (*acta iure imperii*) as distinct from commercial or other transactions which are not unique to the

1 Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, pp. 94–109, 143–149 and 199–200.

2 *United Nations Peacekeeping Operations, Principles and Guidelines* (Capstone Doctrine), DPKO Publications, UN Secretariat, March 2008, p. 34, available at: http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf. All internet references were accessed in March 2014.

3 Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, Sections 1213–1215, pp. 603–605.

4 Ola Engdahl, *Protection Of Personnel in Peace Operations: The Role of the ‘Safety Convention’ against the Background of General International Law*, International Humanitarian Law Series, Martinus Nijhoff, Leiden, 2007, pp. 29–56; Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford, 2001, pp. 3–6 and 487–506.

State (*acta iure gestionis*)'.⁵ This understanding of immunity and its application to military forces is broadly shared today.

Sir Ian Sinclair, devoting his general course in the Hague Academy in 1980 exclusively to the law of sovereign immunity, has provided abundant material on state practice which reveals that there is not any criminal case where a host state has claimed criminal jurisdiction on a member of visiting forces of a sending state, unless such jurisdiction was exceptionally granted by a treaty between those states. Already at that time he observed a continuing trend in the direction of 'recognising and applying the restrictive theory' on state immunity, but confirmed 'a functional need to maintain a measure of jurisdictional immunity for foreign States',⁶ thus explaining the core principle of state immunity. There are certain restrictions stemming from that focus on 'functional needs': immunities *ratione materiae* are not granted as personal privileges, and they do not extend to acts or omissions outside the performance of official duties. Acts *iure imperii* are not subject to control by any other state. In respect of those acts, there is a presumption that a foreign state organ possesses immunity. As states are independent and free to direct their affairs, no government is obliged to accept outside interference with respect to its own organs by another state. Organs of a sending state that have committed a wrongful act may be requested to leave the host state, but their immunity before foreign state authorities and courts remains.⁷

The principle of immunity applies not only to organs of states, but likewise to military and civilian personnel of entities enjoying international legal personality, such as the UN and other international or regional organisations. However, most of the personnel engaged in peace operations are and will be contributed by sending states, even if certain limited forms of command or control – mostly operational control,⁸ but not full command⁹ – may be exercised by the international

5 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, p. 488.

6 Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, Hague Academy of International Law, Collected Courses, Vol. 1980–II, Martinus Nijhoff, Leiden, 1980, pp. 216–217.

7 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 94.

8 *US Military Dictionary: The Oxford Essential Dictionary of the U.S. Military*, Oxford University Press, Oxford, 2001: 'Operational control may be delegated and is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the missions. Operational control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. Operational control should be exercised through the commanders of subordinate organizations. Normally this authority is exercised through subordinate joint force commanders and service and/or functional component commanders. Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions. Operational control does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training' (emphasis added). Definitions set up in pertinent documents of the UN or regional organisations do not essentially deviate from this.

9 *Ibid.*: Full command includes '[t]he military authority and responsibility of a superior officer to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services. The term *command*, as used internationally, implies a lesser degree of authority than when it is used in a purely national sense. It follows that no NATO commander has full command

organisation involved.¹⁰ Hence the immunity of peacekeepers is foremost that of their sending states, and the latter remain accountable for wrongful acts committed under their control.¹¹ It is important to understand that immunity does not imply impunity for military or civilian members of the forces of a sending state or international organisation. Neither can immunity limit the accountability of that state¹² or international organisation.¹³ Rather, it bars the host state from taking direct action against the members of a visiting force, whereas the sending state and/or the international organisation is accountable. Individual perpetrators are to be prosecuted by the sending state. In exceptional situations their immunity may be waived *vis-à-vis* the host state. But a host state interested in the successful performance of a peace operation may expect the sending state to exercise its jurisdiction exclusively and in a responsible manner.

This immunity derives from the principle of state sovereignty as recognised in customary international law and does not depend on consent of the host state.¹⁴ The purpose of such immunity is not to provide personal benefits to individuals, but rather to ensure an unimpeded performance of their official functions, to respect the equality of states under the law and to exclude any outside interference inconsistent with the Purposes of the United Nations.¹⁵ State immunity is of utmost importance for the effectiveness of any peace operation. For the members of participating military forces, including their civilian component, immunity is essential for an impartial and effective performance of the mandate which is a prerequisite for the success of the mission.¹⁶ As a rule, UN forces engaged in peace operations enjoy full immunity from host state jurisdiction while the sending state exercises exclusive criminal jurisdiction. While certain treaty limitations to the immunity principle are not free from misunderstandings, as will be shown below, it must be underlined that

over the forces that are assigned to him. This is because nations, in assigning forces to NATO, assign only operational command or operational control' (emphasis added).

10 See, for example, Capstone Doctrine, above note 2, p. 66.

11 See Terry D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', in *Netherlands Yearbook of International Law*, Vol. 42, 2011, pp. 37–68, esp. 46–49 and 51–52. Insofar as peacekeepers are recruited and sent by an international organisation rather than a sending state, their immunity derives from the immunity of the international organisation. See e.g. United Nations Secretariat, 'Responsibility of International Organizations: Comments and Observations Received from International Organizations', 56th Session, UN Doc. A/CN.4/545, 25 June 2004, p. 17. For a discussion on the attribution of responsibility of wrongful behaviour of peacekeepers, see Paolo Palchetti's article in this issue of the *Review*.

12 Articles on Responsibility of States for Internationally Wrongful Acts, United Nations, International Law Commission, Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

13 Draft Articles on Responsibility of International Organizations, United Nations, International Law Commission, Report on the Work of Its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), General Assembly, Official Records, 63rd Session, Supplement No. 10 (A/66/10), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

14 D. W. Bowett *et al.*, 'United Nations Forces: A Legal Study of United Nations Practice', Stevens & Sons, London, 1964, pp. 428–467; T. D. Gill and D. Fleck (eds), above note 1, p. 143.

15 Charter of the United Nations, 26 June 1945, XV UNCIO 335, Art. 1.

16 See Dieter Fleck, 'Securing Status and Protection of Peacekeepers', in Roberta Arnold and Geert-Jan Alexander Knoops (eds), *Practice and Policies of Modern Peace Support Operations Under International Law*, Transnational Publishers, New York, 2006, p. 155.

the privileges and immunities of the sending state's military and civilian personnel in the host state are crucial for the mission.

The immunity of members of foreign armed forces for acts committed in their official capacity has always been honoured in jurisprudence. In the *Armed Activities on the Territory of the Congo* case, the International Court of Justice (ICJ) confirmed the customary rule that 'the conduct of individual soldiers ... is to be considered as the conduct of a State organ'.¹⁷ In the *Jurisdictional Immunities of the State* case, the ICJ had no doubt that acts committed by armed forces abroad in the performance of a duty must be characterised as acts *iure imperii* – that is, acts covered by a full immunity.¹⁸ In *Prosecutor v. Blaškić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that, while it is empowered to issue binding orders and requests to states, the Tribunal may not issue binding orders to state officials acting in their official capacity.¹⁹ In *Jones v. United Kingdom*, the European Court of Human Rights was fully satisfied that the granting of immunity to state officials in the applicants' civil cases had reflected generally recognised current rules of public international law and did therefore not amount to an unjustified restriction on access to court,²⁰ as enshrined in Article 6 of the European Convention on Human Rights.²¹ In the *Lozano* case, the Italian Court of Cassation, deciding on criminal proceedings brought against a US soldier who had killed an Italian intelligence officer during service at a checkpoint outside Baghdad, concluded that criminal proceedings for wilful killing could not be conducted by Italian authorities as a result of the fact that the US soldier was acting in an official capacity and therefore enjoyed immunity due to his status as official of his state.²² In *Mothers of Srebrenica et al. v. Netherlands and the United Nations*, the Hague Court of Appeal ruled that it is impossible to bring the UN before a Dutch court due to the immunity from prosecution granted to the UN pursuant to international conventions, and it accepted that the Netherlands should share UN immunity in this respect.²³ Later on, in *Netherlands v. Hasan Nuhanović*, the Supreme Court of the Netherlands concluded that the Netherlands was responsible for the death of three Muslim men from Srebrenica and stated that the pertinent conduct of Dutchbat, as part of a UN peacekeeping force, could be attributed to the Netherlands because public international law allows the conduct to be attributed in

17 ICJ, *Democratic Republic of the Congo v. Uganda*, Judgment, 19 December 2005, *ICJ Reports 2005*, para. 213, available at: www.icj-cij.org/doCKET/files/116/10455.pdf.

18 ICJ, *Germany v. Italy: Greece Intervening*, Judgment, 3 February 2012, *ICJ Reports 2012*, para. 9978, available at: www.icj-cij.org/doCKET/files/143/16883.pdf.

19 ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 29 October 1997, available at: www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html, para. 43.

20 European Court of Human Rights (ECtHR), *Jones v. United Kingdom* (Applications Nos. 34356/06 and 40528/06), Judgment, 14 January 2014, para. 189, available at: <http://justsecurity.org/wp-content/uploads/2014/01/Jones-v-United-Kingdom-ECtHR-2014.pdf>.

21 European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 22.

22 Italy, Court of Cassation, *Lozano v. Italy*, Appeal Judgment, Case No 31171/2008, ILDC 1085 (IT 2008), 24 July 2008, First Criminal Division.

23 Appeal Court in The Hague, *Association of Citizens Mothers of Srebrenica v. (1) State of the Netherlands and (2) United Nations*, Judgment, 30 March 2010, para. 4.2, available at: www.haguejusticeportal.net/Docs/Dutch%20cases/Appels_Judgment_Mothers_Srebrenica_EN.pdf.

this specific case to the sending state and not to the UN, insofar as the state had effective control over the disputed conduct.²⁴ Immunity was not invoked here, because the Court was deciding on the conduct of national military personnel. It rather concluded that the UN did not have (or no longer had) exclusive operational control over Dutchbat, and that the state of the Netherlands was responsible for those actions in terms of domestic tort law.

More recent developments in legal doctrine have focused on procedural aspects of and possible exceptions from immunity, without in any way qualifying the role of military personnel as organs of their sending state.²⁵ Other treatises have expressly confirmed the immunity of state officials before foreign authorities and courts, with the arguable exception of prosecution for international crimes.²⁶

Treaty regulation of the status of personnel involved in UN peace operations

Status under the UN Charter

There is little generic treaty regulation on the issue – that is, treaty law that is readily available and can be used in peace operations without entering into new negotiations during the difficult stages of planning and mission start-up.

Article 105 of the UN Charter states in rather broad terms that the Organisation ‘shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’ and that officials of the Organisation ‘shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation’. The 1946 Convention on Privileges and Immunities of the United Nations²⁷ provides for immunity of ‘officials’ (Article V) and also of ‘experts on missions’ (Article VI), but there is no consensus, let alone consistent practice as to the application of these provisions to peacekeepers.²⁸ General Assembly Resolution 76(I) of 7 December 1946 approved the granting of these privileges and immunities

24 Supreme Court of the Netherlands, *The State of the Netherlands v. Hasan Nuhanović*, Judgment, 6 September 2013, available at: www.internationalcrimesdatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/.

25 See Andrew Dickinson, Rae Lindsay, James P. Loonamand Clifford Chance LLP, *State Immunity: Selected Materials and Commentary*, Oxford University Press, Oxford, 2004.

26 Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008, pp. 102, 139 and 419; Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 94 and 611.

27 Convention on the Privileges and Immunities of the United Nations, 14 December 1946, 1946–1947 UNTS 15 (entered into force 17 September 1946).

28 In ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 15 December 1989, *ICJ Reports 1989*, p. 177, the ICJ has confirmed the expert on mission status of a special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. No such confirmation has been given for peacekeepers so far. See Steven J. Lepper, ‘The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate’s Analysis’, in *Houston Journal of International Law*, Vol. 18, 1996, p. 367.

‘to all members of the staff of the United Nations with the exception of those who are recruited locally and are assigned to hourly rates’.

In 1981, the UN Legal Counsel confirmed that there was no doubt in law or in practice that field service officers under a headquarters agreement between France and UNESCO are ‘officials’ within the meaning of that agreement and the 1946 Convention, and that all staff members including the locally recruited (except for those who were employed at hourly rates) qualified as officials of the UN.²⁹ In 1995, the UN Legal Counsel confirmed that, in accordance with customary law, military personnel of sending states enjoy privileges and immunities. However, civilian contractors do not share such immunities, not even as ‘experts on mission’, as this term is understood to apply to persons charged with performing specific functions or tasks for the UN, but does not include functions that are commercial in nature.³⁰ Under Article V (Section 20) and Article VI (Section 23) of the 1946 Convention, the Secretary-General shall have the right and the duty to waive the immunity of any official or expert on mission ‘in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations’. But the application of these provisions to peace operations never became relevant in practice. Sending states would not need any waiver to exercise criminal or disciplinary jurisdiction on their own personnel. As far as UN personnel, including locally recruited staff, are concerned, however, the Secretary-General would be bound to consider a waiver of immunity.

The 1961 Vienna Convention on Diplomatic Relations³¹ provided for certain immunities of technical staff of a sending state’s embassy. While personnel performing military missions in a host state are sometimes – in lieu of a more specific regulation – listed this way, peacekeepers are not expressly mentioned here and there is no practice on using this Convention for peace operations.

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons³² establishes intentional attacks against an ‘internationally protected person’ as an international crime and requires any state party in whose territory the alleged offender is present to ‘take the appropriate measures under its internal law so as to ensure his presence for the purpose of

29 Statement made by the Legal Counsel at the 59th meeting of the Fifth Committee of the General Assembly on 1 December 1981, *United Nations Juridical Yearbook*, 1981, pp. 161–162, relating to field service officers under the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, 2 July 1954 (entered into force 23 November 1955), available at: http://portal.unesco.org/en/ev.php-URL_ID=48888&URL_DO=DO_TOPIC&URL_SECTION=201.html. See also Michael Gerster and Dirk Rottenberg, Art. 105, MN 22, in Bruno Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012. See generally Anthony J. Miller, ‘Privileges and Immunities of United Nations Officials’, in *International Organizations Law Review*, Vol. 4, 2007, pp. 169–257.

30 Memorandum of the Legal Counsel to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, *United Nations Juridical Yearbook*, 1995, p. 407, paras. 3–6.

31 Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

32 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

prosecution or extradition' (Article 6). This Convention is related to international criminal justice and the term 'protected person' used here is separate from immunities, although linked. The definition of internationally protected persons (Article 1(1)(b)) includes

[a]ny representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

It remains an open question whether and to what extent military or civilian personnel participating in UN peace operations qualify as internationally protected persons under this Convention. An argument was made that if accorded 'expert on mission' status, UN peacekeeping personnel would qualify as internationally protected persons.³³ However, this argument is not convincing for two reasons: on the one hand, the Convention does not require that status to be specifically 'accorded', and on the other, 'expert on mission' status is not expressly covered under the terms 'representative' or 'official' or 'other agent'. Yet, when a person is specially protected under this Convention, this may be used as an argument in favour of immunity.

The UN International Law Commission (ILC) has included the topic 'immunity of State officials from foreign criminal jurisdiction' in its long-term program to develop possible future legal instruments. While it would be premature to envisage a comprehensive codification of the issue in the near future, customary rules of state immunity are well respected in these efforts.³⁴

A specific legal basis for the protection of personnel participating in UN peace operations may be seen in the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol.³⁵ This Convention applies to persons engaged or deployed by the Secretary-General (Article 1(a)) as well as to persons assigned by a government or intergovernmental organisation (Article 1(b)). It covers all UN operations conducted 'for the purpose of maintaining or restoring international peace and security' or when the Security Council or the General Assembly 'has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation' (Article 1(c)), conditions that are generally met in peace operations by

33 S. J. Lepper, above note 28, p. 368.

34 See Second report on the immunity of state officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/661, 4 April 2013, available at: http://legal.un.org/ilc/guide/4_2.htm.

35 Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999); and the Optional Protocol thereto, 8 December 2005, UN Doc. A/RES/60/42, Annex, Registration No. A-35457 (entered into force 19 August 2010). Both documents are reprinted with a short commentary in Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010, pp. 185–194.

the mandate of the Security Council.³⁶ Although strictly speaking ‘safety’ and ‘security’ have a different meaning,³⁷ both terms are used interchangeably in the Convention and its Optional Protocol. Under the Convention, all parties are obliged to ensure the safety and security of UN and associated personnel and take appropriate steps to protect such personnel deployed in their territory. The Optional Protocol extends that obligation to the protection of UN operations delivering humanitarian, political and development assistance. The Convention includes an obligation to conclude status agreements on the UN operation and all personnel engaged in it,³⁸ agreements which – subject to the composition of the personnel involved – are called status-of-forces agreements (SOFAs) or status-of-mission agreements (SOMAs). This obligation underlines the need for closing gaps in regulation and ensuring cooperation between the host state and the international organisation; but as will be shown below, it is difficult to fully comply with the Convention in practice. It is important to first consider the text of the Convention and its shortcomings.

Shortcomings of the 1994 UN Safety Convention

The Convention, developed because of deep concern over ‘the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel’,³⁹ falls short of its declared purpose. It suffers from five main shortcomings, which clearly limit its practical relevance for current peace operations: (a) the international obligations created in the Convention are those of states, not of non-state actors, yet the responsibility of states to ensure its application is not sufficiently addressed; (b) the application of the Convention and the Optional Protocol is formally excluded in certain ill-defined enforcement actions under Chapter VII of the Charter; (c) in other forms of robust peace operations the relevance of both instruments is unclear and disputable; (d) peace operations conducted by states or regional organisations, even if authorised by the Security Council, are not clearly covered by the text of the Convention; and (e) hardly any of the many host states to a peace operation so far has ratified the Convention, let alone the Optional Protocol. These shortcomings shall be discussed here in turn.

36 The legal character of ‘UN operation’ may also be confirmed by a special declaration by the Security Council or the General Assembly under Art. 1(c)(ii) ‘that there exists an exceptional risk to the safety of the personnel participating in the operation’.

37 ‘Safety issues’ comprise any hazards of deployment, including for example the handling of equipment or exposure to tropical diseases. ‘Security issues’ include external threats ranging from military assault to petty crime.

38 Art. 4: ‘Agreements on the status of the operation. The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia*, provisions on privileges and immunities for military and police components of the operation.’ The latter formulation is open to misunderstanding, as immunities are derived from customary international law so that SOFA or SOMA provisions can be no more than declaratory in nature.

39 Preamble, para. 1.

Non-state actors

The Convention is binding on state parties but, unlike the principles and rules of IHL,⁴⁰ this does not engender direct obligations for non-state actors under international law. Article 19 of the Convention provides for the dissemination of the text and its inclusion in military instruction programmes of states party to it. However, it says nothing on dissemination among non-state actors. While it is fair to say that non-state actors are subject to the criminal law of the state where they are present, the obligations on implementation which are included in the Convention, such as those in Article 7(2) and (3) and Article 9(1) and (2), will remain dead letters unless taken more seriously and transformed into national legislation. The duty to take appropriate implementing measures⁴¹ needs to be fulfilled by states. As acknowledged in Article 7(3), relevant initiatives are particularly required ‘in any case where the host State is unable itself to take the required measures’. Such initiatives should include exchange of experience, training activities and the development of model legislation.

The general principle of *pacta sunt servanda* is one of the long-standing and universally recognised principles of international law,⁴² but neither the Convention nor SOFAs become automatically part of the national law of either the host state or the sending state. While certain provisions are declaratory in nature in that they reaffirm pre-existing obligations, others have a constitutive character, as they create or amend rights and obligations. Each participating state has its own constitutional mechanisms regulating how international agreements become domestically binding. Most states will need to adopt legislation for that purpose, and they should take appropriate additional measures at the national level to ensure compliance with international legal obligations. This is particularly important where criminal jurisdiction is involved.

Under Article 7(2) of the Convention, states are obliged to ‘take all appropriate measures to ensure the safety and security of UN and associated personnel’, and under Article 8 personnel captured or detained shall be promptly released and returned.⁴³ However, as explained above, in most legal systems these

40 On the applicability of IHL to non-state actors, see D. Fleck (ed.), above note 3, Section 1201, para. 5, pp. 585–586.

41 For a general consideration of the problem of compliance with international treaty obligations, see Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge University Press, Cambridge, 2007. For some first steps taken, see GA Res. 67/85 (21 March 2013) and 68/101 (18 February 2014), *Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*.

42 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 26: ‘Every treaty in force is binding upon the parties to it and must be performed in good faith.’

43 Art. 8: ‘Duty to release or return United Nations and associated personnel captured or detained. Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.’

obligations remain those of the state party, not of its citizens, unless further steps are being taken through national legislation. The requirement to take not only executive but also legislative steps and ensure their effective implementation in cooperation with the UN and other states has not been addressed in the Convention, except in very broad terms. Even two decades after the adoption of the Convention, when the right of states parties 'to take action in the exercise of [their] national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State' was expressly acknowledged in Article 3 of the Optional Protocol, no reference was made to the duty of states to enact legislation binding their own citizens and ensuring the protection of peacekeepers under national law.

While this gap may be criticised, this is not to suggest that there are easy solutions to create legal obligations for non-state actors in this respect. Large-scale crimes, such as those committed against the UN Mission in Sierra Leone in May 2000, when up to 500 UN peacekeepers were taken hostage, disarmed and disrobed by the Revolutionary United Front,⁴⁴ do require resolute action by states in accordance with existing obligations under Article 9 of the Convention, before perpetrators may be brought to justice. Peacekeepers acting under a UN mandate are bound to impartiality even in the performance of the most robust operations. They are acting on behalf of the international community and hence cannot be considered parties to a conflict, unless they take a direct part in the conflict, hence losing their impartiality. Indeed, more should be done to qualify attacks against peacekeepers as crimes when they are not to be considered parties to the conflict (and to hold perpetrators accountable for such crimes). But also specific policies should be developed in order to avoid peacekeepers becoming involved in hostilities which in terms of intensity and duration rise to the level of participation as a party to an armed conflict.

Article 9(2) of the Convention requires states parties to make crimes against UN and associated personnel 'punishable by appropriate penalties which shall take into account their grave nature'. There is still a lack of relevant national legislation on the issue. States, including those sending or hosting peacekeeping personnel, seem to take the position that attacks against such personnel may be sufficiently prosecuted as regular crimes against civilians such as manslaughter, hostage-taking or wilful killing, thus neglecting the specific obligation under Article 9(2). Many states specifically sanction attacks against law enforcement officers,⁴⁵ but

44 Peacekeeping Best Practices Unit/Department of Peacekeeping Operations, *Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone*, United Nations, September 2003, p. 3/83, available at: http://pbpu.unlb.org/PBPS/Pages/PUBLIC/ViewDocument.aspx?docid=275&cat=1&scat=111&menukey=_6_2_17; Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?*, Oxford University Press, Oxford, 2011, p. 174.

45 For an example, see Arts. 113(1) and (2) of the German Criminal Code: '(1) Whosoever, by force or threat of force, offers resistance to or attacks a public official or soldier of the Armed Forces charged with the enforcement of laws, ordinances, judgments, judicial decisions or orders acting in the execution of such official duty shall be liable to imprisonment not exceeding two years or a fine. (2) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if (a) the principal or another accomplice carries a weapon for the purpose of using it during the commission of the offence; or (b) the offender through violence places the person assaulted in danger of death or serious injury.'

these laws will hardly suffice as they are designed for normal peacetime situations and the penalties may be too weak to ensure compliance with the rule of law in post-conflict peacebuilding. Peacekeepers may not even qualify as personnel specially protected under such existing national legislation. Should they become victims of attacks, such particular sanctions would then not apply, although the UN mandate may be considered as an aggravating circumstance in the adjudication of the penalty.⁴⁶ International criminal jurisprudence so far is silent on attacks against peacekeepers in peacetime and in post-conflict situations.⁴⁷

Non-applicability in certain enforcement actions

It remains difficult to define those limits of robust peace operations beyond which the Convention ceases to apply. Article 2(2) of the Convention is less than clear in providing:

This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies.⁴⁸

As admitted by Mahnoush Arsanjani in an official UN publication, the purport of Article 2(2) of the Convention is not entirely clear and is open to interpretations which may not have been anticipated at the time of the negotiation of the Convention.⁴⁹ According to one possible reading, such enforcement actions may be understood as being confined to those operations in which the UN force itself becomes party to an armed conflict. Another reading might include certain aspects of peace enforcement operations,⁵⁰ but in that case it will be difficult to agree in practice on exact criteria for an engagement 'as combatants against organised armed forces'. The beginning and end of that situation will be a matter of dispute, and any conclusion that such combatants might be held as prisoners of war until the

46 See e.g. Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber I), 8 April 2009, para. 218, available at: www.refworld.org/pdfid/49e71f1b2.pdf.

47 The provisions in Art. 8 (2)(c)(iii) and 8(d)(iii) of the ICC Statute deal with attacks against persons protected under the law of (international or non-international) armed conflict, thus excluding most peace operations.

48 This provision also applies to the Optional Protocol, which shall be read and interpreted together with the Convention as a single instrument.

49 Mahnoush H. Arsanjani, Commentary on the UN Convention on the Safety of United and Associated Personnel, *United Nations Audiovisual Library of International Law*, p. 4, available at: http://legal.un.org/avl/pdf/ha/csunap/csunap_e.pdf; see also Mahnoush H. Arsanjani, 'Defending the Blue Helmets: Protection of United Nations Personnel', in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, Proceedings of the international symposium held on the occasion of the 50th anniversary of the United Nations, Geneva, 19–21 October 1995, Pedone, Paris, 1996, pp. 115 and 132–145.

50 See the sub-section on 'Applicability in other forms of robust peace operations' below.

cessation of active hostilities⁵¹ would be unacceptable as long as the mandate of the peace operation is to be upheld. A full exclusion of all peace enforcement operations from the application of the Convention would be illogical, as it would deprive UN and associated personnel from protection even below the threshold of combat action.

Sir Christopher Greenwood has convincingly explained that while the effect of Article 2(2) is that ‘the threshold for the applicability of IHL of international armed conflicts thus becomes the ceiling for the operation of the Convention’,⁵² those who drafted the Convention hardly intended its applicability to cease as soon as there was any fighting, however low-level, between members of a UN force and members of other organised armed forces, as this would reduce the scope of application of the Convention to almost nothing.⁵³ Article 2(2) is also misconceived for an additional reason: it excludes the application of the Convention *in toto* as soon as ‘any’ of the personnel are engaged as combatants, thus depriving even non-military personnel of special protection.⁵⁴ Regrettably, in the two decades of the Convention’s existence, no attempt was made to relieve it of these severe defects.

There is some international criminal jurisprudence on attacks against peacekeepers in armed conflicts. In an assessment of recent cases before the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the ICTY and the International Criminal Court (ICC), in which a number of crimes against peacekeepers, all committed during non-international armed conflicts, had to be adjudicated, Ola Engdahl has analysed pertinent jurisprudence on determining whether peacekeepers are entitled to the protection of civilians under IHL.⁵⁵ He questions whether it was correct to focus only on whether or not peacekeepers as members of a military operation had directly participated in hostilities. Instead, he suggests that, since peacekeepers are members of an armed force, the most appropriate way to address this issue would be to analyse whether they belong to the armed forces of a party to an armed conflict. But that would depend on the court that was competent to decide in accordance with its statute. A qualification of peacekeepers as party to an armed conflict would exclude, as Engdahl convincingly underlines, that they could be regarded as civilians only temporarily taking part in hostilities.⁵⁶ It should be noted that permanent fighting under UN mandate is extremely rare. It is not to be understood as a ‘peace operation’, but happened in enforcement operations such as the Korean War

51 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 118(1).

52 Christopher Greenwood, ‘Protection of Peacekeepers: The Legal Regime’, in *Duke Journal of Comparative & International Law*, Vol. 7, 1996, pp. 199–200.

53 Christopher Greenwood, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, para. 4 to Section 208, p. 53.

54 C. Greenwood, above note 52, pp. 197–202 and 207.

55 Ola Engdahl, ‘Prosecution of Attacks against Peacekeepers in International Courts and Tribunals’, in *Military Law and the Law of War Review*, Vol. 51, No. 2, 2012, pp. 279–280.

56 *Ibid.*, p. 279: ‘There is a risk that such an approach adversely affects the respect for the protection of peacekeepers.’

(1950–1953),⁵⁷ Operation Desert Storm in Iraq (1991)⁵⁸ and Operation Unified Protector in Libya (2011).⁵⁹

Applicability in other forms of robust peace operations

Robust forms of peace operations in which peacekeepers become involved in using force, however low-level, to act in self-defence or defence of their mandate are sadly part of today's reality.⁶⁰ On numerous occasions the Security Council has authorised peace enforcement operations which,

while potentially involving combat, will not amount to full-scale warfare on a sustained basis against a State, and which fall conceptually and in terms of their objectives and the intensity of the use of force between enforcement operations and traditional peacekeeping.⁶¹

These include the UN Operation in the Congo (ONUC),⁶² the Stabilization Force in post-conflict Bosnia-Herzegovina and Croatia (SFOR),⁶³ the Kosovo Force (KFOR)⁶⁴ and the Intervention Brigade in the Democratic Republic of the Congo.⁶⁵ The mandate of the Security Council foresaw the members of these operations not as becoming party to an armed conflict, but rather as maintaining or restoring international peace and security in cooperation with the host state, yet there were circumstances of participation in support of the host state in the conduct of hostilities.

The situations which are to be considered here are mostly those of law enforcement rather than the conduct of hostilities. With very few exceptions, they

57 SC Res. 82, 25 June 1950; SC Res. 83, 27 June 1950; GA Res. 377(V), 3 November 1950; GA Res. 498(V), 1 February 1951; GA Res. 500(V), 18 May 1951.

58 SC Res. 678, 29 November 1990.

59 SC Res. 1973, 26 February 2011.

60 Mona Khalil, 'Humanitarian Law and Policy in 2014: Peacekeeping Missions as Parties to Conflicts', 13 February 2014, available at: <http://phap.org/thematic-notes/2014/february/humanitarian-law-policy-2014-peacekeeping-missions-parties-conflicts>.

61 T. D. Gill and D. Fleck (eds), above note 1, Section 5.01, p. 81.

62 SC Res. 161, 21 February 1961; SC Res. 169, 24 November 1961; see Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford University Press, Oxford, 2002, p. 71.

63 SC Res. 1088, 12 December 1996; SC Res. 1174, 15 June 1998.

64 SC Res. 1244, 10 June 1999.

65 SC Res. 2053, 27 June 2012; SC Res. 2076, 20 November 2012; and SC Res. 2098, 18 March 2013. In the Democratic Republic of the Congo, the United Nations Organization Stabilization Mission (MONUSCO) found itself supporting government forces against the rebel group M23. The Security Council, '[e]xpressing its deep concern regarding the threat posed by the presence of M23 in the immediate vicinity of the city of Goma in violation of resolution 2076 (2012), as well as the continuation of serious violations of international humanitarian law and abuses of human rights by the M23 and other armed groups', readjusted MONUSCO's mandate to include protection of civilians, neutralising armed groups through the Intervention Brigade, monitoring the implementation of the arms embargo, and provision of support to national and international judicial processes (SC Res. 2098, Preamble para. 9; op. paras. 12–16), tasks that should not be misunderstood as deviations from the fundamental principles of consent of the host state, impartiality, and non-use of force except in self-defence or defence of the mandate. For a first discussion on background and legal interpretation, see Bruce Oswald, 'The UN Security Council and the Force Intervention Brigade: Some Legal Issues', in *ASIL Insights*, Vol. 17, No. 15, 6 June 2013, available at: www.asil.org/sites/default/files/insight130606_0.pdf.

cannot be considered as armed conflicts, so IHL does not formally apply. This could speak for the applicability of the Convention and its Optional Protocol in most cases in which peacekeepers are using force. But the situation is not clear-cut. While the applicability of IHL to a situation depends not on the qualification of the situation by the parties involved but rather on the facts on the ground, any assessment may be disputed, and many will hesitate to conclude from single incidents, even when such incidents occur frequently, that they have become part of an armed conflict. Sometimes armed opposition groups may be interested in seeing their case so qualified, while the government still speaks of internal disturbances. A clear understanding of possible consequences is necessary at the level of decision-makers within the UN and states. It should inform the planning and conduct of the relevant peace operation and be made public.

Peace operations by regional organisations

Peace operations conducted by regional organisations or coalitions of willing states acting under a Security Council mandate are not included in the text of the Convention. Article 1(c) rather refers to 'United Nations operation[s]', thus neglecting important parts of the reality in many areas of post-conflict peace-building. The Optional Protocol has expanded the range of applicability of the Convention to 'humanitarian, political or development assistance', while still insisting that the operation is conducted under 'United Nations authority and control' (Article II(1)). It would be worthwhile to seek agreement that such 'control' should be understood here as political rather than operational control and that states and regional organisations have the right and responsibility to ensure an adequate protection of peacekeepers also in such missions.

Lack of ratification

So far, hardly any of the many host states to a peace operation have ratified the Convention,⁶⁶ let alone the Optional Protocol,⁶⁷ and hardly any visible effort has been undertaken to change this situation. Current UN practice has been relatively successful in coping with it, however: in accordance with Security Council and General Assembly resolutions, SOFAs or SOMAs concluded with the host state often provide that relevant parts of the UN Safety Convention will apply.⁶⁸

66 The list of States Parties to the Convention is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&lang=en.

67 The list of States Parties to the Optional Protocol is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8-a&chapter=18&lang=en.

68 Information kindly provided to the author by Ms. Katarina Grenfell, Office of the Legal Counsel, United Nations. See for example SC Res. 1502 (2003), 26 August 2003, op. para. 5(a); Protocole modifiant l'Accord entre l'Organisation des Nations Unies et la République démocratique du Congo concernant le statut de la Mission de l'Organisation des Nations Unies en République démocratique du Congo (MONUSCO), Kinshasa, 6 June 2006, 2106 UNTS 357; and GA Res. 67/85 of 13 December 2012, op. paras. 16 and 17.

The Security Council has confirmed this practice.⁶⁹ Yet a number of recent SOFAs were concluded without any reference to the UN Safety Convention, referring instead to the privileges and immunities of the peacekeeping mission and its members under the 1946 Convention.⁷⁰ Other SOFAs further confuse the picture by also mentioning

the principles and rules of the international humanitarian law conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, and the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.⁷¹

Even if such SOFA provisions are included without prejudice to the mandate of the mission and its international status, this appears to be an unfortunate distraction from the legal status of the personnel involved and the international protection it deserves. The treaties referred to here are only applicable in armed conflicts. When the SOFAs were concluded for Sudan and South Sudan, the Comprehensive Peace Agreement⁷² and the Addis Ababa high-level consultation on the situation in Darfur of 16 November 2006⁷³ were assumed to have ended Africa's longest-running civil war.⁷⁴ While the situation continued to constitute a threat to international peace and security,⁷⁵ none of the states sending military contingents to UNAMID, UNISFA or UNMISS, many of them after parliamentary debates at home, had acted under the impression that the situation would again amount to an armed conflict.⁷⁶ A clear distinction should have been drawn between assistance in post-conflict law enforcement and the conduct of hostilities rather than confusing these two different modes of operation. The reference in SOFAs to IHL treaties might indicate that many negotiators involved were more familiar with these than

69 See, for example, SC Res. 1778, 25 September 2007, Preambular para. 9, op. para. 4.

70 See, for example, Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei (UNISFA) (with exchange of letters), New York, 1 October 2012, I-50146; Status-of-Forces Agreement between the United Nations and the Government of the Republic of South Sudan (with supplemental arrangement) concerning the UN Mission in South Sudan (UNMISS), Juba, I-48873 (entered into force 8 August 2011).

71 Agreement between the United Nations and the African Union and Sudan concerning the Status of the African Union/United Nations Hybrid Operation in Darfur (UNAMID), Khartoum, 9 February 2008, 2503 UNTS 217, para. 6(a), available at: <http://unamid.unmissions.org/Portals/UNAMID/UNAMID%20SOFA.pdf>.

72 Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, 31 December 2004, available at: <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

73 See communiqué of the 66th meeting of the Peace and Security Council of the African Union held in Abuja on 30 November 2006, available at: www.peaceau.org/uploads/communiquedarfureng-68th.pdf; and communiqué of the 79th meeting of the Peace and Security Council of the African Union on 22 June 2007, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20AU%20PSC%20PR%20COMM%20LXXIX.pdf.

74 For a legal assessment of the conflict in Sudan, see the Rule of Law in Armed Conflicts Project (RULAC) website, available at: www.geneva-academy.ch/RULAC/state.php?id_state=205.

75 SC Res. 1769 (2007), 31 July 2007.

76 See Alex J. Bellamy and Paul D. Williams, *Providing Peacekeepers*, Oxford University Press, Oxford, 2013.

with the principles and rules of post-conflict peacebuilding, but the UN Safety Convention, its many shortcomings notwithstanding, would have been the more appropriate document to offer legal guidance for those hosting and participating in the missions. Yet it was either ignored or neglected at the time and some may have felt that, unlike UN and associated personnel, peacekeepers provided by regional organisations would not enjoy protection under the text of the Convention.

Summarising these developments, the purpose of the Convention, which was to take effective legal action on deliberate attacks against UN and associated personnel, has not been convincingly met so far. New efforts will be necessary to ensure ratification by states engaged in peace operations (host states and sending states alike), improve implementation efforts and reach appropriate understandings and amendments to overcome the existing shortcomings.

Status-of-forces or status-of-mission agreements

The conclusion of SOFAs or SOMAs is of practical value for each mission.⁷⁷ While the sovereign immunity of peacekeepers derives from customary law rather than SOFAs and SOMAs, the latter may have three important effects: to confirm the principle of immunity; to jointly agree on certain limitations to existing privileges where this may be appropriate; and to establish rules and procedures for cooperation between the sending state and the host state.

It may be noted here that, since the end of the Cold War, UN peacekeeping operations have undergone a legal development in that mandates could explicitly be based on Chapter VII of the Charter due to more frequent unanimous Security Council support. Peace operations have increased in number and intensity ever since. The UN Secretary-General has prepared, in 1990, a Model Status-of-Forces Agreement for Peacekeeping Operations⁷⁸ which should serve as a basis for individual agreements to be concluded between the UN and host countries. This document marks an important development, as it describes the specific requirements of peace operations that are different from those for stationing visiting forces for other purposes, such as military cooperation, training or exercises.

Host states may be interested in temporary or long-term military cooperation with another state or a group of states, involving the presence of foreign troops on their territory. They may also agree on the joint use of specialised or expensive equipment and infrastructure. In such cases, there may be a mutual interest in proposing and accepting certain limitations for the exercise of privileges and immunities by the sending state, in order to support close cooperation according

77 See 'Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?', Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, 28 February 2008, Serial No. 110-153, available at: http://psm.du.edu/media/documents/congressional_comm/house_foreign_affairs/us_house_foreign_affairs_hearing_feb_28_2008.pdf; William Thomas Worster, 'Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement', in *Military Law and the Law of War Review*, Vol. 47, No. 3-4, 2008, pp. 277-375.

78 UN Doc. A/45/594 (9 October 1990), reprinted with a short commentary in B. Oswald, H. Durham and A. Bates, above note 35, pp. 34-50.

to the host nation's principles and rules. The North Atlantic Treaty Organisation (NATO) SOFA⁷⁹ and the European Union (EU) SOFA⁸⁰ serve exactly such purposes. They were concluded as reciprocal and long-term arrangements for peacetime deployments on allied territories, a cooperation which was made possible in part due to the relatively comparable legal systems of the participating states and the desire by all parties to participate in the exercise of relevant rights and responsibilities in a balanced form. Close peacetime cooperation between participating states offers the necessary conditions for sharing even the exercise of jurisdiction in certain matters.⁸¹

Yet such conditions will generally be absent in operations carried out to maintain or restore peace. For these, the UN Model SOFA provides appropriate service conditions for the commander of the military component and the head of the UN civilian police component; the civilian staff; military personnel of sending states; and locally recruited personnel. As peace operations are also conducted by other international organisations, such as the African Union, the Economic Community of West African States, the EU⁸² and NATO, the UN Model SOFA may be used, *mutatis mutandis*, as a basis for agreements between the latter organisations and host countries in which military and civilian personnel are deployed. This may be practical, as similar issues are to be solved in peace operations conducted by these organisations and the UN experience may help to standardise similar activities. Once enacted in the national law of the host state, these provisions may effectively contribute to the respect for the status of personnel participating in peace operations and their protection.

- 79 Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces (NATO SOFA), 19 June 1951, available at: www.nato.int/cps/en/natolive/official_texts_17265.htm; Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces (PfP SOFA), 19 June 1995, available at: www.nato.int/cps/en/natolive/official_texts_24742.htm; Additional Protocol of 19 June 1995 to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces, available at: http://www.nato.int/cps/en/natolive/official_texts_24743.htm?selectedLocale=en; Further Additional Protocol of 19 December 1997 relating to the application of the Paris Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, 28 August 1952, available at: www.nato.int/cps/en/natolive/official_texts_17300.htm.
- 80 Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Art. 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 17 November 2003, available at: www.statewatch.org/news/2009/mar/eu-uk-military-staff-agreement.pdf.
- 81 Lady Hazel Fox and Philippa Webb, above note 26, p. 595, observed that the NATO SOFA observes a principle of 'equivalence, by which the host State is only obliged to extend to visiting forces the privileges and benefits that it extends to its own forces'. But this may be based on a misunderstanding. It should be noted that equivalence may exist for support standards for these forces which are more or less comparable within the Alliance, but definitely not with respect to their legal status, as armed forces of the receiving state do not enjoy immunity at home.
- 82 The EU, however, has adopted its own Draft Model Agreement on the Status of the European Union-Led Forces between the European Union and a Host State, Council of the European Union, 2007, available at: <http://register.consilium.europa.eu/pdf/en/07/st11/st11894.en07.pdf>; see also Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 17141/08, 15 December 2008, available at: <http://register.consilium.europa.eu/pdf/en/08/st17/st17141.en08.pdf>.

A SOFA can take many different forms. It can be a legally binding instrument, such as a treaty or agreement, which must be signed and ratified by the parties. Alternatively, it can be an expression of a political commitment set out in a memorandum of understanding or an exchange of notes. SOFAs can be concluded bilaterally between one sending state and the host state. They may also take the form of a multilateral arrangement between several parties, especially when the armed forces of more than one sending state are operating in the host state. SOFAs can be designed for a specific mission or for recurring or permanent missions. Considering the complexity of the issues involved and time constraints during the negotiations, all parties must concentrate on finding pragmatic solutions to the problems identified. In the preparatory phase and during the actual negotiations, each party may wish to seek expert advice at the national and international levels. This may help to identify the interests of relevant branches of the other party's government (the ministries of foreign affairs, defence, the interior and finance, including taxation, customs and border control agencies, and so on) and formulate negotiating strategies. Such information may prove to be very useful for the negotiations. Although certain information may be kept classified for security reasons, the parties could share fundamental principles of good governance, transparency and democratic control.⁸³ In many – if not most – cases, negotiations will be influenced by a lack of time, a lack of expertise, and difficulties in ensuring smooth implementation and settling disputes in close cooperation. Legislative acts will be necessary under the constitution of the host state for implementing certain SOFA provisions, and this may need more time or even turn out to be unrealistic. As with any treaty negotiation, political control of (and support for) the negotiators, based on a willingness to reach practical solutions, may greatly affect the outcome of SOFA negotiations and help to secure acceptance on both sides.

It remains an open problem that SOFAs on peace operations are rarely transformed into the national law of the host state. To reach that goal, relevant provisions may need to be enacted by the parliament of the host state, which will not happen easily in a post-conflict situation. In order to cope with the notorious lack of time for deployment and mission start-up, the Security Council resolution establishing a peace operation often decides that the UN Model SOFA shall apply provisionally, pending the conclusion of a specific SOFA.⁸⁴ With this practice,

83 See Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons From International Organizations', K.U. Leuven, Institute for International Law, Working Paper No. 54, May 2004, available at: www.law.kuleuven.be/iir/nl/onderzoek/wp/WP54e.pdf, with reference to the definition used by the United Nations Economic and Social Commission for Asia and the Pacific: 'Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.' See also Victor-Yves Ghebali and Alexander Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security: Anatomy and Implementation*, Martinus Nijhoff, Leiden, 2005.

84 Examples include SC Res. 1320 (2000), para. 6, in respect of the UN mission in Ethiopia and Eritrea (UNMEE), and SC Res. 2043 (2012), para. 7, noting the agreement between the Syrian government and the UN in respect to the UN Supervision Mission in Syria, to be established under the command of a Chief Military Observer. Some of these decisions were taken under Chapter VII of the UN Charter: see SC Res. 1990 (2011), para. 4, to apply the SOFA for the UN Mission in Sudan (UNMIS) *mutatis mutandis* to UNISFA; and SC Res. 1996 (2011), para. 26, to apply the UN Model SOFA *mutatis mutandis* to UNMISS.

the Security Council has finally adopted a solution that this author had proposed many years ago in the interest of legal clarity and to support an effective legal protection of the military and civilian personnel involved.⁸⁵ But it should be considered that this is just a provisional solution which cannot fully replace implementation under the law of the host state. The enactment of status provisions by the relevant Security Council resolution should be the first step, to be followed by SOFA negotiations aimed at reaching appropriate provisions and procedures, and the implementation of these in close cooperation between the host state, the sending states and the international organisation involved.

A significant part of SOFA negotiations will focus on the extent to which the law of the host state applies to military and civilian personnel of the sending state. Article 6 of the UN Safety Convention provides in rather general terms that:

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall:
 - (a) Respect the laws and regulations of the host State and the transit State; and
 - (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.
2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

To be effective, such measures should not be taken only on an *ad hoc* basis, and they should be developed in cooperation with the host state.

The international legal obligations of the host state are of particular relevance in this respect. While the human rights obligations of sending states will apply extraterritorially only to acts committed within their territory and subject to their jurisdiction,⁸⁶ respect for the human rights commitments of the host state and the shared interest in the success of the mission requires sending states to take a sensitive approach in order to ensure human rights protection.⁸⁷ The same applies to obligations under environmental law. The role of peacekeepers in protecting human rights and the environment is significant today and will likely become increasingly important in the future. SOFA provisions may address this role by referring to relevant international law principles or supplementing them for the mission under consideration.

Organs of a foreign sending state are not automatically subjected, however, to all the laws of the host state.⁸⁸ Some of these laws, such as traffic regulations, will generally apply to peacekeepers. The host state's requirements may

85 Dieter Fleck and Michael Saalfeld, 'Combining Efforts to Improve the Legal Status of UN Peace-Keeping Forces and Their Effective Protection', in *International Peacekeeping*, Vol. 1, No. 3, 1994, pp. 82–84.

86 See, for example, the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 2(1). See Jann K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in T. D. Gill and D. Fleck (eds), above note 1, pp. 51–77.

87 See Ben F. Klappe in D. Fleck (ed.), above note 3, Section 1307, pp. 619–625.

88 See Rodney Batstone in D. Fleck (ed.), above note 4, pp. 61–69.

also be relevant for building measures and fire precautions, particularly where local employees are involved. Other laws, however, do not apply – for example, rules on the use of firearms or on taxation. It would also not make sense for the host state to seek to regulate matters such as the command structure, terms of service and salaries of the members of the peacekeeping force. This situation is comparable to that of foreign diplomatic or consular personnel in the host state.⁸⁹ Hence, SOFA and SOMA negotiations should identify the laws of the host state that will apply to the foreign personnel, and both the host state and sending states or organisations should agree to cooperate on these issues, notwithstanding the exclusive jurisdiction in criminal, disciplinary and civil matters which remains a prerogative of the sending state in peace operations, is confirmed under the UN Model SOFA⁹⁰ and has never been waived in practice. Judicial control in this complex field must respect the exclusive criminal and disciplinary jurisdiction of the sending state.⁹¹

Receiving states are rarely able to offer a full guarantee for the safety and security of the foreign visiting force. Hence, this responsibility to a large extent needs to be shouldered by the sending state. For this reason, the sending state will have to ensure the safety of its personnel through the use of its military and police forces and/or private security companies. The SOFA should reflect this shared responsibility for safety and security, identify competent authorities on both sides, describe their respective tasks and arrange for cooperation.

The increasing role of civilian employees and private contractors in support of any peace operation makes it essential to clearly define their status in the host state and regulate their tasks. Some peace operations are entirely civilian in nature. This explains the relevance of SOMAs as opposed to SOFAs. The personnel involved may be individually employed, either by the sending state or by a contracting company. They may be brought to or recruited within the host state. In both cases, the UN Model SOFA, which applies to military and civilian personnel alike, provides for immunities for such civilian personnel, making an exception only for locally recruited personnel insofar as the latter do not enjoy tax exemptions (Section 15(b)), but deliberately affirming their immunity from legal process in the host state (Section 46). While this is adequate to secure effective performance of the peace operation, existing legal limitations for the work to be performed are often neither clearly regulated nor explained to those concerned. All tasks to be performed should be limited to a strictly civilian function. Attributability either to the sending state⁹² or to the organisation⁹³ should be considered, and the regulatory regime for

89 Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Art. 41(1); Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261 (entered into force 24 June 1964), Art. 55(1): 'Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.'

90 See UN Doc. A/45/594, above note 78, Sections 46–49.

91 Françoise J. Hampson and Ai Kihara-Hunt, 'The Accountability of Personnel Associated with Peacekeeping Operations', in Chiyuki Aoi *et al.* (eds), *Unintended Consequences of Peacekeeping Operations*, United Nations University Press, Tokyo, 2007, p. 198.

92 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above note 12, Arts. 4–11.

93 Draft Articles on the Responsibility of International Organisations, above note 13, Arts. 6–9.

private companies, in particular issues of accountability and oversight requirements, made more transparent.

A number of international instruments and initiatives offer guidance on the proper conduct of private security companies and may be referred to in SOFAs. For example, the 2008 Montreux Document on Private Military and Security Companies describes pertinent international legal obligations and good practices for states and private military and security companies.⁹⁴ Moreover, an international Code of Conduct for Private Security Companies has been developed by the Swiss government in collaboration with other government experts and representatives of the private security industry.⁹⁵ The latter document incorporates internationally recognised human rights standards and promotes best practice activities to ensure supervision and accountability of private contractors. It is supported by states and civil society organisations. The UN requires adherence to this document for the hiring of private security companies by UN agencies. An open-ended intergovernmental working group was established by the UN Human Rights Council to consider the possibility of elaborating an international regulatory framework for monitoring and oversight of the activities of private military and security companies.⁹⁶ It should be in the interests of both the host state and the sending state to address the role of such companies in the SOFA and provide for cooperative solutions of contentious issues which may arise in this context.

It is a widely shared experience that in peace operations sending states and international organisations, as well as host states, often face unforeseeable challenges which may include legal and policy issues and might even lead to changes in the character of the mission. A SOFA should therefore be as flexible as possible and remain open for adaptations.

Conclusions

Gaps in the regulation and uncertainties in the interpretation of various rules may affect the practice of peace operations and jeopardise the security and safety of military and civilian personnel to an extent that may impede the effective performance of the mandate.

The 1994 UN Safety Convention and its 2005 Optional Protocol are characterised by shortcomings and a lack of adequate implementing activities by states. While a focus has been placed on criminal provisions for the prosecution of

94 Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict of 17 September 2008, UN Doc. A/63/467-S/2008/636, 6 October 2008, available at: [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20\(e\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20(e).pdf).

95 International Code of Conduct for Private Security Providers, 9 November 2010, available at: www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

96 UN Human Rights Council Resolution 15/26, 7 October 2010, para. 5, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/167/42/PDF/G1016742.pdf?OpenElement>.

individual perpetrators, issues of state responsibility and the responsibility of the UN and other international organisations are not sufficiently addressed in these instruments. Their scope of application in robust forms of peace operations is unclear and, regrettably, peace operations conducted by states or regional organisations, even when authorised by the Security Council, are not formally covered. It is a particular matter of concern that, two decades after the Convention was adopted, hardly any of the many host states to a peace operation has become party to it.

While the deficiencies of the Convention should be overcome by formal amendments, this process would likely take time, and its potential results are uncertain. States and international organisations deploying military or civilian personnel abroad will negotiate SOFAs or SOMAs anyway, to define more precisely the rights and obligations of their personnel in the host state. Host states, in turn, may be more ready to enter into such negotiations than to accede to general treaties at a time of ongoing crisis in post-conflict peacebuilding, when resources are limited and activities have to concentrate on *ad hoc* measures rather than general regulation. Hence, it may be preferable to concentrate on comprehensive SOFA negotiations in the preparation of peace operations and devote some time to establishing cooperation between the host state, the sending states and the international organisation on this issue, rather than pressuring the host state to accede to a treaty which is neither comprehensive nor fully understood in all of its requirements and consequences.

SOFA negotiations, which could be preceded by provisional regulations based on Security Council decisions, ought to use standardised principles and rules and supplement them as appropriate. All participating states will need to be involved, as this may offer the best guarantee of establishing confidence in their willingness and ability for achieving cooperative solutions for faithful implementation and the settlement of any disputes. To the extent that command and control will be exercised by the UN or a regional organisation, the relevant organisation may represent the contributing states during the negotiations, but the latter should also be closely involved, as their personnel will be directly affected by the result of the negotiations.

In critical situations, status issues may become superposed by rules of IHL. Yet international organisations and participating states have a shared interest in maintaining and restoring peace rather than waging war through peace operations. They should focus on law enforcement operations and avoid peacekeepers becoming parties to an armed conflict. Strict policy rules should make their impartiality more visible, strengthen their policing role and limit any involvement in the conduct of hostilities.

Issues of state responsibility and responsibility of the international organisation involved should be clearly addressed in the SOFA. Host states must be held accountable to ensure respect for military and civilian personnel participating in the peace operation. Likewise, the SOFA should include provisions and procedures for the settlement of any claims for wrongful acts committed by peacekeepers, as it is in the interests of the peacebuilding process to settle such

claims quickly and convincingly. Effective claims settlement worked well in many peace operations.⁹⁷ It should be mandatory for any mission.

For the settlement of claims in peace operations, transparent procedures should be put in place and appropriate forms of judicial control should be ensured. It appears unacceptable under the rule of law, and counter-productive for the success of peacebuilding, if an international organisation prefers to hide behind its immunity rather than taking an active and forthcoming role in providing reparations for wrongful acts falling under its responsibility. Special procedures for judicial review of acts falling under the responsibility of the UN and other relevant international organisations are overdue.

The Secretary-General has recently been tasked with taking 'all measures deemed necessary to strengthen United Nations field security arrangements and improve the safety and security of all military contingents, police officers, military observers and, especially, unarmed personnel'.⁹⁸ Activities initiated under this mandate are yet to be taken and appropriately promulgated. Jurisdiction and control by sending states and the responsibility of the relevant international organisation should be explored in the light of current practice, taking into consideration that attacks against peacekeepers with no sufficient action taken by host states to investigate and prosecute such acts are sadly part of the reality. The occurrence of attacks and threats against humanitarian personnel and UN and associated personnel is a factor that increasingly restricts the provision of assistance and protection to populations in need: acts of wilful killing and other forms of violence, armed robbery, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention continue to endanger peacekeepers and severely jeopardise the success of current peace operations.

Existing deficiencies in legal regulations on the status of personnel participating in peace operations may challenge those seeking pragmatic solutions, but they also offer opportunities for legal innovation. Future trends in the law will be influenced by the way in which states and international organisations respond to developments in the global and regional security architecture in order to improve civil-military cooperation for post-conflict peacebuilding.

97 See, for example, Jody M. Prescott, 'Claims Operations in the Former Yugoslavia', in D. Fleck (ed.), above note 4, pp. 170–182.

98 SC Res. 2086, 21 January 2013, para. 20.