International Humanitarian Law Series

Protection of Personnel in Peace Operations:

The Role of the 'Safety Convention' against the Background of General International Law

by
Ola Engdahl

Martinus Nijhoff Publishers

Protection of Personnel in Peace Operations

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Ola Engdahl

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Table of Contents

Foreword		**ix**
Acknowledgements		**xiii**
Abbreviations		**xv**
Chapter 1	**Introduction: The Safety Convention and its Legal Environment**	**1**
	1.1 Method and Material	5
	1.2 Delimitations and Terminology	9
	1.3 Procedural Mechanisms	21
	1.3.1 Diplomatic Protection	22
	1.3.2 Functional Protection	26
Chapter 2	**Jurisdiction and Immunity**	**29**
	2.1 Principles of Jurisdiction	30
	2.2 Multilateral Treaties Providing Jurisdiction	40
	2.3 Ad Hoc Tribunals and Criminal Courts	45
	2.4 Multilateral Treaties on Immunity	50
	2.5 Status-of-Forces Agreements	51
	2.6 Conclusions	55
Chapter 3	**General Protection**	**57**
	3.1 International Minimum Standard	58
	3.1.1 The Standard in Practice	64
	3.1.2 Conclusions	74
	3.2 Human Rights Law	75
	3.2.1 Scope of Application	77
	3.2.2 Duties of the Host Nation	88
	2.2.3 Conclusions	91
	3.3 International Humanitarian Law	92
	3.3.1 Scope of Application	95
	3.3.2 Standards of Protection	103
	3.3.3 Conclusions	117

Chapter 4 Special Protection 119
4.1 Diplomatic Privileges and Immunities 120
4.1.1 Background 121
4.1.2 Diplomatic Agents 124
4.1.3 Conclusions 130
4.2 International Privileges and Immunities Provided by Multilateral Treaties 130
4.2.1 Scope of Application 135
4.2.2 Customary Law 147
4.2.3 Conclusions 149
4.3 International Privileges and Immunities Provided by SOFAs 150
4.3.1 Scope of Application 160
4.3.2 Status of the Operation and Personnel 168
4.3.3 Powers of Arrest and Jurisdiction 177
4.3.4 SOFA Norms as Customary International Law 193
4.3.5 Conclusions 201

Chapter 5 Convention on the Safety of United Nations and Associated Personnel 205
5.1 Introduction 205
5.2 Process Leading to the Adoption of the Safety Convention 205
5.3 Analysis of the Safety Convention 213
5.3.1 Scope of Application 214
5.3.1.1 “United Nations personnel” 215
5.3.1.2 “Associated personnel” 218
5.3.1.3 “United Nations operation” 225
5.3.1.4 Relationship to international humanitarian law 233
5.3.1.5 Proposed measures to expand the scope of the Convention and the new Optional Protocol 241
5.3.1.6 Assessment 256
5.3.2 Provisions on the Legal Status of Personnel 261
5.3.3 Duty to Provide Protection 269
5.3.3.1 Duty to release or return personnel captured or detained 271
5.3.3.2 Article 8 and SOFAs 274
5.3.4 Individual Criminal Responsibility 281
5.3.5 Miscellaneous 288
5.4 Conclusions 292

Chapter 6 An Emerging Legal Regime against Impunity 293
6.1 Convention on the Safety of United Nations and Associated Personnel 295
6.2 Draft Code of Crimes against Peace and Security of Mankind 296
6.3 International Criminal Court 300
6.4 Indictments under the Ad Hoc Tribunals and the Specialised Court for Sierra Leone 303
6.5 Conclusions 305

Chapter 7 Summary and Suggestions for the Future 309
7.1 Summary 309
7.1.1 The Safety Convention in International Law 309
7.1.2 The System of Protection 313
7.2 Suggestions for the Future 318
7.2.1 A Broadened Scope of Application of the Safety Convention 319
7.2.2 Conformity of SOFA norms 319
7.2.3 Responsibility and Accountability 320
7.2.4 Combating Impunity Effectively 321
7.2.5 The Safety Convention and International Humanitarian Law 322

Treaties and Agreements 323

Table of Cases 327

Official Documents 331

Miscellaneous 342

Bibliography 343

Index 353

Foreword

Over the course of time, peace operations have become one of the main instruments for achieving the goals set out in the United Nations Charter. Despite the fact that such enterprises were not in the minds of those who drafted the Charter, peace operations have nevertheless evolved into one of the most remarkable achievements of the UN.

The concept was created in 1956 by the then UN Secretary-General Dag Hammarskjöld and the Canadian Minister of Foreign Affairs Lester B. Pearson in response to the Suez crisis. Thereafter, the concept has been developed and adapted to address contemporary conflicts. Current operations are no longer limited to observation, monitoring and reporting. The ambitious nature of present-day mandates is evidenced by the increasing significance of peace operations.

The fact that most conflicts today are intrastate has resulted in a more volatile environment for personnel engaged in peace operations. In the end, the successes of these operations depend upon the willingness of men and women to engage in such operations in the various arenas of unrest and conflict that occur regularly around the globe. In so doing, they expose themselves to great risks. In some instances they even risk their lives.

Ultimately, the adequate protection of such personnel is crucial to the success of peace operations. In effect, attacks upon this personnel constitute crimes committed against the international community.

I am writing this foreword, against the background of my experience as Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations from March 1994 to March 2004. The safety and security of personnel involved in peace operations formed part of the regular duties of us who served in the Secretariat. A deteriorating respect for the blue helmets and the UN flag became one of the most poignant issues for the Secretary-General.

The invariably volatile situation faced by personnel in peace operations has been addressed in various documents. The findings of the Secretary-General, in his *Agenda for Peace,* were that the safety and security of such personnel must be strengthened.

The 1994 Convention on the Safety of United Nations and Associated Personnel is further evidence of the continued work required to enhance their protection. Unfortunately, the 2005 Optional Protocol to that convention clearly

illustrates that this issue continues to be a topic demanding significant attention.

The need to eradicate what one may describe as an emerging 'culture of impunity' in relation to violent onslaughts upon personnel engaged in peace operations is a major challenge. The success of all future peace operations depends on how well this personnel can be protected. Acts of aggression and violence against UN personnel must simply never be tolerated.

The need to confirm the independence of the United Nations and uphold the immunity of the organisation and its personnel continues to have high priority. Equally, it is necessary for the Secretary-General to be prepared to waive the immunity of personnel in cases where, to do otherwise, would impede the course of justice.

The recently reported cases of sexual exploitation by UN peacekeepers are particularly troublesome, since respect for the protected status of this personnel is gravely compromised by such criminal acts. The responsibilities of UN personnel and respect for their protected status are mutual.

It is a fact that certain armed groups, criminal gangs and suchlike are wantonly set on attacking peace operations personnel for the sake of it, irrespective of the conduct of such staff. Though personnel security might involve situations where a wide variety of practical measures have been taken, an effective system of legal protection is nevertheless required.

In the final analysis, individual host states in cooperation with other states must engage this 'culture of impunity'. Where the evidence exists, they must arrest, charge and put on trial those suspected of committing crimes against UN personnel. Sadly, it remains a fact that there are few cases of anyone being prosecuted for attacks made against personnel involved in peace operations.

We must realise that if we are to succeed in "saving future generations from the scourge of war" we are dependent upon men and women prepared to participate in peace operations. Accordingly, the international community as a whole has an obligation to afford them the best protection possible. In this way, the success of any peace operation will be enhanced, and so too will the noble objectives of the UN Charter.

In this work, Dr Ola Engdahl provides an in-depth account of the protection afforded under international law for personnel engaged in peace operations, and of the difficulties involved in arriving at effective universal protection.

Dr Engdahl presents a system divided into a general and special protection and an emerging legal regime against impunity for crimes committed against personnel in peace operations. The Convention on the Safety of United Nations and Associated Personnel plays a prominent role in this work, as it is the only multilateral instrument to deal exclusively with the protection of personnel in peace operations. He finds certain lacunas in the present system, but the main deficiencies are to be found in relation to a lack of respect for existing rules for the protection of such personnel.

Dr Engdahl's work is a most valuable contribution to the study of this important topic and should provide an instructive introduction to those who would like to deepen their understanding of the subject.

Hans Corell
Ambassador
Former Under-Secretary-General for
Legal Affairs and the Legal Counsel
of the United Nations

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This book is an updated version of my doctoral thesis written at Stockholm University and completed in 2005.

Örebro
Ola Engdahl

Abbreviations

AJIL	American Journal of International Law
ACHR	American Convention on Human Rights
BYIL	British Yearbook of International Law
ECCAS	Economic Community of Central African States
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
ETS	European Treaty Series
EU	European Union
EUF	European Union Force
EUFOR	European Union Force in Bosnia-Herzegovina
FOMAC	Central African Multinational Force
GAOR	General Assembly Official Records
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDRL	International Disaster Response Law
IFRC	International Federation of the Red Cross
IFOR	Implementation Force
IGO	International Governmental Organisation
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
INTERFET	International Force for East Timor
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
KFOR	Kosovo Force
LJIL	Leiden Journal of International Law
MINUCI	United Nations Mission in Côte d'Ivoire

MINUSTAH	United Nations Stabilization Mission in Haiti
MFO	Multinational Force and Observers
MNF	Multinational Force
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MOSS	Minimum Operating Security Standards
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OAU	Organisation of African Union
ONUC	United Nations Operation in the Congo
ONUCI	United Nations Operation in Côte d'Ivoire
ONUMOZ	United Nations Operation in Mozambique
OJ	Official Journal of the European Union
RdC	Receuil des Cours de l'Académie de Droit International
SCOR	Security Council Official Records
SFOR	Stabilisation Force
SOFA	Status-of-Forces Agreement
SOMA	Status-of-Mission Agreement
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMIR	United Nations Mission in Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNAVEM	United Nations Angola Verification Mission
UNCRO	United Nations Confidence Restoration Operation in Croatia
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFIL	United Nations Interim Force in Lebanon
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia-Herzegovina
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Interim Administration in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISET	United Nations Mission of Support in East Timor
UNOB	United Nations Operation in Burundi
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNSECOORD	United Nations Security Coordinator
UNTAC	United Nations Transitional Authority in Cambodia
UNTS	United Nations Treaty Series
UNTSO	United Nations Truce Supervision Organization

Chapter 1

Introduction: The Safety Convention and its Legal Environment

Personnel involved in peace operations are frequently required to perform their duties within inherently risky environments. The attack on the United Nations headquarters in Baghdad in August, 2003, killing 22 people, is clear evidence of this. The response by the UN Security Council illustrates the seriousness of the commitment of the international community to improving the levels of protection available to such personnel operating in these dangerous situations. In resolution 1502 the Security Council

> 5. *Expresses its determination* to take appropriate steps in order to ensure the safety and security of humanitarian personnel and United Nations and its associated personnel, including, inter alia, by:
>   (a) *Requesting* the Secretary-General to seek the inclusion of, and that host countries include, key provisions of the Convention on the Safety of United Nations and Associated Personnel, among others, those regarding the prevention of attacks against members of United Nations operations, the establishment of such attacks as crimes punishable by law and the prosecution or extradition of offenders, in future as well as, if necessary, in existing status-of-forces, status-of-missions and host country agreements negotiated between the United Nations and those countries, mindful of the importance of the timely conclusion of such agreements; [1]

The unequivocal willingness of those personnel, either on missions of state or representing intergovernmental organisations or non-governmental organisations, is instrumental to realising the twin aims of peace and security. Efforts to protect such people are not new, but it now appears to be a determined and genuine interest on the part of the international community to enforce, as well as enhance, their protection under international law.

The purpose of this study is to examine the contribution made by the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter referred to as the Safety Convention) to the protection of personnel in peace

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1 SC Res. 1502, UN SCOR 4889th mtg., UN Doc. S/RES/1502 (2003).

operations.[2] In a larger perspective this study aims to systematise the protection of personnel in peace operations under international law and to identify strengths and weaknesses with the present system as well as some trends and developments in this area of law. The identifying and systematising of such norms may contribute to clarifying the legal protection of personnel in peace operations and thereby, it is hoped, contributes to the realisation of such protection in the field.

The Safety Convention is first and foremost a criminal law instrument and should be viewed against the background of the increasingly volatile environment in which peace operation personnel were required to operate at the beginning of the 1990s.[3] In relation to other instruments protecting personnel in peace operations, it is mainly one of enforcement. Its purpose is to prevent and punish deliberate attacks on protected personnel. State parties are under a duty to ensure the safety and security of UN and associated personnel. The Safety Convention defines a number of criminal acts and obligates parties to the convention to criminalise such acts in their national legislation. Furthermore, it states that the personnel concerned shall not be the object "of any action that prevents them from discharging their mandate."[4] It is clearly a duty imposed upon states parties not to interfere, and to prevent others from interfering, with personnel in the execution of their official duties.

However, the drafters of the Safety Convention also aimed at other objectives. It therefore includes references to other legal areas concerned with the legal status of such personnel. The Safety Convention, however, has received criticism and was the subject of a review for the purpose of strengthening and enhancing its protective regime, and its development in this respect is of particular interest.[5] In

2 Convention on the Safety of United Nations and Associated Personnel, 9 Dec. 1994, 2051 UNTS 361 (80 parties 2006-04-01 according to the UN Treaty Section http://untreaty.un.org/English/treaty.asp).

3 See, for example, UN Secretary-General, Supplement to An Agenda for Peace, position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations, paras. 15-16, UN Doc. A/50/60-S/1995/1, (1995).

4 Safety Convention, Article 7(1).

5 Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 57th Sess., Supp. No. 52, UN Doc. A/57/52 (2002), Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 58th Sess., Supp. No. 52, UN Doc. A/58/52 (2003), Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 59th Sess., Supp. No. 52, UN Doc. A/59/52 (2004), and UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 60th Sess., Supp. No. 52, UN Doc. A/60/52 (Supp) (2005).

2005, an Optional Protocol was adopted which extends the Safety Convention's scope of application.[6]

A categorisation in this work has been made between general and special protection. A *general* protection encompasses all personnel, irrespective of positions in the operation, and is provided, for example, by human rights law and international humanitarian law. By representing states and/or international governmental organisations personnel may also enjoy a *special* protection. Such protection goes beyond a general protection and is afforded some personnel based upon their position in the operation concerned. Diplomatic and international privileges and immunities are areas of international law that will be studied under that heading. The practice of concluding bilateral agreements with a state hosting a peace operation is of particular importance in this respect. A Status-of-Forces Agreement (SOFA) is a bilateral agreement concluded between the entity (international organisation or state) leading the operation and the host state. A UN Model SOFA was issued in 1990 to function as the model for future agreements. A SOFA is of principal importance to members of military contingents who are generally not covered by multilateral treaties providing privileges and immunities to personnel representing international organisations. The legal norms stipulated in SOFAs draw primarily on the law on visiting forces and international privileges and immunities, as well as on diplomatic privileges and immunities.

The emerging *legal regime against impunity* in relation to the commission of crimes against personnel in peace operations has in this work been referred to as a third category of protection. The Safety Convention has been an important tool in the development of this regime. It is modelled upon so-called "terrorist-conventions" and includes a prosecute-or-extradite mechanism (*aut dedere aut judicare*). Crimes committed against UN and associated personnel were, for example, included, as one out of five categories of crime, in the Draft Code of Crimes against Peace and Security of Mankind.[7] Attacks on personnel in peacekeeping operations and humanitarian assistance enterprises are, moreover, listed as a particular war crime under the statute of the International Criminal Court (ICC).[8] This category of protection is one of enforcement and must be viewed against other instruments providing personnel with a certain legal status. If general and

6 GA Res. 60/42, Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, UN GAOR, 60th Sess., UN Doc. A/RES/60/42 (2005).

7 Draft Code of Crimes against Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, paras. 45 and 50, UN Doc. A/51/10 (1996).

8 Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, 37 ILM 999.

special protections are to be regarded as shields for protected personnel, then the symbol for this regime against impunity is the sword.[9]

Against the background of how the protection of personnel in peace operations is systematised in this work, detailed analysis of the Safety Convention will follow after the chapters on general and special protection. References will be made in those chapters to the Safety Convention, especially in relation to the duty of states parties to establish their jurisdictions over crimes stipulated under the convention.[10] Criminal acts under the Safety Convention are "murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel" and "violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty".[11] The obligation to prosecute or extradite alleged perpetrators of such crimes is of particular importance in this respect.[12]

The Safety Convention is the first multilateral instrument dealing specifically with the legal protection of personnel in peace operations and in a work of this character it merits special attention. The negotiations in 1993 and 1994, leading up to the Safety Convention, are examined in some detail. The purpose is that it gives account for the ideas on how delegations at the time viewed important issues relating to "immunity", "jurisdiction", peacekeeping and peace enforcement operations, international humanitarian law, and the emerging importance of international criminal law. The debates within the meetings of the Ad Hoc Committee, between 2002 and 2005, which ultimately led to the creation of the Optional Protocol to the Safety Convention are also of interest since they provide an insight into how states viewed these important issues at that point in time.

For example, the reluctance shown by several delegations, not at the time parties to the Safety Convention, to extend its scope of application through an additional protocol, is interesting in view of the fact that there seems to be an overall concern expressed for the safety of personnel in peace operations. For

9 Bassiouni states that since international criminal law (ICL) incorporates human rights law protection, "it can be said that where human rights law is the shield, ICL is the sword". M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in *International Criminal Law* Vol. I, *Crimes*, 3, 46 (M. Cherif Bassiouni, ed., 2nd ed., 1999).

10 See Articles 9, 10 and 14 of the Safety Convention.

11 Article 9 includes, *inter alia*, threats and attempts to commit such crimes.

12 See Article 14, which states: "The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State."

these purposes the analysis of the Safety Convention will include different propositions presented during discussions both between 1993 and 1994 and 2002 to 2005.

1.1 Method and Material

In order to discover the content of international law it is necessary to resort to its sources.[13] The most authoritative statement regarding the sources of international law is to be found in Article 38(1) of the statute of the International Court of Justice (ICJ). According to the statute, the primary sources of international law are international conventions,[14] international customary law[15] and general principles of law.[16] Legal doctrine and judicial decisions are commonly regarded as subsidiary sources.[17] Although this work has relied upon a traditional view on sources

13 A formal source of law may be described as "the source which the legal rule derives its legal validity". Jennings, Sir Robert and Watts Sir Arthur (eds.), *Oppenheim's International Law*, Vol. I, 23 (9th ed., 1992). On the difficulty of distinguishing between formal and material sources in international law, see Ian Brownlie, *Principles of Public International Law*, 3-4 (6th ed., 2003).

14 A treaty does not create rights or obligations for states not parties to it without their consent. According to the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent". Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 34. The Vienna Convention is a treaty itself and its provisions are only applicable as treaty-law to the states that have ratified it. See Hugh Thirlway, The Sources of International Law, in *International Law* 122 (Malcolm D. Evans, ed. 2003).

15 Customary international law consists of two parts: an established practice, *usus*, and a conviction that this practice is legally binding, *opinio juris*. Rein Müllerson, The Interplay of Objective and Subjective Elements, Customary Law, in *International Law: Theory and Practice. Essays in Honour of Eric Suy*, 161 (Karel Wellens ed., 1998). The ICJ, in the *North Sea Continental Shelf Cases*, analysed the creation of customary international law: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*". North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) Judgement, 1969 ICJ Rep 3, para. 77. A treaty may mirror customary international law or develop the law by stipulating new norms under international law. Treaty norms may also over time develop into norms of customary international law, such as large parts of the UN Charter.

16 Such principles are often referred to as those which appear to be shared by a majority of domestic legal systems. Thirlway, 131. Brownlie asserts that "international tribunals have employed elements of legal reasoning" based upon domestic legal orders. Brownlie, 16.

17 Although legal doctrine is a source of subsidiary character it plays an important role in interpreting and systematising international law. Judicial decisions are generally referred to as authoritative statements of the content of international law as it stands

of international law, it is true that evidence of customary law may be sought not only from the interaction between states but also from their opinions in international foras, judicial decisions, national legislation and so on.[18] Documents of a so-called "soft law" character have also been studied, although mindful of their legal status in relation to traditional sources of international law.[19] Actors other than states are, moreover, growing in importance in the creation of international law.[20] Based upon these considerations, this work has sought to find out the law as it currently stands (*lex lata*) and to identify new developments that might be in the process of becoming law (*lex ferenda*). The latter perspective includes an assessment, for example, of the work of the Ad Hoc Committee ultimately leading an Optional Protocol to the Safety Convention and the customary law aspects of SOFA-norms. The *lex ferenda* perspective also includes suggestions on how the protection of personnel should be strengthened.

The analysis of the protection of personnel in peace operations has been somewhat affected by limitations on available sources of both primary and subsidiary character. The Safety Convention came into force in 1999 and the practice relating to it is limited, if any exists at all. Only a small number of articles have dealt in particular with the implications of the Safety Convention.[21] The following analysis of the Safety Convention has therefore partly been based upon the UN documents issued during its preparation and the current negotiations on the possibility of enhancing its protective regime. According to the Vienna Convention on the Law of Treaties, preparatory work of a treaty, such as documents issued during a diplomatic conference, may only be resorted to as a supplementary means of interpretation in cases where other means of interpretation "(a) Leaves the meaning ambiguous or; or (b) Leads to a result which is manifestly absurd or unreasonable."[22] The analysis of the Safety Convention may therefore be criticised for relying too much on its preparatory work. However, the lack of subsequent practice and the modest amount of literature have made examination

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today (*lex lata*). This is especially so with regard to practice of such institutions as the ICJ and other international courts and tribunals. See, for example, Brownlie, 5.

18 *Oppenheim's International Law*, 26.

19 G. J. H. van Hoof, *Re-thinking the Sources of International Law*, 187-189 (1983), Prosper Weil, Towards Relative Normativity in International Law, 77 *AJIL* 413, 414 (1983).

20 Bruno Simma and Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 *AJIL*, 302, 306 (1999).

21 See, for example, Steven J. Lepper, The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis, 18 *Houston Journal of International Law*, 359 (1996), Evan T. Bloom, Protecting peace-keepers: The Convention on the Safety of United Nations and Associated Personnel, 89 *AJIL*, 621 (1995), M.-Christiane Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 44 *ICLQ*, 560 (1995).

22 Article 32, Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 33.

of the preparatory work necessary. The status of the preparatory work as a subsidiary source of interpretation needs, however, to be kept in mind.

The emergence of customary law norms is relevant to this work in several aspects. Regarding the Safety Convention, it is here held that it in some respects codifies norms of customary law. The Safety Convention has also made a valuable contribution to the emergence of an international legal regime for punishing crimes committed against personnel in peace operations. Customary international law, moreover, comes into play in situations where personnel are present within the territory of a state hosting a peace operation before particular agreements on their legal status have been concluded. Not all host states may be party to major treaties on human rights and international humanitarian law and their customary law status is therefore of importance. The almost fifty-year practice of SOFAs has been assessed from a customary law perspective. Is it possible to rely on the established practice of past operations in future operations where no SOFA has been concluded? The problems of identifying when an established practice has become a rule of international law are well known.[23] In this regard it is interesting to note the position of the International Law Commission (ILC) which states that "records of the cumulative practice of international organisations may be regarded as evidence of customary international law with references to states' relations to the organisation".[24] In situations where no agreement has been concluded between the parties, the analysis of applicable norms has also relied upon the principle of consent. When a state consents to host a peace operation it may generally be interpreted as constituting consent to include established norms relating to the protection of the personnel in question, as part and parcel of the overall concept of peace operations.[25]

The analysis of SOFAs has been restricted by limited access to material on the negotiations of these agreements and a lack of documented practice following their conclusions. The study of SOFAs has therefore, in contrast to the analysis of the Safety Convention, been almost exclusively based upon primary sources of law, such as the text of particular agreements. The UN Model SOFA has, however, proved very useful in this respect. There is a surprisingly modest amount of literature dedicated to the SOFAs applicable to peace operations, especially when

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23 De Visscher compares the formation of customary international law to a gradual creation of a road across vacant land. Initially "the tracks are many and uncertain, scarcely visible on the ground. Then most users, for some reason of common utility, follow the same line; a single path becomes clear, which in turn gives place to a road henceforth recognized as the only regular way, though it is impossible to say at what moment the latter change took place". Charles De Visscher, *Theory and Reality in Public International Law,* 154-155 (1968). See also Mark E. Villiger, *Customary International Law and Treaties*, 29-32, (1985).

24 Report of the International Law Commission covering its second session, 5 June – 29 July 1950, in *Yearbook of the International Law Commission*, II, 364, 368-372 (1950).

25 See Chapter 4.3.4.

one considers the vast amount written on the practice of SOFAs in relation to visiting forces, such as the NATO SOFA (1951). Lazareff[26] has written the standard work on the law of visiting forces and a comprehensive study on the current status of visiting forces has been edited by Fleck,[27] which also deals with some aspects of SOFAs in peace operations.

Numerous books and articles have been written on the topic of peace operations. There are, however, comparatively few that address the legal aspects of such operations. Some of the classical works are by Higgins,[28] Bowett[29] and Seyersted.[30] Others, who have devoted themselves to a specific interest in the legal protection of personnel in peace operations, are Siekmann,[31] Sharp,[32] and McCoubrey and White.[33] Among others, useful documentations on peace operations include *Basic Documents on United Nations and Related Peace-keeping Forces* (Siekmann),[34] *UN Peacekeeping. A Documentary Introduction* (Bothe/Dörschel)[35] and *The Blue Helmets. A Review of United Nations Peace-keeping* (United Nations).[36]

Any study of these legal instruments is therefore partly dependent upon an analysis of other areas of international law. Such areas include, for example, human rights law and international humanitarian law, international institutional law and international criminal law. The dependency of available material has thus necessitated an apparent inconsistency in the application of legal sources when different chapters are compared. A particular international organisation's internal regulations may be of importance for clarifying the legal status of certain categories of personnel within that organisation. As such they may also carry evidentiary weight when the status of the personnel under international law is questioned.

26 Serge Lazareff, *Status of Military Forces under Current International Law,* (1971).

27 Dieter Fleck et al (eds.) *The Handbook of the Law of Visiting Forces*, (2001).

28 Rosalyn Higgins, *United Nations Peacekeeping 1946 – 1967 Documents and Commentary* Vol. I-IV, (1969 – 1981).

29 Derek W. Bowett, *United Nations Forces. A Legal Study of United Nations Practice*, (1964).

30 Finn Seyersted, *United Nations Forces in the Law of Peace and War,* (1966).

31 Robert C. R. Siekmann, *National Contingents in United Nations Peace-keeping Forces,* (1991).

32 Walter Gary Sharp, Sr., *Jus Paciarii. Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century*, (1999).

33 Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations (1996)* and Nigel D. White, *Keeping the Peace*, (2nd ed., 1997).

34 Robert C. R. Siekmann, *Basic Documents on United Nations and Related Peace-keeping Forces*, (2nd ed., 1989).

35 Michael Bothe and Thomas Dörschel (eds.) *UN Peacekeeping. A Documentary Introduction*, (1999).

36 United Nations Department of Public Information, *The Blue Helmets. A Review of United Nations Peace-keeping*, (3rd ed., 1996).

However, this work does not claim to take full account of all such regulations. Rather this study assesses the theoretical underpinning of the norms providing protection to personnel in peace operations. The process of improving security for personnel in such operations, however, includes both legal and practical measures that cannot be completely separated in a work of this nature. Much has been achieved within the UN to advance the security of personnel in terms of practical and institutional improvements.[37] The establishment of the Department of Safety and Security constitutes a major step in that development.[38] The implementation of Minimum Operating Security Standards (MOSS) at all UN duty stations is another.[39] The Lessons Learned and After Action Reports from the bombing of the UN headquarters in Baghdad are primarily focused upon improving of practical measures.[40] Such improvements are of the utmost importance for the realisation of the proper protection of personnel.

1.2 Delimitations and Terminology

The delimitations of this study are closely related to the terminology used. The definitions of the terms "protection", "personnel" and "peace operation" very much set the delimitations, and will thus be treated under the same heading.

Because this work seeks to analyse the level of protection provided, *inter alia,* by the Safety Convention, the terminology of that convention will be used as a point of departure for the definitions of terminology that are used here. The present study is not limited to UN-led operations but also embraces operations based upon a UN-mandate, but led by another organisation or state. Since this study also includes instruments providing personnel with a special status, the definition of protection in this work is somewhat broader than the notion of "safety" in the Safety Convention. Personnel in the present study are categorised based upon their legal status but, as in the Safety Convention, this includes all personnel with a formal connection to a peace operation. Finally, as with the Safety

37 See, for example, Report of the Secretary-General, Interorganizational security measures: implementation of section II of General Assembly resolution 55/238 of 23 December 2000 entitled "Safety and security of United Nations personnel", UN Doc. A/56/469 (2001). Also *Handbook on United Nations Multidimensional Peacekeeping Operations,* Chapter XI: Security and Safety of Personnel, (Department of Peacekeeping Operations 2003).

38 See Report of the Secretary-General, Strengthened and unified security management system for the United Nations, UN Doc. A/60424 (2005).

39 See Report of the Secretary-General, Safety and security of humanitarian personnel and protection of United Nations personnel, paras. 26-28, UN Doc. A/59/332 (2004).

40 *Report for the Steering Group on Iraq. Lessons Learned Report and Implementation Plan, The United Nations Headquarters crisis Response to Threat to the 19 August 2003 Attack on the United Nations Office in Baghdad,* Vol.1, *After Action Report and Appendices*, Vol.2 (2004).

Convention, the present study stops short of war. Situations where personnel in peace operations are involved as parties to an armed conflict have not been analysed. However, the criteria used to define when such a situation occurs are of great interest to examine, since such a situation changes the status of the personnel concerned in many respects.

Since this work is limited to personnel engaged in peace operations it does not analyse purely humanitarian assistance missions,[41] with no formal connection to a peace operation, or the legal framework known as international disaster response law (IDRL).[42] It does not follow from this, however, that the analysis of the protection of personnel in peace operations is of little or no interest for such efforts. On the contrary, many of the conclusions on the protection of the personnel here analysed are also of importance for personnel on international assignments in a broader perspective.

Protection

It is a well-established principle of international law that a state has the responsibility of ensuring the protection of individuals within its jurisdiction. According to the Secretary-General, the host government assumes the primary responsibility for UN and related personnel, and "this responsibility flows from every Government's normal and inherent functioning of maintaining order and protecting persons and property within its jurisdiction."[43] A host state is thus placed under an obligation to secure the general protection of *all* members of a peace operation, irrespective of any differences in legal status. As human beings they are entitled to be treated in accordance with applicable human rights law or international humanitarian law. Through bilateral or multilateral agreements with the host state in question, personnel representing states or international organisations may enjoy a higher legal status than otherwise, and be accorded certain

41 See, for instance, the United Nations Office for the Coordination of Humanitarian Affairs, www.un.org. For the terminology with regard to such efforts, see Monika Sandvik-Nylund, *Caught in Conflicts. Civilian Victims, Humanitarian Assistance and International Law*, 4-7 (2nd rev. ed., 2003). She offers the following definition of humanitarian assistance: "*assistance of an exclusively humanitarian character, provided by the international community, to meet the immediate needs of victims of emergency situations*". Ibid. 6-7.

42 See, for example, *World Disasters Report*, Chapter 8, (International Federation of Red Cross 2000), *International disaster response laws, rules and principles*, (International Federation of Red Cross 2003), www.ifrc.org. Peter Macalister-Smith, *International Humanitarian Assistance. Disaster Relief Actions in International Law and Organization*, 150-161 (1985). Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations. The Right and Duty to Humanitarian Assistance*, 311-336 (1991).

43 UN Secretary-General, Security of United Nations operations, para. 4, UN Doc. A/48/349 – S/26358 (1993).

privileges and immunities within the territory of the host state. Towards these individuals, the host state concerned is obligated to ensure a special protection.

The nature of the general and special protection may vary depending upon the international agreements to which that host state is a party. Protection under international humanitarian law, for example, denotes a positive duty to "ward off dangers and prevent harm" to protected persons.[44] The term "special protection", referred to in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (IPP),[45] has been described as one of inviolability, implying a duty upon the host state "to take all appropriate steps to prevent any attack upon the person, freedom, or dignity of those entitled to it".[46]

Host states are under an obligation to prevent wrongful acts against individuals and to punish those found guilty of committing them. Although this is an obligation that forms part of the responsibility of all states, the duty to prevent and punish is also expressed in a number of treaties, including the Safety Convention. The obligation of states to prevent and punish wrongful acts against individuals is of particular importance in cases where the host state is not party to the Safety Convention or for personnel not protected by this regime.

The term "protection" can be divided into two parts. These are procedural and substantive rules. In this study the former concerns the right of states and organisations to protect their interests when one of its citizens or agents has been maltreated; while the latter refers to rules that pertain to the legal status of the individual and the responsibilities of states (and belligerent groups) to ensure the protection of that status. The right of states to preserve their own interests when one of their nationals has been harmed in another state is commonly referred to as diplomatic protection and could be described as procedural rules.[47] It is now beyond doubt that the UN possesses the right to bring an international claim against a state found to be responsible for injuries suffered by one of its agents.[48] Presumably this right also exists for other intergovernmental organisations enjoying international capacity.

44 Frits Kalshoven, *Constraints on the Waging of War*, 42 (2nd ed., 1991).

45 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973, 1035 UNTS 167.

46 Louis M. Bloomfield and Gerald F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment. An Analysis of the UN Convention,* 72 (1975).

47 See below 1.4.1.

48 Reparation for injuries suffered in the service of the United Nations (Advisory Opinion) ICJ Rep 74 (1949). Cf. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)1989, ICJ. Rep 194 and Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory

The right of a state and/or organisation to claim reparation for an internationally wrongful act is not specific to the topic examined in this work. Although an integral part of ensuring respect for the legal status of personnel, the focus of this study will not be on procedural aspects conditioning the right to claim reparation. Nor will such aspects, for example, be dealt with in relation to human rights foras. The present work will instead deal primarily with the substantive rules. In this respect the term protection, for the purpose of this analysis, could be defined as *the duty of states to prevent and punish wrongful acts against personnel in peace operations corresponding to their legal status*. While this duty falls primarily upon the state hosting a peace operation, it has, through the Safety Convention, become elevated from a national to a universal level.

A state that fails to protect personnel present within its territory might well be in breach of an international obligation, either of a treaty-based or of a customary law character. The very nature of peace operations, however, means that the personnel concerned will be deployed in areas characterised by human suffering, violence, possible armed conflicts and chaos. It is therefore not uncommon to find such a host state not in control of certain areas of its territory. It may even be that no governmental authority at all exists to exercise territorial control. The obligations of the host state concerned must thus be judged against those things that are practically possible in relation to the requirements of the situation at hand. This fact does not alter the legal status of the personnel in question but it may affect their legal protection. It is possible that a state may not be in breach of its international obligations if it shows due diligence in its efforts to ensure the legal status of personnel.[49]

Another important aspect in this regard is the way personnel in peace operations are perceived by the local population. An effective protection is probably dependent on the fact that the legal status of the personnel in question appears as legitimate by the population within the host state. This could be a particularly important issue in relation to immunity from criminal jurisdiction of the host state. Another area of concern lies in the applicability of international humanitarian law in situations where force is used between a peace operation's military

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Opinion) 1999, ICJ Rep 62. These latter cases are of great concern for personnel representing the UN. They are dealt with in Chapter 4.2.

49 In the Home Missionary Society Claim the Tribunal stated, "It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection." Home Missionary Society Claim (United States of America v Great Britain) (1920) 6 Rep Intl Arbitral Awards 42. However, it should be noted that the standard of responsibility depends on the content of the primary obligation in question. There is, for example, no general rule in this respect in the ILC's Draft Articles on State Responsibility of 2001. See James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, 82 (2002).

personnel and local opposition. Even if theoretically sound, it is of importance for the materialisation of the protection that it is also perceived as such. The behaviour of the protected personnel concerned is therefore of the utmost importance. Any abuse of their status could prove to be detrimental in relation to the respect shown towards the operation as a whole.

Personnel

Current peace operations include a wide range of functions involving an increasing number of civilians. An important categorisation of personnel is that which falls between military and civilian personnel. The latter category includes personnel representing states, international governmental organisations (IGOs) and international non-governmental organisations (NGOs).[50] Representatives of states and IGOs generally enjoy privileges and immunities in the host state. The nature and content of these privileges and immunities may, however, vary. Representatives of NGOs often enjoy only a basic legal status provided, for example, by human rights law and international humanitarian law. In practice, however, representatives of NGOs are also accorded certain privileges and immunities through agreements with international governmental organisations – the UN, for example, as implementing partners of the mandate entrusted by the latter. In peace operations of a later date international contractors often enjoy protection under applicable SOFAs. A usual requirement is that they must be *engaged* by the organisation leading the operation.[51]

Military personnel either participate as members of national contingents, or hold a position in the operation in their individual capacities.[52] Both categories represent the entity leading the operation but members of national contingents remain in the national service of their sending states. In general terms their legal status depends upon the conclusion of a SOFA, while military officers employed in their various individual capacities enjoy privileges and immunities provided for by international instruments of a different nature.

The wide array of activities and personnel included in a contemporary peace operation tends to make it difficult to arrive at a useful and working definition of personnel taking part in such operations. The drafters of the Safety Convention were faced with similar difficulties. Notwithstanding their differing legal statuses, the Safety Convention protects "United Nations and associated personnel".[53] To

50 Pagani makes a distinction between international staff, local staff and international contractual personnel. See Fabrizio Pagani, The recruitment of civilian personnel of peacekeeping operations, 3 *International Peacekeeping,* 43, 44 (1996).

51 See, for example, Agreement Between the United Nations and Sierra Leone Concerning the Status of the United Nations Mission in Sierra Leone, Article 1(g), 2118 UNTS 190, (2000).

52 An example of the latter is military observers.

53 "United Nations personnel" means: (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian compo-

qualify as UN or associated personnel it is necessary to show the existence of a formal connection to a UN operation. In this respect this study follows the example of the Safety Convention. The concept of "peace operation" is in this study, however, in some respects wider than a "United Nations operation" and the categories of personnel covered are thus correspondingly wider.

Peace operations

The term "peace operation" is here used as an overall term denoting the wide range of activities in support of the maintenance of international peace and security. It includes operations ranging from traditional peacekeeping to peace enforcement operations, based upon a UN mandate but not necessarily under UN command and control. In many respects the term peace operation, as applied here, is similar to the term "United Nations operation" in the Safety Convention.[54] It is wider, however, since it does not exclude operations conducted by other international organisations or states. It is also narrower since the term "peace operation" in this work is primarily focused on operations involving a military component. The terminology in this area, however, is vast, but it is possible to distinguish some categories of peace operation.[55]

According to the Report of the Panel on United Nations Peace Operations (Brahimi Report), peace operations include "conflict prevention and peace-

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nents of a United Nations operation; (ii) Other officials and experts on mission of the United Nations or its specialised agencies of the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted; (b) "Associated personnel" means: (i) Persons assigned by a Government or an intergovernmental organisation with the agreement of the competent organ of the United Nations; (ii) Persons engaged by the Secretary-General of the United Nations or by a specialised agency or by the International Atomic Energy Agency; (iii) Persons deployed by a humanitarian non-governmental organisation or agency under an agreement with the Secretary-General of the United Nations or with a specialised agency or with the International Atomic Energy Agency; to carry out activities in support of the fulfilment of the mandate of a United Nations operation; (Article 1).

54 "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) Where 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).

55 Durch, for example, refers to four categories of peace operations: "traditional peacekeeping, multidimensional peace operations, humanitarian intervention, and peace enforcement". William J. Durch, Keeping the Peace: Politics and Lessons of the 1990s, in *UN Peacekeeping, American Politics, and the Uncivil Wars of the 1990s*, 1, 3-10 (William J. Durch, ed., 1996).

making; peacekeeping; and peace-building."[56] Bothe states that the Secretary-General's report *An Agenda for Peace*[57] including its supplement[58] and the Brahimi Report on the evaluation of peacekeeping "reflect a practice of operations, in the new terminology 'peace operations', of a much more complex character than the initial peace-keeping operations."[59] As the present study is primarily limited to those operations that include a military component, peacekeeping operations (as the term is used within the UN system) are central to this thesis. Peace operations also include those operations mandated with enforcement powers under Chapter VII of the UN Charter. This study, however, stops short of cases where operations involve personnel as a party to an armed conflict.

The legality of peacekeeping operations under the UN Charter has been approved by the ICJ in the *Certain Expenses Case* and it is now beyond doubt that it falls within the competence of the UN to establish such operations.[60] The ICJ acknowledged that the General Assembly had the power to create peacekeeping forces, although not including enforcement powers. The Security Council, however, is empowered to establish peace operations with enforcement powers under Chapter VII of the UN Charter.[61] The concept of *peacekeeping* has developed in practice and is underpinned by three basic principles:[62] "consent of the parties, impartiality and the non-use of force except in self-defence."[63] It was introduced by the UN in 1956 in a response to the Suez crisis. A UN force was deployed in

56 Report of the Panel on United Nations Peace Operations, para. 10, UN Doc. A/55/305 – S/2000/809 (2000).

57 UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Doc. A/47/277 – S/24111 (1992).

58 UN Secretary-General, *Supplement to An Agenda for Peace: Position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1 (1995).

59 Michael Bothe, Peacekeeping, *The Charter of the United Nations. A Commentary*, Vol. 1, 648, 663 (Bruno Simma et al eds., 2nd ed., 2002). The conclusions of the reports have as a matter of principle been endorsed by the Security Council. Ibid.

60 Certain Expenses of the United Nations (Advisory Opinion) 1962, ICJ Rep 4, 151.

61 Nigel D. White, The UN Charter and Peacekeeping Forces: Constitutional Issues, 2 *International Peacekeeping*, 49 (1995).

62 It will, from a legal point of view, fall somewhere between Chapter VI and VII of the UN Charter. A peacekeeping operation would be of a more interfering character than that is envisaged under Chapter VI of the UN Charter but less interfering than enforcement measures under Chapter VII. Peacekeeping operations are therefore at times referred to as operations coming under the imaginary Chapter VI ½. See Ove Bring, *FN-stadgan och världspolitiken: Om folkrättens roll i en föränderlig värld*, 15 (4th ed., 2002). In practice, however, traditional peacekeeping operations are often referred to as "Chapter VI operations" and those involving enforcement measures "Chapter VII operations". The UN has no forces of its own and each operation is dependent on voluntary contributions of member states.

63 *Supplement to An Agenda for Peace*, para. 33. Nigel D. White, *Keeping the Peace*, 232-244 (1997).

Egypt with the task to "secure and supervise the cessation of hostilities"[64] and functioned as an interpositionary force between Egypt and Israel. Being a neutral body that both parties could rely on, the UN forces functioned as a tool put at the disposal of the warring states. In this respect, the UN forces contributed to the process of improving levels of confidence between the parties, and in the end to a peaceful resolution of the conflict. In operations where military force has been required to act as a buffer between warring parties, the adherence to these basic principles appears to have generally worked well.[65]

However, by the end of the Cold War the UN had taken on a much greater responsibility in relation to operations both in volume and ambition.[66] Operations, known as *second-generation peace-keeping*,[67] became multifunctional and included a wide variety of actors, often with a large civilian component.[68] Such operations have also been described as, for example, *expanded peacekeeping* or *wider peacekeeping*.[69] The role of the personnel engaged in such operations has been explained as one where they are "mandated to seek just and lasting resolutions" of a conflict, in contrast to earlier operations where the personnel concerned had

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64 GA Res. 998 (ES-I) (1956).

65 See e.g. United Nations Peacekeeping Force in Cyprus (UNIFICYP) SC Res. 186, UN SCOR, 1102nd mtg., UN Doc. S/RES/186 (1964), United Nations Emergency Force II (UNEF II) SC Res. 340, UN SCOR, 1750th mtg., UN Doc. S/RES/340(1973), United Nations Disengagement Observer Force (UNDOF) SC Res. 350, UN SCOR, 1774th mtg., UN Doc. S/RES/350 (1974), United Nations Interim Force in Lebanon (UNIFIL) SC Res. 425, UN SCOR, 2074th mtg., UN Doc. S/RES/425 (1978).

66 In 1988, 11 121 personnel (military, police and civilian) were deployed in UN peacekeeping operations and in December 1994, 77 783 personnel were deployed. *The Blue Helmets*, 4.

67 Ratner defines second-generation operations as "UN operations, authorized by political organs or the Secretary-General, responsible for overseeing or executing the political solution of an interstate or internal conflict, with the consent of the parties". Steven R. Ratner, *The New UN Peacekeeping. Building Peace in Lands of Conflict After the Cold War*, 17 (1997).

68 See *The Blue Helmets*, 5. Michael, W. Doyle, Ian Johnstone, and Robert C. Orr, Introduction, Keeping the peace, in *Multidimensional UN Operations in Cambodia and El Salvador,* 1, 17 (Michael, W. Doyle, Ian Johnstone, and Robert C. Orr Eds., Doyle, Johnstone, and Orr, 1997). A. B. Fetherston, *Towards a Theory of United Nations Peacekeeping*, 23-24 (1994). Examples are United Nations Angola Verification Mission I – III (UNAVEM I- III), SC Res. 626, UN SCOR, 2834th mtg., UN Doc. S/RES/626 (1988), SC Res. 696, UN SCOR, 2991st mtg., UN Doc. S/RES/696 (1991), SC Res. 976, UN SCOR, 3499th mtg., UN Doc. S/RES/976 (1995), United Nations Transitional Authority in Cambodia (UNTAC), SC Res. 745, UN SCOR, 3057th mtg., UN Doc. S/RES/745 (1992), United Nations Mission in Haiti (UNMIH) SC Res. 867, UN SCOR, 3282nd mtg., UN Doc. S/RES/867 (1993).

69 See, e.g. Trevor Findlay, *The Use of Force in UN Peace Operations*, 5-6 (2002), and Francois Hampson, State's military operations authorized by the United Nations and international humanitarian law, in *The United Nations and International Humanitarian Law,* 375-6 (Luigi Condorelli, ed., 1995).

"studiously avoided tackling the root causes of armed conflict in favour of containment and de-escalation".[70] Sometimes this type of operation is also characterised by a lack of consent by parties in the mission area, which do not represent the host state. Hampson has described this kind of operation, with regard to the question of consent, that "[o]perational consent must be present but tactical or local consent may be lacking."[71]

From being largely international in character, the great majority of armed conflicts during the 1990s and up to the time of writing were non-international in character. As a result, UN operations have primarily been deployed in the area of *internal* conflict, such as Somalia,[72] the former Yugoslavia,[73] Cambodia,[74] Mozambique,[75] Haiti[76] and Rwanda.[77] The nature of conflict has made it difficult to hold on to the principles of consent, impartiality and the use of force in self-defence.[78] A sustained lack of discipline among rival forces, often accompanied by the objective of exterminating or otherwise removing people of a particular ethnic, religious or cultural group, which in itself contravenes international

70 Findlay, 5. Ratner asserts that [w]hile the earlier missions primarily sought to minimize external conflict by monitoring cease-fires, the latest efforts strive to advance more fundamental goals: civil order and domestic tranquillity; human rights, from those most basic to human dignity to those empowering a people to choose its government; and economic and social development." Ratner, 1.

71 Hampson, 375. Some authors also refer to a third generation of peacekeeping. Against the background of the experiences of UNOSOM II, operations authorised to use force beyond the concept of self-defence have been regarded as third-generation peacekeeping. Mari Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations*, 51-2 (2002).

72 United Nations Operation in Somalia I-II (UNOSOM I-II), SC Res. 751, UN SCOR, 3069th mtg., UN Doc. S/RES/751 (1992), SC Res. 814, UN SCOR, 3188th mtg., UN Doc. S/RES/814 (1993).

73 United Nations Protection Force (UNPROFOR) SC Res. 743, UN SCOR, 3055th mtg., UN Doc. S/RES/743 (1992).

74 United Nations Transitional Authority in Cambodia (UNTAC), SC Res. 745, UN SCOR, 3057th mtg., UN Doc. S/RES/745 (1992).

75 United Nations Operation in Mozambique (ONUMOZ), SC Res. 797, UN SCOR, 3149th mtg., UN Doc. S/RES/797 (1997).

76 United Nations Mission in Haiti (UNMIH) SC Res. 867, UN SCOR, 3282nd mtg., UN Doc. S/RES/867 (1993).

77 United Nations Assistance Mission for Rwanda (UNAMIR), SC Res. 872, UN SCOR, 3288th mtg., UN Doc. S/RES/872 (1993).

78 According to the Panel on United Nations Peace Operations, these principles have been challenged, in the context of modern peace operations deployed in internal conflicts, by so-called spoilers who seek to undermine the peace process. The principles of consent, impartiality and use of force in self-defence should, however, according to the Panel 'remain the bedrock principles of peacekeeping'. Report of the Panel on United Nations Peace Operations, Part 2, para. 48. See paras. 21-22, and 48-55 at http://www.un.org/peace/reports/peace_operations/docs/part2.htm.

humanitarian law, resulted in a deteriorating security situation for UN personnel.

The Security Council bases *peace enforcement operations* on a Chapter VII resolution.[79] UN Security Council resolutions that provide an operation with a peace enforcement mandate are commonly characterised by the terminology of "the use of all necessary means" to fulfil a set of defined tasks.[80] The principal criteria of traditional peacekeeping operations do not as such apply to peace enforcement operations. In peace enforcement operations, the *consent* of the host nation concerned is not necessary. In practice, however, it is sought, and often received.[81] A Chapter VII mandate provides peace operation forces with the authority to enforce the tasks entrusted to them, irrespective of the consent of the host nation. The forces therefore maintain a strong position in relation to the host nation. The criterion of consent is the principal divide between war and peace. So long as peace operation forces are present with the consent of the host nation, they will not simultaneously be engaged in armed conflict with that nation. The consent of the host nation is therefore of fundamental importance to the legal status of the forces. If peace operation forces are drawn into armed conflict, for example, with resistance movements present in the territory of the host nation, the legal position of those forces vis-à-vis the host nation will not be affected. The capability of the host nation to guarantee the rights of personnel under applicable SOFAs may, however, be restricted in areas where it does not exercise effective control.

Impartiality is a consequence of the dependency of consent-criterion. Even though impartiality is something to strive for, it is, in fact, not indispensable in a peace enforcement operation. The very nature of peace enforcement operations goes beyond *self-defence* limitations on the use of force. It should be noted, however, that the principle of self-defence has been given a wide interpretation by the UN. It has repeatedly been stated that self-defence includes "resistance to

79 The Security Council has the right to take enforcement measures against any member of the UN when it finds that a situation poses a threat to international peace and security according to Article 39 of the UN Charter. On the practice of the Security Council in this respect, see Inger Österdahl, *Threat to the peace: the interpretation by the Security Council of Article 39 of the UN Charter* (1998).

80 See e.g., SC Res. 794, UN SCOR, 3145th mtg., para. 10, UN Doc. S/RES/794 (1992), (Somalia), SC Res. 929, UN SCOR, 3392nd mtg., para. 3, UN Doc. S/RES/929 (1994), (Rwanda).

81 See e.g., East Timor, SC Res. 1264, UN SCOR, 4045th mtg., UN Doc. S/RES/1264 (1999), Haiti, peaceful deployment of the US-led multinational force, SC Res. 944, UN SCOR, 3430th mtg., UN Doc. S/RES/944 (1994), the Military Technical Agreement between KFOR and the Federal Republic of Yugoslavia and the Republic of Serbia at http://www.nato.int/kfor/kfor/documents/mta.htm, and the General Framework Agreement for Peace in Bosnia-Herzegovina at http://www.nato.int/ifor/gfa/gfa-home.htm.

attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council".[82]

Although peace operation forces may not initially act as combatants in an armed conflict, the nature of their tasks and the environment in which they act may have the effect of drawing them into an armed conflict and thus becoming combatants under international humanitarian law. The situation may become very difficult to determine in cases where there is no government in office to exercise control over its territory and where there is no counterpart from which to obtain consent.

The operations against North Korea[83] and Iraq,[84] decided under Chapter VII of the UN Charter, are defined as *enforcement operations*. They are examples of operations established *against* the will of the target states (North Korea and Iraq clearly did not consent). In these operations there were identified enemies, and the laws of war applied unequivocally to the use of force by the UN-mandated coalitions. Peace enforcement operations conducted upon the basis of consent of the host nation take on the character of robust police operations rather than of military forces engaged in armed conflict.[85]

Command and control

Since the mid-1990s, it has been the practice to authorise coalitions of the willing, regional organisations or single states to carry out operations based upon a

82 See e.g. Report of the Secretary-General on the implementation of Security Council resolution 340 (1973), UN Doc. S/11052/Rev. 1 (1973) and Report of the Secretary-General on the implementation of Security Council resolution 425 (1978), UN Doc. S/12611 (1978).

83 SC Res. 84, UN SCOR, 476th mtg., UN Doc. S/RES/84 (1950) [S/1588].

84 SC Res. 678, UN SCOR, 2963rd mtg., UN Doc. S/RES/678 (1990).

85 A study of the peacekeeping doctrines of the United Kingdom, United States and France shows these states' efforts to come to terms with the problems connected with the new character of conflicts where the consent of the parties is limited. It is possible to distinguish three pillars (with some variations); i) traditional peacekeeping, ii) peace enforcement, iii) war. The first pillar is based upon Chapter VI of the UN Charter and the use of force is limited to self-defence. Pillars ii) and iii) are based upon Chapter VII of the UN Charter, involving enforcement measures and force is permitted beyond the concept of self-defence. The third pillar (war) is different from the other two in that it involves a designated enemy. See, Peter Viggo Jakobsen The Emerging Consensus on Grey Area Peace Operations Doctrine: Will It Last and Enhance Operational Effectiveness?, 7 *International Peacekeeping*, 41 (2000).

mandate of the Security Council,[86] such as in Bosnia-Herzegovina,[87] Kosovo,[88] Rwanda,[89] East Timor[90] and Afghanistan.[91] This practice has brought to the fore questions on the exercise of command and control over such operations. The exercise of command and control, moreover, is an indication of the extent to which personnel should be regarded as agents of the entity leading the operation and whether or not their actions are imputable to that entity.[92] It is the position of the UN "that liability for damage caused by members of United Nations Forces is attributable to the Organisation".[93] The UN does not, however, recognise liability for combat-related activities unless it exercises exclusive command and control over the operation in question.[94] In cases where the Security Council has authorised a Chapter VII operation to be "conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation".[95]

Responsibility under international law for states or international organisations for peace operation activities is a complex issue and beyond the scope of this work.[96] The exercise of command and control, however, is also of importance

86 Daphna Shraga, The United Nations as an actor bound by international humanitarian law, in *The United Nations and International Humanitarian Law*, 328 (Luigi Condorelli, ed., 1995).

87 The NATO-led Implementation Force (IFOR), SC Res. 1031, UN SCOR, 3607th mtg., UN Doc. S/RES/1031 (1995).

88 The NATO-led Kosovo Force (KFOR) SC Res. 1244, UN SCOR, 4011th mtg., UN Doc. S/RES/1244 (1999).

89 The French-led Operation Turquoise in Rwanda assisting the United Nations Mission in Rwanda (UNAMIR), SC Res. 929, UN SCOR, 3392nd mtg., UN Doc. S/RES/929 (1994).

90 The Australia-led International Force in East Timor (INTERFET) in East Timor SC Res. 1264, UN SCOR, 4045th mtg., UN Doc. S/RES/1264 (1999).

91 The, initially, UK-led International Security Assistance Force (ISAF) SC Res. 1386, UN SCOR, 4443rd mtg., UN Doc. S/RES/1386 (2001).

92 ICJ has declared an "agent" to be "any person who, whether paid official or not, or helping to carry out, one of its functions – in short, any person whom it acts." *Reparation Case*, 177. In the *Nicaragua Case*, the ICJ required, in principle, the exercise of "effective control" over military forces in order for the acts of such forces to give rise to international responsibility of the state in question. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) 1986, ICJ Rep 14, para. 115.

93 Report of the Secretary-General, Financing the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters, paras. 6-8, UN Doc. A/51/389 (1996).

94 Ibid., para. 16.

95 Ibid.

96 See Final Report of the International Law Association, Berlin Conference *Accountability of International Organisations*, 21 (2004), Niels Blokker, Is the

in order to establish the nature of the special protection where, no agreement on the legal status of personnel would at the time have been concluded with the host nation. Should the personnel be considered agents of the organisation, or state(s), leading[97] the operation or of their state of nationality? Is it in such cases possible to rely on the customary law of diplomatic privileges and immunities or the privileges and immunities of an international governmental organisation? This work does not purport to examine all UN-authorised operations from a command and control perspective.[98] Suffice to say, it is the exercise of command and control that has to be examined in each case to ascertain whether or not the personnel concerned are agents of the entity leading the operation or of their state of nationality.[99]

1.3 Procedural Mechanisms

Under this heading, the right of states and international governmental organisations to claim reparation for injurious acts against its citizens, or agents, in the state hosting a peace operation, is discussed. To be able to find out whether or not a citizen, or agent, has been maltreated it is necessary to judge the behaviour of the host state against a relevant standard of treatment. Under the law of diplomatic protection, the standard of treatment that has developed in practice is known as the international minimum standard. This standard is today largely reflected in the international human rights law. If a citizen, or agent, is entitled to a higher level of protection, such as privileges and immunities stipulated in a

Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing', 11 *EJIL*, 541, 547 (2000).

97 The term "leading" does in this respect not imply full command and control over the operation.

98 According to the UN, the principle in joint operations is that "international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations". Report of the Secretary-General, Financing the United Nations Protection Force, para. 18.

99 The Artemis operation may be taken as an example of an operation involving complex command and control issues. Based upon a Chapter VII-mandate of the Security Council, directed to member states, the multinational operation *Artemis* was launched by the EU to support the peace process in the Democratic Republic of the Congo in close coordination with the UN operation MONUC. France acted as the "Framework nation" with the operational headquarters based in Paris. Under the responsibility of the Council, political control and strategic direction of the operation was exercised by the EU's Political and Security Committee. See 9957/03 (Presse 156), Brussels, 5 June 2003, Adoption by the Council of the Joint Action on the European Union military operation in the Democratic Republic of Congo (DRC), and SC Res. 1484, UN SCOR, 4764th mtg., paras. 1 and 4, UN Doc. S/RES/1484 (2003).

multilateral or bilateral treaty, the relevant standard of treatment is thus correspondingly higher.[100]

1.3.1 Diplomatic Protection

Diplomatic protection is primarily a mechanism to safeguard the interests of a state when its citizens have been maltreated in a foreign state.[101] Diplomatic protection as a discipline of international law has traditionally been treated under the heading of state responsibility.[102] In principle, state responsibility for injuries to aliens means that any state admitting persons into its territory has a legal responsibility for their protection, even though the nature of this obligation may vary according to circumstances.[103] From the standpoint of the state having citizens abroad, the institution of diplomatic protection has been described as "essentially a procedural device designed to trigger the application of the substantive law governing the Responsibility of States for Injuries to Aliens."[104]

Before the Second World War, and the development of conventional human rights law, there was no codified standard according to which states should treat aliens. Historically, disputes concerning injuries to aliens have been decided by international tribunals and claims commissions, which have produced a jurisprudence through which an international minimum standard has emerged. The

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100 It should be noted that the law of diplomatic, or functional, protection concerns three levels of legal relations: that between the host state and the sending state (or international governmental organisation); that between the sending state (or international governmental organisation) and the individual in question; and the host state and the individual in question. Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, 66-67 (2001). Tiburcio speaks of diplomatic protection in general and thus does not refer to the case of peace operations.

101 The right of diplomatic protection is a right for states and not individuals. It falls within the exclusive discretion of the state whether or not it decides to exercise its right of diplomatic protection. See C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, 56-61 (1966).

102 It may then be held responsible by the injured state and compelled to make reparation. The obligation to make reparation is regarded as the core principle of state responsibility and is well established in customary international law. The Permanent Court of International Justice (PCIJ) has confirmed its fundamental character. In the *Chorzów Factory Case* (Indemnity) (Merits) it commented "… it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." See Case Concerning the Factory at Chorzów (Germany v Poland) PCIJ Rep Series A. No 17 at 29 (1928).

103 The "obligation to make reparation" refers mainly to the *consequences* facing the state which breaches an international obligation and the possibilities available for the injured state to receive compensation. The nature and content of the obligations has not received the same attention.

104 Richard Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 *RdC*, 329, 357, (1978-III).

international minimum standard has not been codified, and the assessment of its content requires an examination of some central decisions of tribunals and commissions. In many respects, the international minimum standard is closely related to the responsibility of states and the acts of their officials. An assessment of the relevant standard, therefore, will also involve these aspects. The international minimum standard requires, *inter alia*, the prevention and punishment of criminal acts committed against aliens, an obligation, established in customary law, and in many respects resembling the duties stipulated in the Safety Convention.

The protection of foreigners has strong traditions.[105] In his treatise on *The Law of Nations*, Emmerich de Vattel formulated a thesis on the protection of citizens abroad. He stated:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The Sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[106]

The obvious risk of abuse by a strong state of a weaker one gave rise to objections against this thesis.[107] Opposition against the practice of diplomatic protection

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105 In the Middle Ages, an individual seeking redress for injuries allegedly done to him had the opportunity of engaging in self-help, or to obtain a so-called letter of reprisal from his head of state. A letter of reprisal would have the effect, to a certain extent, of legalising the action. More importantly, it provided a theoretical connection between the injured alien and his home state. In that sense, the dispute transferred from the national law level to the international law level. The dispute, therefore, became in a sense a dispute between states. The system with letters of reprisals that could be issued by the ruler to his citizens was obviously something that could be abused and did not support friendly relations with other states. For these reasons, modifications of both a customary as well as a treaty-based nature began to evolve. The purpose was to put restrictions on the possibilities of executing reprisals. It *inter alia* took the form of a need to demonstrate by the allegedly injured citizen, for his ruler, that his cause was a just one. He could, moreover, be required to show that he had tried, but failed, to obtain redress under the law of the host state. See Richard B. Lillich, The Human Rights of Aliens in Contemporary International Law, 8 (1984).

106 Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, III, 136 (translation of the edition of 1758 by Charles G., Fenwick 1916). According to Dunn, “this celebrated passage is frequently cited as the real basis of the practice of diplomatic protection of citizens abroad.” Frederick Sherwood Dunn, *The Protection of Nationals: a Study in the Application of International Law,* 48 (1932).

107 Interestingly, Vattel also provided support for those who sought to restrict diplomatic protection. Concerning the exclusiveness of the sovereign’s jurisdiction over his territory, Vattel claimed: “Sovereignty following upon ownership gives a Nation jurisdiction over the territory which belongs to it. It is the part of the Nation, or of its sovereign, to enforce justice throughout his territory subject to it, to take cognizance

began to grow in Latin America. In 1868, the Argentinean Carlos Calvo published an extensive treatise on the law of nations. He argued that foreigners could not expect a superior form of treatment compared with that of the citizens of the country concerned and that an international responsibility could not be incurred by a state that permitted foreigners access to the courts in the same way as its citizens. His views came to be known as the Calvo Doctrine, and found extensive support among Latin American states.[108]

By the end of the eighteenth century, the United States and Great Britain included in the Jay Treaty of 1794 (named after John Jay, the first chief justice of the US Supreme Court) provisions for the establishment of three arbitration commissions. It was the beginning of the modern era of international arbitration and the bilateral Jay treaties came to have a significant influence on the development of diplomatic protection in international law.[109] Ad hoc-established claims commissions during the nineteenth century considerably developed the jurisprudence of the subject.[110] The publication in 1915 of Borchard's treatise on *The Diplomatic Protection of Citizens Abroad* caused the subject to be recognised as a separate branch of international law.[111]

The United Nations International Law Commission (ILC) had considered at its first session that "The Law of State Responsibility" was one of 14

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of crimes committed therein, and of the differences arising between the citizens. Other Nations must respect this right; and as the administration of justice necessarily requires that every sentence, pronounced in due form and by the court of the last resort, be regarded as and executed as such, when once a case in which foreigners are involved has been decided in due form, the sovereign of the litigants may not review the decision. To undertake to inquire into the justice of a definitive sentence is an attack upon the jurisdiction of the court which passed it. Hence a sovereign should not interfere in the suits of his subjects in foreign countries nor grant them his protection, except in cases where justice has been denied or the decision is clearly and palpably unjust, or the proper procedure has not been observed, or finally, in cases where his subjects, or foreigners in general, have been discriminated against.... The principle may be accepted without any reference to the merits of the particular case which turned on the facts involved." Vattel, 139.

108 Dunn, 56.

109 Ibid., 52-53.

110 Claims commissions were set up between the United States and Mexico under the conventions of 1839, 1848, 1868 and 1923. Similar commissions were established between the United States and Great Britain under the conventions of 1853, 1871, and 1908.

111 In the United States, the title of the work came to be known as the technical name for the subject, and even his classification and terminology became generally accepted. See Dunn, 60. The traditional law on the treatment of aliens, naturally, did not deal with protection of personnel in peace operations. Its primary aim was rather to maintain "a unified economic and social order for the conduct of international trade and intercourse" Dunn, 1, Lillich 367.

topics ripe for codification.[112] Up until the reports by the special rapporteur, Dr García-Amador, between 1956 and 1961,[113] they had dealt exclusively with State Responsibility for Injuries to Aliens. With the appointment of special rapporteur Ago to the ILC, there was a shift of focus to a more general approach on the law of state responsibility.[114] This general approach is illustrated by the set of draft articles adopted by the ILC in 2001.[115] However, in 1965, Bishop wrote on the topic of state responsibility that

112 Report of the International Law Commission to the General Assembly, *Yearbook of the International Law Commission*, II, 278, 281, (1949). In September 1927, the Assembly of the League of Nations had submitted three subjects to an international conference on the codification of international law. One of these was the responsibility of states for damage done in their territories to the person or property of foreigners. Forty-seven states (including eight states not members of the League of Nations) were represented at the first conference for the Codification of International Law held at the Hague on 13 March 1930. Although the subject was thoroughly examined during the conference, the states failed to reach an agreement on a future convention. See Dunn, 65.

113 García-Amador, First Report on State Responsibility, *Yearbook of the International Law Commission*, II, 173 (1956); García-Amador, Second Report on State Responsibility, *Yearbook of the International Law Commission*, II, 104 (1957); García-Amador, Third Report on State Responsibility, *Yearbook of the International Law Commission*, II, 47 (1958); García-Amador, Fourth Report on State Responsibility, *Yearbook of the International Law Commission*, II, 1 (1959); García-Amador, Fifth Report on State Responsibility, *Yearbook of the International Law Commission*, II, 41 (1960); and García-Amador, Sixth Report on State Responsibility, *Yearbook of the International Law Commission*, II, 1 (1961).

114 In its work on codifying the law of state responsibility, Special Rapporteur Ago thought it useful to recapitulate previous codification attempts to the members of the International Law Commission. From this review, it is apparent that the codification on the law of state responsibility has attracted a lot of attention from private, regional, as well as international bodies. On the one hand, it may be held that these codification attempts have not received sufficient support and therefore is not significant when analysing the content of the customary standard of treatment of aliens. On the other hand, they may at least be considered to be a subsidiary source of international law as it is an expression of the "most highly qualified publicists". Several of the draft articles may also be regarded as reflecting an *opinio juris* shared by a number of states. Together with the vast number of decisions of the arbitration tribunals, these attempts at codification will be referred to below as support for views on the content of the relevant standard of treatment. See First report on State Responsibility, by Mr. Robert Ago, Special Rapporteur-Review of previous work on codification of the topic of the international responsibility of States, *Yearbook of the International Law Commission*, II, 125, 127 (1969).

115 Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). Report of the International Law Commission on the work of its fifty-third session, GAOR, 56th Sess., Supp. No. 10, Chapter IV.E.1, UN Doc. A/56/10 (2001).

> When we speak of "State Responsibility" we mean that area of international law which from the standpoint of the defendant state is thought of as "State responsibility for injury to aliens"; from the plaintiff state regarded as "Diplomatic protection of citizens abroad"; and from the procedural standpoint described as "International claims". There are, of course, other types of state responsibility, as for breach of treaty or direct state-to-state injury; but in present-day usage the term "state responsibility" is reserved primarily for this area of the law.[116]

In 1996 the topic of diplomatic protection resurfaced on the agenda of the ILC, the commission identifying it as one of three topics appropriate for codification and progressive development.[117] The following year a working group within the ILC reported "the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest."[118] The working group further held that the work of the commission "should focus on the consequences of an internationally wrongful act". As with the topic of state responsibility, the topic of diplomatic protection is limited to the study of secondary rules and leaves aside the content of the international legal obligation that is incumbent on a state.[119]

1.3.2 Functional Protection

The historical account of diplomatic protection clearly shows that this is a question on the international plane between states. When an agent of the UN was killed on a mission for that organisation this also became a matter for international governmental organisations. The assassination of UN official Count Bernadotte, a Swedish citizen, in Israel in 1948 led the General Assembly to ask the ICJ to give an Advisory Opinion on the question of whether the UN had "as an Organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or the persons entitled through him?"[120] The Court found that the UN was "a subject of international law and capable of possessing international rights and duties, and

116 William W. Bishop, General Course of Public Law, 115 *RdC* 147, 384 (1965-II).

117 Report of the International Law Commission on the work of its forty-eighth session, GAOR, 51st Sess., Supp. No. 10, para. 249 and Annex II Addendum 1, UN Doc. A/51/10 (1996).

118 Report of the International Law Commission on the work of its forty-ninth session, GAOR, 52nd Sess., Supp. No. 10, para. 172, UN Doc. A/52/10 (1997).

119 Ibid., paras. 180-1.

120 *Reparation Case*, 174.

that it ha[d] capacity to maintain its rights by bringing international claims".[121] The UN invoked its own right, and not that of the agent, and secured respect for its functions. The organisation's connection to the individual injured was not one of nationality but one of function and the task he had been authorised to perform. The protection could therefore not be defined as traditional diplomatic protection but instead the Court referred to a "functional protection."[122] The reference to functional protection is evidence of the difference between states and international organisations as illustrated in the nature of privileges and immunities accorded the representatives of these entities.

Is it possible for both the state of nationality and the international organisation to claim reparation of the state hosting a peace operation, if one of its nationals/agents has been injured? During the United Nations operation in the Congo (ONUC 1960-1964), the question of responsibility of the government for violent acts committed against the force was not covered in the status agreement. According to Higgins, such responsibility "rests none the less in general international law; and the general international law right of the UN to claim on behalf of its forces remained unimpaired."[123] It would seem that there exist concurrent legal rights of basing such protest or claim. As defined in the *Reparation Case*, the organisation may base such a right upon the breach of a functional protection of one of its members while the state may base such right upon the customary law of diplomatic protection.[124]

No legal claims seem to have been brought against the government of the Congo but instead the UN protested on numerous occasions against the acts of violence directed against its forces. At times, even the home state of the attacked forces protested.[125] The protests brought by national states seem to have recognised the exclusive international character of the force and, according to Bowett,

121 Ibid., 179.

122 Ibid., 184. The Court noted, however, that there may be competing claims in cases of injuries to agents of international organisations by both the organisation and the state of nationality of agents but found no rule assigning priority to either the state or Organisation. Ibid.

123 Rosalyn Higgins, *United Nations Peacekeeping, Documents and Commentary, III Africa*, 208 (1980).

124 Bowett believes, however, that while, in general, "the UN and not the participating State [was] the primary claimant in respect of injuries to ONUC personnel … this would only be true where the agent was injured in the course of his official duties as agent. If he were, for example on leave it may well be that the right of functional protection has no basis and only the national State could claim." Bowett, 243, note 99.

125 The arrest of three Swedish helicopter pilots on 3 March 1961, caused the Swedish Government to protest to President Kasa-Vubu and expressed "the expectation of the Swedish Government that measures will be taken to prevent the recurrence of such acts of violence, which in the Swedish government's view infringe the conditions for the presence and activities of the UN forces in the Congo in accord-

were even "in the nature of an association of the State with formal United Nations protest and did not attempt to press a separate claim on the basis of a breach of the Congo's duties towards aliens."[126] Bowett accordingly concludes that there was "no question of concurrent protection, functional and diplomatic, on two different bases, for both protests were based on the fact that the personnel were United Nations personnel and neither protest involved an actual claim."[127] Higgins, on the other hand, asserts that it is "arguable that the contributing states retained a right of protest at the diplomatic level; and the issue of the preferable protecting authority in respect of a legal claim never arose."[128] Although the ICJ held that the UN may base a right to claim reparation upon the breach of a functional protection of one of its members, while the state of nationality may base such right upon the customary law of diplomatic protection, it declared in the *Reparation Case* that there is "no rule of law which assigns priority to the one or to the other".[129] The Court believed, however, that the parties were capable of finding "solutions inspired by goodwill and common sense".[130]

It is probable that the international organisation would have a primary right to claim reparations for injuries to the agent in his official capacity, while the state of nationality would have the primary right for acts not related to the official duties of the agent.

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ance with the relevant UN resolutions." See Seyersted, 114. Documents on Swedish Foreign Policy 1961, 57 (Utrikesfrågor) Royal Ministry for Foreign Affairs (1962).

126 Bowett, 243.

127 Ibid.

128 Higgins, 208.

129 *Reparation Case*, 185.

130 Ibid., 186.

Chapter 2

Jurisdiction and Immunity

This chapter deals with general principles on jurisdiction and immunity of states and international governmental organisations. Its purpose is to provide a background to these important areas of international law. The protection of personnel in peace operations is closely related to issues of jurisdiction and immunity and it is therefore necessary to give a brief account of some of the essential principles and rules in this respect. A number of general principles, according to which national courts may exercise jurisdiction over criminalised acts, have developed in international law with varying support.[1] Some of these principles of jurisdiction are dealt with in this chapter. The principle of prosecute-or-extradite has been incorporated in many treaties and the jurisdiction based upon these treaties is described here. The section on jurisdiction ends with an overview of the competence of international tribunals and the International Criminal Court (ICC). Rules on immunity will thereafter be briefly examined with reference to multilateral and bilateral treaties. As this chapter aims to provide necessary background information to issues discussed later in this work, a short introduction is also given to the bilateral agreement on the status of personnel in peace operations, known as a status-of-forces agreement.

The exercise of jurisdiction comprises legislative, judicial and executive competence. Jurisdiction may be defined as "the term that describes the limit of the legal competence of a State or other regulatory authority […] to make, apply, and enforce rules of conduct upon persons."[2] If host state jurisdiction is *limited* in relation to categories of personnel in a peace operation it affects all the abovementioned branches of state jurisdiction. While the most apparent branch is that of the judiciary, restricting local courts from exercising jurisdiction over some personnel, the legislative and executive powers of the receiving state will also be subject to restrictions.

Host states have primary responsibility for exercising jurisdiction over criminal acts directed against protected personnel. At the same time personnel participating in peace operations generally enjoy some sort of immunity against the exercise of local jurisdiction. High-level members of an operation may be accorded

1 Ian Brownlie *Principles of Public International Law*, 299 (6th ed., 2003).

2 Vaughan Lowe, Jurisdiction, in *International Law*, 329 (Malcolm D. Evans, ed., 2003).

privileges and immunities similar to those of diplomatic agents. Members of the civilian component normally enjoy functional immunity for acts performed in an official capacity. Military contingents are usually subject to the exclusive criminal jurisdiction of the sending states.

The ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have indicted persons suspected of crimes against peace operation personnel. The ICTY has jurisdiction over crimes committed on the territory of the former Yugoslavia since 1991. That would also include crimes, under the jurisdiction of the tribunal, committed by personnel in peace operations.

The establishment of the ICC has pushed questions of jurisdiction even more to the fore. Between July, 2002, and July, 2004, two resolutions from the Security Council aimed to exempt personnel in peace operations, supplied by a non-member state of the ICC, from the jurisdiction of the ICC.[3] Through a number of bilateral treaties, modelled on Article 98 of the ICC statute, the United States has sought assurances from other states that they will not hand over US personnel to the ICC.[4]

2.1 Principles of Jurisdiction

The Harvard Research Draft Convention on Jurisdiction (1935), identified the following five general principles of jurisdiction: the territorial principle; the nationality principle; the protective principle; the universality principle; and the passive personality principle.[5] While the first four were adopted as permitted by international law, the passive personality principle was questioned, and thus not included in the draft convention.[6]

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3 SC Res. 1422, UN SCOR, 4572nd mtg., UN Doc. S/RES/1422 (2002) and SC Res. 1487, UN SCOR, 4772nd mtg., UN Doc. S/RES/1487 (2003). See Carsten Stahn, The Ambiguities of Security Council 1422 (2002), *14 EJIL,* 85 *(2003).*

4 Article 98 of the ICC Statute. See, for example, Efforts to Obtain Immunity from ICC for U.S. Peacekeepers, in Contemporary practice of the United States Relating to International Law, (Sean D. Murphy ed.,), 96 *AJIL,* 725 (2002); U.S. Bilateral Agreements Relating to ICC, in Contemporary practice of the United States Relating to International Law, (Sean D. Murphy, ed.), 97 *AJIL,* 200 (2003*).*

5 Edwin, D. Dickinson, Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935, 29 *AJIL*, Supp., 443, 445 (1935). The Draft Convention, with its comments, is not a legally binding instrument but is based upon a considerable research of international national cases, legislation and writers of the time and is a document of great importance especially as a statement of customary international law.

6 Ibid.

Territoriality

It is universally accepted that a state has jurisdiction over crimes committed on its territory.[7] The sovereignty of each state necessarily entails the right of exercising jurisdiction over criminal acts committed on its territory. Notwithstanding the fact that the territorial principle is regarded as the most fundamental principle of jurisdiction, it is not necessarily of an exclusive character. When there exist competing claims of jurisdiction, priority depends upon custody.[8] The universal acceptance of the territorial principle largely finds its basis in practical considerations. The state must have the right to enforce its own laws and is generally best suited to carry out the necessary investigations, hear witnesses, and take suspected individuals into custody. Territoriality is the main reason for the exercise of jurisdiction, and although not an exclusive ground for jurisdiction "the majority of prosecutions occurring where a crime has been involved take place because the crime was committed within the territory of the state."[9]

The general rule is that a state, including a host state, shall exercise territorial jurisdiction over persons and property situated in its territory.[10] This general rule, however, is subject to limitations in respect of immunity rules and agreements on allocation of jurisdiction between sending and receiving states. A host state may be prevented from exercising its jurisdiction over personnel in peace operations insofar as the personnel concerned can claim immunity from local jurisdiction. From another and increasingly important perspective, the host state has a duty to exercise jurisdiction over crimes committed on its territory. The inability, or unwillingness, of host states to take this duty seriously has led to the establishment of a culture of impunity in relation to criminal acts committed against personnel engaged in peace operations.

Nationality

To claim jurisdiction based upon the nationality of an offender is in fact of an older date than the territorial principle. The nationality principle emanates from the time when rulers asserted jurisdiction over persons owing allegiance to the ruler. The rise of the territorial state has caused the territorial principle to assume a much greater importance than the nationality principle.[11] Nevertheless, the nationality principle is universally accepted.[12] Since there is no clearly accepted

7 Brownlie, 299.

8 D. J. Harris, *Cases and Materials on International Law*, 251 (4th ed., 1991).

9 M. N. Shaw, *International Law*, 580 (5th ed., 2003).

10 Lowe, 336.

11 The latter is in fact "used relatively infrequently", Lowe, 339.

12 Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 *AJIL*, (Supp), 519 (1935).

definition of nationality in international law, states are able to exercise a wide discretion in the granting of nationality.[13]

The principle of nationality plays a prominent role in peace operations. The exclusive exercise of jurisdiction of sending states reflects the principle of nationality. This was a point of major concern during the establishment and the deployment of the United Nations Emergency Force. To ensure that no "jurisdictional vacuum" arose, the UN concluded agreements with contributing states that were based upon the understanding that those states "would exercise such jurisdiction as might be necessary with respect to crimes or offences committed in Egypt by any members of the Force provided from their own military services."[14] A Model Agreement on the relationship between UN and contributing states was issued in 1991 incorporating a similar provision.[15] Difficult questions may surface if an act is criminalised in the host state in question but not in the contributing state.

Protective

The protection of vital state interests forms the foundation for the protective principle.[16] In the event of individuals threatening a vital interest of the state it may exercise its jurisdiction over them, despite the fact that they are non-nationals acting abroad. Typical crimes are currency and immigration offences. The protective principle enables the state to combat threats against those areas that are vital to its interests, even though it might not be an offence within the state itself where such acts might be committed. The protective principle is also one of the essential conditions to be found in the Safety Convention. It provides for the right of a state party to establish jurisdiction over the crimes defined therein when *inter alia* they are committed "[i]n an attempt to compel that State to do or to abstain from doing any act."[17] This principle is also included in other treaties incorporating the *aut dedere aut judicare* principle.[18] It is particularly justified in cases of political crimes. Such crimes are often not extraditable and the threat-

13 Shaw, 585.

14 Report of the Secretary-General, Summary study of the experiences derived from the establishment and operation of the Force, para. 136, UN Doc. A/3943 (1958).

15 Report of the Secretary-General, Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, UN Doc. A/46/185 (1991).

16 Lowe, 342.

17 Convention on the Safety of United Nations and Associated Personnel, 9 Dec. 1994, Article 10, 2051 UNTS 361.

18 See, for example, International Convention against the Taking of Hostages, 17 December 1979, 18 ILM 1456, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177, Convention on the Prevention and Punishment of Crimes against Internationally Protected Personnel including Diplomatic Agents, 14 December 1973, 1035 UNTS 167.

ened state might wish to establish its own jurisdiction over acts that threaten a vital state interest.[19] According to the Harvard Draft Convention the protective principle, with a few exceptions, is incorporated as a matter of course in national penal codes and "t]he basis of such jurisdiction is the nature of the interest injured rather than place of the act or the nationality of the offender."[20]

The protective principle, however, should be applied with caution. It does not require double jeopardy, and applying the principle might therefore not only infringe upon the sovereignty of other states, but also lead to negative effects for the individual because that person might not even be aware of the fact that the act is a criminal offence in another state.[21]

Passive Nationality

According to the principle of passive nationality, jurisdiction may be claimed by reference to the nationality of the victim. It is, however, a controversial ground for jurisdiction,[22] but has found a new legitimacy in the struggle against terrorism and other international crimes.[23] It is, for example, stipulated in Article 9 of the International Convention against the Taking of Hostages,[24] Article 5 (1) c of the Convention against Torture,[25] Article 3 (1) c of the IPP Convention[26] and in Article 10 of the Safety Convention. The United States, which has historically opposed the passive personality principle,[27] claimed jurisdiction over a Lebanese citizen in international waters upon the basis that he had allegedly been involved in the hijacking of a Jordanian airliner carrying several US nationals. The Court, accepting both the universality principle and the passive personality principle, stated with regard to the latter that although being the most controversial princi-

19 Shaw, 591.

20 Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 *AJIL*, Supp., 543 (1935).

21 Iain Cameron, *Protective Principle of International Criminal Jurisdiction*, 32 (1994).

22 Harvard Research Draft Convention on Jurisdiction, 29 *AJIL*, Supp 579 (1935). It was further stated that "[o]f all principles of jurisdiction having some substantial support in contemporary national legislation, it is the most difficult to justify in theory." Ibid.

23 Shaw, 591.

24 International Convention against the Taking of Hostages, 17 December 1979 1316 UNTS 206.

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

26 Convention on the Prevention and Punishment of Crimes against Internationally Protected Personnel including Diplomatic Agents, 14 December 1973, 1035 UNTS 167.

27 According to Harvard Research Draft Convention on Jurisdiction "[i]t has been vigorously opposed in Anglo-American countries.", 579.

ple of jurisdiction in international law, "the international community recognises its legitimacy."[28]

According to *Restatement (Third)*, the principle of passive personality "has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."[29]

In relation to personnel engaged in peace operations, the passive personality principle provides a basis of jurisdiction that enables contributing states to prosecute individuals responsible for criminal acts against their nationals. This could be of particular importance when the state hosting a peace operation lacks, for example, a functional judicial system. In such cases the principle serves as a complementary basis of jurisdiction. The importance of this principle in the deployment of peace operations is also reflected in the Safety Convention.[30]

Universality

The conceptualisation of the principle of universal jurisdiction has in the legal doctrine been subject to diverse interpretations and categorisations. It partly seems to be an effect of the different legal traditions of civil law states and states belonging to the common law tradition. Civil law states are less willing to extradite and thus assert a wide scope of extraterritorial jurisdiction while common law states generally have chosen the opposite solution.[31] Below follows a brief account on some views on the principle of universal jurisdiction.

Under the principle of universality, Cameron makes a distinction between two types of jurisdiction. The first concerns extraterritorial jurisdiction over acts that are "universally" accepted as being offences in all societies, acts such as murder. The state that claims jurisdiction on this basis would represent the state with a closer connection to the crime. Cameron finds this to be close to representational jurisdiction although it is not, as opposed to the latter principle, condi-

28 See United States v Yunis 681 F. Supp 896 (1988), United States District Court, District of Columbia. Martin Dixon, & Robert McCorquodale, *Cases & Materials on International Law*, 281 (4th ed., 2003).

29 American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987), Vol. 1, Part IV, § 402, Comment g and Reporter's Note 3, at 240. Malanczuk finds it questionable if the sole fact that a national has been injured concerns the general interest of the national state but on the other hand if the territorial state is unable or unwilling to prosecute an alleged offender it could be argued that the state of nationality of the victim has a right to prosecute the suspect when under control of competent authorities as a measure of protection of its own citizens. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 111, (7th revised ed., 1997).

30 Safety Convention, Article 10 (2) (b).

31 Cameron, 20.

tional upon a request from another state.[32] The other type of universal jurisdiction relates, "to offences defined by customary international law or multilateral conventions".[33] This type of jurisdiction may itself be divided into offences against international law and offences where international law permits a state to exercise universal jurisdiction but which are not as such crimes against international law. The former category is described as an international crime and the latter a crime of universal jurisdiction.[34]

A recent analysis of the concept of universal jurisdiction distinguishes three categories: "co-operative general universality principle, co-operative limited universality principle, and unilateral limited universality principle".[35] The co-operative general universality principle provides a basis for jurisdiction for the custodial state over both common crimes and international crimes when the extradition of an alleged offender is not possible. In relation to common crimes, the basis for jurisdiction is also referred to as the representation principle or "vicarious administration of justice".[36] The co-operative limited universality principle relates only to international offences and excludes common crimes. Jurisdiction is based upon the nature of the crime and the only requirement "is the voluntary presence of the offender".[37] The unilateral limited universality principle relates solely to the nature of the crime and allows for any state to launch investigations even in absentia.[38]

Others describe universal jurisdiction mainly in relation to crimes of such a type and nature that their proper punishment is in the interests of the whole of international society.[39] The principle of universal jurisdiction provides a legal basis for national courts to exercise jurisdiction over non-nationals committing

32 Cameron, 80. Under the principle of representational jurisdiction, jurisdiction is not exercised in the primary interests of the custodial state but rather in the interests of another state as part of the international co-operation in penal matters. In such cases, the custodial state represents a state, which bases its jurisdiction upon ordinary jurisdiction criteria. Representational jurisdiction is not an independent basis of jurisdiction but is derived from the right of another state to exercise jurisdiction. The custodial state may exercise jurisdiction under the representational principle if requested, in some form, by a state with an independent jurisdictional basis. See International Crimes and Swedish Jurisdiction, Report of the Commission on International Criminal law, A Swedish Governmental Official Report, in Statens Offentliga Utredningar 81, (SOV 2002:98) and Christoffer Wong, *Criminal Act, Criminal Jurisdiction and Criminal Justice*, 112 (2004).

33 Cameron, 80.

34 Ibid. See in this respect, Brownlie, 303.

35 Luc Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives*, 28 (2003).

36 Ibid., 34 – 35.

37 Ibid., 38.

38 Ibid.

39 Lowe, 343, Shaw, 592-3, *Restatement (Third)* §404 254-256.

heinous crimes on foreign territory or at sea in those cases where other recognised connections to the crime in question and to the perpetrator or perpetrators are missing.[40]

Cassese defines universal jurisdiction as a principle empowering states "to bring to trial persons accused of international crimes, regardless of the place of the commission of the crime, or the nationality of the author or of the victim."[41] He draws a distinction between conditional universal jurisdiction and absolute universal jurisdiction. The former includes piracy, part of customary international law, and war crimes, torture and terrorism, which are treaty-based. A prerequisite of this category is that a suspected offender must be present on the territory of the state claiming jurisdiction.[42] Under the principle of absolute universal jurisdiction a state may prosecute persons suspected of committing international crimes regardless of whether the accused was present in the territory of that state. As states normally do not conduct trials *in absentia*, a suspect or suspects must therefore be present for the initiation of proceedings. National authorities, however, may begin their criminal investigations in advance against such persons.[43]

The above-mentioned categorisations of universal jurisdiction have in common that they all acknowledge a right of states to exercise jurisdiction over persons accused of certain crimes when there is no connection to the crime other than the custody of the offender.[44] Some even include trials *in absentia.* It is, however, mainly in relation to specific crimes that the principle of universal jurisdiction has lately received a lot of attention. In the progress of a comprehensive international criminal system, in which the establishment of the International Criminal Court (ICC) represents a major step forward, national courts still play a significant role.[45] The jurisdiction of the ICC is subsidiary to the jurisdiction of national courts. Ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia[46] (ICTY) and the International Criminal Tribunal for Rwanda[47] (ICTR), are geographically limited and treaties establishing a "prose-

40 See United States v Yunis 681 F. Supp 896 (1988), Dixon & McCorquodale, 281, 288.

41 Antonio Cassese, *International Criminal Law,* 284 (2003).

42 Ibid., 286.

43 Ibid.

44 Jurisdiction under the representational jurisdiction requires a request from another state with closer connection to the crime.

45 Reydams has shown that over the past ten years, approximately 20 cases of the exercise of jurisdiction under the principle of universality have taken place.

46 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, UN SCOR, 3217th mtg., UN Doc. S/RES/827 (1993).

47 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for gen-

cute or extradite" mechanism aim for universal jurisdiction for specific crimes but as yet, in most cases, are only applicable between parties to the agreements.

What are the crimes that enable a national court to exercise the right of jurisdiction when there exists no specific connection to the state? International law in 1935 found piracy to be the only crime subject, unambiguously, to universal jurisdiction.[48] In the national penal codes of the time there were, however, examples of other crimes that were to be treated in a similar way to piracy. These were the slave trade, the counterfeiting of foreign money and securities, traffic in women and children for immoral purposes, the use of explosives or poisons to cause a common danger, and traffic in narcotics, and so on.[49] But according to the Comment to the Draft Convention, there was insufficient legal authority for treating crimes precisely like the crime of piracy, which stood alone. Jurisdiction was satisfied under other and different principles of jurisdiction.[50] While piracy has been accepted as being subject to universal jurisdiction owing to the very nature of the crime, the main consideration is not necessarily the notion that its atrocious character requires its perpetrators to be punished. It is rather the universal realisation of its harmful effects on the whole fabric of international society.[51] According to the Harvard Research Draft Convention, the original basis for prosecuting the act of piracy was generally described as follows "that the pirate who preyed upon all alike was the enemy of all alike."[52] However, in 1935 the act of piracy was better thought of as being based upon the fact that it was committed at sea where "the safety of commerce" was in the interests of all states and where no state exercised territorial jurisdiction.[53]

The Princeton Project, of 2001, found that acts of piracy, slavery, war crimes, crimes against the peace, crimes against humanity, genocide and torture to be "seri-

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ocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, SC Res. 955, UN SCOR, 3453rd mtg., UN Doc. S/RES/955 (1994).

48 Harvard Research Draft Convention on Jurisdiction, 563-4, 572.

49 Ibid., p. 570 –1. The Costa Rica Penal Code (1924), Article 219, sec. 11 and the Venezuela Penal Code (1926), Article 4, sec. 9, "crimes against humanity" is used as an overall term for crimes of which they assert jurisdiction on this basis. Ibid. at 571.

50 Ibid., 572 (1935). In conclusion, the Comment stated that "[w]hile international law undoubtedly requires such treatment in the case of piracy, it does not at the present time do so with respect to other so-called *delicta juris gentium.*" Ibid.

51 Cassese, 24.

52 Harvard Research Draft Convention on Jurisdiction, 566.

53 Ibid. It also made room for the exercise of universal jurisdiction, "on the sole basis of the presence of the alien within the territory of the State assuming jurisdiction". The competence of the state assuming jurisdiction was, however, limited to the point where it is "distinctly subsidiary and one which will be rarely invoked." Ibid., 573.

ous crimes" subject to universal jurisdiction.[54] According to *Restatement (Third)*, "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" are from a customary law perspective subject to universal jurisdiction.[55] Lowe finds that acts of "genocide, crimes against humanity and serious war crimes" fall within this category,[56] while Malanczuk contends that piracy, the slave trade, war crimes and crimes against humanity all are subject to universal jurisdiction.[57] According to Shaw, however, the act of piracy and war crimes are the only categories that "clearly belong to the sphere of universal jurisdiction."[58] Cassese defines "international crimes" as "breaches of international rules entailing the personal criminal liability of the individuals concerned".[59] Other cumulative criteria referred to are that there must be a violation of customary rules that protect universal values and where there exists a common interest among states to repress crimes of this nature. Lastly, there is no immunity for perpetrators acting in an official capacity except for certain officials, such as heads of state, and foreign ministers while still in office. Based upon this definition, international crimes include "war crimes, crimes against humanity, genocide, torture (as distinct from torture as one of the categories of war crimes or crimes against humanity) aggression, and some extreme forms of terrorism (serious acts of State-sponsored or – tolerated international terrorism). By contrast, the notion at issue does not embrace other classes."[60]

Brownlie distinguishes between the principle of universality and that of crimes under international law.[61] An example of the latter is that of war crimes. The right of any state to punish a person responsible for war crimes is based upon a breach of international law. This is different from the act of piracy, for instance, for which international law provides the right for all states to punish under national law, although it is not considered a crime under international law.[62] International law thus provides for national courts to exercise jurisdiction over crimes that need not necessarily be criminalised under international law. Brownlie, however, also states that "[i]t is increasingly recognized that the princi-

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54 *The Princeton Principles of Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Principle 2 (1), 29 (2001). The Princeton Principles are, however, "a progressive restatement of international law" and include components of both *lex lata* and *lex ferenda*. Ibid., 39.

55 *Restatement (Third)* §404.

56 Lowe, 343.

57 Malanczuk, 113.

58 Shaw, 593 (2003).

59 Cassese, 23.

60 Ibid., 24.

61 Brownlie, 303.

62 Ibid.

ple of universal jurisdiction is an attribute of the existence of crimes under international law."[63]

A similar distinction appears to have been made by Kittichaisarre, who regards universal jurisdiction in relation to the act of piracy to be based mainly upon the rationale that the high seas are outside the jurisdiction of any state and that pirates are common enemies to all. He notes, however, that "pirates are tried by municipal courts and punishable under municipal law, not international law. International law merely concedes that every State has universal jurisdiction to try and punish pirates when they come within their respective jurisdiction."[64]

It should also be noted that a more restrictive approach to universal jurisdiction is sometimes advanced. In the *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)* President Guillaume argued in a Separate Opinion that "international law knows only one true case of universal jurisdiction: piracy."[65] He cited, in support of a restrictive approach to universal jurisdiction, Lord Slynn of Hadley, in the first *Pinochet Case*: "The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it … There is no universality of jurisdiction for crimes against international law".[66]

There are clearly different opinions on universal jurisdiction, and whether it should be distinguished from international crimes. There are also divergent opinions on what precise acts constitute international crimes, although some common ground may be identified. Currently, many crimes committed under international law are subject to a treaty-based *duty* to prosecute or extradite the perpetrators of such crimes, and may thus be described as a quasi-universal jurisdiction since it only applies between and among the parties to such treaties. Jurisdiction under the principle of representation may also come into effect under treaties of an *aut dedere aut judicare* character. It has been held that the crimes addressed in such treaties are of such a nature that every state possesses a *right* to exercise jurisdiction. In this respect, the adoption of the General Assembly of conventions addressing, among other things, offences against internationally protected persons, hostage-taking and torture, may well support such an interpretation.[67] The distinction between compulsory and optional universal jurisdiction is of the

63 Ibid., 565. Brownlie finds that the statute of the ICC provides for evidence of crimes under general international law, that is, genocide, crimes against humanity, war crimes and the crime of aggression. To this list of international crimes he also adds torture in times of peace. Ibid., 561, 564.

64 Kriangsak Kittichaisarre, *International Criminal Law*, 15 (2001).

65 See Case Concerning the Arrest Warrant of April 11 2000 (Congo v Belgium), ICJ Rep. 14 February 2002, Separate Opinion of President Guillaume, 7.

66 Ibid..

67 See Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 *Texas Law Review* 785, 825-827 (1988) and Oscar Schachter, *International Law in Theory and Practice*, 268-269 (1991).

utmost importance for the emerging legal regime against the culture of impunity for criminal acts against peace operation personnel. An effective regime against impunity requires a duty to prosecute suspected perpetrators of crimes against protected personnel.

2.2 Multilateral Treaties Providing Jurisdiction

A number of treaties have established jurisdiction over crimes characterised by their transboundary nature.[68] These treaties are generally modelled upon a formula where state parties are required to exercise jurisdiction over defined offences by making them punishable in their respective national penal codes. They include a prosecute-or-extradite mechanism. The purpose of this mechanism, often referred to as *aut dedere aut judicare*, is to ensure that those committing the stipulated crimes are prosecuted. The state in which an offender is found must either prosecute or extradite to a state with a closer connection to the crime. The offences stipulated in these kinds of convention should therefore be deemed to be included in any existing extradition treaties as extraditable offences between state parties. In cases where there is no extradition treaty, the convention itself may be regarded as being an extradition treaty for the purpose of the offence.[69] The purpose of these kinds of convention is to establish a "net" that grows tighter the more that states become parties, thus narrowing the possibility of safe havens for those committing crimes of international concern.[70]

68 See e.g. the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, 860 UNTS 105; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973, 1035 UNTS 167; Convention Against the Taking of Hostages of 17 December 1979, 1316 UNTS 206; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; 1465 UNTS 85 the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; 27 ILM 627, the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; 27 ILM 668; the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, 28 ILM 493; Convention for the Suppression of Terrorist Bombings of 15 December 1997, 37 ILM 249, and the Convention for the Suppression of the Financing of Terrorism of 9 December 1999, 39 ILM 270.

69 See e.g. Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970. This provision has been used as a model for other agreements. M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, 10 (1995).

70 Lowe finds the fact that the treaty is only applicable between the parties may, in theory, have consequences if a person whose national state was not a party to the convention was prosecuted for a crime committed outside the territory of the prosecuting state (or not on an aircraft registered in that state). There appears, however,

The *aut dedere aut judicare* mechanism is not only an often used measure in the fight against terrorism it may also be an essential tool to enforce compliance with international law norms by non-state actors.[71] According to Lowe, the "most important basis for the assertion of extraterritorial jurisdiction is now the large, and constantly growing, network of treaties in which States cooperate to secure the effective and efficient subjection to the law of offences of common concern."[72]

The Safety Convention includes the same prosecute-or-extradite mechanism as traditional "anti-terrorist" conventions and an initial draft was modelled on the International Convention against the Taking of Hostages and the IPP Convention.[73] The latter convention is of particular interest in this respect. Growing concern over increasing attacks on diplomatic agents and other persons specially protected under international law at the beginning of the 1970s began a process that eventually led to the conclusion of the IPP Convention. It resembles the Safety Convention in the way that it was a criminal law response, aiming for universal jurisdiction through the inclusion of an *aut dedere aut judicare* mechanism, to enforce respect for the protected status of personnel under international law. It was even suggested during the negotiations on the Safety Convention that instead of a new convention, there should be an additional protocol to the IPP Convention.[74] The similarities between the Safety Convention and the IPP Convention merit a brief examination of central parts of the latter.

The legal status of those protected by the IPP Convention has been largely based upon conventions such as the Vienna Convention on Diplomatic Relations (1961),[75] the Vienna Convention on Consular Relations (1963),[76] the Convention on Special Missions (1969),[77] and the Convention on the Privileges and

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not to have been any protests against states asserting jurisdiction in this respect. Lowe, 344.

71 By limiting the possibility of safe havens of persons suspected of crimes under such treaties the risk of prosecution increases. This will hopefully lead to an enhanced awareness of applicable law. The norms of such treaties are transformed to obligations of non-state actors in states parties to these conventions. See Martin Scheinin on the obligations of international humanitarian law and compliance of non-state actors, Commission on Human Rights, Promotion and Protection of Human Rights, Appendix 2, Backgroundpaper, Expert meeting on fundamental standards of humanity 22-24 February, 2000, 47 UN Doc E/CN.4/2000/145 (2000).

72 Lowe, 343.

73 Convention Against the Taking of Hostages of 17 December 1979, 1316 UNTS 206, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973, 1035 UNTS 167.

74 See chapter 5.2.

75 Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95.

76 Vienna Convention on Consular Relations 24 April 1963, 596 UNTS 261.

77 Convention on Special Missions, 8 December 1969, 1400 UNTS 231.

Immunities of the UN (1946).[78] The penal law provisions of the IPP Convention were principally influenced by more recently adopted conventions such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970)[79] and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971).[80]

Article 2 of the IPP Convention sets out acts that state parties to the convention are required to criminalise under their internal laws. These are "(a) murder, kidnapping or other attack upon the person or liberty of an internationally protected person, (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty."[81] The convention also asserts that threats, and attempts to commit any of these offensive acts should also be criminalised – as well as participation as an accomplice.[82]

The principle of *aut dedere aut judicare* is clearly expressed in the convention. It is stipulated that "The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."[83] It is for the state having custody of the alleged offender to decide whether or not it wants to prosecute.[84] The obligation of the state is not to prosecute but to submit the case to the competent authorities for the purpose of prosecution. If

78 Convention on the Privileges and Immunities of the UN, 13 February 1946, 1 UNTS 15.

79 The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105.

80 The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177.

81 IPP Convention Article 2. The expression "violent attack", proposed by the ILC, was criticised during the debates in the General Assembly as being particularly vague and imprecise. Louis M. Bloomfield and Gerald F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment. An Analysis of the UN Convention*, 76-78 (1975).

82 Some representatives in the Sixth Committee held that the "establishment of a universal or quasi-universal jurisdiction was, in their view, acceptable only in respect of specific crimes of exceptional seriousness" but not in relation to the types of crime listed in Article 2. Bloomfield and FitzGerald, 82.

83 IPP Convention Article 7.

84 According to the ILC, the state may refuse to extradite for any reason it regards suitable. The position could also be reversed, where no state requests extradition and thus leaves the state holding the suspect with only one option – submitting the case to the competent authorities for prosecution. Bloomfield and FitzGerald, 96.

the authorities decide not to prosecute, for example, through lack of evidence, the state has still fulfilled its obligations under the convention.[85]

Article 8 stipulates different procedures of extradition depending on the possible national law requirements of existing extradition treaties. If a state upon whose territory an alleged offender is present chooses not to extradite, it is under an obligation to establish its own jurisdiction over the crimes allegedly committed.[86] The function of such provision is clearly to aim at a universal jurisdiction in relation to crimes committed against internationally protected persons.[87]

Can citizens of states not party to the convention violate the provisions therein and be prosecuted for the crimes laid down in Article 2? An individual who is a citizen of state A, which is not party to the convention, attacks an internationally protected person in the territory of state B, and is present in state C, which is party to the convention. State C does not extradite the offender to state B because of its use of the death penalty. If the offender's national state is a party to the convention then it has also agreed to the duty of the state, in which the offender is present, to establish its jurisdiction even though no "clear" connection to the crime exists. When an offender's national state is not party to the convention there is no such agreement. How is it possible to reconcile a right to prosecute nationals of non-state parties with the Vienna Convention on the Law of Treaties? The treaty states, "A treaty does not create either obligations or rights for a third State without its consent."[88]

While a right to prosecute nationals of non-state parties to anti-terrorist conventions has been the subject of criticism,[89] it seems that such a right has been accepted in practice.[90] A valid policy argument in this respect would be that an absence of ability to subject individuals of non-state parties to prosecution "would mean that the community of states is essentially helpless to take legal

85 The requirement that a case should be submitted to the competent authorities "without undue delay" aims at a more effective implementation of a state's obligation and provides at the same time protection for an alleged offender from being held in custody for an unreasonably long time. Ibid., 101-102.

86 The provision follows the examples of Article 4(2) of the Hague Convention and Article 5(2) of the Montreal Convention.

87 Commenting on the ILC Draft Articles, Rozakis found that this was a development of the law and stated that, "nowhere can one find any legal trend indicating that in the past, crimes against 'internationally protected persons' were in any way considered as *delicta juris gentium*." Christos L., Rozakis, Terrorism and Internationally Protected Persons in the Light of the ILC's Draft Articles, 23 *ICLQ*, 44, 52 (1974).

88 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Article 34.

89 Jordan Paust, Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards, 20 *Vanderbilt Journal of Transnational Law* 235, 254 (1987).

90 See Thomas M. Franck and Stephen H Yuhan, The United States and the International Criminal Court: Unilateralism Rampant, 35 *New York University Journal of International Law and Politics*, 519, 535 (2003).

measures against terrorists who are nationals of states that do not ratify the conventions."[91]

Without a customary legal base of compulsory universal jurisdiction, the universality principle would be conditional upon the number of state parties to the convention. On the journey towards complete universalism, an important effect of the obligation to prosecute or extradite is to be found in the narrowing down of the number of states offering safe havens to those who have committed crimes against internationally protected persons.

Is it possible, however, that the obligation to prosecute or extradite offenders has become a duty of customary international law with regard to international crimes? Bassiouni argues that the principle *aut dedere aut judicare* is a rule of customary international law. The main reason appears to be that the prosecution of international crimes is in effect a duty of care owed by all states to the international community as a whole. A lack of effective international institutions means that individual states must accept the responsibility of prosecuting offenders in the national courts. This principle has been accepted in a number of multilateral treaties. According to Bassiouni, with regard to international offences, it is "accepted as a positive norm of general international law."[92] This argument, however, is based upon a view of international law which, from being a law between sovereign states, is "becoming the law of a planetary community of which all human beings are members."[93] Bassiouni finds support for this view in the development of the body of international criminal law dealing not only with co-operation in criminal matters between states "but also with the repression of conduct perceived to be harmful to the interests of the international community as a whole."[94]

Bassiouni's co-author, Wise, does not share this view. However, they both express interest in the question of whether the principle of *aut dedere aut judicare* should be regarded as being a rule of general international law to be treated as if it were implicitly incorporated in any decision that a certain conduct should be treated as an international offence. It is thus necessary to study how they define an international offence. International offences are "those offenses which are of sufficient international concern so as to be the subject of a multilateral treaty requiring the parties to take steps of some sort to cooperate in their suppres-

91 Malvina Halberstam, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, 82 *AJIL*, 269, 271 n. 10 (1988). Cf. Michael Wood, The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 23 *ICLQ* 809 (1974).

92 Bassiouni and Wise, 24.

93 Ibid., 1.

94 Ibid.

sion."[95] They point out that international offences, in the loose sense, should be distinguished from a) "international crimes" in the sense of wrongs for which a state is responsible, and b) "crimes under international law" or "international offenses *stricto sensu*". Crimes of the latter category generally refer to a course of conduct directly prohibited by international law for which there is an individual criminal responsibility.[96] It is apparent that an international offence, according to the above-mentioned definition, is a broader concept than the notion of an international crime, as has been described in the above section on universal jurisdiction.

Crimes under the Safety Convention (and, for example, the IPP convention) should thus be regarded as international offences. In the view of Bassiouni, the obligation to prosecute or extradite persons responsible for such acts represents an obligation under general international law. The principle of *aut dedere aut judicare*, as it has been formulated in, for example, the Safety Convention leaves only two options – to prosecute or extradite. There is no third way. As will be discussed later, an obligation certainly exists under general international law to criminalise such acts as murder and kidnap, as stipulated under the Safety Convention. The principle of *aut dedere aut judicare* in respect of such crimes is of yet, however, only applicable between states parties to the convention.

2.3 Ad Hoc Tribunals and Criminal Courts

The Ad Hoc tribunals and the ICC are of interest to the protection of personnel in peace operations from two perspectives. First, it is of importance that these institutions have the power and authority to punish persons responsible for crimes committed against protected personnel. That will hopefully act as a deterrent to potential perpetrators and would be in line with the spirit of the Safety Convention. Second, it is of interest whether the protected personnel concerned can themselves be prosecuted before these institutions. The legal discussions on this aspect have mainly centred on the powers of the ICC but are also relevant in relation to the ICTY.

The ICTY was established by the Security Council in 1993 in response to the serious violations of international humanitarian law that had been committed within the territory of former Yugoslavia since 1991.[97] The decision to create the tribunal was taken under Chapter VII of the UN Charter because these violations were deemed to pose a threat to international peace and security. In 1994 the ICTR was established by the Security Council for the purpose of adjudicating over the prosecution of persons suspected of committing genocide and other serious violations of international humanitarian law within the territory of

95 Ibid., 5-6 (footnote omitted).

96 Ibid., 6 note 11.

97 SC Res. 827, UN SCOR, 3217th mtg., UN Doc. S/RES/827 (1993).

Rwanda between 1 January 1994 and 31 December 1994.[98] The decision to create the ICTR was also taken under Chapter VII of the UN Charter.

Offences that fall within the jurisdiction of the ICTY include grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, acts of genocide and crimes against humanity.[99] The tribunal had, and still has, jurisdiction to hear the prosecution of natural persons accused of the commission of any of those stipulated crimes committed on the territory of the former Yugoslavia in and after 1991.[100] In cases of concurrent jurisdiction the tribunal had, and still has, primacy over national courts.[101]

The subject-matter jurisdiction of the ICTR is genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and violations of Additional Protocol II.[102] The tribunal is competent to adjudicate in cases where natural persons are accused of any of the above-mentioned crimes committed within the territory of Rwanda, and in the territory of neighbouring states, in relation to serious violations of international humanitarian law committed by Rwandan citizen between 1 January 1994 and 31 December 1994.[103] The ICTR retains primacy over national courts in cases of concurrent jurisdiction.[104]

Those serious crimes over which these tribunals had jurisdiction, and at the time of writing, still had, involve crimes which personnel in peace operations would hardly commit, if at all. However, against the background of what happened in Somalia, such things cannot be ruled out and the jurisdiction of the ICTY is therefore of importance for personnel in peace operations.[105] Unlike the ICTR, the ICTY had no time limit on its existence and those committing criminal acts stipulated in the ICTY statute at any time in or after 1991 could still be brought before it. The most significant point to be realised with regard to the jurisdictional competence of these tribunals is their primacy over national courts in cases of concurrent jurisdiction. The territorial principle would generally give the territorial state, where the crime had been committed, primary jurisdiction in cases where the perpetrator was in the custody of that state. The primacy of these tribunals is based upon the fact that the Security Council established them in order to maintain international peace and security and therefore retained the

98 SC Res. 955, UN SCOR, 3453rd mtg., UN Doc. S/RES/955 (1994).

99 Articles 2-5 of the Statute of the ICTY.

100 Article 8 of the Statute of the ICTY.

101 Article 9 of the Statute of the ICTY.

102 Articles 2-4 of the Statute of the ICTR.

103 Article 7 of the Statute of the ICTR.

104 Article 8 of the Statute of the ICTR.

105 See e.g. the Court Martial Appeal Court of Canada, CMAC-374, Ottawa, Ontario, May 16, 1995 and Court Martial Appeal Court of Canada, CMAC-376, in, *How Does Law Protect in War*, 1074, 1078 (Marco Sassòli and Antoine A. Bouvier, eds., 1999).

right to interfere in the domestic jurisdiction of relevant states.[106] In effect, the jurisdiction of the ICTY is valid in the territory of the former Yugoslavia and any peace operation personnel suspected of committing any of the crimes stipulated in the statute of the ICTY would risk prosecution before it. The exclusive criminal jurisdiction of sending states, and the immunity of certain personnel from local jurisdiction under applicable status-of-forces agreements could not be relied upon in relation to the primary jurisdiction of the ICTY.[107]

In addition to these international tribunals for the former Yugoslavia and Rwanda, a number of mixed (or internationalised) criminal courts have been established to support the rebuilding of society in the aftermath of conflict, or to intervene in the event of a breakdown of the judicial system.[108] In August, 2000, the Security Council adopted Resolution 1315 which expressed deep concern over the widespread attacks that were taking place against the people of Sierra Leone and UN and associated personnel within that country, together with the existing situation of impunity.[109] It noted the urgent need for international co-operation to assist in the strengthening of the judicial system in the Republic of Sierra Leone. It requested the start of negotiations between the government of Sierra Leone and the Secretary-General on the establishment of an independent special court for Sierra Leone.[110] An agreement was reached on 16 January 2002.[111] Article 1 of the agreement stipulated the establishment of the special court to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[112]

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106 Article 2 (7) of the UN Charter.

107 It has been noted that US concerns over the reach of the ICC jurisdiction concerning its uniformed personnel stationed abroad has no equivalent with regard to the jurisdiction of the ICTY. At the time of writing, large contingents of US troops were deployed in Kosovo and Bosnia and were therefore subject to the primary jurisdiction of the ICTY. See Franck and Yuhan, 535.

108 Such courts are neither international nor national in character but a mixture of both. Courts of this type have been established in Sierra Leone, East Timor and Kosovo. A similar such court has been proposed for Cambodia. See Antonio Cassese, *International Law*, 458-9 (2nd ed. 2005).

109 SC Res. 1315, UN SCOR, 4186th mtg., UN Doc. S/RES/1315 (2000).

110 SC Res. 1315, UN SCOR, 4186th mtg., UN Doc. S/RES/1315 (2000), para.2.

111 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, done at Freetown on 16 January 2002. See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January (2002), Annex, UN Doc. S/2000/915. See also http://www.sc-sl.org/scsl-agreement.html.

112 Ibid., Article 1.

According to its statute, the special court would have the power and authority to prosecute those who committed crimes against humanity (Article 2), including violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3), other serious violations of international humanitarian law (Article 4) and the commission of crimes under Sierra Leonean law (Article 5).[113] Article 4 b described the following acts as serious violations of international humanitarian law: "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict." The text replicates the text of Article 8 (2) (b) (iii) of the ICC statute.[114]

The ICC came into force on 1 July 2002. Mindful of its subsidiary principle on national jurisdiction, it represents, however, a major achievement in the fight against impunity in relation to international crimes of a serious nature. Unlike the tribunals for the former Yugoslavia and Rwanda, the ICC was established through an international agreement granting it certain powers of jurisdiction.[115] A number of states were reluctant to grant the Court primary jurisdiction over national jurisdictions, and the power and authority of the Court was therefore curtailed by the principle of complementarity.[116] Despite this principle, the Court may exercise jurisdiction over any person committing a crime, referred to in Article 5 of the ICC statute, on the territory of a state party, irrespective of whether that person's state of nationality was a member, or not, of the ICC.[117]

Concerns expressed by the United States over its armed forces, during the negotiations of the ICC statute, led to a successful US-sponsored bid seeking exception from the obligation of member states to surrender, upon request, a person to the Court if it required the requested state to act contrary to its obligations under international agreements.[118] This exception is of particular importance for personnel in peace operations since the international agreements that

113 Statute of the Special Court of Sierra Leone, see Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, and http://www.sc-sl.org/scsl-statute.html.

114 It is interesting to note that it refers to the *international* law of armed conflict. That would encompass both the law applicable in international and non-international armed conflicts.

115 For comments on the statute of the ICC, see *Commentary on the Rome Statute of the International Criminal Court. Observer's Notes, Article by Article*, (Otto Triffterer, ed.,1999), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I-II, (Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, eds., 2002).

116 See e.g. articles 17-19 of the Statute. See, for example, William A. Schabas, *An Introduction to the International Criminal Court*, 67-70 (2001).

117 Article 12.

118 Article 98(2) of the ICC statute.

were in the minds of the sponsors were SOFAs, which in peace operations allocate exclusive criminal jurisdiction over military personnel to the contributing states.[119] According to an applicable SOFA, states hosting a peace operation are under a duty not to exercise jurisdiction over such personnel. To surrender them to the Court would in effect be contrary to its obligations under the SOFA. This is a provision of the statute concerning the *co-operation* of member states and does not limit the powers of jurisdiction of the Court. The statute does, in fact, explicitly state that it "shall apply equally to all persons without any distinction based on official capacity."[120]

Article 98 (2) provides the necessary tool for states hosting peace operations to balance the competing interests of the ICC and of an applicable SOFA.[121] The United States, however, has entered into a number of bilateral agreements with states for the purpose of protecting US citizens from the exercise of jurisdiction of the Court. These agreements are often referred to as "Article 98" agreements or bilateral immunity agreements (BIAs).[122]

A much-criticised resolution by the Security Council in 2002 aimed to interfere with the powers of the ICC in relation to personnel in peace operations. According to the Security Council Resolution 1422, the ICC may not commence or proceed with the investigation or prosecution of any case "involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation" for a period of 12 months from 1 July 2002, the intention of the resolution was to renew these conditions each 1 July.[123] However, in the summer of 2004 the US decided not to pursue a new resolution on this matter.[124]

The ICC, for other reasons, is also of special interest in relation to the protection of personnel engaged in peace operations. Its statute establishes that intentional attacks on personnel involved in humanitarian assistance or peace-

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119 Mahnoush H. Arsanjani, The Rome Statute of the International Criminal Court, 93 *AJIL*, 22, 41 (1999).

120 Article 27 of the Statue.

121 These agreements are discussed further in chapter 4.3.3.

122 See the Coalition for the International Criminal Court www.iccnow.org.

123 SC Res. 1422, UN SCOR, 4572nd mtg., paras. 1 and 2, UN Doc. S/RES/1422 (2002). 1 July 2003 the period was renewed through the adoption of SC Res. 1487, UN SCOR, 4772nd mtg., UN Doc. S/RES/1487 (2003).

124 According to Hans Corell, Legal Counsel to the UN March 1994 – March 2004, the resolutions dealt with a non-issue. The ICC judges would not recognise the validity of these resolutions and simply require a new resolution, to stop proceedings, in the case a peacekeeper would be brought before the ICC. See A Question of Credibility. http://www.iccnow.org/documents/declarationsresolutions/CorellHansArticleonUS-ICC23May04.pdf.

keeping missions constitute a special category of war crime,[125] equally punishable in non-international armed conflicts as in international armed conflicts.[126]

2.4 Multilateral Treaties on Immunity

State representatives are normally accorded immunity from local jurisdiction when visiting other states. The immunity of diplomatic agents is one of the oldest tenets of international law and one that is regularly upheld in relationships between states. Immunity of diplomatic agents is thus firmly rooted in customary international law but has been codified (and developed) through the Vienna Convention on Diplomatic Relations.[127] The immunity enjoyed is not for the personal benefit of the diplomatic agent concerned. Rather it is to ensure the efficient functioning of diplomatic missions representing the state.[128] Immunity, however, can be waived by the sending state.[129] The privileges and immunities of a diplomatic agent apply in relation to local jurisdiction, but not to jurisdiction of the sending state. Diplomatic immunities are also characterised by their reciprocity. The system of diplomatic immunities, because of this element of reciprocity, is largely self-regulating.[130]

In contrast, the immunity of representatives of international governmental organisations involves no element of reciprocity. These privileges and immunities, often referred to as international privileges and immunities,[131] are a relatively new development and are almost entirely based upon conventional law. Based upon Article 105 of the UN Charter, the main treaty in this respect is the Convention on the Privileges and Immunities of the United Nations (the General Convention).[132] The immunities enjoyed by representatives of international organisations are based in total upon the principle of functional necessity. Immunity is thus limited to their official acts. International privileges and immunities apply in relation to the jurisdiction of all states. This has proved to be of particular importance in cases where so-called "experts on missions", perform-

125 Article 8 (b) (iii) of the ICC statute. See also Article 8 (b) (vii) under which it is a war crime to make improper use of the flag or insignias of the UN.

126 Article 8 (e) (iii) of the ICC statute.

127 See Article 31 of the Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS, 95.

128 Ibid., 4th preambular paragraph.

129 Ibid., Article 32.

130 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) 1980, ICJ Rep 3, para. 86.

131 See D. B. Michaels, *International Privileges and Immunities: a Case for a Universal Statute*, (1971), C. Wilfred Jenks, *International Immunities* (1961), C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, (1996).

132 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.

ing special functions for the UN, are requested to act within the jurisdictions of their respective national states.[133] The need to subject the immunity to a waiver institute is in this respect of significance. According to the General Convention, the Secretary-General has the right and duty to waive the immunity of agents representing the organisation if that immunity were to impede the course of justice.[134] The Security Council is in turn authorised to waive the immunity of the Secretary-General.[135]

In this work, the term "diplomatic privileges and immunities" refers to the status accorded diplomatic agents and other personnel representing their various states. The term "international privileges and immunities" refers to personnel representing international governmental organisations. In the literature this division, however, is not always upheld. With regard to peace operations the terms "absolute immunity" and "functional immunity" or "on-duty immunity" are sometimes referred to.[136] It appears that the terms "functional immunity" and "on-duty immunity" are both equal to international immunity accorded personnel representing international governmental organisations. The terms "absolute immunity" or "absolute criminal immunity" appear to relate to diplomatic immunity. The latter, however, is not wholly correct, since the sending state can waive the immunity of the agent. This is probably so that the practice of allocating exclusive criminal jurisdiction, in a status-of-forces agreement, on the part of the sending state over its military forces, is treated as a rule of immunity. The exclusive exercise of criminal jurisdiction of sending states does not, however, appear to reflect traditional rules of immunity.[137] In this respect, it should be noted that status-of-forces agreements allocating the exclusive criminal jurisdiction to the sending state do not contain waiving clauses.

2.5 Status-of-Forces Agreements[138]

It is an established practice of the organisation leading a peace operation to conclude a status-of-forces agreement (SOFA) on the legal status of both the operation and its members in the territory of the host nation. Based upon earlier practice, a UN Model Agreement was issued in 1990 to function as a basis for

133 Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion) 1989, ICJ Rep 194.

134 Convention on the Privileges and Immunities of the United Nations (1946) 1 UNTS 15, Article V, Section 20 (Officials) and Articles VI, Section 23 (Experts on Missions).

135 Ibid.

136 Robert C. Siekmann, *National Contingents in United Nations Peace-keeping Forces,* 153 (1991).

137 Steffen Wirth, Immunities, Related Problems, and Article 98 of the Rome Statute, 12 *Criminal Law Forum*, 429, 455 (2001).

138 Status-of-Forces Agreements are dealt with in Chapter 4.3.

future SOFAs.[139] The most important parts of these agreements are perhaps the provisions on criminal jurisdiction. According to Article 46 of the UN Model Agreement all members of the operation, including locally-employed personnel, are immune from any legal process with regard to words spoken or written, and acts performed, in an official capacity. The General Convention is either referred to, or incorporated in, the relevant SOFA.[140] Although not explicitly stated, the references to the General Convention imply that the waiver of immunity mechanism of the Secretary-General remains intact for officials of the UN and "experts on missions".[141] Immunity for official acts, and the right and duty of the Secretary-General to waive such immunity, is in accordance with the well-established practice of privileges and immunities for agents of recognised international governmental organisations.

Military members of the military component (often most of the personnel referred to as peacekeepers) are accorded those privileges and immunities explicitly stated in the SOFA.[142] According to Article 46 (b) of the UN Model SOFA military personnel, referred to above, are subject to the exclusive criminal jurisdiction of sending states in relation to any criminal offence that might be committed by them. The SOFA provisions on criminal jurisdiction over military members of the force in question are influenced by concerns other than for civilian personnel. It is appropriate, therefore, to briefly recapitulate the traditional view on jurisdiction and foreign military forces, and how this is reflected in the SOFAs of contemporary peace operations.

Jurisdiction in relation to foreign military forces is influenced by two opposing doctrines. These are the jurisdiction of the sending state (the "law of the flag") and the territorial jurisdiction of the receiving state.[143] The 1812 case of the schooner *Exchange* is often referred to as a point of departure in any discussions on immunity for foreign military forces. Two American ship-owners claimed possession of a French naval ship, at the time in Philadelphia for repairs, on the basis that it was in fact the schooner *Exchange* owned by them, but had been seized by

139 Report of the Secretary-General, Model status-of-forces agreement for peace-keeping operations, UN Doc A/45/594 (1990).

140 See paras. 25-26 of the UN Model Agreement. Locally recruited personnel are accorded functional immunity by reference to 18 (a) – (c) of the General Convention in para. 28 of the UN Model Agreement.

141 This conclusion is supported by the fact that if a member of the civilian component, or a civilian member of the military component, is accused of a criminal offence, the Special Representative/Commander of the Force is obliged to reach an agreement with the host government, on whether or not proceedings should be instituted. If the parties fail to reach such agreement, the issue will then be referred to an arbitration tribunal. Para. 47 (a) and para. 53 of the UN Model Agreement.

142 Para. 27 of the UN Model Agreement.

143 Dieter Fleck, Introduction, in *The Handbook of The Law of Visiting Forces*, 6 (Dieter Fleck, et al eds. 2001).

France on the high seas in 1810. According to Chief Justice Marshall of the US Supreme Court, the jurisdiction of all states within their territories is "necessarily exclusive and absolute." Exceptions to this principle must therefore be based upon the consent of the territorial state, either express or implied. There exists, however, a category where the sovereign in question must have been understood to have waived part of the exclusive territorial jurisdiction. One such case would be where a sovereign allows troops of a foreign state to pass through its territory.

> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend upon retaining the exclusive command and disposition of his force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.[144]

The essence of the doctrine of the law of the flag is that foreign forces are not subject to the jurisdiction of the host state. The sending state retains exclusive jurisdiction over its forces. The decision in the schooner *Exchange* case represents a clear statement of the law of the flag principle. It is apparent, however, that the free passage of foreign armed forces is not necessarily the same as that of the stationing of troops.[145] The presence of foreign forces within a state is a rather recent phenomenon. In general, up until about 1914, these presences occurred only as occupying forces during times of war or peace.[146] Following the end of the Second World War, there arose a need for clear rules on the legal status of foreign armed forces in peacetime. The prime example of this body of law is the multilateral SOFA of 1951 defining the status of visiting forces of the North Atlantic Treaty Organisation (NATO).[147] Applying the law of the flag principle would provide

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144 The Schooner "Exchange" v McFaddon, Supreme Court of the United States, 7 Cranch, 116 (1812), 3 *AJIL*, 227 (1909).

145 Jennings, Sir Robert and Watts Sir Arthur (Eds.), *Oppenheim's International Law*, 1156 (9th ed., Vol. II 1992).

146 Serge Lazareff, *Status of Military Forces under Current International Law*, 7 (1971). During the 18th Century there were instances of military forces passing through foreign territory or being stationed during a brief period.

147 Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 199 UNTS 67, at http://www.nato.int/docu/basictxt/b510619a.htm.

the sending state with exclusive criminal jurisdiction over its forces, while the territorial principle would give the receiving state exclusive jurisdiction over visiting forces. According to Lazareff there exists no "unqualified statement in favour of the principle of the immunity of jurisdiction."[148] A customised principle of territorial sovereignty appears instead as the principle *de lege lata* in the absence of an agreement.[149] The receiving state must take into consideration the fact that the personnel of the foreign forces concerned are to some extent representatives of the sending state. The negotiations leading up to the conclusion of the multilateral NATO SOFA in 1951, with regard to criminal jurisdiction, did result in a compromise between the opposing principles and stipulated a concurrent jurisdiction between the sending and receiving states.[150] Nowadays, concurrent jurisdiction represents the norm in relation to treaties regulating status of visiting forces, but in 1951 it represented a break with earlier practice where sending states often had extensive, if not exclusive, jurisdictional powers over their forces.[151]

According to the NATO SOFA, sending and receiving states are, in general, granted exclusive criminal jurisdiction in relation to offences that violate their own laws. If a crime were to violate the law of both states, the exercise of jurisdiction would be resolved through a system of priority of rights. The sending state has the primary right to exercise jurisdiction both over offences arising out of the performance of official duties and offences directed solely against its security, property or personnel. The receiving state retains primary jurisdiction in all other instances.

The favoured solution of criminal jurisdiction in relation to visiting forces is that of concurrence. Development with regard to peace operations has followed a different path. In the first operation, UNEF in 1956, the sending states retained exclusive criminal jurisdiction over their forces. This principle has survived and is expressed in the UN Model SOFA. Also in NATO-led peace operations, such as the Implementing Force (IFOR) deployment in Bosnia and Herzegovina, the sending states exercised exclusive criminal jurisdiction over their military contingents. The reason for these opposing solutions is to be found in the "operational context" where peace operation forces are deployed in contrast with those of visiting forces.[152]

148 Lazareff, 17.

149 Ibid.

150 Article VII of the NATO SOFA.

151 Paul J. Conderman, Jurisdiction, in *The Handbook of The Law of Visiting Forces*, 103 (Dieter, Fleck, et al eds., 2001).

152 Typical differences between visiting forces and United Nations Forces are, according to Bowett, "(1) the United Nations Force is not that of an ally: indeed it will generally be completely independent of the local authorities; (2) the Force generally may be actually operating, in the military sense, within the territory of the State and not merely stationed there." Derek, W. Bowett, *United Nations Forces. A Legal Study of United Nations Practice*, 434 (1964).

The SOFAs, both concerning visiting forces and peace operation forces, approach the questions of jurisdiction and immunity from slightly different perspectives from those that are usual for civil servants. A SOFA allocates jurisdiction between sending and receiving states by applying the formula of concurrent or exclusive jurisdiction. The NATO SOFA of 1951 favours the solution of concurrent jurisdiction. In the UN Model SOFA, the exercise of jurisdiction is exclusive for sending states and has thus been allocated in full for these states. Sending states are often not parties to the SOFA in question, but function as beneficiaries to the agreement to which the receiving state and the organisation leading the operation are parties. Since the receiving state retains no right of exercising criminal jurisdiction over the military members of the military component, the question of immunity need not be raised at all. This position is further supported by the fact that in the SOFA there is no provision on a right or duty to waive any immunity for military personnel subject to the exclusive criminal jurisdiction of their sending states. Strictly speaking, military personnel do not benefit from traditional rules on immunity from local jurisdiction, but rather enjoy the benefits of being subject to the exclusive exercise of criminal jurisdiction of sending states.

A SOFA is perhaps the single most important instrument on the status of personnel in peace operations. It provides detailed provisions on privileges and immunities for personnel, as well as duties, and emphasises the duty of the host nation to punish persons responsible for criminal acts committed against protected personnel. In some SOFAs of a later date, certain key provisions of the Safety Convention have been included. SOFAs will be examined later in some detail.

2.6 Conclusions

The three partite relationships between the entity leading a peace operation, the sending state and the host state involve complicated issues on jurisdiction and immunity. The survey above of the law on jurisdiction and immunity provides, in this respect, a basis for the following analysis of the protection of personnel in peace operations. Such personnel often enjoy some sort of immunity from criminal jurisdiction of the state hosting an operation. For agents of an international governmental organisation, these are measured against the principle of functional necessity. The limits of the functional necessity criterion, however, are not easily defined.[153] In respect of military forces, sending states retain exclusive

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153 Klabbers expresses strong criticism against the theory of functional necessity, especially with regard to its normative character. He finds that it may serve as a useful description of privileges and immunities provided to an international organisation. However, he finds that what is required for an organisation to perform its functions

criminal jurisdiction according to an applicable SOFA. In cases where no SOFA has been concluded such a proposition must be based upon an argument of customary international law, or that it is implied in the invitation of the host state of the peace operation. The building blocks of the emerging legal regime against the culture of impunity for hostile acts against peace operations personnel are *inter alia* the international tribunals and the ICC. The probably most important component is still national courts, where the Safety Convention plays a significant role. It is argued that crimes stipulated under the Safety Convention are subject to universal jurisdiction of an optional character, providing a right for all states to prosecute offenders in relation to such crimes. Universal jurisdiction of a compulsory character is probably still only applicable *inter partes*.

is essentially seen in the eyes of the beholder. The functional necessity theory is therefore too abstract for it to have a normative character. Jan Klabbers, *An Introduction to International Law*, 149-153 (2002).

Chapter 3

General Protection

This study on general protection is based upon an examination of three areas of international law: (1) The law on diplomatic protection of aliens and more specifically the international minimum standard; (2) international human rights law; and (3) international humanitarian law of armed conflict. These fields of international law provide a basic protection for personnel in peace operations. A brief background to each area of law is presented, as well as an overview of the specific characteristics of the different legal regimes.

Numerous books and articles have been written on human rights law and international humanitarian law. The purpose of this chapter is not to analyse those areas in all their aspects, but rather to examine how they relate to the protection of personnel engaged in peace operations. Their scope of application, duties of host nations and customary law development are in this respect of importance. The relationship between human rights law and international humanitarian law is also of interest since modern day conflicts are often of an internal low-intensity nature and character, and the application of these sets of norms may become blurred in such contexts.

The fact that most current armed conflicts are of a non-international character, and that protection under human rights law may be derogated from in situations of emergency, has led to the necessity of identifying fundamental standards protecting individuals applicable in all situations, irrespective of how a particular conflict becomes classified. A process of identifying *fundamental standards of humanity* was at the time of writing taking place within the framework of the UN Commission on Human Rights.[1] This process was initiated by a group of non-governmental experts who adopted the Declaration on Minimum Humanitarian Standards in 1990.[2] It appears to be a common understanding that there is no a need to create new standards.[3] The identification of fundamental standards of humanity is rather directed towards strengthening the implementation of exist-

1 Fundamental standards of humanity. Report of the Secretary-General submitted pursuant to Commission Resolution 2000/69, para. 4, UN Doc. E/CN.4/2001/91 (2001).

2 Theodor Meron, Allan Rosas, A Declaration on Minimum Humanitarian Standards, 85 *AJIL*, 375-381 (1991).

3 Fundamental standards of humanity, UN Doc. E/CN.4/2001/91 (2001), para. 6.

ing legal norms. Four key issues have been identified that pose specific challenges in this area: "the threshold of applicability of international humanitarian law; the question of how to deal with States and other actors which have not ratified or cannot ratify treaties; the question of derogation from human rights treaties; and the accountability of armed groups and other non-State actors."[4] Recent reports have focused on the "need to secure practical respect for existing international human rights and humanitarian law standards in all circumstances and by all actors."[5] This may be achieved in part through the clarification of uncertainties in the practical application of such standards.[6] Factors that have contributed to the clarification of such uncertainties are *inter alia* the development of international criminal law, especially the jurisprudence of the war crimes tribunals for the former Yugoslavia and for Rwanda, and the General Comment by the Human Rights Committee on the right of derogation from human rights treaties as well as the Draft Articles on state responsibility. The development of fundamental standards of humanity may prove to be a valuable pedagogical tool and an important set of rules as a basis for reference. However, there is also the risk of the distinction between these different sets of norms becoming blurred, with standards thus perceived as being the only norms relevant – undermining both sets of norms.[7]

The level of protection for personnel engaged in peace operations might also benefit from the traditional rules on state responsibility for injury to aliens. The relevant standard of treatment developed in customary law might in many respects be regarded as being the forerunner to the human rights law of today.[8]

3.1 International Minimum Standard

The treatment of aliens has traditionally been subject to two opposing standards: the principle of an international minimum standard; and the standard of national treatment. The discussion on the relevant standard of treatment is in fact also a discussion reflecting, to some extent, opposing views of economic and political interests. The former view seeks to establish a standard applicable to all, irrespective of the prevailing conditions in certain states. The application of this principle

4 Ibid., para. 7.

5 Fundamental standards of humanity. Report of the Secretary-General submitted pursuant to Commission on Human Rights decision 2001/112, para. 3, UN Doc. E/CN.4/2002/103 (2001).

6 Ibid.

7 Sia Spiliopoulou Åkermark, *Humanitär rätt och mänskliga rättigheter: samspel under utveckling*, (2002).

8 On the relationship between human rights law and the law of state responsibility for injury to aliens, see Thomas E. Carbonneau, The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement, 25 *Virginia Journal of International Law*, 99-123 (1984).

has been criticised as favouring the position of aliens and cementing the differences between individuals from "rich" and "poor" states.[9] The second standard seeks to maintain equality among all individuals on a state's territory, irrespective of nationality.

On the topic of "The Basis of Protection to Citizens Residing Abroad", US Secretary of State, Elihu Root, in his 1910 presidential address to the American Society of International Law, on the relevant standard of treatment, said this: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."[10]

The international minimum standard has received considerable support in case law. In the 1926 *Neer Claim*, the Commission, recognising the difficulties involved in pronouncing a formula of general nature, held "that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency."[11]

In the 1926 *Roberts Claim*, the United States claimed, *inter alia,* that one of its citizens had been subjected to cruel and inhumane treatment during the time he served in a Mexican prison. The conditions reported to exist in the prison were not disputed by the Mexican authorities. They stated that the claimant's treatment was no different from that of other prisoners. The US-Mexican General Claims Commission ruled that the equality of treatment of aliens and nationals "is not the ultimate test of the propriety of such acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization".[12]

The US-Mexican Claims Commission recognised the fact that the applicability of such a standard might at times afford aliens better treatment than a particular state afforded its own citizens. That in itself was not to be regarded as

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9 See, for example, S. N. Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?, 55 *AJIL*, 863 (1961).

10 Elihu Root, The Basis of Protection to Citizens Residing Abroad, 4 *AJIL* 517, 521 (1910).

11 US v Mexico 4 Rep Intl Arbitral Awards 61 (1926). See also *Mecham Case*, (US v Mexico) 4 Rep Intl Arbitral Awards 440, (1929) in which the Commission held: "even though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question but rather whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law". Ibid., 443.

12 US v Mexico 4 Rep Intl Arbitral Awards 77 (1926), Opinion of the Commission, para. 8. See also *Garcia and Garza Case* (Mexico v US) 4 Rep Intl Arbitral Awards 119 (1926), *Chattin Case* (US v Mexico) 4 Rep Intl Arbitral Awards 282 (1927) with references to "international standards of civilization" paras. 19, 22, 29.

constituting discrimination between a state's own citizens and aliens, but rather as "a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens."[13]

The content of the international minimum standard, however, is difficult to define. The 1910 assertion by Secretary of State Root that the standard was "very simple, very fundamental", has been criticised. According to Lillich, no definite standard exists. Rather, it is a "process of decision", during which the responsibility of the state "could be weighed and resolved given the context and facts of a particular claim."[14]

The standard of national treatment, based upon the Calvo doctrine, drew considerable support primarily from the states of Latin America. During the early 1960s the Inter-American Juridical Committee prepared a report on the American doctrine of state responsibility reflecting the contribution by American states to the development and codification of the subject. In 1961 a report was presented to the Inter-American Council of Jurists, reflecting the Latin-American view. The second of the proposed Articles stated: "The State is not responsible for acts or omissions with respect to foreigners except in those same cases and conditions where, according to its own laws, it has such responsibility towards its own nationals."[15] In a 1965 report, reflecting the view of the United States, the first of the proposed Articles stated: "When a State admits foreigners to its territory, it has an international duty to protect their life and property according to a minimum standard of rights determined by international law. Neither the receiving State nor the foreigner's State can by its own law determine this international standard. It is determined by international law."[16]

13 *Hopkins Case,* (US v Mexico) 4 Rep Intl Arbitral Awards 41 (1927), Opinions of the Commissioners 42, 47 (1927).

14 Richard Lillich, Duties of States Regarding the Civil Rights of Aliens, 161 *RdC*, 329, 350-352, (1978-III).

15 See First Report on State Responsibility, by Mr. Robert Ago, Special Rapporteur-Review of previous work on codification of the topic of the international responsibility of States, *Yearbook of the International Law Commission*, II, 125, 153-154 (1969). The Inter-American Juridical Committee argued that it was the Latin American law alone, which contributed to the development of international law on state responsibility. The position of the United States did, in their view, represent old standards developed by European powers in order to secure a privileged status to foreigners. Inter-American Juridical Committee, Contribution of the American Continent to the Principles of International Law That Govern the Responsibility of States 7-8, in F. V., García-Amador, Sohn, Louis, and B., Baxter, R., R., *Recent Codification of the Law of State Responsibility for Injuries to Aliens,* Annex II, 359-360 (1974).

16 See First Report on State Responsibility, 153-154.

Earlier, in 1958, García-Amador, in his role as Special Rapporteur to the International Law Commission (ILC) on the subject of state responsibility, applied the development of the international human rights norms as a tool to reconcile the theory of the international minimum standard with the theory of national treatment. He argued that both theories had been superseded by the (at the time) rather new development of human rights law. García-Amador claimed that

> both the "international standard of justice" and the principle of equality between nationals and aliens, hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule incorporating the essential elements and serving the main purposes of both. The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international law.[17]

In Article 5 of the draft convention on state responsibility contained in his Second Report this thesis became articulated in this way: "The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its nationals. These rights and guarantees shall not, however, in any case be less than the 'fun-

17 García-Amador, et al, 5. Stressing the importance of the development of human rights he, in the next passage, further held that "[i]t will be easily seen how, from a purely legal point of view, both of the two traditional principles have been rendered obsolete by the development of international law. ….. The distinction [between the two principles] itself, however, disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens." ….. "[T]he "international recognition of human rights and fundamental freedoms" constitutes precisely a synthesis of the two principles." …. "In fact, from a study of the instruments in which these rights and freedoms have received international recognition, (…), it becomes evident that all of them accord a measure of protection which goes well beyond the minimum protection which the rule of the 'international standard of justice' was meant to ensure to aliens. Moreover, in all these documents there is no reference to any case or circumstance in which aliens enjoy a legal status more favourable than that of nationals. In reality, the idea of equality of rights and freedoms constitutes the very essence of these instruments." Ibid.

damental human rights' recognised and defined in contemporary international instruments."[18]

The reference to "fundamental human rights" implies a distinction between such rights and other human rights. In an attempt to specify what sort of rights should be regarded as being "fundamental human rights", Article 6 of the draft convention offers a non-exhaustive enumeration of rights falling within the ambit of the general definition in Article 5.[19] This new approach did not find sufficient support in the ILC. At the time, it was probably more a reflection of "progressive development" than pure codification of the law of state responsibility. Since then the ILC has changed its focus and in its Draft Articles of 2001 approached the topic of state responsibility on a more general level.[20]

The dividing line between states favouring a national treatment and those favouring an international minimum standard is not so much of a legal nature as of an economic/political nature. Developing states, in general, tend to follow the former standard while developed states, in general, support the latter.[21] After the Second World War, criticism directed towards the traditional law in this area grew in strength.[22] The strong rejection of the international minimum standard by

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18 Second Report on State Responsibility, *Yearbook of the International Law Commission*, II, 104 (1957).

19 Draft Article 6 read:

1. For the purpose of the foregoing article [5], the expression "fundamental human rights" includes, among others, the rights enumerated below:

(a) the right to life, liberty and security of person; (b) the right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation; (c) the right to freedom of thought, conscience and religion; (d) the right to own property; (e) the right of the person to recognition everywhere as a person before the law; (f) the right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms; (g) the right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of rights and obligations under civil law; (h) in criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released. García-Amador, Second Report, 112-113.

20 Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). Report of the International Law Commission on the work of its fifty-third session, UN GAOR 56th Sess., Supp. No. 10 UN Doc. A/56/10 (2001).

21 See D. J. Harris, *Cases and Materials on International Law*, 494 (4th ed., 1991).

22 Lillich has identified three main reasons for this criticism, "the decline in the resort to international adjudication, the convention by the new or developing States that

a group of states does, of course, affect the formation of customary international law and consideration should be given to the fact that it is possible that these states, from the viewpoint of customary international law, might not be bound by it. It should, however, be noted that the debate following the Second World War centred almost exclusively on questions of wealth deprivation. According to Lillich, "no other rules from the entire treatment of aliens area ever have been criticized" by those who, in fact, challenge the entire corpus of this area of international law.[23]

Although the international minimum standard has been contested by some states, it musters considerable support in state practice, arbitration awards and bilateral investment treaties (BITs).[24] It has clearly been strengthened by the strong development in human rights law, and as Garcia-Amador once argued, has possibly led to the merging of two standards.[25] The traditional international minimum standard, however, is not one with a fixed content. It is rather a question of attitude towards the law, and its content is set on a case-by-case basis. On that point, the development of human rights law must be noted. The position of international human rights law in the contemporary world endorses the international minimum standard as the relevant standard of treatment. It could in fact be argued that human rights law has made the role of the traditional law on the treatment of aliens redundant, but this is not wholly true. The development of human rights has considerably strengthened and articulated the obligations of the state. It has, moreover, provided the international community with a relevant standard of treatment applicable to all individuals, irrespective of their status as aliens or citizens. The national treatment standard, therefore, cannot imply that the treatment of foreigners forms a topic that is a purely domestic matter. If it were to mean that foreigners could not expect better treatment than a state's own citizens, a demand could rightly be made upon the state concerned that its own citizens must be treated in accordance with, at least, basic human rights norms.

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they should not be bound by earlier rules fashioned before their appearance and allegedly against their interests, and the demand by these same States for a "New International Economic Order". Lillich, Duties of States Regarding the Civil Rights of Aliens, 357.

23 Richard B. Lillich, The Current Status of the Law of State Responsibility for Injuries to Aliens, in *International Law of State Responsibility for Injuries to Aliens,* 11 (R. Lillich ed., 1983).

24 Ove Bring, *Det folkrättsliga investeringsskyddet. En studie i u-ländernas inflytande på den internationella sedvanerätten*, 62-64 (1979).

25 Harris finds that the development of human rights law, of both a treaty-based and customary law character, may have, with regard to the national treatment standard involve "a shift, as Garcia-Amador intended, from an expectation that states must treat aliens as they, in their discretion, treat their nationals to an expectation instead that they must treat aliens as they are required by international law to treat their nationals". Harris, 499.

From this it ought not to be taken for granted that the traditional law has been superseded. It has been pointed out by Harris that the continued important role of state responsibility relating to the treatment of aliens "follows from the uncertainty as to the rules on the enforcement of customary human rights law and the less than perfect remedies and universal acceptance of human rights treaties."[26] As one legal authority on this topic has claimed, "revitalized, contemporary treatment of aliens' law will have a significant role to play in international affairs until such time as an all-inclusive and truly effective international human rights system renders it superfluous."[27]

3.1.1 The Standard in Practice

A breach of an international obligation can be the result of an act of commission or omission by a state organ.[28] The responsibility of the state will be incurred if officials perform acts beyond their competence (and in breach of an international obligation binding on the state) but within their apparent authority.[29] However, acts committed by state officials purely in their private capacity will not generally entail the responsibility of the state. To hold the state responsible for its officials even when they have acted outside their competence or power (*ultra vires*)

26 Harris, 499-500 (footnotes omitted). Harris further states, "[f]or the time being at least, the possibility of diplomatic protection by one's national is a valuable alternative and supplement to such guarantees and procedures under international human rights law." Ibid.

27 Lillich, Duties of States Regarding the Civil Rights of Aliens, 341. See in this respect also the report of the International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property.

28 The Commissioner in the *Massey Case* held "that it is undoubtedly a sound general principle that misconduct [of state officials], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants." US v Mexico, 4 Rep Intl Arbitral Awards, 155, 159 (1927). Massey, an American citizen, had been killed by a Mexican citizen. The latter was arrested and imprisoned but the assistant jail-keeper unlawfully helped the accused to escape. According to Crawford and Olleson, "the scope of State responsibility for official acts is broad, and the definition of 'organ' for this purpose comprehensive and inclusive. There is no distinction based on the level of seniority of the relevant officials in the State hierarchy; as long as they are acting in their official capacity, responsibility is engaged". James Crawford and Simon Olleson, The Nature and Forms of International Responsibility, in *International Law* 455 (Malcolm D. Evans ed., 2003).

29 See Article 7 of the ILC Draft Articles (2001). According to Crawford, to draw "the line between unauthorised but still 'official' conduct, on the one hand, and 'private' conduct on the other" is rather a question whether the official "acted with apparent authority" or not. James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries,* 108 (2002).

is clear motivation for the state to exercise effective control over its organs. The need for control may be even more important regarding the executive organs of the state, such as the armed forces and the police. Effective supervision should lead to better discipline and thus limit the potential scope for individual officials to abuse the rights of aliens. It will, however, require a genuine will on part of the state not to conduct a policy detrimental to the protection of foreigners in violation of international standards.

Below follows some examples of cases dealing *inter alia* with responsibility for acts and omissions of state organs in situations of special concern for personnel in peace operations. These examples deal with the responsibility of the state for *ultra vires* acts of law enforcement officials and military personnel against the background of applicable legal standards on treatment.

Life, liberty and security of person

Responsibility may derive from the act of the official concerned or from improper handling by other institutions to deal effectively with the consequences of the act in question.[30] A common example of the latter is to do with negligence in prosecuting the perpetrator of an offence. In the *Janes Case*, a Mexican employee shot dead a superintendent of a US mining company in Mexico. Although it took place in front of a large number of witnesses, the authorities failed to apprehend the person responsible. The Mexican government was found liable "for not having measured up to its duty of diligently prosecuting and properly punishing the offender".[31]

State responsibility has been incurred for the use of firearms disproportionate to the aim pursued. In the *Garcia and Garza Case*, a US law officer shot dead a Mexican girl as she crossed the Rio Grande river. He had suspected her of smuggling liquor. According to the General Claims Commission a violation occurred of the "international standard concerning the taking of human life".[32] There was a lack of proportion between the use of firearms, involving a high risk to human life, and the supposed offence. As to the use of firearms by border officials the Commission regarded a combination of four requirements to be necessary:

> (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood: (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency

30 Ian Brownlie, *Principles of Public International Law*, 432 (6th ed., 2003).

31 See US v Mexico 4 Rep Intl Arbitral Awards 82, 87 (1925).

32 Mexico v US 4 Rep Intl Arbitral Awards 119, 121-122 (1926).

> might be available? (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the officials intention to hit, wound, or kill.[33]

The Commission concluded that in no manner can it "endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exists prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms."[34]

In the *Kling Case*, a group of US citizens in Mexico had been firing shots in the air for fun. Mexican soldiers, who had been following the party, deliberately fired several shots at the group thereby killing one of the Americans. The Mexico-United States General Claims Commission found that "it cannot properly be considered that the shooting was the result of any attempt to secure the apprehension of a person endeavouring to escape arrest."[35] The acts of the troops, in the circumstances, had been "indiscreet, unnecessary and unwarranted".[36] The position of the Mexican government, that the soldiers were not under the command of an officer and that it therefore could not be responsible for their acts, was rejected by the Commission, which stated "[m]en on patrol duty are not acting in their private capacity, even though an officer may not be present on the spot where acts of soldiers alleged to be wrongful are committed."[37] It moreover declared that "[I]n cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action".[38]

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33 Ibid. The status of war that existed between the United States and Germany during the time of the shooting did not affect the outcome of the case. The Commission referred to the fourth Hague Convention of 1907 in which Article 46 of the "Regulations respecting the laws and customs of war on land" states an obligation to protect the lives of persons in occupied territory. Article 3 of the treaty itself, states that a belligerent party is "responsible for all acts committed by persons forming part of its armed forces."

34 Ibid.

35 US v Mexico 4 Rep Intl Arbitral Awards 575, 580 (1930).

36 Ibid. See also *Falcón Case* (Mexico v US) 4 Rep Intl Arbitral Awards 104 (1926), where US soldiers used firearms contrary to US military regulations that forbade firing on unarmed persons, and *Roper Case* (US v Mexico) 4 Rep Intl Arbitral Awards 145 (1927). In that case shots were fired by police officers with the purpose to intimidate a group of men suspected of robbery. As a result they jumped into the water where three of them died, one of them probably shot by the police. The acts of the police were regarded as "reckless and unnecessary use of firearms by persons engaged in the enforcement of law." Ibid., 147.

37 US v Mexico 4 Rep Intl Arbitral Awards 575, 578 (1930).

38 Ibid., 579.

A state's responsibility for its armed forces measures up to a high standard of control. In the *Caire Claim*, Mexican soldiers killed a French national in Mexico after they had demanded money from him. Mexico denied liability, *inter alia,* on the grounds of the private nature of the acts. The President of the French-Mexican Claims Commission held that a state may be responsible even in the absence of any fault on its part. Any illegal act committed under international law by state organs will incur the liability of the state irrespective of whether or not the officials concerned had acted within their competence. The important point was whether they had exercised powers connected with their official duties or, at least apparently, acted as authorised officers. Mexico was found to be liable for the acts of its soldiers.[39]

The treatment of aliens by a state's armed forces, in times of peace, was apparently judged according to an international standard.[40] This standard also seems to require the state to use the means at its disposal in a manner necessary and proportionate to the aim pursued. The responsibility for *ultra vires* acts[41] will

39 He stated: "The officers in question, whatever their previous record, consistently conducted themselves as officers in the brigade of the Villista general, Tomás Urbina; in this capacity they began by exacting the remittance of certain sums of money; they continued by having the victim taken to a barracks of the occupying troops; and it was clearly because of the refusal of M. Caire to meet their repeated demands that they finally shot him. Under these circumstances, there remains no doubt that, even if they are to be regarded as having acted outside their competence, which is by no means certain, and even if their superior officers issued a counter-order, these two officers have involved the responsibility of the State, in view of the fact that they acted in their capacity of officers and used the means placed at their disposition by virtue of that capacity." France v Mexico 5 Rep Intl Arbitral Awards 516 (1929).

40 In the *Youmans Claim*, three US nationals were trapped inside a house in Mexico with a mob gathered around. The mayor of the town sent troops, led by a lieutenant, to disperse the mob. Instead, the troops opened fire on the house killing one of the Americans. The troops and the rest of the mob then killed the other two. The United States claimed, *inter alia*, that the Mexican authorities had failed to exercise due diligence to protect US citizens against the mob. The Mexican Government held that they were not responsible for the wrongful acts of the soldiers because the highest official in the area had ordered that the Americans should be protected but the soldiers had acted in violation of the orders. The Commission found that there might be some uncertainty on what kind of acts of soldiers should be regarded as being private acts. They could not, however, be regarded as private acts when they were committed while on duty and under supervision of a commanding officer. The Commission held that "[s]oldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts." US v Mexico 4 Rep Intl Arbitral Awards 110, para 14 (1926).

41 However, see the *Gordon Case*, where two Mexican officers injured an American citizen during shooting practice. Mexico was not held liable due to the private character of the act, which was regarded to be "outside the line of service and the perform-

probably function as an effective instrument for the state to exercise effective control over its forces.[42] It also seems clear that states are under an obligation to prosecute offenders.

Treatment during detention and arrest

In the *Quintanilla Claim* a young man of Mexican nationality was killed in Texas in 1922. After throwing a girl off her horse, Quintanilla was taken in custody by car by a deputy sheriff and three of his men. His corpse was later found near the road. It was unclear whether the deputy sheriff and his men had murdered the young man, but it was clear that he had never reached a lawful place of detention. The Commission drew parallels with the international law of war concerning the treatment of war prisoners and found that there existed a legal obligation to account for persons taken into custody. That case was found to be analogous insofar as it concerned the taking into custody of a foreigner by a state official. Although a government could not be responsible for everything that happened to a person in custody "it has to account for him. The Government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody, either in jail or in some other place and form, and that it ignores what happened to him."[43]

The *Turner Case* supports the principle that a state is under an obligation to account for an alien taken into custody by a state official. Turner died while being illegally held in custody. It was not proved whether or not his treatment in prison caused his death, but it was found that this treatment would, at the least, have made it difficult for him to regain his health. The Presiding Commissioner stated: "[I]f having a man in custody obligates a Government to account for him, having a man in illegal custody doubtless renders a Government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty".[44]

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ance of a duty of a military officer". US v Mexico 4 Rep Intl Arbitral Awards 586, 588 (1930). According to the Mexico-United States General Claims Commission, "[t]he principle is that the personal acts of officials not within the scope of their authority do not entail responsibility upon a State". The target practice exercised in this case was not prescribed by Mexican Army Regulations.

42 See in this respect Article 91 of Additional Protocol I to the Geneva Conventions, stating that a party to a conflict "shall be responsible for all acts committed by persons forming part of its armed forces."

43 Mexico v US 4 Rep Intl Arbitral Awards 101, 103 (1926), Opinion of the Commission.

44 US v Mexico, 4 Rep Intl Arbitral Awards 278, 281 (1927) The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens outlined the norms applicable to arrest and detention of aliens: "The arrest or detention of an alien is wrongful: if it is a clear and discriminatory violation of the law of the arresting or detaining State; if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the

Even if the norms on treatment of aliens are not sufficiently identified, the responsibility of the state for the treatment of aliens taken into custody, irrespective of the actions of the officials directly responsible for this treatment, appears to have considerable support in the practice of arbitral awards and state practice.[45]

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world; if the State does not have jurisdiction over the alien; or if the arrest or detention otherwise involves a violation by the State of a treaty. The detention of an alien becomes wrongful after the State has failed: to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him; to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful; to grant him a prompt trial; or to ensure that his trial and any appellate proceedings are not unduly prolonged. The mistreatment of an alien during his detention is wrongful." Article 5 of the Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes By Louis B. Sohn and R. R. Baxter, in *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, 179 (García-Amador, Sohn and Baxter eds., 1974).

45 In the *Chevreau Case* (1931) British troops arrested a French citizen, Chevreau, during military operations conducted in Persia with the consent of the Persian Government, in 1918. The Arbitrator held that the need of the British forces to take necessary measures to protect themselves against harmful acts made the arrest itself lawful, together with the fact that Chevreau had not been ill-treated during his detention. The fact that the British Government had failed to initiate proper inquires into the accuracies of the charges on which Chevreau had been arrested made it liable to pay for the moral and the material injury suffered. France v Great Britain 2 Rep Intl Arbitral Awards 1113, 1129 (1931). In 1957, the United States protested to the Haitian government against the death of one of its nationals, Shibley Jean Talamas. According to the U.S. Note, Talamas was beaten to death by the Haitian police authorities. He had surrendered voluntarily after the officer in charge had assured representatives of the U.S. Embassy that he would not be mistreated. The Note requested that the persons responsible should be punished, compensation to the victim's survivors should be offered, and assurance that the lives and property of U.S. citizens should be properly protected should be given. In the responding Note from the Haitian government, it was stated that the interrogating officers had acted in self-defence and been forced to hit Talamas with clubs. He had died shortly thereafter from heart failure. The Haitian government acknowledged responsibility of the death of Talamas, because the blows he received, while in custody of Haitian authorities, clearly contributed to his death. It proposed a settlement, which was accepted by the United States that included disciplinary measures against the guilty officers, compensation to the victim's wife and infant child, and guarantees on the protection at all times of U.S. citizens. See Whiteman, Marjorie M., 8 Digest of International Law, 898-9 (1967), and George T. Yates III, State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era, 213, 222-223, in *International Law of State Responsibility for Injuries to Aliens* (Richard Lillich ed., 1983).

Protection against wrongful acts of private persons: the standard of due diligence

States are under a duty to prevent and punish wrongful acts committed by private persons.[46] Failures in the protection of aliens have in a number of arbitration awards entailed the responsibility of the state. What then is the nature and character of such a duty? Since that duty will vary with differing circumstances, the standard most commonly accepted in the jurisprudence, and adopted in the various drafts aiming to codify the law of state responsibility, is the standard of due diligence.[47] The term due diligence does not in itself add anything more to the definition of the duty of protecting aliens. Commenting on the protection of aliens, Garcia-Amador found that "that there is a presumption against responsibility" and the responsibility of the state is not incurred "unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts".[48]

A few cases from international tribunals and some of the codification proposals serve to illustrate this "presumption against responsibility". In the *Home Missionary Society Claim* the United States claimed compensation from Great Britain for the destruction of its missions and the deaths of a number of missionaries that occurred during the course of an uprising in the Protectorate of Sierra Leone. The United States argued that the rebellion, which started on 27 April 1898 and lasted for several days, was the result of a newly imposed "hut tax" by Great Britain. According to the United States, the British government was aware of the prevailing "deep native resentment; that in the face of the native danger the British Government wholly failed to take proper steps for the maintenance of order and the protection of life and property." The tribunal found that the "hut tax" was in accordance with the British Governments legitimate exercise of sovereignty and that a widespread rebellion could not have been foreseen. The tribunal ruled: "It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection."[49]

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46 See Gordon A. Christenson, Attributing Acts of Omission to the State, 12 *Michigan Journal of International Law*, 334-5 (1991).

47 Jennings, Sir Robert and Watts Sir Arthur (eds.), *Oppenheim's International Law*, Vol. I 549 (9th ed., 1992).

48 Draft Articles on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, by F. V. Garcia-Amador, in *Recent Codification,* 27 García-Amador et al. Garcia-Amador acknowledged that the problems connected properly defined the standard of due diligence and he declared that duty of the state was a duty "the content and scope of which are as a rule very hard to define, and in certain specific cases utterly undefinable." Ibid., 26.

49 US v Great Britain 6 Rep Intl Arbitral Awards 42 (1920).

In the *Noyes Claim* (1933) a US citizen was attacked by a crowd of people in Panama. The United States claimed that the Panamanian government had failed "to provide to the claimant adequate police protection, to exercise due diligence in the maintenance of order and to take adequate measures to apprehend and punish the aggressors".[50] The claim was disallowed, the Commission finding that

> the mere fact that that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authority arises: either their behaviour in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals. There were no such circumstances in the present case.[51]

In 1974 professors Louis Sohn and Richard Baxter presented a Draft Convention on the International Responsibility of States for Injuries to Aliens, undertaken as part of the Program of International Studies, at the Harvard Law School.[52] Article 13 of the Draft dealt with the "Lack of Due Diligence in Protecting Aliens". Paragraph 1 states

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50 US v Panama 6 Rep Intl Arbitral Awards 308 (1933).

51 Ibid. See also *Rosa Gelbtrunk Claim*, US v Salvador XV Rep Intl Arbitral Awards 463, 464-466 (1902). In the *Sambaggio Case*, the Umpire in declaring that a state was not responsible for the acts of unsuccessful revolutionaries, stated: "Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appears that the government has failed to use promptly and with appropriate force its constituted authority, it cannot reasonably be said that it should be responsible for a condition of affairs created without its volition. We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because Revolutionists are not the agents of government, and a natural responsibility does not exist. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraint. See Italy v Venezuela, 10 Rep Intl Arbitral Awards 499 (1903).

52 Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes By Louis B. Sohn and R. R. Baxter, in *Recent Codification,* 135 García-Amador et al.

> Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful:
>
> > if the act is criminal under the law of the State concerned; or the act is generally recognised as criminal by the principal legal systems of the world.[53]

In determining whether due diligence has been shown by state authorities, its foreseeablity of the risk and effective use of available measures are factors of importance.[54] The Claims Commission in the *Solis Case* advanced similar arguments on the responsibility for the acts of insurgents.[55] It found two points of significance in that respect – "namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection."[56]

According to Oppenheim, the duty of the state, with regard to acts of private persons, is limited to "exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged state as far as possible, by punishing the offenders and compelling them to pay damages where required."[57] The same is true for acts committed by insurgents and rioters. Responsibility is assumed on the part of the state only when due diligence could have immediately prevented or defeated an insurrection or riot.[58] The state has a duty to punish any rioters convicted of committing criminal acts against foreigners. It is, however, not incumbent upon the state to repair all the losses sustained by foreign subjects through an insurgency or riot, provided the state had exercised due diligence. Accordingly foreigners need to take into account the possible risk of insurrection or riot. The duty of the state is to enable foreigners to gain access to the courts to claim damages from guilty parties. In the event of alleged

53 In the Explanatory Note it is maintained that "the duty of a State to afford protection may vary with the character of the territory in question in the very same manner that the acts necessary for the exercise of sovereignty may vary with the nature of the terrain, the population, and the degree of civilization of the area claimed." Ibid., 237.

54 Ibid.

55 In this case, cattle had been taken from the ranch of Solis, an American citizen, both by insurgent and by regular forces. The claim against the latter was successful, but the claim against the former was rejected on the ground that it concerned the acts of revolutionary forces and in absence of negligence of the Mexican authorities. US v Mexico 4 Rep Intl Arbitral Awards 358, 362-3 (1928).

56 Ibid.

57 *Oppenheim's International Law*, 549.

58 Ibid., 550-551.

offenders being convicted of criminal acts it is, moreover, the duty of the state to punish them.[59] The traditional customary law duty of states to punish individuals found guilty of criminal acts, may in content be similar to the specific duties of member states to the Safety Convention to punish those convicted of the crimes stipulated therein.[60]

Successful revolutions may lead to the assumption of responsibility on the part of the new state for wrongful acts committed during the revolution. In the *Pinson Case* (1928) the President of the French-Mexican Claims Commission held that positive international law did not at that time recognise a general obligation for states to award compensation for losses to aliens as a result of riot or civil war. A state, however, was liable for the acts of its armed forces in excess of military necessity, pillage and failure to suppress adequately civil unrest such as mutinies or riots.[61] On juridical acts, or of international delinquencies of revolutionaries, the state could only be responsible if the revolution concerned was successful, in which case responsibility would become retroactive from the start of the revolution.[62]

The revolution in Iran and the occupation of the United States Embassy is an example of the due diligence standard being subject to surrounding circumstances. In that particular case most of the US nationals (50 out of 52) in the occupied embassy were diplomatic or consular personnel. The United States claimed that Iran had *inter alia* violated the 1961 and the 1963 *Vienna Conventions on Diplomatic and Consular Relation*s and requested the International Court of Justice to make an order demanding the release of the hostages, the punishment of those responsible and the payment of reparation.[63] According to the Court, the demonstrators who attacked the embassy lacked any form of status as officials of the state and could not on that ground alone incur the responsibility of the state. The Court found, however, that the government of Iran had "failed altogether to take any 'appropriate steps' to protect the premises, the staff and archives of the United State's mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion".[64] That failure was all the more serious since Iran, in accordance with the Vienna Conventions of 1961 and 1963, was "placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and consulates, their staffs, their archives, their means of communica-

59 Ibid., 551.

60 See Articles 9 and 10 of the Safety Convention.

61 France v Mexico 5 Rep Intl Arbitral Awards 327, 352-354 (1928).

62 Ibid., 419-433.

63 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) 1980, ICJ Rep 3.

64 Ibid., Judgement of the Court, para. 63.

tion and the freedom of movement of the members of their staffs".[65] It was the opinion of the Court that "the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means".[66]

The fact that the Court found that the failure of Iran amounted to more than just mere negligence supports the contention by Garcia-Amador that the conduct in question must "show patent or manifest negligence" on the part of the state organs or officials in the protection of aliens to incur the responsibility of the state. It is also apparent that the Court measured the conduct of the state against a higher standard because of the privileged status of the personnel.

The many references to customary law on the treatment of aliens expressed by the Iran-US Claims Tribunal is evidence of the role that this regime continues to play in international relations, and thus in the protection of personnel on international assignments. The fact that the topic of diplomatic protection continued to be dealt with by the ILC is in itself further evidence of the continuing importance of customary law in relation to the treatment of aliens.[67]

3.1.2 Conclusions

The content of the international minimum standard largely reflects norms of human rights law. The nature of the diplomatic protection in question, however, is clearly different from that of human rights law and it is submitted that these areas of international law will continue to exist in parallel. As has been pointed out, this area of the law may serve as an important complement to the more detailed human rights law regime, especially in situations where the host state is not a party to the relevant treaties. While this survey has focused on the content of the international minimum standard, this area of the law is closely connected, of course, to the law of diplomatic protection. The right of states to claim reparation for injurious acts to its citizens has its counterpart in the right of international organisations to exercise their functional protection. The international minimum standard as such, is of relevance for both procedural mechanisms.

65 Ibid., para., 61.

66 Ibid., para., 63.

67 The General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live (1985) is indicative of the role that human rights law plays in this area. It is also indicative of the limitations on human rights protection with regard to aliens. See GA Res. 40/144, The General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, UN GAOR, 40th Sess., Supp. 53, 253, UN Doc. A/RES/40/144 (1985). In the preamble it is stated, *inter alia*, "*Conscious* that, with improving communications and the development of peaceful and friendly relations among countries, individuals increasingly live in countries of which they are not nationals". In Article 1, the term Alien is defined as "any individual who is not national of the State in which he or she is *present*". (Emphasis added).

Case law on the international minimum standard includes to a great extent issues concerning state responsibility, *ultra vires* acts and the principle of due diligence. Many of these questions have now been dealt with by the ILC in its set of Draft Articles on State Responsibility of 2001. These articles have also contributed to clarifying relevant standards of treatment, since they constitute the circumstances under which a state can be in breach of its international obligations.

Perhaps the most important conclusion to be drawn from this survey is the customary law obligation incumbent upon all states to exercise due diligence to prevent illegal acts against foreigners and to punish those convicted of perpetrating them. The fact that all states are under such an obligation means that certain provisions (but not all) of the Safety Convention are declaratory of customary international law. Another important conclusion to be drawn is that future host states are duty-bound to organise their state organs, especially those with executive tasks, in such a way that they are able to exercise effective control over them. That proposition is also supported by Draft Article 7 on state responsibility, which lays down that it is considered to be an act of state responsibility if one or more of the state's organs, authorised to exercise governmental authority, and does so in that capacity, and then exceeds that authority or contravenes instructions.

3.2 Human Rights Law

International human rights law plays a major role in the general protection of personnel engaged in peace operations. In contrast to the international minimum standard, protection under human rights norms does not hinge upon nationality requirements.[68] Human rights law establishes a norm according to which states are obliged to treat nationals and foreigners alike. The law of human rights, however, is partly conditional upon the ratification of relevant treaties by the host state. If the state in which an operation is conducted is not party to the major treaties on human rights, the emerging customary human rights law will be of particular importance. Major human rights treaties provide for derogation of the rules therein, with the exception of some fundamental rules, in times of emergency. The establishment of a peace operation might in fact be in response to an emergency, and derogation from human rights treaties could have a serious affect on the protection of the personnel concerned. In times of internal disturbances, it might not be possible for the government of the state in question to have effective control over all of its territory. Acting in such situations, therefore, could entail serious consequences for the protection of personnel.

The avowed protection of every individual's human rights was seen to be an important part of the new, and more peaceful, world order that was aimed at in 1945. During the San Francisco conference it became clear that the Great Powers were not at that stage ready to create a universal protective system of

68 Philip C. Jessup, *A Modern Law of Nations – An Introduction*, 102 (1968).

human rights. But provisions incorporated within the UN Charter can nevertheless be regarded as laying down the legal foundation for the development of a universal human rights law system.[69] The protection of human rights became one of the purposes of existence for the UN.[70] According to Article 55 "the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." In strengthening the obligation to promote respect for human rights, Article 56 states: "All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

The Universal Declaration of Human Rights was adopted by the General Assembly in December, 1948.[71] It was the first international instrument to deal exclusively with human rights and it can be seen as a reaction to the atrocities that were revealed during and after the Second World War. Its purpose was to declare and articulate certain basic rights belonging inherently to mankind irrespective of race, religion, ethnicity or nationality. Eighteen years later the two treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, were adopted.

On the regional level the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and entered into force in 1953.[72] The European Convention became the first system providing protection for human rights. It is now by far the most developed and effective human rights regime. The American Convention of Human Rights came into force in 1978 and largely incorporates those rights contained within the European Convention.[73] The convention is an instrument of the Organization of American States (OAS) and its enforcement is closely connected with the OAS. The Inter-American Commission on Human Rights, an OAS organ, and the American Court of Human Rights, are the organs entrusted with its enforcement.[74]

The African Charter on Human Rights and People's Rights entered into force 1986. The Charter was closely related to the Organization of African Unity (OAU), now the African Union (AU), and was drafted under OAU sponsorship. The Charter differs from the other universal and regional human rights

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69 Thomas Buergenthal, *International Human Rights*, 23 (2nd ed., 1995).

70 Article 1(3) of the United Nations Charter, 26 June 1945, 1 UNTS XVI.

71 GA Res. 217 (III), Universal Declaration of Human Rights, UN GAOR 3rd Sess., UN Doc. A/RES/217 (III) (1948).

72 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Rome 4 November, 1950, ETS 5-1950.

73 American Convention on Human Rights (1969) 22 November 1969 1144 UNTS 123. For a brief comparative study of these conventions see Jochen A. Frowein, The European and the American Conventions on Human Rights – A Comparison, 1 *Human Rights Law Journal*, 44-65 (1980).

74 D. J. Harris, *Cases and Materials on International Law*, 714 (4th ed., 1991).

instruments. Emphasis has been placed upon people's rights (Articles 19-24) and upon the individual's duties (Articles 27-29). There is no derogation clause in the Charter.[75] An African Commission on Human and People's Rights has been established but its enforcement role is limited. There is as yet no Court under the African Charter.[76]

The following analysis of protection under human rights law will be limited to the International Covenant on Civil and Political Rights (ICCPR) on the universal level and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the American Convention of Human Rights (ACHR) on the regional level. The Universal Declaration of Human Rights does not as such entail the legal obligations of host states and the African Charter is of limited value as there is as yet no court established in connection with the Charter, and the role of the Commission is limited.

3.2.1 Scope of Application

The three human rights treaties here analysed all determine their own field of application. There are, however, striking similarities to be found between these instruments with regard to the field of personal application (*ratione personae*), the geographical field of application (*ratione loci*) and the material field of application (*ratione materiae*). The ICCPR states: "Each Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant".[77] According to the ECHR, the "Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention".[78] The ACHR states that the Parties to the Convention "undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms".[79]

75 But see Articles 9 and 11.

76 On the mandate of the Commission, see, Inger Österdahl, *Implementing Human Rights in Africa: The African Commission on Human and People's Rights and Individual Communications*, (2002). She also discusses the prospects of creating an African Court on Human Rights, 30-33. See also Nsongurua J. Udombana, So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and People's Rights, 97 *AJIL*, 1 (2003).

77 Article 2, of the International Covenant on Civil and Political Rights (1966), 19 December 1966, 999 UNTS 171.

78 Article 1 of the ECHR.

79 Article 1 of the ACHR. See also the Universal Declaration of Human Rights, commonly regarded as having a customary law status, which declares in its preamble the need to secure the rights and freedoms contained therein "both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction", GA Res. 217A (III) (1948).

Ratione personae

The references to "all individuals", "everyone", "all persons" in the three conventions indicate that they apply to individuals *per se*, irrespective of nationality. This is, of course, an important prerequisite for the expected protection of international personnel by the host state. Foreigners may face certain restrictions on political activity in another state but such restrictions are not considered to be a breach of that state's human rights obligations. There is, however, no difference between nationals and non-nationals in the conventional human rights law concerning basic protection for the human being.[80]

Peace operation personnel acting within the territory of a state that is party to one of the major human rights treaties could thus expect to be treated in accordance with the standard prescribed by that treaty.

Ratione loci

With regard to geographical applicability of the human rights treaties, it is apparent that this is not primarily a condition in relation to territory but rather on the exercise of jurisdiction. The European Court of Human Rights has interpreted the term "jurisdiction" to mean an area in which a member state has "effective control".

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[81]

Effective control over territory would seem to entail jurisdiction, and thus responsibility to ensure the enjoyment of human rights by individuals in that area. Mirroring that conclusion, *loss* of effective control over territory could make it impossible to secure human rights in such an area. A state, therefore, might not be responsible for violations of human rights if it was prevented from exercising control over that part of its territory where such violations had occurred. Peace operation personnel deployed in an area *de jure,* belonging to one state but *de facto* controlled by another state, might thus expect the same level of treatment by the latter – depending, of course, upon that state's human rights obligations.[82]

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80 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3 (3rd ed., 1998).

81 Loizidou v Turkey, Preliminary Objections, A 310 1995, para. 62.

82 If the host state were unable to control all of its territory because of armed resistance by rebel movements, the human rights obligations might not "transfer" over to

Depending upon the circumstances, the reference to "jurisdiction" could thus be both a limiting and an expanding factor with respect to territory. The limiting factor will come into play in a state unable to exercise effective control over its territory owing to internal disturbances or external influences. The term "jurisdiction" may be an expanding factor, insofar as the state exercises effective control over territory that does not *de jure* belong to that state. Control over territory will usually cause the controlling state to assume responsibility of guaranteeing the safety and security of individuals living or travelling in that area.[83]

The Inter-American Commission on Human Rights adopted a similar approach to the applicability of the ACHR. In relation to the military action led by US military forces in Grenada in 1983, the Commission found that the convention had extraterritorial application. According to the Commission, the obligation to ensure the human rights of every person within its jurisdiction could include situations where a person might be present within the territory of one state but under the control of another state through its agents abroad. The important fact was whether "the State observed the rights of a person subject to its authority and control".[84]

In view of the above, the language of the ICCPR Convention, "territory *and* subject to its jurisdiction", appears ambiguous. According to the wording, the responsibility of member states could not be entailed outside their territories. Buergenthal offers another interpretation. He asserts that a member state has an obligation to ensure and respect the human rights in the covenant "to all individ-

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that group. For insurgents to fall under the obligation of ensuring human rights to individuals within the territory controlled by them, they must first attain the status of a subject of international law as international human rights law directly binds only subjects of international law. See, for example, Theodor Meron, Allan Rosas, A Declaration on Minimum Humanitarian Standards, 85 *AJIL*, 375, 376-377 (1991).

83 In the *Bankovic Case*, the applicant argued that victims of NATO bombing in Belgrade, during the conflict between NATO states and the Federal Republic of Yugoslavia in 1999, came under the "effective control" of these states and their right to life had therefore been violated. The Court found that it had recognised extra-territorial jurisdiction when the respondent state exercised effective control over territory and inhabitants as a result of a military occupation or by the consent of the government of that territory. The court rejected the argument that the positive obligation of Article 1 extended to secure the Convention's rights proportional to the level of control exercised in a given situation. Bankovic and others v Belgium, Admissibility Decision, 12 December (2001), Reports 2001-XII paras. 71 and 75. For comments on this case see, Matthew Happold, Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights, 3 *Human Rights Law Review*, 77-90 (2003) and Ruth Alexandra and Trilsch Mirja, Bankovic v. Belgium (Admissibility). App. No. 52207/99, 97 *AJIL*, 168-172 (2003).

84 Inter-American Commission on Human Rights, Report No. 109/99, Case 10.951, Coard et al v United States, 29 September, 1999, para. 37.

uals within its territory" and "to all individuals subject to its jurisdiction".[85] There are strong arguments in favour of such an interpretation. In Article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights, a member state of the ICCPR becoming a party to the Protocol "recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction".[86]

The Human Rights Committee has repeatedly supported Buergenthal's interpretation. In a General Comment on Article 27, the Committee interpreted Article 2(1) to apply to all individuals "within the territory *or* under the jurisdiction of the state."[87] Commenting on a report submitted by Iraq under Article 40, the Committee expressed concern over failure to include events in Kuwait during the Iraqi occupation "given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country."[88] It should be noted, however, that in the *Legal Guide to Peace Operations*, published by the US Army Peacekeeping Institute, it is held that the ICCPR does not apply to the extraterritorial conduct of its state organs.[89] The proper interpretation, however, must be to interpret the applicability of the ICCPR in line with the views of Buergenthal and the Human Rights Committee.

Ratione materiae

The possibilities open to states to derogate from their human rights obligations are of the utmost importance for personnel involved in peace operations. The right to derogate from human rights treaties must be treated separately from any inability on the part of a state to fulfil its obligations through loss of territorial control. The former is an explicit right for member states in human rights treaties in times of public emergency, and does not deal with territorial control.

According to Article 4 (1) of the ICCPR the States Parties retain the right to derogate from their obligations in "time of emergency which threatens the life of the nation and the existence of which is officially proclaimed", but only

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85 Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, in *The International Bill of Rights: The Covenant on Civil and Political Rights*, 72, 74 (Louis Henkin ed., 1981).

86 First Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 302.

87 Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum, para. 4 UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) (emphasis added).

88 Report of the Human Rights Committee, UN GAOR, 46th Sess., Supp. No. 40, para. 652, UN Doc. A/46/40 (1991).

89 Glenn Bowens, *Legal Guide to Peace Operations*, 315 (1998), Cf. Nihal, Jayawickrama, *The Judicial Application of Human Rights Law. National, Regional and International Jurisprudence*, 47 (2002).

"to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law". The Human Rights Committee has explained its position on Article 4, stating that the requirement that derogation must be strictly required by the exigencies of the situation "relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency".[90] Certain fundamental rights do not permit derogation – for example, the right to life and protection against torture.[91] Any state exercising the right to derogate must immediately inform other states parties, through the UN the provisions of, and the reasons for, the derogation.[92]

Article 15 of the ECHR provides for derogation "[i]n time of war or other public emergency threatening the life of the nation". The reference to "time of war" may be interpreted as the existence of either an international armed conflict between two states or a non-international armed conflict between the state concerned and armed factions of the same nationality. In both situations the law of armed conflict applies in relevant parts. Whether or not an internal upheaval reaches the level of a non-international armed conflict is not of significant importance concerning the right of derogation, since this is also possible in public emergencies. The European Court found, on the interpretation of "public emergency threatening the life of the nation", that it was equal to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed."[93]

The state is left with a fairly wide margin of discretion and appreciation in determining the seriousness of any situation that arises in relation to whether or not it might derogate from its obligations. In the *Ireland v UK Case* the Court held, with regard to "public emergency" that due to "their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation."[94]

Even if the Court makes its own assessment, it has nevertheless been concluded that "it cannot be asserted that the margin of appreciation allowed to a

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90 Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), para. 4, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

91 See Article 4 (2).

92 See Article 4 (3).

93 Case of Lawless v Ireland, Judgment (Merits), 1 July (1961) A3, para. 28.

94 Case of Ireland v UK, Judgment (Merits and Just Satisfaction) 18 January (1978) A25, para. 27.

state on the question of the existence of the emergency is anything but wide."[95] One commentator finds, from examining the jurisprudence from the ECHR, ICCPR and the ACHR, that a few principal characteristics can be observed on the type of emergency stipulated under these treaties:

> the emergency must be actual or at least imminent; therefore an emergency of a "preventive nature" is not lawful; the emergency should be of such magnitude as to affect the whole of the nation, and not just part of it; the threat must be to the very existence of the nation, this being understood as a threat to the physical integrity, or to the functioning of the organs of the State; the declaration of emergency must be used as a last resort once the normal measures used to with public order disturbances have been exhausted; the declaration of emergency is a temporary measure which cannot last longer than the emergency itself; therefore, the so-called "permanent states of emergency" are not lawful.[96]

In the three main conventions certain rights are listed as being non-derogative in character even in times of war. It has been suggested that two criteria have guided the work of identifying those rights non-derogative in character in the three conventions: rights regarded as being "indispensable for the protection of the human being"; and those rights which have no "direct bearing on the emergency" and where derogation from those rights could never be justified for that purpose.[97] There are four rights regarded as being non-derogative in character in all three conventions: "the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery and servitude, and the principle of non-retroactivity of penal laws".[98]

Those four rights are the only one rights listed as being non-derogative in character within the ECHR. The ICCPR contains seven rights and the ACHR refers to eleven rights regarded as being non-derogative. It is noteworthy that the right to be free from arbitrary arrest and the right to due process of law, which are at particular risk in emergency situations, have not been made non-derogative in character in any of the major treaties.

In the *Aksoy v Turkey Case*[99] (1996), the European Court of Human Rights found a violation of Article 5(3) had occurred, even though Turkey had deposited

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95 Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights*, 493 (1995). See also Rosalyn Higgins, Derogations under Human Rights Treaties, 48 *BYIL*, 281, 296-300 (1976-1977).

96 Jaime Oraá, *Human Rights in States of Emergency in International Law,* 33 (1992).

97 Oraá, 94. See in this respect Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 *Human Rights Quarterly* 89, 113-14 (1985).

98 Oraá, 96.

99 Case of Aksoy v Turkey Reports 1996-IV, (1996).

a notification of derogation in respect of that provision. The Court found that the measures had been taken pursuant to the derogation but it "was not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer".[100]

The Human Rights Committee has listed certain rights, which in its opinion may not be derogated from, although not listed as such in Article 4 of the ICCPR. It is stated in relation to one of those rights that "the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law".[101] The fact that certain fundamental rights have not been made non-derogative in character under the conventions may be balanced by the fact that the court may judge each measure against the requirement of necessity, as it did in the *Aksoy Case* mentioned above.[102]

Owing to the fact that the international human rights instruments have not as yet received universal adherence, it is important to analyse the customary law governing human rights in public emergencies. Furthermore, it is of importance, for instance, in relation to the African Charter on Human Rights, which does not contain any derogation clause. For this purpose, Oráa conducted a detailed examination of the existing evidence of the customary character of the principles embodied in the derogation clauses. Based upon this, he found several principles that can be regarded as being "emergent principles of general international law in a very advanced state of crystallization."[103] These principles are found to be those of exceptional threat, non-derogation of fundamental rights, proportionality and non-discrimination.[104] Oráa suggests that "the principle of proportionality, which

100 Ibid., para 84. Rodley notes that the fact that freedom from incommunicado detention is a right that can be derogated from under the ECHR and that it has "been validly derogated from does not prevent a finding that the provision has been violated," and he therefore, holds that in effect "the Convention has to be read as prohibiting in all circumstances prolonged incommunicado detention, regardless of any state of emergency." Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 345 (2nd ed., 1999).

101 General Comment No. 29, States of Emergency (Article 4).

102 Oráa has suggested that the right of states to derogate from human rights obligations in times of public emergency "is conditioned by the *principle of proportionality*, which states that measures must be strictly required by the exigencies of the situation, by the *principle of non-discrimination*, which states that the measures must not involve any discrimination, and finally, by the *principle of consistency*, which states that the measures should not be inconsistent with the State's other obligations under international law." Oraá, 139 (footnotes omitted).

103 Ibid., 268-69.

104 It is conceded that "some of these substantive principles are in fact already principles of general international law. This seems to be the case with the principles of pro-

is the main criterion for derogation in general international law, provides a strong safeguard against possible doubts in concrete cases concerning the non-derogable character of certain rights."[105]

A connection exists between international humanitarian law and human rights law in relation to the right to derogate. All three instruments state that derogation from the convention's rights shall not be inconsistent with the state's other obligations under international law. Article 15 of the European convention refers specifically to "time of war". The applicability of international humanitarian law, however, depends upon the existence of an armed conflict. It is, however, a difficult task to assess when a state of emergency ends and develops into an armed conflict to which international humanitarian law applies.[106] Derogation from human rights law does not necessarily mean the existence of an armed conflict. Situations of internal violence, where the state in question has derogated from its human rights obligations, which have not reached the threshold of an armed conflict, may in fact be regarded as the most troublesome circumstance with regard to protection of individuals.[107]

It should be noted that human rights institutions refers to international humanitarian law. The Inter-American Commission has even applied it in situations which, according to the Commission, should be characterised as armed conflicts.[108] Does human rights law continue to apply during armed conflict? The ICJ commented on this point, with regard to the right to life, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons:

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portionality and non-discrimination, and, at least as far as the four common non-derogable rights are concerned, the case with the principle of non-derogability. The same could probably be said in respect of the principle of exceptional threat". Oraá, 260.

105 Ibid., 265. According to Oraá "[t]he principle of proportionality refers not only to the nature of the measures taken, in the sense that they must be proportionate to the threat, but also includes what the IACHR has called the "principle of temporariness" (which means that they cannot last longer that the emergency itself), and the limitation that they must be extended in geographical terms only to those places affected by the emergency." Ibid, 263.

106 Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 *AJIL*, 1, 26 (2004). Watkin suggests that the level of violence and the state's ability to exercise normal control may be useful criteria in this respect.

107 Fundamental Standards of Humanity. Report of the Secretary-General submitted pursuant to Commission resolution 2000/69 para. 6, UN Doc., E/CN.4/2001/91, 12 January 2001.

108 Inter-American Commission on Human Rights, Report No. 55/97, Case 11.137 para. 161, Abella et al v Argentina (*Tablada Case*), November 18, 1997. For criticism of the arguments put forward by the Commission in this respect, see Liesbeth Zegveld, The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case, 324 *IRRC,* 505-511 (1998).

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[109]

This seems to be a valid model with which to explain the relationship between human rights law and international humanitarian law. Human rights law continues to apply to the extent that no derogation has been made by the state in question.[110] If human rights law and international humanitarian law apply simultaneously, the latter is regarded as being *lex specialis.* If a question of law is regulated in that legal framework it takes precedence over human rights law.

In conclusion, under the three major human rights treaties states parties have been afforded a wide margin of appreciation in determining the existence of a situation constituting a public emergency that would provide them with a right to derogate from some of their human rights obligations. There are certain rights that are not subject to derogation. The rights considered to be non-derogative in character are of a different nature under the three major human rights treaties. There are, however, four rights considered to be non-derogative in all three treaties: the right to life; the right to be free from torture and other inhuman or degrading treatment or punishment; the right to be free from slavery and servitude; and the right of enjoyment of the principle of non-retroactivity of penal laws. These rights have also been considered to have achieved *jus cogens* status.[111]

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109 Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Rep 226, para. 25.

110 Louise Doswald-Beck and Sylvain Vité, International Humanitarian Law and Human Rights Law, 293 *IRRC*, 94, 102 (1993).

111 See *Restatement, (Third),* Vol. 2, §702 174-5. A *jus cogens* norm is defined in Article 53 of the Vienna Convention on the Law of Treaties. It is there stated: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." It is not the right to life as such that has been recog-

The fact that any derogation must take account of the exigencies of the situation concerned and be proportionate to the objectives sought, means that derogation of those rights that are able to be derogated from could in the actual situation be judged to be a breach of a state's human rights obligations.

Personnel engaged in peace operations may find themselves in situations of public emergency or caught up in armed conflicts that can be international or non-international in character. Consequently, the host state's derogation from human rights treaties could affect their protection to a serious extent. The fact that the right of freedom from arbitrary arrest and the right to due process of law are rights that can be subject to derogation is particularly troublesome in such situations. Although each measure taken should be set against the principle of proportionality, and whether or not they were necessitated by the exigencies of the particular situation, it must not be forgotten that in practice states are afforded a wide margin of appreciation in judging the appropriateness of derogating measures.

If a host state has not derogated from its obligations under human rights law, personnel engaged in peace operations can expect to be treated in accordance with such standards. In times of public emergency, where the host state has legitimately derogated from its human rights obligations, the levels of protection of such personnel might be considerably limited. If the state of emergency turns into an armed conflict, the protection of personnel might in fact be enhanced, depending upon the nature of the armed conflict – whether international or non-international.

Human Rights as customary international law

It is perhaps appropriate to make some brief points on the customary law status of human rights in general. Since the development of human rights law is a fairly new phenomenon, the international treaties have largely stated new norms based at that point only upon conventional form.[112] Treaties that are not by nature codificatory of customary law might be normative in character, and therefore instead develop the law. The different legal norms embodied in a multilateral treaty may of course be of a different character. While some may codify existing law, others may develop new law, crystallising emergent law or merely create obligations between states parties to the convention.[113] Meron has noted that "[j]ust as special rules concerning reciprocity, breach and interpretation of treaties often apply

nised as a *jus cogens* norm. It is rather the prohibition against "arbitrary killings" that have a peremptory status. See Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 436, 514-519 (1988).

112 Although partly based upon the international minimum standard, human rights law was a new phenomenon as it also applied to a state's own citizens.

113 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 90 (1989).

to human rights instruments, different types of evidence may be relevant to the creation of customary human rights law."[114] The US *Restatement* adopts a similar position and states that "the practice of States that is accepted as building customary international law of human rights included some forms of conduct different from that building customary international law generally".[115] Based upon these criteria the *Restatement* lists rights regarded as being norms of customary international law. It is a violation of international law if a state,

> as a matter of policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognised human rights.[116]

In the Comment to this article it is stated that that the human rights norms listed in (a) to (f) are of *jus cogens* status. Breaches of these rights, by there very nature, are regarded as being "gross" human rights violations even if they do not form part of a "consistent pattern". Paragraph (g) refers to human rights, breaches of which would constitute a violation of customary law only if they formed part of a "consistent pattern of gross violations". A gross violation is defined as being "particularly shocking because of the importance of the right or the gravity of the violation".[117] Examples of rights grossly violated as a consistent pattern of state policy are *ipso facto* "systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged)".[118]

Meron is of the opinion that finds the *US Restatement* is "somewhat too cautious". Among other things, he would like to see included a core number of due process guarantees as well as the humane treatment of detainees.[119] There is further reference to the ICCPR and the obligations of member states to "not

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114 Ibid., 100.

115 *Restatement (Third)*, Vol. 2, §701, 154. Schachter, in expressing support for the same position, elaborates on the reasons: "States do not usually make claims on other states or protest violations that do not affect their nationals. In that sense, one can find scant state practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American Courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence." Oscar Schachter, International Law in Theory and in Practice, General Course in Public International Law, 178 *RdC,* 9, 334 (1982-V).

116 *Restatement (Third)* Vol. 2, § 702, 165.

117 Ibid.

118 Ibid.

119 Meron, *Human Rights and Humanitarian Norms as Customary Law* 95-97.

only respect but also to 'ensure' the rights recognised by the Covenant, suggesting an obligation to act to prevent their violation whether by officials or by private persons."[120] According to the ICJ, customary international law prohibits "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship."[121]

It is not within the ambit of this study to analyse more exactly the extent to which human rights law has developed into customary international law. It is clear, however, that at least some norms have acquired this status. It is also clear, that the analysis of human rights law as customary law must take due account of the special context in which these norms have developed. The work on fundamental standards of humanity will be of help in clarifying which norms apply in cases where host states are not party to the relevant human rights law treaties.

3.2.2 Duties of the Host Nation

The duties of member states to the major human rights conventions are formulated in terms of a duty to "respect",[122] "ensure"[123] and "secure"[124] the rights stipulated in the conventions. In practice there are few if any cases, relating to a particular duty to protect the human rights of personnel involved in peace operations. Guidance, however, may be sought from the practice of the European Court of Human Rights, the Inter-American Court of Human Rights, and the Human Rights Committee. These institutions deal with issues concerning the organisation of a state's security forces, the use of force by law enforcement officials, and the responsibility of the state for acts of armed groups and individuals. From this practice, it is possible to detect norms of a general character that are of interest to the subject of protection of personnel employed in peace operations.

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120 *Restatement*, *(Third)* Vol. 2, §702, Reporter's Notes. Meron states: "Given the rapid, continued development of international human rights, the list as now constituted should be regarded as essentially open-ended. Human rights are undergoing a stage of continuing evolution. Through a process of accretion, in which the repetition of the articulation and the assertion of certain norms in various resolutions and declarations and treaties plays an important role, elements of state practice and *opinio juris* form new customary norms of human rights. This continuing process, in which *opinio juris* appears to have greater weight than state practice, is more interesting than the static picture of human rights as reflected by the *Restatement*. Many other rights will be added in the course of time." Meron, *Human Rights and Humanitarian Norms as Customary Law*, 99.

121 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) 1980, ICJ Rep 3, 42.

122 Article 2 of the ICCPR and Article 1 of the ACHR.

123 Ibid.

124 Article 1 of the ECHR.

The Inter-American Court of Human Rights, in the case of Velásquez v Honduras,[125] interpreted the obligation to "ensure" human rights as implying that "the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[126] According to the Court, the obligation to "ensure" the exercise of the rights enumerated in the Convention means that "the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation".[127]

The Court further declared that not only would acts committed by authorities and officials be attributable to the state, but acts committed by private persons or persons not identified might also entail the responsibility of the state over a "lack of due diligence to prevent the violation or to respond to it as required by the Convention."[128] The Court therefore concluded, that on responsibility in general under the convention, the decisive factor was whether the alleged violation of rights had taken place "with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible".[129] The Court found, *inter alia*, that failure to investigate the disappearance of Velásquez, to pay compensation and to punish those responsible constituted a breach of the obligations stipulated by the convention. The Honduran authorities had failed to "take effective action to ensure respect for human rights within the jurisdiction of that State as required by Article 1(1) of the Convention".[130]

From the European Court of Human Rights some cases are to be found on the positive obligation to "secure" the effective enjoyment of human rights. In Ergi v Turkey (1998) the European Court of Human Rights was faced with the question of the responsibility of Turkey for the death of the applicant's sister who was accidentally killed during a shooting incident between Turkey's security

125 Inter-American Court of Human Rights, Judgment of July 29, 1988, 28 ILM. 294 (1989). It concerned the responsibility of the state for the disappearance of Velásquez, a Honduran national, in 1981. The Court found, *inter alia*, that "(1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; (2) Manfredo Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice", para. 148.

126 Ibid., 166.

127 Ibid.

128 Ibid., para. 172. Shelton finds that the reasoning of the Court in this respect mirrors the traditional law of state responsibility for aliens. Dinah Shelton, Private Violence, Public Wrongs, and the Responsibility of States, 13 *Fordham International Law Journal*, 1, 15 (1989-1990).

129 Inter-American Court of Human Rights. Judgment of July 29, 1988, para. 173.

130 Ibid., para. 180.

forces and the PKK.[131] The facts of the case, according to the Court, did not reveal with sufficient certainty whether or not the security forces had fired the bullet that actually killed Havva Ergi.[132] The Court then turned to the interpretation of Article 2.[133] In its assessment the Court stated that, not only would the actions of state agents need to be taken into consideration, especially when deliberate force was applied, "but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination".[134] On the obligation to "secure" the right to life, the Court held that the responsibility of the State may "be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life."[135]

The Court concluded in the case under consideration that villagers had been at considerable risk of being caught in the crossfire between security forces and PKK terrorists and "[e]ven if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught up in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint."[136] With regard to the lack of evidence produced by the respondent state on the planning and conduct of the operation, the Court found that "there was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict."[137]

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131 Case of Ergi v Turkey, Judgment (Merits and Just Satisfaction) 28 July (1998), Reports 1998-IV.

132 Ibid., para. 78.

133 Article 2 of the ECHR states "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." The Court noted that the use of the term "absolutely necessary" implied "a stricter and more compelling form of necessity" than that normally applicable under the test of "necessary in a democratic society" as stipulated by paragraph 2 of Articles 8 to 11. It found it particularly important that the use of force "must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2." Ibid., para. 79.

134 Case of Ergi v Turkey, para. 79.

135 Ibid.

136 Ibid., para. 80.

137 Ibid. On the duty to carefully control and organise an operation where lethal force might be used, see the opinion of the Court in the Case of McCann and others v

The general requirement to "respect" those rights recognised in the human rights treaties would by implication be accomplished by the state in its not actually violating those rights. The obligation to actively "ensure" or "secure" is indicative of the positive duties placed upon member states to take definite measures in order to guarantee those rights.[138] The positive duties under these instruments are far-reaching. States are required to prevent and punish any violation of the conventional human rights law. States are not only responsible for the acts committed by their own officials but also for acts of omission in relation to acts by private persons if there is found to be a lack of due diligence on the part of the state. The most important obligation, however, may be the duty of organising governmental structures in such a way that it becomes possible to ensure full enjoyment of human rights by all persons residing or travelling within the jurisdiction concerned. This also becomes apparent with regard to the responsibility for the planning of law enforcement operations in such a way that they do not unnecessarily or arbitrarily violate the human rights of innocent people. These positive duties are of considerable relevance in relation to the implementation of adequate levels of protection under human rights law for personnel engaged in peace operations. The duty to prevent and punish violations of human rights is of specific relevance and one which is largely reflected in the Safety Convention.

2.2.3 Conclusions

Human rights law obligations are closely connected to such principles of international law as state sovereignty and jurisdiction. The exercise of effective control over territory constitute jurisdiction on the part of the state in question. Host states thus assume an obligation to secure, or ensure, human rights law with regard to all persons within the territories over which they exercise effective control. In times of peace, human rights law establishes the fundamental norms upon which all people can rely. Human rights law, however, may be subject to derogation in times of emergency. The protection afforded by these norms may under

United Kingdom, (Merits and Just Satisfaction) 27 September (1995) A324, paras. 202–213.

138 Halûka, Kabaalioglu, The Obligations to "Respect" and to "Ensure" the Right to Life, in *The Right to Life in International Law*, 165 (B. G. Ramcharan ed., 1985). The General Assembly stated in Resolution No. 421(V) on the ICCPR that "it was essential that the Covenant should include provision rendering it obligatory for States to promote the implementation of the human rights and fundamental freedoms proclaimed in the Covenant and to take the necessary steps, including legislation, to guarantee to everyone the real opportunity of enjoying those rights and freedoms." GA Res. 421(V), Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights, UN GAOR 5th Sess., UN Doc. A/RES/421(V) 1950.

such circumstances be reduced to a few fundamental norms. The right to derogate, however, is subject to certain formal requirements. Moreover, derogation from the material law must, for example, take the principle of proportionality into account. The right to derogate is of particular concern for personnel involved in peace operations, since they are often deployed in areas of conflict.

It is apparent that states are under a *positive duty* to secure and uphold the human rights of everyone within their jurisdiction. That duty, however, could be impossible to fulfil if the host government concerned were unable to exercise effective control over all parts of its territory. This is not an unusual situation in peace operations. Non-state actors, which have not attained the status of a subject of international law, are not formally bound by human rights law standards. Peace operation personnel deployed in such areas cannot rely on the protection of such norms. However, acts contravening human rights law might constitute crimes under the provisions of international law and the perpetrators of such crimes would face the risk of being prosecuted not only by their own states but also by other states. The effective application of the Safety Convention could in this respect have a deterrent effect.

3.3 International Humanitarian Law

Introduction

Rules governing the conduct of war have a history almost as old as mankind[139] and were focused primarily upon the waging of war.[140] The rules governing the means and methods of warfare are often referred to as the law of The Hague. The most pertinent rules protecting persons and property from the effects of war are to be found in a set of laws known as the law of Geneva. This law focuses on the protection of individuals not taking part in the hostilities and mainly comprises the four Geneva Conventions of 1949.[141] The Additional Protocol I (AP I) (1977) to the four Geneva Conventions comprises rules of both the law of Geneva and the law of The Hague, while Additional Protocol II (AP II) (1977) was the first con-

139 See Leslie Green, *The Contemporary Law of Armed Conflict*, Chapter 2 (2nd ed., 2000).

140 See e.g. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and annexed Regulations, 2 *AJIL* Supp. 90-117 (1908) and 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, 2 *AJIL* Supp. 146-153 (1908).

141 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 UNTS 31 (Geneva Convention I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 UNTS 85 (Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 UNTS 135 (Geneva Convention III), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 UNTS 355 (Geneva Convention IV).

vention to deal exclusively with non-international armed conflicts.[142] Sometimes a third category is added, referred to by Kalshoven as the law of New York. This contains the implementation of fundamental human rights norms in situations of armed conflict.[143] He regards, however, a trend to be a merger between those three categories. Evidence of such a merger, for example, is the codification of rules governing the means and methods of warfare in the Additional Protocol I and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, with Protocols (CCW).[144] The term "international humanitarian law" (IHL) is used here as an overall term for the protection of persons and property in times of war, and means and methods of warfare.[145]

At the heart of international humanitarian law applicable in armed conflicts lies the distinction between civilians and combatants. Civilians and civilian property must not be the direct object of attacks. Combatants are legitimate military targets, as are military installations of the warring factions. Under international humanitarian law, a civilian is defined as any person who does not fall under the various categories of combatant.[146] In case of doubt, a person shall be regarded as being a civilian.[147] Military personnel in a peace operation therefore enjoy the protection afforded to civilians if they act in the area of an armed conflict so long as they do not engage as a party to the conflict.[148]

The 1949 Geneva Conventions made an important contribution to the protection of non-participants to an armed conflict. As is well known, they pro-

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142 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (Additional Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (Additional Protocol II).

143 Frits Kalshoven, *Constraints on the Waging of War*, 8 (2nd ed., 1991).

144 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980 19 ILM 1523 (1980).

145 In a strict sense, the international humanitarian law does not comprise all the norms in what is usually referred to as the Laws of War, e.g. the law of neutrality. See Christopher Greenwood, Historical Development and Legal Basis, in *The Handbook of Humanitarian Law in Armed Conflicts*, 1, 9 (Dieter Fleck et al eds., 1995). See also Bring and Körlof who describe the international law in war, 'the laws of war', to comprise three legal frameworks: the humanitarian law, the law of neutrality and the law of occupation. Ove Bring and Anna Körlof, *Folkrätt för Totalförsvaret. En Handbok*, 30 (3rd ed., 2002).

146 AP I, Article 50. This definition has the advantage of being final.

147 Hans-Peter Gasser, Protection of the Civilian Population, in *The Handbook of Humanitarian Law in Armed Conflicts*, 209, 210, (Dieter Fleck, et al eds., 1995).

148 See the Rome Statute of the International Criminal Court, Article 8 (b) (iii) and (e) (iii), at http://www.un.org/law/icc/statute/romefra.htm.

vide standards of protection for civilians, the sick and wounded, prisoners of war and medical personnel. As a rule, such protected persons must not be made the objects of attack. The conventions recognise the desire of armed forces to attack legitimate military objectives located near civilian installations. Underlying the rules on international humanitarian law is a balance that has to be struck between military necessity and respect for humanity.[149]

The following chapter deals with the protection of personnel, deployed in peace operations, under IHL. As this work stops short of situations where such personnel act as combatants to an armed conflict, rules protecting combatants will not be examined. Personnel participating in peace operations will generally enjoy a similar protection as that afforded to civilians under international humanitarian law. Certain groups of civilians, such as religious and medical personnel, enjoy a *special* protection under international humanitarian law. As peace operations are a relatively new concept, there are few rules that deal specifically with the protection of such personnel.[150]

The 1949 Geneva Convention IV on the protection of civilian persons in times of war was the first treaty to deal exclusively with the protection of civilians in times of war. Common Article 3 to the four Geneva Conventions stipulates basic norms applicable in non-international armed conflicts.[151] Additional Protocol II develops the law further in non-international armed conflicts but its applicability is *inter alia* dependent on a threshold of control of territory by dissident armed forces.[152] In customary international law the gap between these two sets of rules may slowly be closing. Large parts of the conventional law, in general, are now regarded as being declaratory of customary international law.[153]

The following survey of international humanitarian law will primarily deal with the law applicable in *international* armed conflict. The conventional law applicable in non-international armed conflict is of a rudimentary character and provides only a basic level of protection. In the few cases where AP II has applied,[154]

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149 Greenwood, Historical Development, 32.

150 See, however, Article 12 (2) (a) of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) and the prohibition without authorisation making use of distinctive emblems of the UN, AP I, Article 38.

151 See common Article 3 of Geneva Conventions I-IV.

152 For an evaluation of that protocol, see Heike Spieker, Twenty-five Years After the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?, 4 *Yearbook of International Humanitarian Law*,129 (2001).

153 See note 155, Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* Vol. I, ICRC (2005), Greenwood, Historical Development 24-26 and the authorities cited there.

154 The protocol was applied for the first time in El Salvador during the 1980s. See Greenwood, Historical Development, 48. He refers also to the ICRC Annual Report 39 (1989).

a more extensive protection is provided for those not participating in the conflict concerned. An interesting development in this respect, however, is the extent to which customary law norms of the law of international armed conflict also apply in situations of non-international armed conflict.[155]

3.3.1 Scope of Application

Armed conflicts

The applicability of international humanitarian law, both of an international and non-international character, depends upon the existence of an armed conflict, or cases of partial or total occupation. An *international* armed conflict is considered as being "all cases of declared war or ... any other armed conflict which may arise between two or more of the High Contracting Parties".[156] The application of the conventions between states parties does not depend upon a formal declaration of war, or even the recognition of war, or an armed conflict. According to the Commentary to the Geneva Conventions (hereinafter the Commentary), the conventions apply in "[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."[157]

In *non-international* armed conflicts common Article 3 to the four Geneva Conventions applies, and under certain circumstances, Additional Protocol II. The latter applies only in cases "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[158] According to the same article, the protocol does not apply in situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

In its first case (the *Tadic Case* 1995) the ICTY stated the need to first examine the criteria governing the existence of an armed conflict as such. The appellant asserted that no armed conflict existed at the time or place, international or

155 Greenwood, Historical Development, 49. Jean-Marie.

156 The Geneva Conventions, moreover, apply in situations of partial or total occupation of a territory and in relation to a Power that is not party to the Conventions if it 'accepts and applies the provisions thereof.' See common Article 2 of Geneva Conventions I-IV.

157 Commentary on the Geneva Conventions of 12 August 1949: Commentary, Article 2 GC IV, 20 (Jean S. Pictet et al eds., 1958).

158 Article 1 of AP II.

non-international, that the alleged crimes were said to have been committed. The Court addressed both the temporal and geographic scope of application of international humanitarian law. The Court ruled:

> … an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[159]

A situation may also arise in which none of the states recognises the existence of an armed conflict. Common Article 2 of the four Geneva Conventions only provides for the case of one of the parties to a conflict not recognising it. It is stated in the Commentary that even in those cases it would not appear as if the parties to the conflict concerned could prevent the conventions from applying. The purpose of the convention, to protect individuals, is underlined together with the fact that its provisions are not primarily for serving the interests of states.[160] The purpose of paragraph 2 is also to make the convention apply in situations of occupation not preceded by any hostilities or declaration of war. An occupation of territory, as part of the ongoing hostilities would be regulated by the conventions through their application to the conflict in question.[161]

The application of treaties to the rules of warfare had earlier been based upon reciprocity, containing an all-participation clause. Unless all parties to the conflict were also parties to the relevant conventions, then none of the belligerents would be bound.[162] Paragraph 3 of Article 2 stipulates that the convention also applies in relation to non-parties if the latter "accepts and applies" the convention. The cumulative nature of these conditions is discussed in the Commentary. Could a state party to the convention refuse to apply the provisions therein in cases where the non-state party applies the convention but has failed to declare a formal acceptance of it? Owing to the nature of the convention, on the treatment of civilians, the condition of acceptance must also be understood as including a

159 Prosecutor v Tadic, Case IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, para. 70.

160 Commentary, Article 2 GC IV, 21.

161 Ibid.

162 Green, 34.

tacit or *de facto* acceptance through the application of the convention.[163] To the extent that customary humanitarian law comprises large parts of conventional humanitarian law, the criterion of reciprocity is less important since all armed conflicts are subject to rules of customary humanitarian law.[164]

It is possible to discern different levels of protection depending upon the nature and character of a particular conflict. In cases of internal upheaval, riots and suchlike international humanitarian law does not apply. Such a situation could be particularly troublesome, since the state in question could derogate from its human rights law obligations. If the situation turned out to be an armed conflict, within the state, at least common Article 3 to the four Geneva Conventions would apply. As pointed out above, this article only provides a basic level of protection. If armed groups opposing government forces exercise effective control over territory then AP II may apply to the conflict, thus stipulating higher standards of protection for those not participating in the conflict. If the armed conflict in question turns out to be an international armed conflict, then standards of protection are considerably strengthened.

Large parts of international humanitarian law, however, are now regarded as being part of customary international law. This has, for example, been confirmed by the ICJ.[165] The law that is formally applicable in international armed conflicts might also apply in non-international armed conflicts.[166] The ICTY, for example, in the *Tadic Case* stated that basic rules of customary law applied both in international and non-international armed conflicts.[167] The ICRC-study on customary international humanitarian law shows that the essential rules of the

163 Commentary, Article 2, GC IV, 24.

164 René Provost, *International Human Rights and Humanitarian Law,* 155 (2002).

165 In the Advisory Opinion of 8 July 1996 on the *Legality of the Threat of Use of Nuclear Weapons*, the Court held, for example, that "The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States." ICJ Reports 1996, 226, para. 82. See also in this respect, Vincent Chetail, The contribution of the International Court of Justice to international humanitarian law, 850 *IRRC* 235, 246 (2003).

166 Christopher Greenwood, Scope of Application of Humanitarian Law, in *The Handbook of Humanitarian Law in Armed Conflicts*, 39, 49 (Dieter Fleck et al eds., 1995). Bring and Körlof, 234.

167 The Court analysed customary rules applicable in non-international armed conflicts (paras. 96-127) and provided examples of areas where such rules applied: "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities", Case No. IT-94-1-AR72, October 2, 1995, para. 127.

two additional protocols have become part of customary law. A great number of those rules are also applicable as customary law in non-international armed conflicts.[168] Examples of rules applicable in all types of armed conflict, identified in the ICRC-study on customary international humanitarian law, are the principle of distinction (between civilians and combatants and between civilian objects and military objectives), the prohibition of indiscriminate attacks, the principle of proportionality and the duty to take precautions in attack.[169] Other examples of rules binding upon all types of conflict are the duty to respect and protect medical and religious personnel and objects, humanitarian relief personnel and objects and prohibition to directing an attack against personnel and objects involved in a peacekeeping mission.[170]

Peace operation forces engaged in armed conflict and applicable law

Personnel deployed in peace operations are entitled to the protection afforded civilians under international humanitarian law so long as they do not engage as combatants in an armed conflict. What constitutes an armed conflict has previously been described. Clearly, not any use of force by military personnel would turn them into combatants. Forces involved in the classical peacekeeping operation are entitled to use force in self-defence, but that would not mean *per se* that by doing so they would become combatants. Seyersted points to the fact that peacekeeping forces may be "involved in genuine hostilities with another organized force, even if this was not expected when the Force was set up and when national contingents for it were prepared".[171] Even in operations where forces are entitled to use force to achieve their mandated objective, the force used does not necessarily mean that those involved become combatants engaged in an armed conflict.

Hampson applies an analogy taken from domestic law to illustrate the distinctions between the various uses of force applied in self-defence, or used in order to attain certain objectives and situations where such forces are engaged as combatants to an armed conflict. The police are authorised to use force to protect the interests of peaceful citizens, for example, by quelling a riot. This does not mean that they are biased or that they act as soldiers in an armed conflict in relation to the rioters.[172] The analogy of the right of the police in domestic laws to use

168 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* Vol. I, ICRC (2005). Of the 161 rules identified in the study, approximately 155 are applicable in non-international armed conflicts. See also Jean-Marie Henckaerts, Study on customary international law: A contribution to the understanding and respect for the rule of law in armed conflict, *IRRC,* Vol. 87, No. 857 (2005).

169 Henckaerts and Doswald-Beck, chapters 1-6.

170 Ibid., chapters 7-9.

171 Finn Seyersted, *United Nations Forces. In the Law of Peace and War*, 210 (1966).

172 Françoise Hampson, States' military operations authorized by the United Nations and international humanitarian law, in *The United Nations and International*

force, is rather a good illustration of the position of military personnel engaged in peace operations.[173]

In operations such as the UN-authorised enforcement operation against Iraq in 1990, the UN mandated forces were clearly engaged as combatants in an armed conflict with Iraqi forces.[174] A much more difficult situation arises when peace operation forces come under attack in other types of situation. At what point do they become combatants? Is it possible to rely on the criteria from the *Tadic Case,* referred to before, that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state"? The challenges surrounding this fundamental issue are of great importance for the legal status of the personnel and relate to the application of the Safety Convention.

The deployment of a military force in the context of an international or non-international armed conflict clearly poses specific problems. On the one hand, we have the requirement of international humanitarian law that all parties to an armed conflict are entitled to equal treatment – a horizontal relationship between the parties to an armed conflict – and on the other hand, we have situations where peace operation forces act upon a mandate of the Security Council that entails a vertical relationship with other subjects of international law.[175] This tension between the requirements of international humanitarian law and the "police" functions of UN-mandated military forces colours the debate on the legal status of such personnel when they resort to force. The issue of the applicability of international humanitarian law to military forces in peace operations has been mainly concerned with whether or not the whole set of that law applies. Less emphasis has been placed upon those circumstances where such forces can be regarded as being combatants to an armed conflict. It is, however, possible to discern different positions on this issue in the literature. Glick advocates strongly the applicability of the international humanitarian law to UN forces when engaged in an armed conflict.[176] He appears to support a low threshold for the involvement of

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Humanitarian Law, 371, 378 (Luigi Condorelli et al eds., 1996).

173 On this position see also Gert-Jan F. van Hegelsom, The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations, 6 *Hague Yearbook of International Law*, 45, 55 (1993). According to Article 2(2) of the European Convention on Human Rights, deadly use of force does not contravene that convention if it was absolutely necessary for one of the following purposes: "(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." European Convention of Human Rights, Article 2

174 Christer Ahlström, *Gulfkriget och den humanitära folkrätten*, (1992).

175 Richard D. Glick, Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces, 17 *Michigan Journal of International Law*, 53, 59 (1995).

176 Ibid., 55.

UN forces in an armed conflict, whereby such forces will lose their protection as civilians. For example, he criticises the Safety Convention for wrongly criminalising acts that would be covered by the combatant privilege of forces attacking UN personnel.[177] He also finds it worrying that the UN interpretation of the right of self-defence of its peace operation forces includes the right to defend the mandate. Such "defensive" use of force would thus not be subject to international humanitarian law. According to Glick, this could undermine respect for international humanitarian law.[178]

Shraga refers to a condition that international humanitarian law applies "to United Nations personnel when, in the conduct of Chapter VII mandate operations, they are *actively* engaged in combat mission".[179] However, she finds that international humanitarian law also applies in peacekeeping missions "where UN personnel in self-defence resort to the use of force".[180] The fact that UN forces could, and perhaps would, engage in armed conflict when acting in self-defence seems to be supported by Green.[181] Kolb, on the other hand, asserts that self-defence against sporadic attacks does not give rise to a situation where it could be construed that such forces were involved in an armed conflict. However, "if the attacks degenerate into a general pattern and the forces start conducting military operations on their own so as to respond to the acts of war of the other side, we would find ourselves in the context of an armed conflict, and the mere fact of attacking a member of the forces would no longer be a crime in itself".[182] Greenwood contends that a higher level of force is tolerated in certain peace operations, so that IHL would not apply. This view is based upon the background experiences of UNPROFOR and UNOSOM. Those operations had clearly reached a level where in other cases it would be regarded as sufficient to constitute an armed conflict.[183]

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177 Ibid., 93.

178 Ibid., 77.

179 Daphna Shraga, The Applicability of International Humanitarian Law to United Nations Operations, in *Blue Helmets: Policemen or Combatants?*, 17, 30 (Claude Emanuelli, ed., 1997) (emphasis added). The criterion of being "actively" engaged in an armed conflict appears to be supported by Tittemore. See Brian D. Tittemore, Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations, 33 *Stanford Journal of International Law,* 61, 109 (1997).

180 Shraga, 30.

181 Green, 345.

182 Robert Kolb, Applicability of international humanitarian law to forces under the command of an international organization, Background Document 1, Report. Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, 61, 68, Geneva 11-12 December (2003).

183 Christopher Greenwood, International Humanitarian Law and United Nations Military Operations, 1 *Yearbook of International Humanitarian Law*, 3, 24 (1998).

Great difficulties are involved in defining the circumstances where military personnel in peace operations are to be regarded as combatants, and thereby lose their protected status as civilians under international humanitarian law. The idea that there is a higher threshold for such forces to be regarded as combatants, than that normally applied in relation to other military forces, seems to be supported by writers who refer to a criterion of being "actively" engaged in an armed conflict. No such criterion exists under the Geneva Conventions. Civilians lose their protected status if "they take a direct part in hostilities"[184] but that does not mean that they necessarily or automatically become combatants. The "Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law" issued on 6 August 1999 also includes this condition.[185] The principles and rules of international humanitarian law stipulated therein apply to:

> United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.[186]

The second sentence appears to contain the meaning that the Bulletin applies when UN forces are actively engaged in an armed conflict notwithstanding the *mandate* of the operation.[187]

In a recent report of the ICRC from an expert meeting on the applicability of international humanitarian law to multinational peace operations most experts supported the idea that the application of international humanitarian law to such forces essentially depended on the facts on the ground. Others believed that such

184 Article 51(3) AP I.

185 Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, 6 August 1999, UN Doc. ST/SGB/1999/13. Being part of the UN's internal law, the Bulletin applies to the members of the UN staff. Section 4 of the Bulletin stipulates, however, that troop-contributing nations retain the exclusive jurisdiction of violations of international humanitarian law and violations of the Bulletin's provisions will, therefore, not be handled in the usual administrative processes available for UN staff. See Marten Zwanenburg, The Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law?: A Pyrrhic Victory?, R250 39 *Revue de Droit Militaire de la Guerre*, 4, 5 (nos. 1-4: 2000).

186 Secretary-General's Bulletin, preamble and Section 1.1.

187 The ambiguous wording could also be interpreted to mean that the Bulletin also applies in every peacekeeping and enforcement operation irrespective of the requirement in the first sentence. That would, however, lead to strange consequences for the status of UN forces if they were to apply international humanitarian law in traditional peacekeeping operations. See Michael Bothe and Thomas Dörschel, The UN Peacekeeping Experience, in *The Handbook on The Law of Visiting Forces*, 487, 501 (Dieter Fleck et al eds., 2001).

forces would become combatants only in situations where they took sides against a particular party.[188] Greenwood concludes that the degree of ambiguity surrounding this question is regrettable "and cannot be reconciled with principle".[189] Hampson finds that the question remains unclear.[190]

It would seem that the decision on when a peace operation force crosses the point at which its members become combatants to an armed conflict must be judged against an objective criterion (facts on the ground) and to some extent, a subjective criterion. If such forces fall under attack they should be allowed to respond with a limited use of force in keeping with their protected status and to enable them to retain it. If such use of force could be regarded as being legitimate under human rights law standards, such as under Article 2 of the ECHR, they would not become combatants. If the purpose of the force used went beyond self-defence, or the conditions stipulated by human rights law, the status of the military personnel as civilians under international humanitarian law would be compromised. In that respect it should be noted that the UN interpretation of their forces' right of self-defence is extensive. It has repeatedly been stated that self-defence includes "resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council".[191] The fact that modern operations often involve an explicit mandate to protect civilian population further blurs the distinction between self-defence and actions taken in an armed conflict.[192] In this respect it should also be recalled that the Secretary-General has noted that

> The operational environments of many peacekeeping operations today are particularly threatening. For a peacekeeping mission to succeed in those environments, there must be a shared understanding of the need for a robust force,

188 Report from the Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, Executive Summary 1-2, Geneva 11-12 December (2003).

189 Greenwood, International Humanitarian Law, 26.

190 Hampson, 378.

191 See e.g. Report of the Secretary-General on the implementation of Security Council resolution 340 (1973), para. 4 (d), UN Doc. S/11052/Rev. 1 (1973) and Report of the Secretary-General on the implementation of Security Council resolution 425 (1978), para. 4 (d), UN Doc. S/12611 (1978).

192 See, for example, SC Res. 1291, UN SCOR, 4104th mtg., para. 8, UN Doc. S/RES/1291 (2000), SC Res. 1545, UN SCOR, 4975th mtg., para. 5 UN Doc. S/RES/1545 (2004), SC Res. 1528, UN SCOR, 4918th mtg., para. 6(i) UN Doc. S/RES/1528 (2004). The Security Council has declared "its intention to ensure, where appropriate and feasible, that peacekeeping missions are given suitable mandates and adequate resources to protect civilians under imminent threat of physical danger". SC Res. 1296, UN SCOR, 4130th mtg., para. 8, UN Doc. S/RES/1296 (2000).

> deployed and configured not only to be able to use force; but also to keep the initiative and, if challenged, to defend itself and its mandate.[193]

Even if force is used for the purpose of self-defence, such force must also be judged against the objective criterion of the level of force used (intensity of the conflict) and its duration. The argument of self-defence cannot be relied upon indefinitely in order to escape the application of international humanitarian law.

Another aspect of importance is the fact that in non-international armed conflicts, rebel groups may still be punished for attacking government soldiers in accordance with national criminal law. This is so even if their actions were in keeping with international humanitarian law applicable in such conflicts. Rules applicable in non-international armed conflicts are mainly directed to the protection of those not participating in the conflict. The concepts of "combatant" and "prisoner of war" are not found in conventional IHL applicable in such conflicts. Nor does it seem to have evolved any customary rule on combatant status in non-international armed conflicts.[194] These aspects are of particular importance in situations where peace operation forces become involved in fighting with armed groups within the host state, and have direct implications for the applicability of the Safety Convention. These issues will be further dealt with in Chapter 5.3.1.

3.3.2 Standards of Protection

There are few provisions in international humanitarian law dealing explicitly with the protection of personnel deployed in peace operations. It is forbidden for parties to a conflict to use the emblem of the UN, if not authorised to do so by the UN. It is, moreover, considered a war crime (perfidy) to kill, injure or capture an adversary by feigning the protected status of the UN by using its signs, emblems or uniforms. The Mines Protocol to the CCW (1980) requires parties to a conflict to take necessary measures to protect peace operation forces "from the effects of mines, booby-traps and other devices under its control".[195] The amended Protocol (1996) also applies to non-international armed conflicts.[196] Apart from these specially designed rules, personnel involved in peace operations who are present in an area of armed conflict have to rely on general rules of protection under IHL,

193 Report of the Secretary-General, Implementation of the recommendations of the Special Committee on Peacekeeping Operations, para. 4, UN Doc A/58/694 (2004).

194 Henckaerts and Doswald-Beck, Rules 3-5 with commentaries.

195 Article 8 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1980 Protocol II) 10 October 1980 19 ILM 1523 (1980).

196 Articles 1 and 12 of the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996 Amended Protocol II) 3 May 1996, 35 ILM 1206 (1996).

such as those on protection against attacks and effects of hostilities and those on protection against arbitrary treatment in the hands of a party to the conflict.

Protection against attacks and effects of hostilities

The categorisation of combatants and civilians serves the purpose of protecting civilians from being direct targets. It does not mean, however, that civilians enjoy a complete protection from attacks and other effects of hostilities. Legitimate military targets may come under attack by a party to the conflict, and the presence of civilians close to that target does not necessarily make the attack illegal. It is, in fact, the responsibility of all parties to a conflict to protect civilians by separating military targets from civilians and civilian objects. Certain principles have developed in international humanitarian law restricting the means and methods of warfare by the parties to a conflict.

Some basic principles are of the utmost importance for the protection of civilians during armed conflict. What is often referred to, as the most fundamental rule of international humanitarian law, is the duty of the parties to a conflict to never deliberately attack civilians.[197] This has been clearly stated in AP I where Article 48 (basic rule) reads:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[198]

The protection afforded civilians under international humanitarian law is conditional upon the fact that they do not take a direct part in hostilities.[199] Any direct attack on civilians is also considered to be a war crime under the statute of the ICC.[200] Incidental loss of civilian life and property may be the legitimate consequence of a military operation. In effect it means that the presence of civilians near a military objective does not deprive it of its status as a legitimate target. Acts that cause excessive loss of civilian life and property, however, are prohibited

197 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: Commentary, Article 48 AP I, 598 (Yves Sandoz, Christophe Swinarski and Bruno Zimmerman eds., 1987), states that "It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives". See also Green, 124, and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 115 (2004).

198 Article 48 of AP I.

199 Article 51(3) of AP I.

200 Article 8(2)(b)(i) and (e)(i) of the ICC Statute.

under the principle of proportionality. According to AP I, a prohibited attack is one "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[201] The principles of distinction and proportionality are regarded as being part of international customary law.[202]

Personnel engaged in peace operations run the risk of being killed in the course legitimate military operations if they find themselves in the vicinity of military targets. Parties to a conflict, however, must take all feasible precautions in planning an attack, even cancelling or postponing it if is suspected that it would cause a disproportionate loss of civilian life.[203] An obligation exists on the part of those planning and deciding on attacks to show and exercise concern, but it primarily involves those who actually carry them out.[204]

Protection against arbitrary treatment in the hands of a party to the conflict

While all civilians theoretically enjoy protection from the effects of war, some categories of the civilian population are also, under international humanitarian law, protected against arbitrary treatment when in the hands of a party to the conflict. These are primarily those who live or are otherwise present in the territory of a state that becomes a party to an armed conflict with their own state (enemy aliens) and civilians of a state subject to military occupation.[205] In times of war, civilians who are in the hands of the enemy are considered to be particularly vulnerable. Such enemy civilians are therefore classified as protected persons under Geneva Convention IV. According to its Article 4 protected persons are those

> who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
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> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as

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201 A similar provision is found in Article 57 (2) (a) (3) AP I regarding precautions in attack.

202 Christopher Greenwood, A Critique of the Additional Protocols to the Geneva Conventions of 1949, in *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, 3, 10 (Helen Durham and Timothy L. H. McCormack eds., 1999) See ICJ, Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Rep 226, para. 78, and Dinstein, 120.

203 Article 57(2) of AP I.

204 Commentary, Article 57 AP I, 686.

205 Geoffrey Best, *War and Law Since 1945*, 115 (1994).

> protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[206]

The first paragraph of Article 4 addresses the topic of protection of non-nationals in the hands of a party to the conflict or that of an occupying power. Nationals of a neutral state, present in the territory of a belligerent, are not regarded as being protected persons in cases where their state of nationality maintains normal diplomatic representation in the belligerent state. Nationals of a neutral state in the hands of an occupying power, however, are regarded as being protected persons, irrespective of any diplomatic representation. The rationale seems to be that even if diplomatic representatives remain in occupied territory, they are not accredited to the occupying power.[207] Nationals of co-belligerent states are not regarded as being protected persons if such states have normal diplomatic representation in the territory of either belligerent states or occupied states. It was assumed that nationals of co-belligerent states would not be in need of the protection under the convention.[208]

The purpose of excluding the above-mentioned nationals from the category of protected persons was that they could rely on diplomatic protection of their state of nationality. Persons are either protected persons under the convention or can benefit from the diplomatic protection of their state of nationality. The dependence on nationality for determining whether or not a person has protected status has, however, proved to be an inadequate test in conflicts triggered by the disintegration of a state.[209] In the *Tadic Case*,[210] the ICTY appeals chamber held that the requirement of nationality was in 1949, when the four Geneva Conventions were adopted, already regarded as being of less importance than the existence of diplomatic protection. If there was no *true* diplomatic protection available, for example, to refugees, despite a formal link of nationality, they would be regarded as being protected persons under IHL.[211] According to the Court,

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206 Article 4 of GC IV.

207 In the Commentary on this article it is stated: "This seems to be a legitimate distinction. In the territory of the belligerent States the position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them. In occupied territory, on the other hand, the diplomatic representatives of neutral States, even assuming that they remain there, are not accredited to the Occupying Power but only to the occupied Power." Commentary, Article 4 GC IV, 49.

208 Ibid.

209 Theodor Meron, The Humanization of Humanitarian Law, 94 *AJIL*, 239, 257-260 (2000).

210 Prosecutor v Tadic, IT-94-1-A, July 15 1999.

211 Ibid., para. 165. The Court referred to the preparatory works of Article 44 of GC IV and noted that refugees were mentioned as persons having the nationality of an occupying power but who could not rely on diplomatic protection of their state of

nationals of a neutral state or a co-belligerent state "are not 'protected persons' as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of 'protected persons'".[212] The Court observed that in modern conflicts new states may be created during the conflict itself. Allegiance to the new state is not based upon nationality but rather on ethnicity. A better criterion than nationality would therefore, according to the Court, be whether persons were in the hands of an adverse party to the conflict.[213] All of that will be of limited effect for personnel in peace operations not acting as a party to the conflict. It shows, however, a disposition on the part of the ICTY to apply IHL in a progressive manner. It is disposed to extend the category of protected persons in cases of doubt and to interpret the law in the context of contemporary armed conflicts.

The expression "in the hands of" should be interpreted in a broader way than in a physical sense. It refers to the presence of a person within territory under the control of a belligerent party or occupying power.[214] The ICTY reinforced this interpretation by stating that the expression "in the hands of" was not to be limited to situations where persons were physically in the hands of a party or occupying power. The tribunal held that "those persons who found themselves in territory effectively occupied by a party to the conflict can be considered to be in the hands of that party".[215]

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nationality. This was illustrated by the Court by the example of German Jews who fled to France before 1940 and thereafter found themselves in the hands of German occupying forces.) Ibid., para. 164.

212 Ibid., para. 165.

213 Ibid., para. 166. See also the *Celebici Case*, Prosecutor v Delalic et al., IT-96-21-T, 16 November 1998, para. 265, where the Court states that the victims "were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been 'protected persons' within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State." The Trial Chamber also noted on the requirement of nationality in general in conflicts characterised by the disintegration of the state: "The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that 'the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests' and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible." Ibid., para. 263 (footnotes omitted).

214 According to the Commentary it "need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question. Commentary, Article 4 GC IV, 47.

215 Prosecutor v Tadic, IT-94-1-T, 7 May 1997, para. 579.

Are personnel in peace operations "protected persons" under international humanitarian law? The guiding principle for protected person status is that it concerns civilians in the hands of the enemy. Solely upon this premise, personnel in peace operations would hardly qualify as protected persons. It could naturally be persons involved in the peace operation who in fact retained the nationality of the adverse party to the particular conflict. It is possible that such persons could be regarded as being protected persons if they were mistreated by the belligerent state on the basis of their nationality. Personnel in peace operations are, however, first and foremost deployed as personnel representing their mission and the organisation, or state, exercising command and control over the operation, and not as nationals of their home states. As such, they would not naturally qualify as protected persons within the meaning of Article 4 of GC IV.

Personnel participating in a peace operation may possibly be regarded as protected persons if the organisation, or state, commanding the operation in question did not have normal diplomatic relations with the state in question. As the nationality requirement of a protected person has been given a wide interpretation, such analogy should not be ruled out.[216] It should also be pointed out that the prosecutor engaged in the indictment against Karadzic and Mladic, concerning *inter alia* the taking of UN personnel as hostages, explicitly stated that UN personnel were regarded at all relevant times as being persons protected by the Geneva Conventions.[217]

A large number of rather detailed provisions exist that aim to secure the protection of those persons. The following survey of the levels of protection will take a somewhat general approach identifying the main principles of protection of interest to personnel in peace operations. Part III of G C IV deals with the status and treatment of protected persons. The key provision is Article 27, which states:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same considera-

216 According to Freeman, peacekeepers in the UNOSOM operation qualified as protected persons since Somalia did not have normal diplomatic relations with the UN. See Kenneth S. Freeman, Punishing Attacks on United Nations Peacekeepers: A Case Study of Somalia, 8 *Emory International Law Review*, 845, 856 (1994).

217 Prosecutor v Karadzic & Mladic, Indictment, IT-95-5-I, 24 July 1995, para. 46.

> tion by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.[218]

The provision is applicable both to the territories of the parties to the conflict as well as to occupied territory. The right of respect for the person should be interpreted in its widest sense, including "in particular, the right to physical, moral and intellectual integrity – an essential attribute of the human person."[219] There is room available for the parties to the conflict to place necessary restrictions on protected persons for the purpose of its security. Such restrictions could include limitations on the freedom of movement of protected persons. The right to leave the territory in question during an armed conflict is expressed in Article 35, but is also subject to the national interests of the state.[220]

Prohibition against any form of corporal punishment, torture or any other form of brutality against persons in the hands of a party to the conflict is explicitly stated in Article 32. To ensure that all protected persons shall be entitled to humane treatment the prohibition extends to "any measure as to cause" such effects.[221] The formula is thus not limited to intentional acts. GC IV contains an explicit prohibition against the use of human shields. Article 28 states: "The presence of a protected person may not be used to render certain points or areas immune from military operations." Protected persons must never be punished for crimes they did not commit and collective punishments are prohibited. Reprisals, moreover, are prohibited against protected persons and their property.[222] The prohibition against the taking of hostages should be understood in its widest sense. It includes all forms of hostage-taking and applies both to international and non-international conflicts.[223]

For personnel engaged in peace operations the rules dealing with the status of aliens in the territory of a party to the conflict are of particular importance. Aliens in the territory of a party to the conflict shall have the right to leave the territory, subject to the national interests of the state, and if confined pending proceedings they shall be humanely treated.[224] The main principle guiding the protection of aliens in the territory of a party to the conflict is that peacetime

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218 Article 27 of GC IV.

219 Commentary, Article 27 GC IV, 201.

220 Article 35 of GC IV.

221 Commentary, Article 32 GC IV, 222.

222 Article 33 of GC IV.

223 Commentary, Article 34 GC IV, 230-231. According to the Commentary the prohibition "is absolute in character." Ibid. 231.

224 Articles 35 and 37 of GC IV.

rules continue to apply. Those rules are subject to some restrictions, such as the right of the state to take the necessary measures of control and security, as stated in GC IV, Article 27.[225] The intention of applying peacetime rules to aliens is not that they should escape the effects of war, but that restrictions with regard to the civilian population as a whole, should also apply to aliens.[226]

This work is based upon the premise that the personnel of a peace operation do not act as combatants to an armed conflict. Such personnel, therefore, are not connected to any party to the conflict. It means that the special protection, under international humanitarian law, accorded to medical personnel of the belligerent armed forces will not be examined. Except for medical personnel, other categories enjoy a special protection under international humanitarian law. These include women and children; the sick and wounded (combatants); victims of shipwreck; surrendering members of armed forces; religious personnel, civil defence personnel, journalists and relief personnel. Religious personnel must be attached to the armed forces and civil defence personnel are those so designated by a party to the conflict. The special protection of the above-mentioned categories generally falls outside the scope of this work. The special protection of relief personnel, however, is of interest in relation to the protection of personnel in peace operations.

There are some provisions in the GC IV relating to the free passage of consignments of food and medical supplies and the protection of such consignments (23, 55, 59). For details of the protection available for personnel participating in such missions one should turn to AP I and Article 71. It states in full:

> 1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
> 2. Such personnel shall be respected and protected.
> 3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.
> 4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying

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225 According to the Commentary the general rule is that aliens retain their peacetime status and "that recourse may only be had to exceptional measures in cases of absolute necessity." Commentary, Article 38 GC IV, 246.

226 Ibid.

> out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Relief personnel thus enjoy the general protection under international humanitarian law as civilians, and a special protection under AP I. Personnel of the ICRC, however, always enjoy protection under the emblem of the Red Cross.[227] An important condition for the relief operation in question and the participation of its personnel is "the approval of the Party in whose territory they will carry out their duties". It should be interpreted as meaning the party exercising control over the territory in question.[228]

Personnel in a relief action shall be "respected" and "protected". As to the meaning of these imperatives, they have the same content as in other parts of the Geneva Conventions.[229] The term "respect" means "to spare, not to attack" while the term "protect" means "to come to someone's defence, to lend help and support".[230]

Under international humanitarian law, personnel belonging to relief operations would continue to be regarded as protected persons if they fell into the hands of the enemy of the receiving party. A situation could arise where their state of nationality maintains diplomatic representation in the state that holds them. According to Article 4 of GC IV they would, in that case, not be considered protected persons. However, under Article 71 of AP I there is no such qualification. Paragraph 2 clearly states that they shall be "respected and protected."[231] As for repatriation, although not explicitly articulated, such persons should be entitled to return to their own states as soon as possible and not suffer detention.[232] A parallel may be drawn with medical personnel of a state not party to the conflict. If they were to fall into the hands of the enemy of the party receiving assistance of such personnel, they should not be detained but repatriated.[233]

There are also conditions imposed upon relief personnel. Under no circumstances may they exceed the terms of their mission. They should naturally only provide relief consignments to those who are legitimate beneficiaries of such sup-

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227 Commentary Article 71 AP I, 832.

228 Ibid., 833. Although a relief action is subject to the approval of the receiving Party, this should not be interpreted as giving "this Party the discretionary power to refuse a relief action." Ibid.

229 Commentary, Article 71 AP I, 834 and note 11 with references.

230 Commentary, Article 10 AP I, 146.

231 The Commentary to the article state that if they should fall into the hands of the enemy of the receiving party, "they should obviously still be entitled to respect and protection. Commentary, Article 71 AP I, 834.

232 Ibid.

233 See Article 32 of GC I and Commentary, Article 71 AP I, 834 footnote 14.

plies.[234] That would not include combatants.[235] A more delicate situation arises if relief personnel pass on information of a military nature. This would clearly exceed the terms of their mission. It would, however, not automatically result in the cessation of their protected status under international humanitarian law. The only sanction, which appears to be available for the receiving state if personnel exceed the terms of their mission, is that they may be requested to leave the territory in question immediately.[236] International humanitarian law, however, does not provide immunity from the exercise of criminal jurisdiction of the receiving state if any of the personnel have committed a criminal offence.[237] This does not, in itself, mean that the personnel concerned would lose their protection under international humanitarian law.

As a general formula, however, protected persons are protected from attack if they do not take a direct part in hostilities.[238] It is usually explicitly stated that they will lose their protected status if they commit acts harmful to the enemy.[239] As relief personnel have no enemies, another formula is applied: they must not "exceed the terms of their mission." However, it does not say that they will lose their protection if they exceed the terms of their mission. If relief personnel were to take a direct part in the hostilities they could clearly not claim protection against attack. However, Dinstein appears to suggest that such personnel would lose their protected status if they were to exceed the terms of their mission.[240] Given the explicit language of Article 71, it is possible that this should be interpreted so as to be limited to situations of taking direct parts in hostilities or, possibly, to cases of committing acts harmful to any of the parties to the conflict.[241]

Additional Protocol I establishes fundamental guarantees for all persons in the power of a party to a conflict. All who find themselves in the power of a party to a conflict, and do not benefit from a more favourable treatment under the Geneva Conventions or AP I shall, at the minimum, enjoy the protection afforded under Article 75 of AP I.[242] Article 75 is influenced by human rights law norms and stipulates the basic guarantees applicable to all persons in the power

234 Ibid., 835.

235 Article 70 AP I.

236 Commentary, Article 71 AP I, 836.

237 According to the Commentary it is advisable that the agreement with the receiving state concerning the relief action stipulates that the personnel concerned should enjoy immunity before local courts. Ibid., 836.

238 Article 51(3) AP I.

239 See Dinstein, 150.

240 Ibid.

241 As Dinstein points out, the phrase "acts harmful to the enemy" goes beyond taking part in hostilities. Ibid. According to the Commentary on Article 13 AP I, the definition of "harmful" includes "attempts at deliberately hindering [the enemy's] military operations in any way whatsoever." 175.

242 Article 75 AP I.

of a party to a conflict. It contains well-established standards and rules relating to the arrest, detention and internment of civilians and the procedures governing a fair trial. These standards undoubtedly reflect customary international law.[243] The acts prohibited are of a similar character to those regarded as being grave breaches of international humanitarian law.

Grave breaches of international humanitarian law

The regime of grave breaches of international humanitarian law was introduced in the Geneva Conventions of 1949. These are war crimes of particular seriousness and entail a *duty* of states parties to prosecute offenders of such crimes.[244] The notion of 'war crimes' covers both 'grave breaches' and 'other serious violations' of the laws and customs of war. This is particularly clear in Article 8 of the ICC Statute. There is, however, no difference in consequences between 'grave breaches' and 'other serious violations' under the Statute. Under customary international law it is necessary to distinguish between war crimes subject to *permissive* universal jurisdiction and those subject to *compulsory* universal jurisdiction.[245] According to Meron, there is some confusion in the literature with regard to the concept of universal jurisdiction and the Geneva Conventions. The fact that compulsory universal jurisdiction is explicitly stipulated only with regard to grave breaches of the Geneva Conventions does not necessarily mean that others (Meron refers to non-grave breaches) are not subject to permissive universal jurisdiction.[246] This does not mean that all offences of the Geneva Conventions provide states with a right to exercise jurisdiction but in relation to "offences that are recognized by the community of nations as of universal concern, and as subject to universal condemnation".[247] This interpretation is supported in this work and is of specific importance in relation to war crime of such serious character that, had it fulfilled the conditions of being committed against a protected person in an international

243 It lists a number of acts that are "prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts." Article 75(2) AP I.

244 See articles common to the four Geneva Conventions, 49/50/129/146 and 50/51/130/147.

245 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court. Sources and Commentary*, 128-129 (2003).

246 Theodor Meron, *War Crimes Law Comes of Age*, 248, 251 (1998). Meron finds this form of universal jurisdiction to be the true meaning of the concept.

247 Meron, 251. He refers in this respect to the *Restatement (Third)* §404.

armed conflict, it would have been classified as a grave breach of the Geneva Conventions.[248]

Grave breaches include *inter alia* wilful killing, torture or inhuman treatment, if committed against any persons and property protected by the convention. The grave breaches regime is conditional upon whether the victim or victims of such acts, for the purposes of international humanitarian law, are regarded as being protected persons and whether the acts in question were committed within the context of an *international* armed conflict. As previously stated, personnel participating in peace operations may not necessarily fall under that category. The murder of a member of a peace operation would still be a criminal offence. But it would not qualify as a grave breach of international humanitarian law, and would thus not be subject to a duty on the part of states parties to prosecute or extradite the alleged murderer, if the victim was a member of personnel not regarded as being in the category of protected person.

The category of protected person has been extended through AP I, but does not *per se* include personnel in peace operations.[249] The concept of grave breaches has also been extended through AP I, by including violations of the principles protecting civilians from the effects of war and from unjustified medical procedures, particularly medical experiments.[250] At the present time there appears to be a lacuna in relation to the protection of personnel engaged in peace operations insofar as serious crimes committed against them might not necessarily be regarded as constituting grave breaches of international humanitarian law, since they are not, as such, considered to be protected persons. However, this is based upon a strict reading of the law.[251] A teleological interpretation of the rules may well lead to the inclusion of peace operation personnel as protected persons. This interpretation should also find support in the Safety Convention, where the international community has shown a will to create a system of *aut dedere aut judicare* for serious crimes against such personnel.

The other relevant condition for the grave breaches regime relates to the context of an international armed conflict. There is no mention of grave breaches in common Article 3 or in AP II. There are also authoritative statements that cus-

248 The distinction between grave breaches and other serious violations of the laws and customs of war is sometimes described as the former being subject to universal jurisdiction while the latter "remain war crimes and are punishable as such". *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, 422 (2004). Green, 301.

249 Article 85 AP I.

250 Articles 85 and 11 AP I.

251 Article 147 GC IV, which defines grave breaches of the convention, refers not to "protected persons" but to "persons or property protected by the present Convention". This may perhaps be interpreted as suggesting a wider category of persons. According to the Commentary on Article 147, however, it appears as though the grave breaches regime is limited to persons defined as protected persons under Article 4 of the Convention. Commentary, Article 147 GC IV, 598.

tomary law, as it stood in 1994, did not include the concept of war crimes in non-international armed conflicts. According to a commission of experts, established by the Secretary-General to analyse evidence on whether or not grave breaches of the Geneva Conventions had been committed in the territory of the former Yugoslavia, "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes".[252] There is, however, evidence of a new approach which establishes individual criminal responsibility for violations of the applicable in non-international armed conflicts.[253] The statute of the ICTR confers jurisdiction in relation to persons committing serious violations of common Article 3 and of AP II.[254] The jurisprudence of the ICTY shows a developing tendency towards an enhanced individual criminal responsibility for violations of humanitarian law applicable in non-international armed conflicts. The jurisdiction of the ICTY is limited to grave breaches of the Geneva Conventions (Article 2) and violations of the laws and customs of war (Article 3).[255] The ICTY has constantly upheld the proposition that the grave breaches regime is only applicable in international armed conflicts.[256] It has, however, interpreted the violations of the laws and customs of war to include violations of common Article 3 and other customary rules governing the conduct of internal armed conflicts. The ICC have jurisdiction in respect of violations of humanitarian law applicable in non-international armed conflicts.[257]

A recent study on this topic reveals that there is a movement towards a relaxation of the strict upholding of the division between international and non-international armed conflicts. The research, however, did not find sufficient evidence to establish that the grave breaches regime was as yet also applicable in non-international armed conflicts on a customary law basis. It did, however, find that "there are indications of an enhanced regulatory content of violations committed in internal armed conflicts".[258]

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252 Final report of the Commission of Experts established Pursuant to Security Council Resolution 780 (1992), para. 52, UN Doc. S/1994/674, Annex (1994).

253 Provost, 95.

254 See articles 4 and 6 of the ICTR statute.

255 It also includes the crime of genocide and crimes against humanity.

256 Prosecutor v Tadic, Case No. IT-94-AR72, 2 October 1995, para. 81. Natalie Wagner, The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia, 85 *IRRC*, 351, 358 (2003).

257 Article 8 2 (c) of the ICC Statute.

258 Sonja Boelaert-Suominen, Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?, 5 *Journal of Conflict and Security Law* 63, 103 (2000). See in this respect also James G. Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict, 85 *IRRC,* 63, 313 (2003).

It should be noted, however, that according to the study on customary law by the ICRC, there is already at this point sufficient practice "to establish the obligation under customary international law to investigate war crimes allegedly committed in non-international armed conflicts and to prosecute the suspects if appropriate."[259]

It thus seems to be divergent views on this issue (if not the customary law in this area has developed considerably during the years between these studies). If it is beyond doubt that there exists an obligation under customary international law to prosecute individuals suspected of war crimes in non-international armed conflicts, then all states would be duty-bound to prosecute such suspects if they were present within their jurisdictions. Based on the arguments presented above it could still be somewhat premature to claim that position. The trend is, however, clear. What might still be doubtful is whether the law has in fact developed to the point where states are under a customary law *duty* to prosecute?

The grave breaches regime is thus conditional upon whether or not the punishable act has been committed against a protected person and, possibly, within the context of an international armed conflict. It is not the nationality of the victim *per se* that is the most important requirement. Rather, it is the factual circumstances of whether the person concerned is in the hands of an adverse party or if that person could rely upon the peace-time regime of diplomatic protection. It should be noted, however, that the prosecutor engaged in the indictment against Karadzic and Mladic, concerning *inter alia* the taking of UN personnel as hostages, explicitly stated that UN personnel were regarded at all relevant times as being persons protected by the Geneva Conventions.[260] The need to declare their status as protected persons may perhaps be due to the less than clear rules in this area of the law. The fact that grave breaches still might be conditional upon the existence of an international armed conflict limits the applicability of the regime. Although individual criminal responsibility for violations of humanitarian law applicable in internal armed conflicts seems to have developed over the past years, there is perhaps not, as yet, a customary international law *duty* to prosecute or extradite persons alleged to have committed such crimes. Given the nature of armed conflicts in the modern world, the grave breaches regime appears therefore somewhat limited. It is in this respect that the Safety Convention may well have a particularly important role to play. The parties to the Safety Convention are under a duty to prosecute or extradite persons suspected of crimes against protected personnel. This system of *aut dedere aut judicare* should also have a sup-

259 Henckaerts and Doswald-Beck, 609-610. The study bases its findings on inter alia military manuals, agreements and official statements and some resolutions by the Security Council.

260 Prosecutor v Karadzic & Mladic, Indictment, ICTY Case No. IT-95-5-I, 26 July 1995, para. 46.

porting effect upon the interpretation of the grave breaches regime regarding personnel in peace operations.

3.3.3 Conclusions

International humanitarian law provides high standards of protection for parties to armed conflicts in relation to persons not participating in the fighting. Peace operation personnel enjoy the protection afforded to civilians so long as they do not engage as combatants in an armed conflict. Civilian personnel employed in a peace operation continue to enjoy such protection even in that situation, while military members of the military component assume the role of combatants.

With few exceptions there is no mention of peacekeeping operations and it is apparent that peacekeeping was not contemplated as an endeavour or enterprise in its own right by the drafters of the Geneva Conventions. Analogies, however, may be drawn to the special protection afforded to relief personnel under international humanitarian law. Personnel of peace operations do not neatly fit in with the definition of protected persons under conventional international humanitarian law. It may have some affect on the grave breaches regime, where certain crimes of war are subject to universal jurisdiction. This regime, for peace operation personnel, may not so readily be applicable. First, they may not be regarded as being protected persons under international humanitarian law, and secondly, they are often deployed within the context of a non-international armed conflict where the grave breaches regime might not as yet have attained a customary law status. The Safety Convention in this respect provides a valuable contribution towards the internationalisation of crimes committed against peace operation personnel.

The deployment of peace operation personnel within the context of non-international armed conflict poses special problems regarding their protection. Not only are the rules in such conflicts rudimentary in character, although customary law norms apply, parties in addition often display a disregard for recognised standards.[261] The work on a set of Fundamental Standards of Humanity, which are standards applicable in all types of conflict, may prove to be of particular importance in these areas. This project has attempted to draw attention to the fact that the protection of persons in times of conflict is not an area primarily in need of new rules, but requires respect for existing ones. The duty of states parties to the Safety Convention, to prosecute or extradite those alleged to have commit-

261 Bring and Körlof 230. Spieker, states that the main problem in non-international armed conflicts relates to observance of the, very rudimentary, rules and the application of more extensive norms would probably not stand a better chance of being respected. Spieker, 164. Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, 49 (1987).

ted crimes against UN and associated personnel, may thus have a deterring effect upon those who show scant respect for applicable rules.

Chapter 4

Special Protection

The Corfu Affair of 1923 involved the issue of special protection for international commissioners. In 1923, Italian members of an international commission, appointed by the Conference of Ambassadors, to delimit the frontier between Albania and Greece, were murdered on the Greek side of the border. The affair attracted a great deal of interest in the Council of the League of Nations and its members decided to refer the matter to a Committee of Jurists. Subsequently the Council unanimously adopted the reasoning of the Committee of Jurists. The report of the committee read, in part:

> The responsibility of a state is only involved by the commission in its territory of a political crime against the persons of foreigners if the state has neglected to take all reasonable measures for the prevention of the crime, and the pursuit, arrest, and bringing to justice of the criminals. The recognized public character of the foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.[1]

Commenting on the case, Eagleton rightly points out that the report makes no contribution to clarifying the status of officials not having the status of diplomatic envoys. He found that there appeared to be an intermediate group between diplomats and ordinary aliens, that states were obligated to provide a special protection. But the degree of protection, and those belonging to such a group would still need clarification.[2] Given the facts of the case, members of international commissions could probably expect higher levels of protection than provided to "ordinary" aliens. Whether they could expect a protection similar to that of diplomatic envoys is unclear. The "duty of special vigilance" provides nothing more in clarifying the protection of international officials in this respect.[3]

Personnel representing a state or an international governmental organisation are often accorded a higher legal status in a host state than that enjoyed by

1 League of Nations, *Official Journal*, 524 (1924), cited in John Kerry King, *The Privileges and Immunities of the Personnel of International Organizations* 31 (1949).

2 Clyde Eagleton, The Responsibility of the State for the Protection of Foreign Officials, 19 *AJIL* 293, 307 (1925).

3 King, 31.

ordinary foreigners. The receiving state has a duty to ensure the legal status of personnel in its territory, in other words, to provide protection in accordance with their legal status. The term "special protection" is not new. The IPP Convention refers to a person who "is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity". The convention does not, however, offer a definition of "special protection". According to some views put forward during the negotiations of the IPP Convention, the term special protection could be interpreted to mean inviolability or immunity. The former term implies a far-reaching duty on the part of the host state to take all appropriate measures to prevent any attacks upon the person coming under special protection. The latter term means protection from interference by the host state, but not protection against the violent acts of others, such as terrorists.[4]

The concern of those who drafted the IPP Convention was to not exercise too broad a scope of application of the convention. For the purpose of this study, there is no need to exclude personnel enjoying a lower degree of inviolability or immunity than personnel protected by the IPP Convention. The reference to a special protection here is rather to illustrate the difference between the protection enjoyed by all personnel (general protection), irrespective of whom they represent, and the protection provided to personnel representing states and international governmental organisations (special protection).

This chapter deals with *diplomatic* privileges and immunities, normally accorded to officials representing states, such as diplomatic agents and *international* privileges and immunities, generally accorded representatives of international governmental organisations through multilateral and bilateral (SOFAs) treaties.

4.1 Diplomatic Privileges and Immunities

The senior figures in peace operations, such as the Force Commander and the Special Representative of the Secretary-General to the United Nations, are usually accorded privileges and immunities similar to those of diplomatic envoys. In more recent times, however, diplomatic privileges and immunities became the subject of attention for other members of peace operations. In the EU-led operation in Macedonia the status agreement between Macedonia and the EU granted all personnel "treatment, including immunities and privileges, equivalent to that of diplomatic agents".[5] On peace operations it is thus the status of the diplo-

4 Louis M. Bloomfield and Gerald F. FitzGerald, *Crimes Against Protected Persons: Prevention and Punishment. An Analysis of the UN Convention*, 60, 71-2 (1975).

5 Article 6 of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia, Annexed to Council Decision 2003/222/CFSP, 21 March 2003, Annex, O J, L 82/45 (2003).

matic *agent* that is of the greatest interest, in relation to diplomatic privileges and immunities, and this study's presentation will accordingly centre on those aspects.[6] However, the nature and character of diplomatic privileges and immunities will first be examined in order to understand the differences between privileges and immunities accorded to diplomatic agents and personnel representing international organisations.

4.1.1 Background

The law on diplomatic privileges and immunities is well established in customary international law. It is one of the oldest and most time-honoured areas of international law. The need for sovereign states to maintain communications with one another has resulted in the long-standing practice of the sending and receiving of diplomatic agents. Diplomatic personnel, as representatives of the sending state, have been accorded a special status by the receiving state. The system of exchange of diplomatic representatives is firmly based upon the principle of reciprocity. This is possibly one of the reasons for its being a relatively uncontroversial area of international law. Until 1961 diplomatic relations were regulated under customary international law. The codification, and development, of these customary law norms has been made through the Vienna Convention on Diplomatic Relations.[7] The Vienna Convention largely codifies existing customary law principles but includes elements of development. The fact that this convention does not precisely reflect customary law is, because of the large number of ratifications, not particularly important. Today 184[8] states are parties to the convention and the rules stipulated therein are those that are most widely accepted.[9] The following examination of diplomatic privileges and immunities is based upon this convention.

Different theories have been proposed as to what forms the foundation of the concept of according privileges and immunities to diplomatic personnel. These include the theories of extraterritoriality, "representative character", and functional necessity. On the question of a basis for diplomatic privileges and immunities, the ILC regarded the theory of extraterritoriality (that the dip-

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6 For a more comprehensive study on the topic of diplomatic privileges and immunities, see e.g. Eileen Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, (2nd ed., 1998), *Satow's Guide to Diplomatic Practice*, (Lord Goore-Booth, ed., 5th ed., 1979), Jennings, Sir Robert and Watts Sir Arthur (eds.,) *Oppenheim's International Law*, (9th ed., 1992), B. Sen, *A Diplomat´s Handbook of International Law and Practice*, (3rd ed., 1988), Nascimento e Silva, *Diplomacy in International Law*, (1972).

7 Vienna Convention on Diplomatic Relations 500 UNTS 95 (1961).

8 According to the UN Treaty Section http://untreaty.un.org/English/treaty.asp (2006-04-01).

9 Ian Brownlie, *Principles of Public International Law*, 342 (6th ed., 2003).

lomatic mission represented an extension of the sending state's territory) and the "representative character" theory (that the diplomatic mission personified the sending state) as having influenced the development of such privileges and immunities. It found, however, that the third theory ("functional necessity" – the justification of privileges and immunities on the basis of necessity for a mission to perform its functions) had become more important in modern times. The ILC stated that it "was guided by this third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself."[10]

Privileges and immunities accorded to states and their diplomatic representatives have been contrasted with those accorded to international organisations and their official personnel in that the former is regarded as being "largely based on a theory of equality, supported by the principle of reciprocity, and historically reflected the respect States had for each other's sovereignty."[11] The latter, on the other hand, is primarily based upon treaty law. The privileges and immunities accorded to international organisations are *entirely* based upon function and only such privileges and immunities deemed necessary to fulfil the functions of an international organisation can be expected.[12]

The influence of both the theory of functional necessity and the representative theory on the diplomatic privileges and immunities stipulated in the Vienna Convention, is reflected in its preamble. This states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states".[13]

It is apparent that the theory of functional necessity has greatly influenced modern diplomatic law and it is therefore necessary to assess with which to regard the functions of a diplomat.[14] The functions of a diplomatic mission seem limited

10 Report of the International Law Commission covering the work the work of its tenth session, 28 April – 4 July (1958), *Yearbook of the International Law Commission*, II, 77, 94-95 (1958). For critique of the functional necessity theory, see Jan Klabbers, *An Introduction to International Institutional Law*, 36-39 (2002).

11 C. F., Amerasinghe, *Principles of the Institutional Law of International Organizations*, 369 (1996).

12 Ibid., 370.

13 Vienna Convention 4th preambular paragraph. Brownlie finds that current law is influenced by both the representative theory and the functional necessity approach. Brownlie, 343.

14 The functions of a diplomatic mission consist, according to Article 3 of the Vienna Convention, "inter alia, in: (a) representing the sending state in the receiving state; (b) protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law; (c) negotiating with the government of the receiving state; (d) ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state; (e) promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations".

to the interests of the sending state and to maintaining amity with the receiving state. According to the functional necessity approach, privileges and immunities are limited to the efficient performance of the functions of diplomatic agents. The element of reciprocity in diplomatic law should also be noted in this regard. Respect for the extent of diplomatic privileges and immunities becomes in a way self-regulated because of the reciprocal character of diplomatic law. The view of the UK on the importance of the principle of reciprocity in this respect was expressed in a Foreign Affairs Committee Report. This was set against the background of the use of the Libyan People's Bureau as a base for terrorism in London in 1984. The relevant part of the report stated "that the privileges and immunities operate to provide a very real protection for our diplomats and their families overseas, and that action should not be taken which would expose them to personal danger or make the carrying out of their diplomatic tasks more difficult or even impossible."[15]

The right of the sending state to appoint the head of mission is not unrestricted. It is conditional upon the *agrément* of the receiving of that particular person.[16] The receiving state may, without giving any reasons for its decision, refuse to accept the proposed person. The consent of the receiving state with regard to appointments of heads of mission is closely related to the right of receiving states to declare *any* of the diplomatic staff *persona non grata* or any other member of the mission as being unacceptable.[17]

The privileges and immunities of a diplomatic agent apply within the territory of the receiving state. This is only natural owing to the functions of diplomatic personnel. And for similar reasons, it is natural that these privileges and immunities are not applicable in the sending state.[18] The privileges and immunities that are of special importance to this study are primarily those relating to immunity from local jurisdiction and inviolability of the person. A diplomatic agent enjoys immunity from local criminal jurisdiction. Immunity from the civil and administrative jurisdiction of the receiving state, however, is limited in certain cases where a diplomat acts in a private capacity.[19]

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15 *Foreign Affairs Committee Report*, para. 56 in Rosalyn Higgins, The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, 79 *AJIL* 641, 650 (1985).

16 Article 4 of the Vienna Convention on Diplomatic Relations.

17 Ibid., Article 9.

18 See e.g. Article 31 of the Vienna Convention on Diplomatic Relations stipulating immunity of criminal jurisdiction of the receiving state and which expressly states that there is no exemption from sending state's jurisdiction.

19 See Article 31 of the Vienna Convention on Diplomatic Relations.

4.1.2 Diplomatic Agents

The principle of inviolability[20] of diplomatic agents is generally regarded to be at the core of diplomatic law.[21] The duty of the receiving state is twofold: to not exercise local jurisdiction over diplomatic agents and to protect them against attacks from third parties.[22] On the first aspect, the duty of the receiving state to abstain from any arrest or detention of such agents has in the past been honoured almost without exception.[23] A significant case of a breach of duty in this respect was the unlawful detention by the government of Iran of diplomatic and consular staff in the US embassy in Teheran in 1979. Although there are few cases where the receiving state has arrested or detained a diplomatic agent, there are instances where diplomats have been subject to certain measures of jurisdiction within the receiving state.[24]

Diplomatic agents not liable to any form of arrest or detention

The practice of states on the obligation to abstain from detaining or arresting diplomatic agents has been constantly positive. The outstanding exception, as mentioned earlier, of a breach of a state's duty in this respect was the unlawful detention of US diplomatic and consular staff. The ICJ in the *US Diplomatic and Consular Staff in the Tehran Case* considered the duties of the receiving state.[25] The Court found that the militants attacking the embassy had no official status. Their acts could not be regarded as being imputable to the state of Iran. There was also no reliable evidence that they had received instructions or directions from any competent state organ to carry out the operation on its behalf. This did not

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20 "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Article 29 of the Vienna Convention on Diplomatic Relations.

21 See Said Mahmoudi, Some Remarks on Diplomatic Immunity from Criminal Jurisdiction, *Festskrift till Lars Hjerner*, 339 (Jan Ramberg, Ove Bring, and Said Mahmoudi, eds., 1990), Franciszek Przetacnik, *Protection of Officials of Foreign States according to International Law*, 11 (1983), Denza, 210.

22 John Lawrence Hargrove, Security of Diplomats as a Problem of International Community Policy, in *Diplomacy in a Dangerous World. Protection for Diplomats under International Law*, 15, 28 (Natalie Kaufman Hevener ed., 1986).

23 Denza, 217.

24 The status of diplomatic agents does not exclude the need to search all airline passengers. Airlines are not required to take passengers, including diplomats, who refuse a security search. Ibid., 218.

25 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran*)* 1980, ICJ Rep 3. On 4 November 1979 the embassy of the United States of America in Tehran was occupied by hundreds of militant students and other demonstrators protesting over the fact that the former Shah of Iran had been given medical treatment in the United States.

mean, the Court ruled, that the state of Iran was not in breach of its obligations stipulated in the Vienna Convention, as well as under general international law. It found Iran to be in breach of its legal obligation to take "appropriate steps" to protect the mission and its premises.[26] Inaction by the government of Iran, in this respect, "constituted a clear and serious violation" of its obligations under the Vienna Convention, including Article 29.[27] When the occupation became a fact with diplomatic personnel being held against their will, the duty of the government of Iran under both the provisions of the Vienna Convention and general international law was "manifest", the Court ruled. The duty of the government of Iran was to "at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end"[28]. Instead "the seal of official government approval" was set by a decree by Ayatollah Khomeini, expressing the approval of the continued occupation of the embassy.[29] This act therefore translated into an act of the state that accorded the militants the status of agents of the state of Iran.[30]

Another example was the Swedish diplomat Raoul Wallenberg, who was arrested by Soviet Union forces in Hungary in 1945 and kept in prison until he, reportedly, died of natural courses in 1947. In 1985 a relative of the diplomat pursued the case in a US district court, which, after finding the necessary basis of jurisdiction, held that the infringement of the inviolability of Mr Wallenberg was a "clear violation of the law of nations".[31]

While it appears to be a well-established rule of international law that diplomatic agents must not be liable to any form of arrest or detention, there has emerged a developing practice of exceptions to this rule. This relates to situations where diplomatic agents constitute a danger to other people, frequently with regard to drunken driving.[32] Arrest and detention may also be based upon a right of self-defence and necessity. The ILC held the following view in the Commentary to its draft Article: "Being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion. This principle does not exclude either self-defence or, in exceptional circumstances,

26 Ibid., para. 63.

27 Ibid., para. 67.

28 Ibid., para. 69.

29 Ibid., paras. 73-74.

30 The fact that this action was taken by the state itself, and not by private individuals, was something that the Court found to be unique – and particularly troublesome.

31 Von Dardel v USSR, United States District Court, District of Columbia, 15 October 1985, 77 ILR 258, 261.

32 According to Denza, it is standard police practice in the United States and the UK to restrain diplomatic agents, driving under the influence of alcohol, from further driving and to make arrangements for their safe transport by other means. Denza, 219.

measures to prevent the diplomatic agent from committing crimes or offences."[33] A proposal at the Vienna Conference to incorporate the text of the commentary into the proposed article was rejected, supposedly on the grounds that it was unnecessary and could create ambiguities with regard to the right of self-defence in relation to other provisions of the convention.[34]

In the *Tehran Case* the ICJ supported the right of self-defence as an exception to the rule against any form of arrest or detention of diplomatic agents. The Court held that the principle of inviolability could not be interpreted to mean "that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime".[35]

While the obligation to refrain from any arrest or detention of diplomatic agents appears to be part of general international law, it should be noted that this obligation is not absolute. It allows a little room for manoeuvre for the authorities of the receiving state to take the necessary measures to prevent a crime, especially when lives are at risk.[36] This limited room of exception is of importance in those peace operations where personnel, including members of military contingents, enjoy privileges and immunities equivalent to those of diplomatic agents. Personnel with executive tasks naturally find themselves in situations where they would sometimes need to use force. If the proposed force looked like being excessive in relation to attaining the objective, governmental authorities might well be entitled to take action to prevent a criminal act.

Prevention of attacks on the person, freedom or dignity

According to Article 29 of the Vienna Convention, receiving states "shall take all appropriate steps to prevent any attack" on diplomatic agents. The duty of receiving states to protect diplomatic agents from attacks by third parties has more or less been taken for granted, and prior to the Vienna Convention the issue was not much discussed or debated.[37] But when diplomatic agents became targets for murder and kidnap, particularly in the 1960s and early 1970s, the extent of the obligation to afford protection against attacks became highly topical. The kidnapping of the West German ambassador to Guatemala, Count von Spreti, is a case in point. The kidnappers said their hostage would be freed upon the release

33 Report of the International Law Commission covering the work of its ninth session, 23 April – 28 June (1957), *Yearbook of the International Law Commission*, II, 131, 138 (1957).

34 Denza, 211.

35 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) 1980, ICJ Rep 3, para. 86.

36 B. S. Murty, *The International Law of Diplomacy. The Diplomatic Instrument and World Public Order*, 372 (1989).

37 Denza, 212.

of prisoners and the payment of a ransom. The government of Guatemala refused to give way on the grounds that it would violate national legislation and endanger the security of the nation. The government of the Federal Republic of Germany held that Guatemala was under an obligation to do whatever it took to secure the ambassador's release. He was subsequently murdered and Germany held the state of Guatemala responsible, asserting that it had violated its obligations under the Vienna Convention.[38]

On other occasions, governments had met the demands of kidnappers. The result was a dramatic rise in the number of hostages taken and it became apparent "that a policy of capitulating to unlawful demands was not an inherent requirement of Article 29 of the Vienna Convention".[39] Although the kidnapping of diplomats became less frequent after 1971, possibly because of the new policy of Western governments of rejecting the demands of kidnappers, a collective response was still needed. The UN General Assembly requested the ILC to prepare draft articles on the protection of diplomatic agents and other persons entitled to special protection under international law.[40]

The response by the UN to attacks on diplomatic agents was in many respects a model for how the UN would respond to the deliberate onslaughts upon its personnel during the early 1990s, and led to the creation of the Safety Convention.

Immunity from jurisdiction

Immunity from criminal jurisdiction of diplomatic agents is well established in international law and appears to leave no room for exceptions.[41] In contrast to immunity from civil jurisdiction, there are no conditions attached to immunity from criminal jurisdiction. There is, in the Vienna Convention, no qualification with regard to crimes in respect of their gravity. Diplomatic immunity from criminal jurisdiction, under the Vienna Convention, is absolute. Immunity for so-called core crimes (such as war crimes and crimes against humanity) must,

38 Ibid., 213 See Jerzy Sztucki, Some Reflections on the Von Spreti Case, 40 *Nordisk Tidsskrift for International Ret* 15 (1970). On the interpretation of "appropriate steps", Sztucki notes that what is appropriate must be judged in relation to the circumstances. It is, however, the receiving state that decides on what measures need to be taken. Ibid., 22-23.

39 Denza, 213.

40 Ibid., 214. This was to become the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

41 Article 31 of the Vienna Convention states: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state." It seems, however, that some writers have tried to approach the matter in different ways, particularly in the nineteenth century, ranging from a total abolition of diplomatic immunities to those recognising the need for such immunity but present some exceptions to the rule. See Nascimento e Silva, 121-2.

under certain conditions, yield to the higher interests of punishing those responsible for criminality of that nature. It should be noted that the ICC statute makes no exception for immunities accorded to diplomatic agents, heads of states, or members of governments.[42] Incumbent ministers of foreign affairs and heads of state may, however, enjoy some sort of immunity during their times in office. According to a decision by the ICJ in 2002, such officials may, in fact, enjoy immunity from the consequences of official acts, even after leaving office. This ruling has been the subject of criticism.[43]

The immunity bestowed represents freedom from subjection to the exercise of local jurisdiction. It does not mean immunity from the obligation to respect the law of the receiving state. The diplomatic agent enjoys immunity from legal process but may still be liable under the law.[44] The fact that the Iranian authorities *threatened* to put US embassy staff on trial, led the ICJ to state that if those threats had been "put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1 of the 1961 Vienna Convention."[45]

Oppenheim concludes that Article 31 of the Vienna Convention confirms the established rule "that receiving states have no right, in any circumstances whatever, to prosecute and punish diplomatic agents."[46] There is, however, an obligation to respect local laws and regulations[47] and diplomatic agents are presumed to behave accordingly. Repeated behaviour contrary to local law will eventually lead to a request for the recall of offending diplomatic agents by the receiving state. There seems to be no controversy on the immunity from criminal jurisdiction of the receiving state and Article 31 paragraph 1 of the Vienna Convention reflects the well-established position in international customary law.[48]

42 Article 27 of the ICC Statute.

43 Case Concerning the Arrest Warrant of April 11 2000 (Democratic Republic of the Congo v Belgium) 2002, ICJ Rep 3. See, for example, Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case, 13 *EJIL* 853 (2002), Steffen Wirth, Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case, 13 *EJIL* 877 (2002).

44 See Mahmoudi, 337.

45 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) 1980, ICJ Rep 3, para. 79. According to Sen, immunity from local jurisdiction "is absolute, and he cannot under any circumstances be tried or punished by the local criminal courts of the country to which he is accredited." Sen, 136.

46 *Oppenheim's International Law*, Vol, 1, 1095-6 (footnotes omitted).

47 Article 41 of the Vienna Convention on Diplomatic Relations.

48 See for instance Brownlie, 351.

Waiver of immunity

The sending state retains the right to waive the immunity of the diplomatic agent. Such a waiver must always be express.[49] Diplomatic immunity resides ultimately with the sending state, not with the individual. It is therefore only the sending state that possesses the authority to waive immunity. It is, however, unusual for sending states to waive the immunity of diplomatic agents in cases of crime. The reasons for not waiving immunity often relate to differences between legal systems, the perceived risks of there not being an impartial legal process and the possible punishment itself. It is instead customary to recall the diplomatic agent concerned when a request for waiver of immunity is presented by the receiving state.[50]

The waiver institute is of particular interest with regard to peace operations where members of military contingents are accorded privileges and immunities equivalent to those of diplomatic agents. If the right to waive the immunities of such personnel forms part of their status, then which entity would have this right? Would it belong to the organisation leading the operation or to sending states? The function of these immunities would assume the former, but the nature of the diplomatic immunities suggests the latter.

Persona non grata

The receiving state may at any time, without having to explain its decision, declare a diplomatic agent *persona non grata*.[51] According to Denza, the *persona non grata* institute has proved to be the key instrument for receiving states to protect themselves from activities in contravention of diplomatic functions and balances in a proper way the immunities conferred upon diplomatic agents.[52] For diplomatic agents involved in criminal activity receiving states usually make a request for a waiver of immunity. In situations where a waiver is not granted it is the practice of some states to declare the diplomatic agent *persona non grata*. The fact that no reasons need to be furnished when declaring a diplomatic agent *persona non grata*, is in this way balanced if the receiving state is prepared to initiate proceedings against the diplomat in question. In the *United States Guidance for Law Enforcement Officers*, issued in 1988, it is moreover expressly stated that given the fact that the United States is a society governed by the rule of law it is necessary that any use of the *persona non grata* instrument must be able to be defended "in appropriate detail".[53] States generally use this instrument with care, and only in relation to serious violations of local laws and regulations.[54]

49 Article 32 of the Vienna Convention on Diplomatic Relations.

50 Mahmoudi, 351.

51 Article 9 of the Vienna Convention.

52 Denza, 62.

53 Ibid., 69-70.

54 Mahmoudi, 354.

Again, this is an interesting aspect in relation to those EU-led operations where members of military contingents enjoy privileges and immunities equivalent to those of diplomatic agents.

4.1.3 Conclusions

The privileges and immunities of diplomatic agents seem to be undisputed. While there is some room for limited exceptions to the rule against detention with regard to acts that put others in danger, immunity from local criminal jurisdiction appears not to allow any exceptions. The nature of diplomatic privileges and immunities will be of less importance so long as their status is properly protected. In cases where their legal status is in doubt, the nature of their privileges and immunities could, however, be of importance. The theory of functional necessity, with influences of the representative character theory, provides the basis for diplomatic privileges and immunities. The reciprocal element is also a characteristic of diplomatic law. Whether or not, it is right and proper to extend diplomatic privileges and immunities to personnel not having a diplomatic function nor representing a state, requires evaluation. What in effect does it mean to be accorded "treatment, including immunities and privileges, equivalent to that of diplomatic agents."?[55] Is it at all possible to take a part out of a carefully developed system and then apply it to personnel not connected to the tasks of diplomatic agents? Such issues will be the subject of consideration within the context of EU-led peace operations.

4.2 International Privileges and Immunities Provided by Multilateral Treaties

Personnel representing international governmental organisations are endowed with privileges and immunities similar to those of diplomatic personnel, but different in nature.[56] International organisations play a significant role in the maintenance of peace and security. The most prominent organisation in this regard, of course, is the United Nations. But many other international organisations are today also involved in supporting peace-related initiatives and in alleviating human suffering. These bodies are mainly non-governmental organisations (NGOs) that do not have the authority to grant their personnel special privi-

55 Article 6 of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia.

56 Historically, international organisations are a relatively new concept. The first signs of the need for a forum where problems affecting several states could be solved were the *ad hoc* international conferences, resulting *inter alia* in the Peace of Westphalia 1648, the end of the Napoleonic wars in 1815 through the Congress of Vienna, and the Treaty of Versailles 1919.

leges and immunities. Only certain governmental organisations could possess this authority of affording individuals representing them, specific privileges and immunities within the territories of the member states concerned. Member states exercise their sovereignty by admitting agents of an organisation into their territories by adhering to the legal norms expressed in the organisation's constitution or to a special convention stipulating the privileges and immunities of individuals acting on behalf of the organisation. Clearly, non-governmental organisations do not possess the authority for endowing their personnel with privileges and immunities applicable in the territory of states that are not, by the very nature of non-governmental organisations, members of such organisations.

While the law of diplomatic privilege and immunity may be regarded as being as old as international law itself, the same cannot be said of privileges and immunities accorded to officials of international organisations.[57] From an historic point of view, the legal basis providing such privileges and immunities is fundamentally different. Diplomatic privileges and immunities accorded to state agents are based upon customary international law, while those accorded to international officials are based upon treaty law.[58]

When states decide to form an international organisation for a certain purpose, that organisation may acquire a legal personality of its own, such as the UN.[59] For an international organisation to possess international legal personality means that it is entitled to acquire certain rights and other attributes distinct from its member states.[60] In the *Reparation Case*, the ICJ found the UN to be an organisation having international personality. The Court ruled that this was subject to certain distinctions. The UN could not be regarded as being a state, nor could it possess rights or assume duties in a similar way to states. Nor could it be regarded as being a super state. According to the Court it did not

> even imply that all rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties.[61]

While international organisations may not be regarded as being imbued with similar rights and duties as those of states, it does not mean that in some aspects

57 King, 25.

58 For an overview of the position of international officials prior to the UN Charter and the Convention on the Privileges and Immunities of Personnel of the United Nations (1946), see King, 25-152.

59 Reparation for Injuries Suffered in the Service of the United Nations, (Advisory Opinion) 1949, ICJ Rep 174.

60 Amerasinghe, 78.

61 *Reparation case*, 179.

the *functions* of international organisations may not be similar to those of states. To be able to exercise such functions effectively, international organisations need to provide their officials and agents with the necessary privileges and immunities. These are on an international plane, between the organisations and states, but their effects may be seen primarily on the plane of national law. These privileges and immunities involve protecting the agents of organisations against the influence of states in the subjection of agents to national law. States therefore need to stipulate in their national laws the necessary provisions so as to give effect to the privileges and immunities such agents have been afforded on the international plane. These privileges and immunities are primarily obtained by an organisation's member states through its constitutive instrument or through a special convention.[62]

What are the necessary criteria to be met for an international organisation to be regarded as being an international person? In the *Reparation Case*, the ICJ took a primarily inductive approach by establishing certain facts and from them drew the conclusion that the UN had legal personality.[63] Though the Court stressed the fact that the UN was the supreme organisation endowed with particularly important functions, it is now generally accepted that other organisations also possess international personality.[64] In the UN Charter the only explicit evidence of international personality is to be found in Article 104 where it is stated that "[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." An international organisation may thus have legal personality recognised by its members and effective in relation to the national laws of its member states. In the *Reparation Case* the situation upon which the request for an Advisory Opinion was based, involved an international organisation (the UN) and a non-member state (Israel). The findings of the Court with regard to the legal personality of the UN are therefore relevant as between international organisations and non-member states.[65]

62 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 486 (5th ed., 2001).

63 The Court ruled that "the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged." *Reparation Case*, 179.

64 Sands and Klein, 472. Schermers and Blokker, *International Institutional Law*, para. 1568 (3rd ed., 1995).

65 Most international organisations that have been established since the end of the Second World War have been concerned with assuming a legal personality in rela-

Is recognition of non-member states necessary for an international organisation to have legal personality vis-à-vis those states? Amerasinghe finds that there are no recent examples where non-member states have refused to accept the legal personality of an international organisation on the grounds that it had not recognised it as an international person.[66] Even if the Court in the *Reparation Case* had not dealt with the issue of recognition explicitly, subsequent practice appears to point only to the fulfilment of certain basic criteria in order to achieve the status of international personality. Applying the analogy of statehood, Amerasinghe finds that no similar practice exists of recognition with regard to international organisations on the international plane. Instead, it is a question of facts.[67]

As an international person, the organisation concerned may obtain international rights and duties.[68] The ability to extend privileges and immunities to officials and agents acting on behalf of the international organisation is thus one *effect* of the acquired international personality. The privileges and immunities provided to officials of an international organisation differ markedly, however, from those afforded to diplomatic personnel representing a state. As observed in the previous chapter, diplomatic agents of a state act on behalf of a specific government while international officials and experts act on behalf of *all* states members of an international organisation. The fact that these international functionaries represent the interests of all member states enables them to be independent of national jurisdictions including, unlike diplomatic agents, those of their own states. When an international official is posted within his own state's jurisdiction, this may become very clear. In that respect, the privileges and immunities of an

tion to their member states. The custom of explicitly assuming an international legal personality, however, has become more frequent. Sands and Klein, 471. Because no common recognised process exists for establishing whether or not an international organisation possesses an international personality, the primary test is one of function. Brownlie summarises the criteria for establishing the legal personality of international organisations, which he bases mainly upon the Advisory Opinion of the ICJ in the *Reparation Case*, on three points: "1. a permanent association of states, with lawful objects, equipped with organs; 2. a distinction, in terms of legal powers and purposes, between the organization and its member states; 3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states." Brownlie, 649. For other, in essence, similar criteria, see Finn Seyersted, International Personality of Intergovernmental Organisations, 4 *Indian Journal of International Law* 53 (1964), and Amerasinghe, 83

66 Ibid., 86.

67 Ibid., 87, 91. The acceptance of an international organisation's legal personality in national law may be subject to different criteria.

68 The terms "international" persons and "legal" persons will be used interchangeably without implying a difference in meaning.

international official are more extensive than those of a diplomatic agent, since the latter do not enjoy immunity from national jurisdiction.[69]

The reciprocal element, so important in the protection of diplomatic agents, does not exist in relation to international privileges and immunities. The basis for the latter is instead one of functional necessity. According to the ICJ, the nature and limitations of the international rights and duties acquired by an international organisation needs to be judged against the necessity of discharging its functions (functional necessity).[70]

While the functional theory is regarded as being the current justification for diplomatic privileges and immunities "[t]he functional basis for immunities is even more emphatically recognised in the case of privileges and immunities of international organisations".[71] According to Jenks, "the current régime of international immunities has been evolved as the result of thorough appraisal by governments of the functional needs of effective international organisations. It is these functional needs which constitute both the justification for and the measure of international immunities."[72] The enjoyment of privileges and immunities are therefore not intended for personal benefit, but for the benefit of the organisation itself.[73] The functional necessity test is thus a fundamental test for the nature and limitations of the rights and duties generally afforded an international organisation, and the privileges and immunities in particular.

The obvious problem facing anyone intending to analyse the content and practice of international privileges and immunities is that there is no single con-

69 David B. Michaels, *International Privileges and Immunities. A Case for a Universal Statute*, 163-164 (1971). See Article 31(4) of the Vienna Convention on Diplomatic Relations.

70 *Reparation Case*, 180. In a separate opinion in the *WHO Agreement Case*, Judge Gros stated that "each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the functions which its constitutive charter has defined. This is thus a *competence d'attribution,* i.e., only such competence as States have "attributed" to the organization." Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) 1980, ICJ Rep 73. 103. In this respect the Court did not have another opinion.

71 D. W. Bowett, *United Nations Forces. A Legal Study of United Nations Practice*, 432. He refers to Article 105 of the UN Charter, (1964).

72 C. Wilfred Jenks, *International immunities*, xxxvii-xxxviii , (1961).

73 The functional test being the basis for the immunities leads to "(1) that the persons entitled to the immunities are nevertheless obliged to comply with local law; (2) that there should be some procedure for meeting just claims in respect of which immunity may be claimed including, possibly, some provisions for waiving the immunity concerned. The necessity for waiver is greater in the case of an international official who is entitled to full immunities than in the case of a diplomat for the reason that there is no 'sending' State, the courts of which would have jurisdiction over the individual." Bowett, 432-3.

vention,[74] such as the Vienna Convention for Diplomatic Agents. Instead each international organisation has its own constitution, and possible conventions, affording their agents with privileges and immunities. However, the UN Charter has had a precedential effect upon the constitutions of international organisations, of both universal and regional character, in the way that the privileges and immunities adopted are measured against a principle of functional necessity.[75] This principle, as established in Article 105 of the Charter, has been introduced "into all major status conventions and has since become a fundamental rule of the whole system of international privileges and immunities."[76] The main role played by the UN as an international organisation in the maintenance of international peace and security and the considerable number of its personnel involved in this field, emphasises the importance of the UN Charter and its Article 105, as does the Convention on the Privileges and Immunities of the United Nations (the General Convention).[77] These instruments will therefore determine the basis for this brief study of international privileges and immunities provided by multilateral treaties.

4.2.1 Scope of Application

The current law on international immunities is essentially conventional in nature. According to Zacklin, the need to invoke customary law or general principles of law seldom occurs.[78] He divides the conventional law into three main categories: "constitutive instruments, general multilateral conventions, and bilateral agreements."[79]

Article 105 of the UN Charter stipulates those privileges and immunities that apply in the territories of the member states of which the organisation is composed. Moreover, officials of the organisation and the representatives of the UN members are accorded privileges and immunities necessary for their functions. Article 105 reads:

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74 See, however, Convention on the Representation of States in their Relations with International Organisations of a Universal Character (not yet in force). For the text of the Convention see, Convention on the Representation of States in their Relations with International Organisations of a Universal Character, 69 *AJIL*, 730 (1975). The convention has been criticised by governments due to the poor protection given to host nations, Brownlie 653.

75 Jenks, 18.

76 Michael Gerster and Dirk Rotenberg, Article 105, in *The Charter of the United Nations. A Commentary,* Vol. 2, 1314, 1317 (Bruno Simma et al, eds., 2nd ed., 2002).

77 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.

78 Ralph Zacklin, *Diplomatic Relations: Status, Privileges and Immunities*, *A Handbook on International Organizations*, 295 (René-Jean Dupuy ed., 2nd ed ., 1998).

79 Ibid.

(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
(3) The General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

The reference to the organisation includes all UN organs, of both principal and subsidiary character, not regarded as specialised agencies.[80] Such agencies come under the regime of Article 104 and the Convention on the Privileges and Immunities of the Specialized Agencies (1947).[81] In the Commentary to Article 105, Committee IV/2 stated:

> In order to determine the nature of the privileges and immunities the Committee has seen fit to avoid the term "diplomatic" and has preferred to substitute a more appropriate standard, based, for the purposes of the Organization, on the necessity of realizing its purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions.[82]

The Committee, moreover, held this view: "[I]f there is one certain principle, it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other."[83] Paragraph 2 would seem to make clear that privileges and immunities are extended only to acts performed in an official capacity. They must be "necessary for the independent exercise of their functions in connection with the Organization."

In accordance with paragraph 3 of the Article, the General Assembly acted on the opportunity, and began the work on a convention defining the privileges

80 Gerster and Rotenberg, 1381.

81 Convention on the Privileges and Immunities of the Specialized Agencies 33 UNTS 261 (1947).

82 Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XIII, 703-4, cited in King, 155-6.

83 Ibid., King, 157.

and immunities of the personnel in question.[84] King considers that the convention, in effect, represents a codification of the privileges and immunities that the General Assembly regarded as being necessary for implementing Articles 104 and 105.[85]

Article 105 of the UN Charter applies between states members of the UN. This is explicitly provided for in the article. The General Convention applies between states that are parties to the convention in accordance with general rules of treaty law. The privileges and immunities accorded to officials and experts on mission are valid in relation to all member states, even in relations between nationals and their own states. The convention has also been made applicable through bilateral agreements between the UN and states hosting UN personnel but not party to the convention. The customary status of the convention and its possible applicability in states not parties to it is examined below.

Based upon Article 105 of the UN Charter, the General Convention accords necessary protection to the organisation as such, as well as to certain categories of personnel. The General Convention accords privileges and immunities to the Representatives of Members (Article IV), Officials (Article V), and Experts on Missions for the United Nations (Article VI). The Representatives of Members refers to Member states' representatives to the organs of the UN and will not be considered further.

Officials

To reside within the regime of the convention, the personnel concerned must either be regarded as officials of the UN or as experts on mission. The criteria for officials of the UN are stipulated as follows in Section 17 of the General Convention:

> The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Government of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

It is for the Secretary-General to decide upon the categories of officials of the UN that should enjoy the privileges and immunities stipulated in the convention. In 1946 the General Assembly adopted a resolution, based upon a proposal from

84 In 1946, the Convention on the Privileges and Immunities of the United Nations was adopted, 1 UNTS 15, (1946).

85 King, 164. Article 104 of the UN Charter provides the Organisation with the necessary legal capacity in the territory of each member state to be able to exercise its functions.

the Secretary-General, which granted the privileges and immunities in Articles V and VII "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."[86]

The only distinction to be drawn between staff members was on locally employed staff, who were *also* assigned to hourly rates. All other staff, irrespective of rank, nationality and so on, were to enjoy the privileges and immunities referred to in Articles V and VII. However, high-ranking officials would enjoy *additional* privileges and immunities.[87] The Secretary-General and all Assistant Secretaries-General, together with their families, were to be afforded privileges and immunities enjoyed by diplomatic envoys according to international law in addition to the privileges and immunities stipulated in the convention.

One of the main issues on who could be considered to be an official has been related to the nationality of the individual in question. Some states, for instance, have been reluctant to respect the exemption from taxation of officials locally employed. It has, however, been the constant position of the UN to uphold the privileges and immunities of all officials so categorised in the General Assembly Resolution of 1946, based upon the argument that the privileges and immunities conferred are not for personal benefit but to enable the organisation, through its officials, to carry out its functions.

UN officials are not accredited to a host nation, as is the case with diplomats. Instead, the UN is obligated, according to Section 17 of the General Convention, to inform member states of the names of the relevant officials. For this reason, annual lists are prepared of UN officials. The purpose of the lists is to inform governments of member states of the identities of personnel having the status of UN officials. The lists and information do not have a constitutive effect and the parties to the General Convention are required to respect the privileges and immunities of UN officials even if they have not received in advance proper information on the status of a particular individual. The UN's position is that "the annual lists merely constitute an administrative device to assist in the practical application of the Convention."[88]

Experts on Missions

According to the General Convention, experts on missions are those "(other than officials coming within the scope of Article V) performing missions for the

86 GA Res. 76 (I), Privileges and Immunities of the Staff of the Secretariat of the United Nations, UN GAOR 1st Sess., UN Doc. A/RES/76 (I) (1946). See Paul C. Szasz, International Organizations, Privileges and Immunities, in *Encyclopedia of Public International Law*, 1325, 1330 (R. Bernhardt ed., Vol. II 1999).

87 Article V Section 19 and Article VII Section 27 of the General Convention.

88 The Practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat (1967), in *Yearbook of the International Law Commission*, II, 154, 265 (1967).

United Nations".[89] The term "experts on missions" is not found in Article 105 of the UN Charter. It is clear from the text that it is not possible, for the purposes of the convention, to be at the same time both an official and an expert on mission for the UN. The only other explicit criterion to be met in order to be regarded as an expert on mission, is the need to perform missions for the UN. The ICJ has twice been called upon to give an Advisory Opinion in relation to the interpretation of the meaning of experts on missions.

In 1989 the ICJ held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an expert on mission within the meaning of Article VI of the Convention on the Privileges and Immunities of the United Nations.[90] According to the Court, "mission", originally meant that a person *travelled* on a mission. But term has acquired a broader meaning and it no longer entails a requirement of travel and now includes missions undertaken by persons within their states of nationality. The Court emphasised that the task entrusted to an expert on mission was in the interests of the UN to enable the organisation to perform its independent duties. There would be strange effects if such protection depended on whether or not travelling was involved. The Court found that Article VI, Section 22, of the General Convention did not provide information on issues as to the nature, place, or duration of such missions. It stated, however, that the purpose of the provision was to enable the UN to entrust persons, not considered to be officials of the UN, with tasks on behalf of the organisation and to provide them with the necessary privileges and immunities in that respect. The Court ruled that "[t]he essence of the matter lies not in their administrative position but in the nature of their mission."[91]

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89 Article VI Section 22 of the General Convention.

90 Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion), 1989, ICJ Rep 194.

91 Ibid., para. 47. In a memorandum to the Assistant Special Representative of the Secretary-General for Western Sahara, the United Nations Office of Legal Affairs responded to a question concerning immunity for representatives of the parties (Morocco and Frente POLISARIO) in the Identification Commission, established to identify and register voters in the framework of the United Nations Mission for the Referendum in Western Sahara (MINURSO). The Identification Commission was established by the UN to assist MINURSO in the discharge of its function. The representatives of the parties would therefore perform official functions of the United Nations in accordance with the meaning of article VI of the General Convention and could therefore be accorded Expert on Mission status. Even observers from the OAU participated in the Identification Commission. Insofar as they were regular staff members of that organisation it was not found to be appropriate to provide them with Expert on Mission status due to the protection already accorded through the relevant instruments of that organisation. See Memorandum to the Assistant Special Representative of the Secretary-General for Western Sahara, 13 April 1993, in *United Nations Juridical Yearbook*, 401-402 (1993).

In the Advisory Opinion concerning Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights in 1999, the Court based its analysis upon the mandate and tasks of the Special Rapporteur of the Commission on Human Rights on Resolution 1994/41 of the Commission entitled *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*.[92] The Court found that the Special Rapporteur must be regarded as an expert on mission "by virtue of his capacity."[93]

The Court also addressed the question of the possibility of invoking the privileges and immunities in relation to the states of which experts on mission were nationals, or on the territory upon which they resided. It found that the convention explicitly provided that Sections 11, 12 and 13 of Article IV on the representative status of members were not applicable between such representatives and their states of nationality. Concerning experts on mission, and officials of the organisation, no rule of similar content is contained within the convention. The reason behind this rule is that experts on missions, and officials of the organisation, represent the organisation and their independence must be assured by all states. The fact that some states entered reservations with regard to some aspects of the privileges and immunities in relation to their nationals is evidence that these states believed that the privileges and immunities could otherwise be invoked in full by their nationals.[94]

The increasing use of personnel provided by civilian contractors for UN peace-keeping operations has led to concern over their legal status, and whether they could and should be granted status as experts on missions. In response to a question from by the Deputy Director of Field Operations Division concerning possible "experts on missions" status for personnel who worked as "vehicles mechanics, dispatchers, drivers, electricians, carpenters and plumbers" the Office of Legal Affairs referred to the Advisory Opinion of the ICJ, 1989, and the interpretation of the term "experts on missions".[95] The Office of Legal Affairs regarded the interpretation of the Court to conform in a general sense to UN and state practice and that the tasks performed by the civilian contractors in question could not be regarded as falling within the expression "experts on missions" under its current meaning.[96]

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92 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) 1999, ICJ Rep 62, para. 44.

93 Ibid., para. 45.

94 Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion) 1989, ICJ Rep 194, para 50.

95 Memorandum to the Deputy Director, Field Operations Division, 11 February 1993, in *United Nations Juridical Yearbook*, 400-401 (1993).

96 Ibid. In this respect it is appropriate to mention that in the opinion of the Office of Legal Affairs, UN guards having special service agreements with the UN, should be regarded as experts on mission. See Memorandum to the Director of the Field

In a memorandum to the Assistant Secretary-General for Peace-keeping Operations in 1995, the Office of Legal Affairs again addressed the question of privileges and immunities for contractors supplying goods and services in support of UN peacekeeping operations and whether they ought to be considered "experts on missions" in accordance with the General Convention.[97] It found that the term "experts on missions" was not defined but that the description by the ICJ in its Advisory Opinion on the applicability of Article VI, Section 22, of the convention, that experts on missions "have been entrusted with mediation, with preparing reports, preparing studies, investigations or finding and establishing facts", in general conformed with the UN and state practice.[98] Accordingly, the Office of Legal Affairs' opinion was that activities such as the supply of construction and catering services, for example, could not be regarded as functions falling within the meaning of the term "experts on missions" in the way that this term had developed within the organisation. In this respect, the commercial nature of such functions was found to be of particular importance.[99] Legal issues concerning the employment and status of contractors are often addressed in applicable SOFAs and will be considered further below.

Privileges and immunities

Officials

UN officials enjoy immunity from legal process with regard to acts committed, and words spoken or written, by them in their official capacities. The "official capacity" criterion is naturally taken into account in relation to privileges and immunities accorded to officials of international organisations, which are based upon what is necessary for performing their official functions. Apart from the important immunity from legal process, the following provisions apply to UN officials:

Operations Division, Office of General Services, 4 September 1992, in *United Nations Juridical Yearbook,* 479 (1992).

97 Memorandum to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, in *United Nations Juridical Yearbook*, 407 (1995).

98 Ibid.

99 Ibid. On safeguarding the risk of abuse of the immunities and privileges accorded to personnel working for private organisations, Jenks emphasises the importance of noting that "international immunities never apply to a contractor as a matter of right; they apply only when in the light of the circumstances of the case the government concerned has agreed by a special arrangement such as that for the clearance of the Suez Canal or by the Plan of Operations agreed for a particular project with the United Nations Special Fund that it is appropriate to grant specified immunities in the particular case. Governments are therefore in a position to protect themselves by making the grant of such immunities subject to any appropriate safeguards." Jenks, 143-4.

(b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;
(c) Be immune from national service obligations;
(d) Be immune, together with their spouses and relatives dependant on them, from immigration restrictions and alien registration;
(e) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of the diplomatic missions to the Government concerned;
(f) Be given, together with their spouses and relatives dependant on them, the same repatriation facilities in time of international crisis as diplomatic envoys;
(g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.[100]

In addition to the privileges and immunities accorded to "ordinary" officials, the Secretary-General and all the Assistant Secretaries-General, together with their spouses and minor children, all enjoy the privileges and immunities accorded to diplomatic envoys, in keeping with international law.[101]

Experts on Missions

It is a requirement that experts on missions shall be accorded the necessary privileges and immunities for "the independent exercise of their functions during their missions, including the time spent on journeys in connection with their missions."[102] In this respect they will enjoy

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;
(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. The immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations:
(c) Inviolability for all papers and documents;

100 Article V, Section 18 of the General Convention.

101 Ibid., Section 19. The UN may issue a *laissez-passer* to its officials, and such permits shall be acceptable as valid travel documents. They are not substitutes for visas in those states where such passes are required. However, accompanied with a certificate showing that the official concerned is travelling on UN business, applications made by holders of a *laissez-passer* are required to be dealt with as quickly as possible. Furthermore, they must be granted facilities for speedy travel. Article VII, Sections 24 and 25.

102 Ibid., Article VI, Section 22.

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers of correspondence by courier or in sealed bags;
(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

While immunity from local jurisdiction is similar to that of officials, experts on missions are also protected against personal arrest or detention. This immunity does not extend to officials, except for official acts. The reason for this extended immunity is that experts on missions are often sent to areas of conflict where freedom of movement is of particular importance.[103]

Official capacity and the right and duty to waive immunity

The privileges and immunities of both officials and experts on missions are thus based upon the principle of functional necessity and performance in an official capacity. In practice, it might prove difficult to define an exact difference between private and official acts. For instance, is a UN official acting in an official capacity, out in the field, when driving to work in a UN car during a mission? For officials and experts on missions, the Secretary-General plays a crucial role in determining which acts can be regarded as official. He has, moreover, the power to waive immunity for both categories. For these reasons, officials and experts on mission will be examined jointly.

Where does the ultimate authority reside on the *final* decision on whether or not an official or expert on mission has acted in an official capacity? It might appear that judgment on whether an act by a UN official constitutes either an official or private act, rests with the local courts.[104] It should be noted that the General Convention provides machinery for the settlement of disputes (Article VIII). If the UN disagrees with a decision of the court, the issue may be resolved by the organisation and the member state in accordance with the Provisions on Settlement of Disputes.[105] It has, however, been the consistent position of the UN that such things are solely a matter for the Secretary-General.

103 Carol McCormick Crosswell, *Protection of International Personnel Abroad. Law and practice affecting the Privileges and Immunities of International Organization*, 97 (1952). Experts on missions may not acquire a UN *laissez-passer*, but have the right to enjoy similar treatment as holders of a certificate showing that they are travelling on behalf of the UN. Section 26 of the General Convention.

104 King, 189.

105 Ibid.

In the opinion of the Office of Legal Affairs, it was stated by that office in a letter to the Minister Counsellor, United States Mission to the United Nations, decisions on whether or not acts were to be regarded as official, were not, as a matter of principle, a matter for local courts.[106] It based its position upon Article 97 of the UN Charter, which states that the Secretary-General "shall be the chief administrative officer of the Organization", and Section 20 of the General Convention, which grants the Secretary-General "the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".[107] It further stated that "this has been a long-lasting and uncontested practice" and that it "has never recognized or accepted that courts of law or any other national authorities of Member States have jurisdiction in making determinations in these matters."[108]

In its Advisory Opinion concerning Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights in 1999, the ICJ found that the General Convention (Article VI Section 22 (b)) applied to the special rapporteur with regard to statements made in an interview by the *International Commercial Litigation*. While the parties agreed on the status of the special rapporteur as an expert on mission, with privileges and immunities that could also be invoked against his state of nationality, the question turned on whether these particular statements could be regarded as having been made in the course of the performance of his mission. On behalf of the Secretary-General, the Legal Counsel for the UN argued that the Court should

> establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not the words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission.[109]

The government of Malaysia, on the other hand, claimed that "the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (*b*) of the Convention."[110]

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106 Letter to the Minister Counsellor, United States Mission to the United Nations, 24 January 1995, in *United Nations Juridical Yearbook*, 404 (1995).

107 Ibid.

108 Ibid.

109 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) 1999, ICJ Rep 62, para. 33.

110 Ibid., para. 32.

It was for the Court to decide if the Secretary-General had an exclusive right to judge whether or not acts performed by an expert on mission were of an official character or whether it was a matter for the local courts to determine. The Court did not confirm an exclusive right in these matters for the Secretary-General, but rather that he had a "pivotal role to play" in determining whether a certain expert on mission, taking account of prevailing circumstances, was entitled to the immunity provided by Section 22 (*b*).[111] The decision of the Secretary-General regarding immunity "creates a presumption which can only be set aside for compelling reasons and is thus to be given the greatest weight by national courts."[112]

According to the Court, the determination of the Secretary-General is thus not a final decision. However, in practice it may prove to have that effect. The Office of Legal Affairs will continue to uphold the determination of the Secretary-General on this issue and the margin of appreciation for national courts is thereby probably extremely limited.

Referring to the well-established rule that an act of a state *organ* is considered to be an act of the state, the Court found that the government of Malaysia had a legal obligation to convey information to the courts regarding the position taken by the Secretary-General.[113] As a rule, the Court stated that whenever a case depended on the immunity of an agent of the UN and was dealt with by a national court, such court should be informed immediately of any finding by the Secretary-General regarding that immunity.[114]

In addition to the privileges and immunities accorded officials, the Secretary-General and all Assistant Secretaries-General are entitled to "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law."[115] An obvious difference in the protection accorded

111 Ibid., para. 50.

112 Ibid., para. 61. See Hazel Fox, The Advisory Opinion on the Difference to Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights: Who has the Last Word on Judicial Independence?, 12 *LJIL* 889, 914 (1999). In this particular case, the Court stated that the Secretary-General had acted correctly when finding the words spoken by the Special Rapporteur to be in the course of the performance of his mission, and thus entitled him to the immunity provided for in Section 22 (*b*) of Article VI of the General Convention. Advisory Opinion concerning Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights in 1999, para. 56.

113 Ibid., para. 62.

114 According to the Court, the "governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information." Ibid., para. 61.

115 These privileges and immunities are also extended to their spouses and minor children.

"ordinary" officials is that these high officials are not subject to local jurisdiction for any acts.

The Secretary-General has the power to waive the immunity for officials and experts on mission if, "in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".[116] In this respect, the common car accident is an interesting example. This is because there exists a relatively high risk for UN and associated personnel in becoming involved in such incidents in peace operations. In reply to a request for a waiver of immunity with regard to a car accident involving a UN volunteer, who through the UNDP Standard Basic Assistance Agreement enjoyed the same privileges and immunities as UN officials, UN policy on car accidents was outlined as follows by the Office of Legal Affairs:

> As a general rule, travel between home and office is not in itself considered to be an official act within the meaning of article V, section 18, of the Convention. Therefore, officials who commit traffic violations in transit between their home and the office and vice versa are not considered to be performing an official act for which they can assert immunity from legal process.
> […]
> However, there may be exceptions to the above-mentioned general rule in the light of particular circumstances, and in such case, the Secretary-General would consider raising the question of functional immunity if the particular facts surrounding the incident would warrant it.[117]

It is apparent that with car accidents, although a general rule has developed on travel between home and office, the circumstances of each case need to be taken into account when deciding on whether or not a particular incident occurred in the course of an official act.

The Secretary-General, in relation to experts on mission, also possesses the right, and retains the duty, of waiving that immunity.[118] Personnel in peace operations entrusted with experts on missions status are usually military observers, civil police officers and suchlike.[119] Their main functions are to observe and report

116 The Security Council has the right to waive the immunity of the Secretary-General. Section 20 of the General Convention. In order "to facilitate the proper administration of justice" and prevent any abuse of the stipulated privileges and immunities, the UN and the authorities of member states "shall cooperate at all times". See section 21 of the General Convention.

117 Memorandum to the Senior Policy Officer (Legal), Division of Personnel, United Nations Development Programme, 23 January 1992, in *United Nations Juridical Yearbook*, 482 (1992).

118 Section 23 of the General Convention.

119 It should be noted that both military and civilian personnel in the battalion provided by Germany for UNOSOM II acquired the status of experts on mission for

to the UN. They generally lack executive powers. However, in the operations conducted in Kosovo and East Timor, the civilian police were charged with an executive mandate.[120] The fact that experts on mission perform tasks similar to those of a state's executive branch may have consequences for their privileges and immunities, and the power and authority of that position needs to be reflected in the individual responsibility of the personnel concerned. On military personnel participating in a peace operation, the state providing the personnel exercises exclusive national jurisdiction, in accordance with the SOFAs concluded so far (and reflected in the UN Model SOFA). The obligation to do so is stipulated in contribution agreements between the UN and the sending nation. A more delicate situation arises where experts on missions exercise executive functions.

While the privileges and immunities accorded to officials and experts on missions may not be the subject of any particular difficulties in relation to states members of the international organisation concerned, a more difficult question arises on the status of such personnel in relation to non-member states. What are the legal obligations of a state accepting them on its territory in the capacity of agents of the UN, or of other international organisations? These issues will be analysed below in the section on customary international law.

4.2.2 Customary Law

The appearance of international officials is relatively new in international relations, and their customary law status has been made far from clear. With regard to members of international commissions it was held in 1931 that if they were appointed by, and responsible to, their governments then they had a claim on diplomatic immunities based upon customary international law, although the law could not at that time be regarded as being settled.[121] According to Jenks, a state not a party to a particular organisation clearly does not have an obligation to admit such an organisation to operate on its territory. However, if it does, it "must, it is suggested, respect the immunities appropriate to such an entity. This

the UN, through an Exchange of Letters between the German government and the UN Secretary-General. See Dieter Fleck and Michael Saalfeld, Combining efforts to improve the legal status of UN peace-keeping forces and their effective protection, 1 *International Peacekeeping,* 82, 83 (1994).

120 See SC Res. 1244, UN SCOR, 4011th mtg., UN Doc. S/RES/1244 (1999) (Kosovo) and SC Res. 1410, UN SCOR, 4534th mtg., UN Doc. S/RES/1410 (2002) (East Timor).

121 Lawrence Preuss, Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest, 25 *AJIL* 694, 698 (1931). He wrote: "International functionaries, acting in the interests of the collectivity of states comprised in an organization, enjoy the benefits of diplomatic privileges and immunities only by virtue of express treaty provisions or by the concession of the states on whose territories they act." Ibid., 695.

general line of reasoning is supported by the analogy of the recognition in third States of the immunities of diplomatic agents."[122]

According to the *Restatement*, regional and other major organisations – the UN and its specialised agencies are mentioned specifically, – also have international legal personality towards non-member states. These organisations may largely depend upon customary international law in the upholding of privileges and immunities in relation to all states.[123] In this respect, Brownlie contends that

> [b]y analogy with the privileges and immunities accorded to diplomats, the requisite privileges and immunities in respect of the territorial jurisdiction of host states are recognised in the customary law. However, there is as yet no general agreement on the precise content of the customary law concerning the immunities of international organizations. The minimum principle appears to be that officials of international organizations are immune from legal process in respect of all acts performed in their official capacity.[124]

Is there a customary rule of international law by which international organisations are to enjoy privileges and immunities? A general acceptance for such customary rule is probably only valid for the UN because of "the constant treaty practice of granting immunity to that organisation."[125] Though states in general do not confer upon international organisations privileges and immunities in the absence of a treaty, there are exceptions.[126] It should not, however, be concluded

122 Jenks, 34. Discussing the development of international immunities, Jenks asserts that the "proper measure of international immunities is what is necessary for the impartial, efficient and economical discharge of the functions of the organisation concerned, and in particular what contributes to the effective independence of the organisation from the individual control of its separate members exercised by means of their national law and executive authority as distinguished from their collective control exercised in a regular manner through the appropriate international organs." Ibid., 167.

123 American Law Institute, *Restatement (Third) Foreign Relations Law of the United States,* Vol. 1 §467, 493 (1987). It is there stated that in accordance with "international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfilment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties". *Restatement (Third),* 494. According to the commentary, other organisations are accorded only specific privileges and immunities as stipulated in international agreements and may therefore only rely on these privileges and immunities against member states.

124 Brownlie, 652.

125 Sands and Klein, 489. See Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of Their Legal Status and Immunities*, 150-1 (1994).

126 The District Court of Maastricht, in Eckhardt v Eurocontrol (No. 2), (1984), 94 ILR 331, 338.

from this that without a formal agreement international organisations would not be able to enjoy privileges and immunities. A valid argument is that when a state has given its consent for the presence of an organisation, to fulfil certain functions on its territory, it is obliged to extend the necessary privileges and immunities to enable the organisation to achieve its objectives.[127]

4.2.3 Conclusions

Personnel representing international governmental organisations are often accorded international privileges and immunities when present in states members to the organisation. The nature of such privileges and immunities is different from diplomatic privileges and immunities in that the latter is exclusively based upon function and lack an element of reciprocity. The scope of international privileges and immunities contrast to diplomatic privileges and immunities as the former also applies in relation to the personnel's state of nationality.

While there is no single convention in this area of the law, the convention on the privileges and immunities of the UN (General Convention), based upon Article 105 of the UN Charter, is an instrument of central importance. The two categories of personnel, "officials" and "experts on missions" are of special interest to personnel in peace operations. Important conditions in this respect are that international privileges and immunities only apply in relation to acts performed in an official capacity and that, in the case of the UN, the Secretary-General has the right and duty to waive the immunity "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".

On the question of who has the final say on what constitutes an act taken in an official capacity, the ICJ has delivered its opinion that although the Secretary-General does not have an exclusive right in such matters, his decision is "to be given the greatest weight by national courts".

The extent of the privileges and immunities of personnel representing the UN has attracted new interest in relation to peace operations, such as those on Kosovo and in East Timor, where civilian police, with experts on mission status, have executive powers. International privileges and immunities are a relatively new phenomenon and as such rests primarily on treaty law. However, the princi-

127 Sands and Klein, 490. According to Jenks, the essential function of international immunities "is to bridle the sovereignty of States in their treatment of international organisations." The curbing of the sovereignty of states in relation to international organisations will benefit all state parties. The organisation will not become a tool of some states but continue to serve the common interests of the organisation as stipulated in its constitution. Jenks, 166. On the functional necessity doctrine as customary law, see Charles H. Brower, International Immunities: Some Dissident Views on the Role of Municipal Courts, 41 *Virginia Journal of International Law*, 1, 5 (2000).

ple of immunity for acts performed in an official capacity appears to have acquired a customary law status, and is thus relevant in relation to third states.

4.3 International Privileges and Immunities Provided by SOFAs

In 1956, when the first UN peacekeeping operation was launched, the UN forces involved were present with the consent of the host nation, but they were intended to play a more active role than traditionally visiting forces had played in the past.[128] Because the majority of peacekeepers were provided by member states and not regarded as officials of the UN or experts on mission, and therefore not included under the regime of the General Convention, the need to clarify and strengthen their legal protection became necessary. Through an Exchange of Letters between the UN and Egypt, the host nation, agreement was reached on certain privileges and immunities applicable to the members of the operation.[129] The practice that arose from the UNEF operation was generally followed in subsequent ones and in 1990 the Secretary-General issued a model status-of-forces agreement (UN Model SOFA).[130] It is explicitly stated that the model agreement was based "upon established practice and drawing extensively upon earlier and current agreements" and was intended to function as a model for future individual agreements between the UN and host nations.[131] These types of agreement are now often referred to as Status-of Forces Agreements (SOFAs) or Status-of-Missions Agreements (SOMAs).[132]

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128 It may be held that the difference between the law of visiting forces and UN forces is in respect of the context in which they are deployed. The latter troops are deployed in an 'operational context', although not in a warlike mode, while visiting forces are not charged with any operational tasks in the host nation. Based upon the nature and character of the operation, the privileges and immunities of the members of peace operations are therefore partly different from e.g. those stipulated in the NATO SOFA. See, generally, A. P. V. Rogers, Visiting Forces in an Operational Context, in *The Handbook of the Law of Visiting Forces,* 533 (Dieter Fleck et. al. eds. 2001). Michael Bothe, Peacekeeping, in *The Charter of the United Nations. A Commentary,* Vol. 1, 648, 681 (Bruno Simma et al eds., 2nd ed., 2002).

129 Exchange of letters constituting an agreement between the United Nations and the Government of Egypt concerning the status of the United Nations Emergency Force in Egypt, New York, 1957, 260 UNTS 61.

130 Report of the Secretary-General, Model status-of-forces agreement for peace-keeping operations, UN Doc. A/45/594 (1990).

131 Ibid., para. 1.

132 Although requested by the Special Committee on Peacekeeping Operations to draft a UN Model SOMA as well, the Secretary-General was not disposed to do so because the UN Model SOFA served as the basic framework for the drafting of both individual SOFAs and SOMAs. See Implementation of the recommendations of the Special Committee on Peacekeeping Operations. Report of the Secretary-General, Implementation of the recommendations of the Special Committee on

If, and when, a SOFA is concluded it will apply bilaterally between the UN and the host nation. A SOFA deals mainly with logistic and financial issues and its aim is to facilitate the implementation of the operation's mandate. To this end, it also sets out privileges and immunities for the operation as such, as well as for the members of the operation. Troop-contributing nations are not parties to a SOFA, but rather function as its beneficiaries. A Model Agreement was issued in 1991 on the relationship between the UN and the states contributing personnel and equipment to peace operations.[133]

The most obvious difference compared with the NATO SOFA (1951) is that the sending nations retain *exclusive* criminal jurisdiction over their forces.[134] On this issue the then Secretary-General Dag Hammarskjöld, in his Summary Study of the UNEF operation, concluded:

> The most important principle in the status Agreement ensures that UNEF personnel, when involved in criminal actions, come under the jurisdiction of the criminal courts of their home countries. The establishment of this principle for UNEF, in relation to Egypt, has set a most valuable precedent. Experience shows that this principle is essential to the successful recruitment by the United Nations of military personnel not otherwise under immunity rules, from its Member countries. The position established for UNEF should be maintained in future arrangements.[135]

During the 1990s, regional organisations came to play an increasingly important role in carrying out peace operations mandated by the UN Security Council. The privileges and immunities stipulated in the UN Model SOFA has had a significant influence on arrangements made, and arrangements reached, on the status of

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Peacekeeping Operations, 60, UN Doc. A/54/670 (2000). SOMAs are generally concluded in the form of an Exchange of Letters.

133 Report of the Secretary-General, Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, UN Doc. A/46/185 (1991). Such agreements had been concluded in the UNEF I, the UN Security Force (UNSF), and UNFICYP. According to Bothe, similar documents were not concluded for other operations. He assumes that agreements in other forms, informal or even oral, exist that refer to the practice upon which the Model Agreement is based. Bothe, Peacekeeping, 690-1. The Report of the Secretary-General, of which the Model Agreement is annexed, states: "Basing itself upon established practice and drawing extensively upon current agreements with countries contributing personnel", UN Doc. A/46/185, para. 1.

134 Article 47(b) of the UN Model SOFA. Compare Sections 20 and 23 of the General Convention where the Secretary-General has the right and duty to waive the immunity if 'the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.'

135 Report of the Secretary-General: Summary study of the experiences derived from the establishment and operation of the Force, para. 163, UN Doc. A/3943 (1958).

forces in peace operations not conducted under UN command and control.[136] The practice of regional organisations and states leading peace operations, whether authorised by the UN or initiated and conducted outside UN authority will also be the subject of study.

The UN Model SOFA will be used as a reference point and compared with status agreements in operations conducted both before and after. Because the UN Model SOFA is based upon the established practice of 1990, the focus will be on agreements of a later date. The study of these status agreements, however, is somewhat hampered by the unavailability of official documents.[137]

A prerequisite to any agreement on the status of an operation and its personnel with the host nation is that any operation is based upon the consent of the host nation. Irrespective of the mandate of the operation, the consent of the host nation is necessary in order to begin negotiations on a status agreement. Although a host nation might have consented to a certain operation, there may still be room for opposing views on the precise content of a specific SOFA. The strength of a SOFA lies in the fact that it can be designed to meet the peculiarities of each operation. The norms expressed therein reflect a careful balance between the privileges and immunities accorded to international servants and the law of visiting forces.[138] A negative aspect is that agreements must be concluded for each and every operation, and these things usually take some considerable time to negotiate.[139] It is not uncommon for members of a peace operation to be deployed long before the conclusion of a SOFA.[140] In some operations it has not

136 See Annex 1-A to the General Framework Agreement for Peace (Dayton Agreement), 35 ILM 75 (1996) http://www.nato.int/ifor/gfa/gfa-ap1a.htm; UNMIK/REG/2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo http://www.unmikonline.org/regulations/2000/reg47-00.htm; and Annex A to the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 41 ILM 1032 (2002) http://www.operations.mod.uk/isafmta.pdf.

137 While the agreements themselves often are available, it is difficult to come by documents concerning the negotiations on such agreements and subsequent practice.

138 Bowett believes that these statuses of forces agreements "represent compromises and shifts between the law of visiting forces on the one hand and the law of international privileges and immunities on the other, against the background of functional necessity." Typical differences between visiting forces and United Nations Forces are, according to Bowett, "(1) the United Nations Force is not that of an ally: indeed it will generally be completely independent of the local authorities; (2) the Force generally may be actually operating, in the military sense, within the territory of the State and not merely stationed there." Bowett, 434.

139 The ONUMOZ SOFA took five months to negotiate. See Miguel de Brito, The Relationship between Peacekeepers, Host Governments and the Local Population, *Monograph Conflict Management, Peacekeeping and peacebuilding*, 2 (No. 10, 1997). Evolving customary law in this regard needs, however, to be taken into consideration.

140 In the UNPROFOR operation a SOFA was not concluded until 1995. During that time it was the practice to refer to the SOFA applicable in the UNFICYP operation.

in fact been possible to conclude a SOFA at all. While the main reasons for such lengthy negotiations seems to be resolving controversial issues such as exemption of duties in general, and in particular for civilian contractors, and related issues affecting the host nation's revenue, there are other issues, of a more fundamental importance to the legal protection of such personnel, (freedom of movement, the right to use communications equipment and questions of jurisdiction) that do not seem to spark controversies to a similar extent.

The fact that UN forces are sometimes deployed before a particular SOFA has been concluded, creates ambiguities concerning their legal status. This was noted in 1993 by the UN Security Council when it stated that

> when considering the establishment of future United Nations operations authorized by the Council, the Security Council will require inter alia: […] (c) That an agreement on the status of the operation, and all the personnel engaged in the operation in the host country be negotiated expeditiously and should come into force as near as possible to the outset of the operation.[141]

In authorising the deployment of troops to peace operations, the Security Council has requested governments concerned to conclude a SOFA with the Secretary-General within 30 days, and has recalled, "that pending the conclusion of such agreements, the model status-of-forces agreement of 9 October 1990 (A/45/594) shall apply provisionally".[142]

Even deployment under the regime of a SOFA will involve certain difficulties. Modern operations are often of a multifunctional character involving both civilian and military personnel with different levels of status accorded to different categories. On the material law, the General Convention will in effect be between the parties to the SOFA, as stipulated in the UN Model SOFA, either through the SOFA itself or by way of reference to the convention if the host nation is already a party to it. Members of the operation in question may be accorded privileges and immunities similar to those of diplomatic envoys, and be regarded as officials or experts on mission. The military personnel concerned will be accorded such privileges and immunities provided for in the SOFA.

It is apparent that what in modern times have now become customary principles applicable in peace operations were largely "invented" in the 1956 UNEF operation. This is of particular relevance since it was the birth of the peacekeeping

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For the legal implications of that practice see, Ray Murphy, Ireland: Legal issues arising from participation in United Nations operations, 1 *International Peacekeeping*, 61, 63 (1994).

141 SC Res. 868, UN SCOR, 3283rd mtg., para. 6 c), UN Doc. S/RES/868 (1993).

142 SC Res. 1509, UN SCOR, 4830th mtg., UN Doc. S/RES/1509 (2003). See also United Nations Operation in Burundi (UNUB), SC Res. 1545, UN SCOR, 4975th mtg., UN Doc. S/RES/1545 (2004).

concept and the UN was faced with unprecedented challenges. The UNEF regulations for the deployment illustrate how these challenges were met. According to the regulations for the force, UNEF was "a subsidiary organ of the United Nations consisting of the United Nations Command [...] and all military personnel placed under the United Nations Command by Member States."[143] The members of the force, "although remaining in their national service, are, during the period of their assignment to the Force, international personnel under the authority of the United Nations and subject to the instructions of the Commander through the chain of command."[144] Being a subsidiary organ of the UN, the force enjoyed "the status, privileges and immunities of the Organization provided in the Convention on the Privileges and Immunities of the United Nations."[145] The force members were under a duty to respect local laws and regulations and to "conduct themselves at all times in a manner befitting their status as members of the United Nations Emergency Force."[146] Moreover, it was stated that "[m]embers of the Force are entitled to the legal protection of the United Nations and shall be regarded as agents of the United Nations for the purpose of such protection."[147]

It is true that no fixed legal framework exists on the status of peacekeeping forces. Rather, it is based upon UN practice and there is much room for specific solutions in each particular case. This practice has been described as "adhoc-racy".[148] It is, however, possible to distinguish norms, adhered to almost constantly, over the past 50 years. These are norms, it is here argued, that are integral to the whole concept of peace operations.

This position is largely supported by the practice of other organisations and states leading such operations. Brief backgrounds will here be given to some of those operations led by two increasingly important actors in this field – NATO and EU. Statutes on peace operations of the Commonwealth of Independent States (CIS) and the Economic Community of Central African States (ECCAS) will also be presented.[149]

143 Regulations for the United Nations Emergency Force, para. 6, 271 UNTS 168 (1957).

144 Ibid.

145 Ibid., para. 10.

146 Ibid., para. 29.

147 Ibid., para., 30. See Seyersted, *United Nations Forces*, 113.

148 See Robert C. R. Siekmann, *National Contingents in United Nations Peace-keeping Forces*, 8 (1991) and Henry Wiseman, Peacekeeping: The Dynamics of Future Development, in *Peacekeeping. Appraisals and Proposals*, 343 (Henry Wiseman ed., 1963).

149 On regional peace operations, see Gustaf Lind, *The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security*, 213-269 (2004).

NATO

Implementation Force/Stabilization Force (European Force)

Under the General Framework Agreement for Peace, also known as the Dayton Agreement after the place where it was concluded, applicable between the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia, a NATO-led Implementation Force (IFOR) was charged with the task of implementing the peace agreement's military objective's.[150] Through resolution 1031 (1995), adopted under Chapter VII of the UN Charter, the Security Council endorsed the role of IFOR.[151] The parties to the Dayton Agreement also concluded agreements on the status of the NATO forces on their territory.[152] These status agreements formed part of the Dayton Agreement.[153] The advantages are obvious. It allowed agreement on the status of the forces before their deployment.

While three sovereign states were parties to the Dayton Agreement, the three entities within the Republic of Bosnia and Herzegovina were parties to its annexes.[154] Appendix B (hereinafter the Bosnia and Herzegovina SOFA) is in many respects influenced by the multilateral NATO SOFA for visiting forces. It was, however, modified to an operational context, thus incorporating provisions of the UN Model SOFA. The question of dependants, for example, was not included in the status agreements with Bosnia and Herzegovina and the definition of personnel was in that respect narrowly construed.

After one year the Stabilization Force (SFOR) succeeded the IFOR operation. From 2 December 2004, the EU has led a multinational stabilisation force (EUFOR) as the legal successor to SFOR.[155] The SOFA annexed to the Bosnia and Herzegovina continues to apply in relation to EUFOR.[156]

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150 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Done at Paris December 14, 1995, 35 ILM 75 (1996).

151 SC Res. 1031, UN SCOR, 3607th mtg., UN Doc. S/RES/1031 (1995).

152 Such agreements had in fact already been negotiated for missions planned at an earlier phase, such as the Vance-Owen Plan and the possible withdrawal of UNPROFOR from Bosnia. See James A. Burger, Lessons Learned in the Former Republic of Yugoslavia, in *The Handbook of The Law of Visiting Forces*, 510 (Dieter Fleck et. al., eds., 2001).

153 Appendix B to Annex 1-A of the Dayton Agreement.

154 These entities are the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska.

155 Council Decision 2004/803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, OJ L 353/21 (2004). For the purpose of this study, however, SFOR is the force principally referred to in this respect.

156 SC Res. 1551, UN SCOR, 5001th mtg., para. 20, UN Doc. S/RES/1551 (2004), SC Res. 1575, UN SCOR, 5085th mtg., para. 12, UN Doc. S/RES/1575 (2004).

Kosovo Force

The NATO-led International Security Force (KFOR) in Kosovo is based upon Security Council Resolution 1244 and the Military Technical Agreement between KFOR and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia.[157] Kosovo is part of Serbia-Montenegro but it does not exercise control over the territory, which at the time of writing was administered by the United Nations Interim Administration in Kosovo (UNMIK).[158]

The Military Technical Agreement provides for a special status for KFOR and its personnel in Kosovo. According to Appendix 2 to the agreement, "[t]he international security force ("KFOR") nor any of its personnel or staff shall be liable for any damages to public or private property that they may cause in the course of duties related to the implementation of this Agreement. The parties will agree a Status-of-Forces Agreement (SOFA) as soon as possible."[159]

Basing itself upon the mandate given to it by the Security Council, UNMIK has regarded itself as being authorised to issue Regulations governing the territory of Kosovo. The status of KFOR and UNMIK is dealt with in Regulation

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157 SC Res. 1244, UN SCOR, 4011th mtg., UN Doc. S/RES/1244 (1999). Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, 38 ILM 1217 (1999). http://www.nato.int/kfor/kfor/documents/mta.htm.

158 Although this situation was (and at the time of writing still was) different from most peace operations, it was not unique. In the case of West New Guinea, where the UN administered the territory, there did not seem to be any critical need for regulating the status of the members of the force because of that fact. D. S. Wijewardane, Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces, 41 *BYIL* 122, 195 (1965). Under the authority of the League of Nations, an international force was placed at the disposal of the governing commission in the Saar to maintain order during the Saar plebiscite. The Saar was governed by the League of Nations, which was vested with powers of legislation and the administration of justice, and there is no evidence of any problems in connection with criminal jurisdiction in relation to members of the force. Ibid., 157. Cf. Barton who claim that the international force was immune from the jurisdiction of the local courts, based upon its having the status of an occupying force. G. P. Barton, Foreign Armed Forces: Immunity From Criminal Jurisdiction, 27 *BYIL* 186, 220 (1950).

159 http://www.nato.int/kfor/kfor/documents/mta.htm. Max Johnson, senior legal adviser to NATO, commented on the status of KFOR and held that "[s]ome form of SOFA customarily covers visiting forces. For KFOR, the SOFA is found in the MTA and UNSCR 1244. Neither document resembles a standard SOFA, but taken together, they vest KFOR, in its specified domain, with virtual plenary power within Kosovo". Max S. Johnson, Headquarters KFOR, in *The Handbook of The Law of Visiting Forces,* 339, 343 (Dieter Fleck et. al. eds. 2001). The NATO-led force was clearly acting in an operational context with apparent enforcement capabilities. Johnson's reference to the law of visiting forces should perhaps be interpreted broadly, so as to include situations where such forces have been entrusted with a peace operation mandate.

No. 2000/47.[160] It hardly had the same legal character as a SOFA, but the norms expressed therein fulfilled the same purpose and it appeared to have had the required effect. At the time of writing this was still the case.

International Security Assistance Force in Afghanistan

The International Security Assistance Force (ISAF) in Afghanistan was a UN-authorised operation which at the time of writing was under NATO command and control. Under the "Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions" (Bonn Agreement) a UN-mandated Security Force was requested to assist in the maintenance of security in Kabul and surrounding areas.[161] Acting under Chapter VII of the UN Charter, the Security Council authorised the establishment of the force. It furthermore welcomed "the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security, including to ensure the safety, security and freedom of movement of all United Nations personnel and all other personnel of international governmental and non-governmental organizations deployed in Afghanistan;"[162]

ISAF, initially led by the UK, concluded a Military Technical Agreement with the Interim Administration of Afghanistan with an annex on the status of the International Security Assistance Force (the SOFA).[163] As in the case with KFOR it was not NATO (or in this case the UK) that was party to the Military Technical Agreement, but rather the ad hoc-established security force.[164] This was different from the operation in Bosnia and Herzegovina where NATO was party to the agreement stipulating the legal status of the force, as found in Appendix B to Annex 1 of the Dayton agreement. The mission of ISAF was to assist in the maintenance of security in the area of responsibility, which largely included Kabul and the surrounding areas.[165]

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160 Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (UNMIK/REG/2000/47), 18 August 2000.

161 See Annex 1 to the Bonn Agreement. Under the Bonn Agreement, an Interim Authority was established to represent Afghanistan in its external relations. The Interim Authority consisted *inter alia* of an Interim Administration. http://www.unama-afg.org/docs/_nonUN%20Docs/_Internation-Conferences&Forums/Bonn-Talks/bonn.htm.

162 SC Res. 1386, UN SCOR, 4443rd mtg., para. 5, UN Doc. S/RES/1386 (2001).

163 41 ILM 1032 (2002) (ISAF SOFA).

164 The fact that an ad hoc-established military force, instead of a state or organisation with international personality, is a party to a SOFA may affect questions relating to responsibilities under the agreement.

165 The ISAF AOR is marked out on a map attached in Annex B to the MTA.

European Union

Concordia

Following the termination of the NATO-led undertaking, *Allied Harmony*, in the former Yugoslav Republic of Macedonia, the European Union launched its first military enterprise to ensure a successful follow-up to the NATO operation.[166] The EU-led operation, named *Concordia*, aimed at contributing to a stable environment and to allow for the implementation of the Ohrid Framework Agreement.[167] It found its legal basis by way of direct request of the former Yugoslav Republic of Macedonia government and Security Council Resolution 1371. *Concordia* ran from 31 March 2003 to 15 December 2003. The legal status of the EU forces (EUF) was set out in an agreement between the EU and the Former Yugoslav Republic of Macedonia where the personnel concerned enjoyed treatment equivalent to that of diplomatic agents.[168]

Artemis

In May, 2003, the UN Security Council authorised the deployment of an Interim Emergency Multinational Force in the Democratic Republic of Congo, in support of the UN MONUC operation, to help improve security situation in that country.[169] Acting upon a request from the UN Secretary-General, the EU agreed to provide the necessary forces.[170] The EU developed a SOFA for the operation, called *Artemis,* according to which the personnel concerned enjoyed treatment equivalent to that of diplomatic agents.[171]

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166 Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, O J L 34/26 (2003), Article 1. Catriona Mace, Operation *Concordia*: Developing a 'European' approach to crisis management?, 11 *International Peacekeeping* 474 (2004).

167 http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Police_and_internal_security/OHRID%20Agreement%2013august2001.asp.

168 Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia.

169 SC Res. 1484, UN SCOR, 4764th mtg., UN Doc. S/RES/1484 (2003).

170 Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo, O J L 147/42 (2003). See Ståle Ulriksen, Catriona Gourlay, and Catriona Mace, Operation *Artemis*: The shape of things to come?, 11 *International Peacekeeping* 508 (2004).

171 The draft is on file with the author. The temporary force was operational only for four months and the SOFA was in fact not concluded during the time of the operation.

Commonwealth of Independent States[172]

On 19 January 1996, the Council of Heads of State of the Commonwealth of Independent States (CIS) adopted a number of decisions on the settlement of conflicts and peacekeeping forces. A decision was taken on a Statute on Collective Peace-keeping Forces in the Commonwealth of Independent States. This statute was attached as an appendix to Annex V of the CIS resolution.[173]

The status of the personnel is set out in paragraph 39 of the statute:

> For the duration of their service in the Collective Peace-keeping Forces, personnel shall enjoy the status, privileges and immunities accorded to United Nations personnel when conducting peace-keeping operations in accordance with the Convention on Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946, the Convention on the Safety of United Nations and Associated Personnel approved by the General Assembly on 9 December 1994, the Protocol of 15 May 1992 on the Status of military observer groups and collective peace-keeping forces in the Commonwealth of Independent States, and this Statute.[174]

Economic Community of Central African States

In 1999 member states of the Economic Community of Central African States (ECCAS) decided to establish an organisation for the promotion and maintenance of peace and security in central Africa, to be called the Council for Peace and Security in Central Africa. One of three technical organs of the Council was a non-permanent Central African Multinational Force (FOMAC).[175] The status of the force was set out in the Standing Orders of the Central African Multinational Force.[176]

According to the standing orders, "FOMAC personnel shall enjoy diplomatic status."[177] Moreover, they were to "enjoy the clauses of the Convention on Security of the United Nations staff and associate staff (sic)"[178] Article 13 contained rules on disciplinary matters, where the contingent commanders were competent

172 On legal aspects of the CIS peace operations, see Bakthtiyar Tuzmukhamedov, The Legal Framework of CIS Regional Peace Operations, 6 *International Peacekeeping*, 1 (2000).

173 Letter dated 26 January 1996 from the permanent representative of the Russian federation to the United Nations addressed to the Secretary-General, 17 UN Doc. A/51/62 – S/1996/74.

174 Ibid., 29, para. 39.

175 http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/eccas/ECCASoverview.pdf.

176 http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/eccas/fomaceng.pdf.

177 Article 9 of the Standing Orders, http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/eccas/fomaceng.pdf.

178 Ibid., Article 10.

to decide on "general discipline matters", while "[d]uly noted cases of sheer indiscipline may be subject to sanctions pronounced by the Force Commander."[179]

Common law infractions of FOMAC staff were to reside within the jurisdiction of their national courts and the suspects concerned were to be sent to their countries of origin without delay.[180] As far as crimes went that could be characterised as war crimes or genocide, they would fall within the jurisdiction of ad hoc courts set up for that purpose.[181]

4.3.1 Scope of Application

A SOFA will generally apply throughout the territory of the host country.[182] The territorial application of a SOFA is usually explicitly stated in agreements of a

179 Ibid., Article 13.

180 Ibid., Article 14.

181 Ibid., Article 15.

182 Paragraph 2 of the UN Model Agreement. Examples of UN Agreements in this respect: Agreement Between Liberia and the United Nations Concerning the Status of the United Nations Mission in Liberia (2003) on file with the author (UNMIL SOFA), Agreement between the Democratic Republic of East Timor and the United Nations Concerning the Status of the United Nations Mission of Support in East Timor (2002) 2185 UNTS 367 (UNMISET SOFA), Agreement Between the United Nations and the Government of the Central African Republic on the Status of the United Nations Mission in the Central African Republic (1998) 2015 UNTS 734 (MINURCA SOFA), Agreement between the United Nations and the Government of Mozambique on the Status of the United Nations Operation in Mozambique (1993) 1722 UNTS 39 (ONUMOZ SOFA), Agreement between the United Nations and the Government of Bosnia and Herzegovina on the Status of the United Nations Protection Force in Bosnia and Herzegovina (1993) 1722 UNTS 77 (UNPROFOR – BiH SOFA), Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda (1993) 1748 UNTS 16 (UNAMIR SOFA), Agreement between the United Nations and the Supreme National Council of Cambodia on the Status of the United Nations Transitional Authority in Cambodia (1992) 1673 UNTS 363 (UNTAC SOFA), Exchange of Letters constituting an agreement between the United Nations and the Government of the former Yugoslav Republic of Macedonia on the status of the United Nations Protection Force in the former Yugoslav Republic of Macedonia (1994) 1788 UNTS 257 (UNPROFOR – Macedonia SOFA), Agreement between the United Nations and the Government of Haiti regarding the status of the United Nations Mission in Haiti (1995) 1861 UNTS 268 (UNMIH SOFA), Agreement between the United Nations and the Government of Angola on the status of the United Nations Angola Verification Mission in Angola (1995) 1864 UNTS 193 (UNAVEM III SOFA), Agreement between the United Nations and the Government of Croatia regarding the status of the United Nations forces and operations in Croatia (1995) 1864 UNTS 287 (UNCRO SOFA), Agreement between the United Nations and the Government of Lebanon on the status of the United Nations Interim Force in Lebanon (1995) 1901 UNTS 397 (UNIFIL SOFA). See also examples of non-UN agreements: Appendix

later date. Status agreements in earlier operations sometimes lacked such provisions. In the case of UNEF its operational area was determined by reference to its deployment in exercising its functions, the location of its military installations and other premises, and its lines of communication and supply.[183] In his Summary study, the Secretary-General held, with regard to the principle of freedom of movement, that an agreement as to what should be considered the area of operations of the force would be needed in future operations.[184]

A government lacks the capability of effectively ensuring the implementation of SOFA norms in territories where it does not exercise effective control.[185] The term "Government", in the UN Model SOFA, is, in fact, defined as "the Government of the host country or Administration having de facto authority over the territory and/or area of operations in question."[186] In the Congo operation (1960-1964), secessionist movements exercised control from time to time over large tracts of the Congolese territory. The Secretary-General was therefore more or less forced to negotiate with those movements rather than use force to enter the territory. The UN also concluded cease-fire agreements with forces not under the control of the central Congolese government.[187]

B to Annex 1-A to the Dayton Agreement, 35 ILM 75 (1996) (IFOR/SFOR SOFA), Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, and Agreement between the EU and the Former Yugoslav Republic of Macedonia (EU SOFA).

183 UNEF SOFA paragraph 5. According to the report by the Secretary-General in preparation for UNEF, it was assumed that its functions could "cover an area extending roughly from the Suez Canal to the armistice demarcation lines established in the armistice agreement between Egypt and Israel." See Second and final report of the Secretary-General on the plan for an emergency international United Nations force requested in resolution 998 (ES-I), adopted by the General Assembly on 4 November 1956, UN Doc. A/3302 (1956).

184 Report of the Secretary-General: Summary study of the experiences derived from the establishment and operation of the Force, para. 164, UN Doc. A/3943 (1958). The Secretary-General reiterated this point during the planning of the 1960 operation in the Congo. See First report of the Secretary-General on the implementation of Security Council resolution 143 (1960), para. 9, UN Doc. S/4389 (1960). Although the territorial scope of application was not explicitly stated in the ONUC operation, the force enjoyed freedom of movement throughout the whole Congolese territory.

185 The mission of ISAF was to assist in the maintenance of the security in the area of responsibility, which largely included Kabul and the surrounding areas. The MTA, however, lays down privileges, such as freedom of movement for the ISAF members throughout the *whole* of Afghanistan. The Interim Administration's ability to ensure this freedom of movement depended on its capacity to exercise effective control over the territory. This obligation on the part of the Interim Administration must have appeared impossible to fulfil at the time the agreement was concluded. The ISAF AOR is marked out on a map attached in Annex B to the MTA. 41 ILM 1032 (2002).

186 See para. 2, note c/ of the UN Model Agreement.

187 Bowett, 240-1.

A SOFA generally takes effect from the date of signature and remains in force until the last element of the UN operation concerned has departed from the territory in question.[188] The UN Model Agreement explicitly states that immunity from legal process enjoyed by the members of the operation, including locally recruited personnel, in respect of words spoken or written and all acts performed in their official capacity, shall remain in force even after they cease to be employed by the operation.[189] Other provisions that also remain in force are those related to the settlement of disputes.[190]

A comprehensive and timely SOFA is not always possible to conclude with the host nation. This has resulted in agreements having retroactive effect. In the United Nations Operation in the Congo (ONUC) a non-inclusive Basic Agreement was initially concluded between the UN and the host nation in July, 1960. Negotiations began in August on a comprehensive SOFA but had to be postponed owing to internal disturbances. It eventually led to the situation of the Congo having no established government with which to negotiate such an agreement.[191] The SOFA that was concluded in November, 1961, was therefore deemed to have taken effect from the time of the arrival of the first ONUC elements.[192] The August, 2000, "SOFA-arrangement" in Kosovo similarly took retroactive effect.[193]

In general, the provisions of a SOFA apply to the peacekeeping operation itself as well as to its members.[194] Part IV of the UN Model Agreement stipu-

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188 See paras. 59 and 60 of the UN Model Agreement. Examples of UN Agreements: Agreement Between Ethiopia and the United Nations Concerning the Status of the United Nations Mission in Ethiopia and Eritrea, (2001) paras. 62-63, 2141 UNTS 24 (UNMEE Ethiopia SOFA), MINURCA SOFA paras. 61-62. UNMIL SOFA paras. 62-63. ONUMOZ SOFA paras. 55-56. UNPROFOR BiH SOFA paras. 54-55. UNAMIR SOFA para. 57, no provision explicitly stating the entering into force of the agreement. UNTAC SOFA paras. 53-54. UNMIH SOFA paras. 57-58. UNAVEM III SOFA, paras. 58-59. UNCRO SOFA paras. 57-58. According to the UNIFIL SOFA, it applies provisionally until it has been ratified by the Lebanese Government in accordance with its constitutional requirements. See also ISAF SOFA, Article X, Annex A, EU SOFA, Article 17 and IFOR/SFOR SOFA, para 22.

189 Paras., 60 and 46 of the UN Model Agreement. See note 182 for examples of other UN Agreements containing these provisions.

190 Paragraphs 60, 53 and 54 of the UN Model Agreement. See note 182 for examples of other UN Agreements containing these provisions.

191 Bowett, 237.

192 Agreement between the United Nations and the Republic of the Congo (Leopoldville) relating to the legal status, facilities, privileges and immunities of the United Nations Organization in the Congo, (1961), para. 48, 414 UNTS 229, (ONUC SOFA).

193 See Regulation No.2000/47 on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo, Section 11 "This regulation shall be deemed to have entered into force on 10 June 1999."

194 UN Model Agreement para. 2. Examples of UN Agreements: ONUMOZ SOFA, para. 2, UNTAC SOFA para. 2, UNAVEM III para. 2, UNMIH para. 2.

lates the status of a peace-keeping operation while Part VI defines the status of the members of an operation. An operation is regarded as a subsidiary organ of the UN and enjoys the status, privileges and immunities of the UN in accordance with the General Convention.[195]

In practice, the provisions of a particular agreement determine who may qualify as a member of a peace operation. A member is often defined as "any member of the civilian or military component".[196] In general, a "civilian compo-

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195 UN Model Agreement, para. 15. Examples of UN Agreements: UNIFIL SOFA para. 15, UNAVEM III para. 16, UNAMIR SOFA para. 15, ONUMOZ SOFA, para. 14. The OAU force was regarded as a subsidiary organ of the OAU and thus "entitled to the status, privileges and immunities granted to the Organization of African Unity." OAU Status of Forces Agreement, Nairobi, November 28, 1981, article 5 e), on file with the author. NATO includes for the purpose of the agreement "its subsidiary bodies, its military Headquarters and all its constituent national elements/units acting in support of, preparing and participating in the Operation;" IFOR/SFOR SOFA para. 1. KFOR "means the specially constituted force, composed by the North Atlantic Treaty Organization, including its member States, its subsidiary bodies, its military Headquarters and national elements/units, and non-NATO contributing countries". Regulation NO. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, Sections. 2.3 and 4.1. The MTA defined ISAF as including "all military personnel together with their aircraft, vehicles, armoured vehicles, stores, equipment, communications, ammunition, weapons and provisions as well as the civilian components of such forces, air and surface movement resources and their support services." ISAF SOFA Article 1, para. 4.b

196 "Member of UNTAC" – "means any member of the civilian or military element but unless specifically stated otherwise does not include locally recruited personnel" (UNTAC SOFA para. 1); "Member of ONUMOZ" – "means any member of the civilian or military component" (ONUMOZ SOFA para. 1); "Member of UNPROFOR" – "means any member of the military, police, or civilian components but unless specifically stated otherwise does not include locally recruited personnel" (UNPROFOR-BiH SOFA para. 1); "Member of UNAMIR" – "means any member of the civilian or military section but unless specifically stated otherwise does not include locally recruited personnel" (UNAMIR SOFA para. 1); "Member of UNMIH" – "means a member of the civilian or military component" (UNMIH SOFA para. 1); "Member of UNAVEM III" – "means any member of the civilian, military of police components" (UNAVEM III SOFA para.1); "Member of UNIFIL" – "means any member of the civilian or military element but unless specifically stated otherwise does not include locally recruited personnel" (UNIFIL SOFA para. 1). In the IFOR/SFOR operation, the SOFA applied in respect of NATO personnel, defined as "the civilian and military personnel of [NATO] with the exception of personnel locally hired;" para. 1 IFOR/SFOR SOFA. KFOR personnel was defined as "all military and civilian personnel of KFOR, such personnel shall be issued a distinctive ID card by or under the authority of the KFOR Force Commander". Regulation NO. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, Section 1, personnel belonging to the EUF were "the civilian and military personnel assigned to the EUF, present, except as otherwise provided in the agreement, in the territory of the Host Party, with the exception of personnel locally hired, including contractors;" EU SOFA, Article 1.3. (h).

nent" consists "of UN officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States" to serve as part of the operation.[197] A "military component" usually consists "of military and special civilian personnel made available by participating States" to serve as part of the operation.[198] The operation itself is also defined in each agreement. To take an example, the UN Operation in Mozambique (ONUMOZ) is defined as the UN operation in Mozambique

> established pursuant to Security Council resolution 797 (1992) of 16 December 1992, in line with the General Peace Agreement for Mozambique, with the terms of reference as described in the report of the Secretary-General of 3

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197 "Civilian element" – "consisting of United Nations officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States to serve as a part of UNTAC" (UNTAC SOFA para. 1); "Civilian component" – "consisting of United Nations officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States to serve as part of ONUMOZ" (ONUMOZ SOFA para. 1); "Civilian component" – "consisting of officials of the United Nations" (UNPROFOR-BiH SOFA para. 1); "Civilian section" – "composed of United Nations officials and of other persons assigned by the Secretary-General to assist the Permanent Representative or contributed to UNAMIR by participating States" (UNAMIR SOFA para. 1); "Civilian component" – "made up of United Nations officers and other persons, including the civilian police, assigned by the Secretary-General to assist the Special Representative or placed at the disposal of UNMIH by the participating States" (UNMIH SOFA para. 1) ; "Civilian component" – "consisting of United Nations officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States to serve as part of UNAVEM" (UNAVEM III SOFA para. 1); "Civilian element" – "consisting of United Nations officials and other persons assigned by the Secretary-General to assist the Force Commander or made available by participating States to serve as part of UNIFIL" (UNIFIL SOFA para. 1, includes also UNTSO).

198 "Military element" – "consisting of military and civilian personnel made available by participating States to serve as a part of UNTAC" (UNTAC SOFA para. 1) "military component" – "consisting of military and special civilian personnel made available by participating States to serve as part of ONUMOZ" (ONUMOZ SOFA para. 1); "military component" – "consisting of military and special civilian personnel made available by participating States at the request of the Secretary-General" (UNPROFOR-BiH SOFA para. 1); "military section" – "composed of military and civilian personnel assigned by participating States to serve as part of UNAMIR" (UNAMIR SOFA para. 1); "Military component" – "made up of military personnel and specialized civilian personnel placed at the disposal of UNMIH by the participating States" (UNMIH SOFA para. 1); "military component" – "consisting of military and special civilian personnel made available by participating States to serve as part of UNAVEM III" (UNAVEM III SOFA para.) "Military element" – "consisting of military and civilian personnel made available by participating states to serve as part of UNIFIL" (UNIFIL SOFA para. 1).

> December 1992 (S/24892) which has been approved by the Security Council in the above-mentioned resolution 797 (1992).[199]

Other categories of personnel may also be accorded special status under applicable SOFAs such as those locally employed.[200] An increasing dependency on civilian personnel, not employed by the UN, has led to demands for extending privileges and immunities, for instance, to international contractors and United Nations Volunteers (UNV).[201] With regard to UNVs, the Office of Legal Affairs suggested that the Secretary-General, when recommending the establishment of a new operation, specified the need for such personnel.[202]

The inclusion of international contractual personnel under a SOFA would, according to the Office of Legal Affairs, require additional support by the General Assembly urging that the governments concerned should grant such personnel functional immunity.[203] According to the Secretary-General, "[i]nternational contractual personnel are employees of their respective international service agencies. They are not staff members, employees or agents of the United Nations."[204] The General Convention does not, therefore, cover them. But since such personnel perform functions of UN operations they should, according to the Secretary-General, enjoy legal protection. Such

> protection would extend to immunity from legal process in respect of words spoken and written and all acts performed by them in their official capacity, as well as entitlement to repatriation in times of international crisis. This legal protection would be expressly stated and included in the Status of

199 ONUMOZ SOFA, para. 1(a).

200 Article 28 of the UN Model SOFA. Examples of UN Agreements: UNMEE Ethiopia SOFA para. 30, UNAMIR SOFA para. 28, UNTAC SOFA para. 26, UNMIL SOFA para. 30.

201 More than 7000 volunteers have served in UN peace operations since 1992, http://www.unv.org/infobase/facts/fspeace_operstions.htm.

202 Memorandum to the Under-Secretary-General for Peacekeeping Operations, 12 November 1993, in *United Nations Juridical Yearbook*, 377 (1993). It should be noted that in the UNTAC SOFA, UNVs were accorded privileges and immunities equivalent to that of United Nations officials, UNTAC SOFA para. 23. Other examples are UNMIH SOFA, para. 25 and UNAVEM SOFA, para. 26.

203 The Office of Legal Affairs also emphasised that the possibility of including such personnel under a SOFA depended on the consent of the host nation. Memorandum to the Under-Secretary-General for Peacekeeping Operations, 12 November 1993, in *United Nations Juridical Yearbook*, 378 (1993).

204 Report of the Secretary-General, Use of civilian personnel in peace-keeping operations, para. 32 UN Doc.. A/48/707 (1993).

> Forces Agreements concluded between the United Nations and future host Governments.[205]

By the use of a common definition of contractors, they are regularly included in the SOFAs of a later date.[206] See, for example, the United Nations Mission in Sierra Leone (UNAMSIL) SOFA:

> "Contractors" means persons, other than members of UNAMSIL, engaged by the United Nations, including juridical as well as natural persons and their employees and subcontractors, to perform services and/or supply equipment, provisions, supplies, materials and other goods in support of UNAMSIL activities. Such contractors shall not be considered third party beneficiaries to this Agreement.[207]

The IFOR/SFOR SOFA applies in respect of NATO personnel, defined as "the civilian and military personnel of [NATO] with the exception of personnel locally hired;"[208] NATO includes for the purpose of the agreement "its subsidiary bodies, its military Headquarters and all its constituent national elements/units acting in support of, preparing and participating in the Operation;"[209] Some nations, such as those forming the Nordic-Polish brigade, were assisted by national support elements (NSEs). The personnel of such elements were regarded as IFOR personnel, although stationed in Hungary. Other states were dependent on support from national units not part of IFOR.[210] The SOFA therefore also applies to "the civilian and military personnel, property and assets of national elements/units of NATO states, acting in connection to the Operation or the relief for the civilian population which however remain under national command and control."[211] The fact that a number of non-NATO states participated in the operation also made it necessary to include personnel from such states. The agreement stipulates that

205 Ibid., para. 36. This was done e.g. in the UNCRO SOFA para. 29. See also special status for 'United Nations contractors' in support of the United Nations Mission in Bosnia and Herzegovina, Exchange of Letters constituting an Agreement between the United Nations and Bosnia and Herzegovina on the Status of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) 1996, 1934 UNTS 84 (UNMIBH SOFA).

206 UNMIL SOFA para. 1, UNMISET SOFA para. 1, UNAMSIL SOFA para. 1, MINURCA SOFA, para. 1, UNMEE SOFA para. 1.

207 UNAMSIL SOFA para. 1

208 IFOR/SFOR SOFA para. 1.

209 Ibid.

210 William Thomas Anderson and Frank Burkhardt, Members of Visiting Forces, Civilian Components, Dependents, in *The Handbook of The Law of Visiting Forces,* 51, 60 (Dieter Fleck et. al. eds., 2001).

211 IFOR/SFOR SOFA para. 19.

the host state "shall accord non-NATO states and their personnel participating in the Operation the same privileges and immunities as those accorded under this agreement to NATO states and personnel."[212] The SOFA, furthermore, provides for the possibility of hiring local personnel.[213]

An example of what appears to be a wide category of personnel included in a SOFA is the agreement applicable in the ISAF operation. The SOFA provided privileges and immunities to "ISAF and supporting personnel, including associated liaison personnel."[214] There was no definition of "supporting personnel, including associated liaison personnel". The protections set out in the agreement applied not only to ISAF and all its personnel, but also "to forces in support of the ISAF and all their personnel."[215]

The General Convention applies to the operation subject to the provisions in the agreement. The fact that not all states are party to the convention has led to alternative provisions depending on whether or not the other party to the agreement is also a party to the convention. If the other party is not a member of the convention the agreement in itself provides for the application of the convention.[216] The privileges and immunities specified in the UN Model Agreement apply to the "peace-keeping operation, its property, funds and assets, and its members, including the Special Representative/Commander", and they shall also enjoy those privileges and immunities provided for in the convention.[217] Article II of the convention "shall also apply to the property, funds and assets of participating States used in connection with the United Nations peace-keeping operation."[218]

The scope of application of a SOFA is to be decided upon in each operation. It is clear, however, that the agreements are largely drafted in a similar way. The ISAF SOFA deviates somewhat from this practice. While ISAF was defined, the expression "supporting personnel, including associated liaison personnel" appears particularly vague. The term "supporting personnel" would probably include international contractors while the reference to "associated liaison personnel", in

212 Ibid., para. 21.

213 Ibid., para. 16.

214 ISAF SOFA Article 1.

215 Ibid., Article 18.

216 Note c/ in the UN Model Agreement.

217 Ibid., para. 4.

218 Ibid., para. 5. The application of Article II of the Convention as to the property, and so on, of participating states was also agreed upon in the first UN peacekeeping operation. In the ONUC operation, it was a different situation. The government of the Congo had not ratified the General Convention, and it was therefore necessary to define the privileges and immunities of the force and the property and such like of the participating states in the SOFA. In this respect, Bowett notes that "participating States enjoy, of course, the normal privileges and immunities from suit accorded to States by customary international law". Bowett, 131 footnotes omitted.

the face of a lack of any definition, could be interpreted to include personnel representing other military forces operating within the territory of Afghanistan. This interpretation gains support in Section 6 of the SOFA concerning its application where it is stated that the SOFA protection also applied "to forces in support of the ISAF and all their personnel". The unclear definition as to which personnel were to be protected could in fact erode the protection afforded by the SOFA. If it were to be perceived that personnel with only a limited connection to the operation enjoyed the special status provided by the SOFA, respect for that status might then be negatively affected. With such special status there would come a corresponding assumption of responsibility in this ISAF operation. It was therefore of the utmost importance for ISAF to have assumed some sort of influence over those personnel enjoying a privileged status under the SOFA.

4.3.2 Status of the Operation and Personnel

A SOFA stipulates a number of rights and obligations on both parties to the agreement. A brief examination of those provisions dealing with the status of the operation, as such, and its personnel will be presented in this chapter. It provides a necessary background to the analysis of the Safety Convention and its relation to other instruments on protection of personnel in peace operations.

Status of the operation

As a general statement, the UN operation, including its members, "shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements. The United Nations peace-keeping operation and its members shall respect all local laws and regulations".[219]

It stipulates an obligation on the part of the UN, as a partner to the agreement, to ensure that its provisions are respected. The Special Representative/Force Commander, however, lacks disciplinary authority over members of national contingents. They remain under the disciplinary systems of their own national legal systems.[220] It requires national contingents to be prepared to carry out their duties in good faith and to show a willingness to respect local laws and regulations. According to one writer, the obligation to respect the laws of the host country went beyond psychological importance. The function, rather was

> that it imposes an obligation under international law to respect the law of the receiving state.[…] What would otherwise be a breach only of obligations under receiving state law for which the receiving state has no jurisdiction or

219 UN Model Agreement para. 6. The Special Representative or the Commander is responsible for these obligations being observed.

220 See below on disciplinary powers and criminal jurisdiction.

> powers of enforcement becomes also a breach of a treaty obligation under Art. II SOFA. This breach of a treaty can be invoked by the receiving State in discussions with the authorities of the force, and, should the two sides be unable to reach agreement, the procedures for settling disputes can be invoked.[221]

The UN Model SOFA does not contain any specific provision on the duty of the UN to carry out its operations in accordance with respect for international humanitarian law. In response to a letter from the president of the ICRC in 1992, it was explained that the UN Secretariat was in the process of developing a formula on international humanitarian law to be inserted in future SOFAs.[222] The proposed provision outlined the duty of UN forces to conduct operations with respect for the principles and spirit of the Geneva Conventions of 1949 and their Additional Protocols of 1977, and the 1954 UNESCO Convention on the Protection of Cultural Property.[223] The second part of the formula referred to an obligation on the part of the host state to treat UN forces with full respect for the principles and spirit of the Geneva Conventions of 1949 and their Additional Protocols of 1977. From 1993, SOFAs began to incorporate such a provision. In the SOFA concluded between the UN and Rwanda in November, 1993, it was stated:

> The United Nations shall ensure that UNAMIR carried out its operations in Rwanda in a manner fully consistent with the principles and spirit of the general conventions applicable to the conduct of military personnel. The relevant instruments include the four Geneva Conventions of 12 August 1949 and the additional Protocols thereto of 8 June 1977, and the UNESCO Convention for the Protection of Cultural Property in the event of Armed Conflict of 14 May 1954.[224]

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221 Rodney Batstone, Respect for the Law of the Receiving State, in *The Handbook of The Law of Visiting Forces,* 61, 69 (Dieter Fleck et. al. eds. 2001) (Footnote omitted).

222 Question of the Application of the 1949 Geneva Conventions for the Protection of War Victims and Their Additional Protocols in Peacekeeping Operations of the United Nations. Letter to the President of the International Committee of the Red Cross 1992, in *United Nations Juridical Yearbook*, 430 (1992).

223 The Model Agreement of 1991on the contribution of personnel and equipment to UN peacekeeping operations contains a provision with similar text. Report of the Secretary-General, Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, para. 38 UN Doc. A/46/185 (1991).

224 UNAMIR SOFA para. 7 (a). Footnotes omitted. See also the examples of UNPROFOR-Macedonia SOFA para. 7 (a), UNIFIL SOFA para. 7 (a), UNAVEM III SOFA para. 6 (a).

In SOFAs from 1998 onwards, the text was slightly revised to indicate a further commitment on the part of the UN. Instead of the reference to "principles and spirit" of international humanitarian law the text after that year read "principles and rules".[225] The reference to "rules" instead of "spirit" clearly indicates a change in commitment on the part of the UN.[226]

For its part, the government in question takes on a duty to "treat the military personnel of UNAMIR at all times in a manner fully consistent with the principles and spirit of general conventions applicable to the conduct of military personnel. These relevant instruments include the four Geneva Conventions of 12 April 1949 and their additional protocols thereto of 8 June 1977".[227] In later operations host governments were also required to treat military personnel "with full respect for the principles and *rules*" of the above-mentioned conventions.[228]

As a general statement of fact the government in question "undertakes to respect the exclusively international nature of the United Nations peace-keeping operation."[229] This is a duty that in many respects is further detailed in the SOFA. The UN has a right to display its flag on its headquarters and other premises, as well as on vehicles and vessels.[230] It is, however, a requirement that vehicles, ves-

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225 MINURCA SOFA para. 6 (a), UNAMSIL SOFA 6 (a), UNMISET SOFA6 (a) UNMEE Ethiopia SOFA para. 6 (a). In 1998 the MINURCA SOFA moreover stated that MINURCA shall conduct its mission "in strict compliance with the principles and rule". Now the common terminology seems to be "with full respect for ".

226 In 1999 the S-G promulgated a Bulletin identifying these principles and rules, Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, 6 August 1999, UN Doc. ST/SGB/1999/13. For criticism of this Bulletin see Ola Engdahl, Status of Military Personnel in United Nations Peace Operations: Interplay Between the Laws of Peace and War, in *International Law and Security*, (Diana Amnéus & Katinka Svanberg eds., 2004).

227 UNAMIR SOFA para. 7 (b). See for other examples with similar text: UNAVEM SOFA para. 6 (b), UNMEE Ethiopia SOFA para. 6 (b), UNMISET SOFA para. 6 (b). Both the Government and the UN operation undertakes to "ensure that members of their respective military personnel are fully acquainted with the principles and rules of the above-mentioned international instruments." Ibid.

228 Emphasis added. See e.g. UNAMSIL SOFA 6 (b), "to treat at all times the military personnel of UNAMSIL with full respect for the principles and rules of the international conventions applicable to the treatment of military personnel. These international conventions include the four Geneva Conventions of 12 April 1949 and their Additional Protocols of 8 June 1977." For other examples with similar text: UNAVEM SOFA para. 6 (b), UNMEE Ethiopia SOFA para. 6 (b), UNMISET SOFA para. 6 (b). Both the Government and the UN operation undertake to "ensure that members of their respective military personnel are fully acquainted with the principles and rules of the above-mentioned international instruments." Ibid.

229 UN Model SOFA para. 7.

230 Ibid., para. 8. Examples of other UN Agreements: UNAVEM III SOFA para. 9, UNAMIR SOFA para. 8, UNMEE-Ethiopia SOFA para. 8, UNPROFOR-BiH SOFA para. 7, ONUMOZ SOFA 7.

sels and aircraft forming part of the UN peacekeeping operation shall "carry a distinctive United Nations identification".[231] The UN must properly inform the host government of such identification.[232] Although it is a requirement to carry distinctive identification, the status afforded UN personnel through a SOFA does not seem to depend upon the existence of proper identification.

In order to make protection a reality, a right to communicate to and from the area of operations through radio, telephone, or any other means, and within and between premises of the force, is of the utmost importance. Such rights are expressed in the UN Model Agreement[233] and have been repeatedly confirmed in practice.[234] Paragraph 10 of the UN Model SOFA refers to the General Convention and stipulates that similar communications facilities shall be enjoyed by the peacekeeping operation.[235] Article III of the General Convention in turn states that the UN shall enjoy in the territory of each member state similar treatment as that accorded by the government in question to other governments. In effect, the article says that *diplomatic* privileges are to be extended to the UN and its peacekeeping operations with regard to communications facilities.[236] It should be noted that the right of communication refers to the internal communication within and between UN offices. To operate radio broadcasting to disseminate information about the UN and particular operations is dependent on a special agreement with the host nation.[237]

Freedom of movement is clearly of specific importance for both the conduct of an operation and the safety of its personnel. According to paragraph 12 of the UN Model SOFA

231 UN Model SOFA, para. 9. Examples of other UN Agreements: UNAVEM III SOFA para. 10, UNAMIR SOFA para. 9, UNMEE-Ethiopia SOFA para. 9, UNPROFOR-BiH SOFA para. 8, ONUMOZ SOFA para. 8.

232 UN Model SOFA para. 9.

233 Ibid., para. 10.

234 Examples of UN Agreements: UNTAC SOFA, para. 9, UNAVEM III SOFA para. 11, UNCRO SOFA, para. 10, UNIFIL SOFA, para. 10, UNMISET SOFA, para. 10, UNAMSIL SOFA, para. 10.

235 UN Model SOFA, para. 10.

236 General Convention, Article III. Paragraph 11 of the UN Model SOFA includes additional provisions concerning communications facilities adapted to operational needs. These needs include the right to install and operate satellite systems, the right to unrestricted communication, the "laying of cables and land lines and the establishment of fixed and mobile radio sending, receiving and repeater stations" and the establishment of postal services for private mail. These additional provisions are subject to the provisions of paragraph 10.

237 Memorandum to the Acting Director, Field Operations Division, Department of Peacekeeping Operations, 21 December 1994, *United Nations Juridical Yearbook* 429 (1994).

> The United Nations peace-keeping operation and its members shall enjoy, together with its vehicles, vessels, aircraft and equipment, freedom of movement throughout the [host country/territory]. That freedom shall, with respect to large movements of personnel, stores or vehicles through airports or on railways or roads used for general traffic within the [host country/territory], be co-ordinated with the Government. The Government undertakes to supply the United Nations peace-keeping operation, where necessary, with maps and other information, including location of mine fields and other dangers and impediments, which may be useful in facilitating its movements.[238]

Freedom of movement is now a common right exercised by peacekeeping forces whereas during the first operation, UNEF, the force enjoyed freedom of movement only in certain defined areas.[239] The limitation appeared to be based upon the "functional requirements" of the force.[240] In the next operation, ONUC, the UN enjoyed freedom of movement throughout the Congo.[241] The reason for this extended freedom of movement was basically due to the different character of the operation in comparison with UNEF.[242] The important principle of freedom of movement has repeatedly been confirmed in practice.[243] However, it does not mean that in reality such forces constantly enjoy this freedom. On the contrary, it has often proved difficult in practice for host nations to ensure freedom of movement, especially in those cases where a government fails to exercise effective control over all of its territory. In a later operation (UNAMSIL) the President of Sierra Leone, Ahmed Tejan Kabbah, conferred with leaders of several factions who agreed, among other things, to allow UNAMSIL operatives unhindered movement throughout the territory.[244] Other examples are the experiences of

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238 UN Model SOFA, para. 12.

239 UNEF SOFA para. 32.

240 Bowett, 128.

241 ONUC SOFA, para. 30.

242 Bowett, 239-240.

243 Examples of UN Agreements: UNTAC SOFA para. 11, ONUMOZ SOFA, para. 11, UNPROFOR-BiH SOFA, para. 11, UNMIL SOFA, para. 12, UNMISET SOFA para. 12. In the later SOFAs the provision on freedom of movement has been revised to include vehicles of contractors and that the operation shall enjoy freedom of movement "without delay". IFOR/SFOR personnel "shall enjoy, together with their vehicles, vessels, aircraft and equipment, free and unrestricted passage and unimpeded access throughout the Republic of Bosnia and Herzegovina including airspace and territorial waters of the Republic of Bosnia and Herzegovina." IFOR/SFOR SOFA para, 9.

244 Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone, para. 3, UN Doc. S/2000/455 (2000).

UNPROFOR.[245] In the UNMEE operation both Ethiopia and Eritrea restricted the freedom of movement of UN forces.[246]

The granting of "speedy processing of entry and exit formalities" may prove to be indispensable for an operation.[247] Such a right is granted to all members, including the military component of an operation, upon prior notification. A UN peacekeeping operation's vehicles are not subject to licence and registration requirements by local authorities provided that all vehicles carry third party insurance. Furthermore, an operation retains the authority to use roads, canals and airfields free of charges or toll and with exemption from charges for services rendered.[248]

According to paragraph 15 of the UN Model SOFA, a UN peacekeeping operation is to be regarded as a subsidiary organ of the UN and as such should enjoy the privileges and immunities of the UN.[249] Paragraph 15 deals primarily with issues of import and export, customs and duty. The host government in question is obliged to provide, without charge, the required areas for UN headquarters, camps and other premises the peacekeeping operation needs for its operational, administrative and accommodation purposes. Such premises remain, of course, the sovereign territory of the host nation but "they shall be inviolable and subject to the exclusive control and authority of the United Nations."[250] The UN, moreover, alone may "consent to the entry of any government officials or of

245 See Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* 74 (1996).

246 Progress report of the Secretary-General on Ethiopia and Eritrea, paras. 6-7, UN Doc. S/2003/858 (2003).

247 UN Model SOFA, para. 30.

248 Ibid., paras., 13 and 14. The distinction between charges and tolls on the one hand and charges for services rendered on the other could be difficult to define. According to the General Convention, Section 7 (a), the UN's "assets, income and other property shall be: (a) Exempt from all direct taxes which are, in fact, no more than charges for public utility services;" Examples of such direct taxation are landing and parking fees. According to the Office of Legal Affairs, public utility services has been interpreted as "applying to supplies or services rendered by a Government … for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered". Such services need to be "services which can be specifically identified, described and itemized" See Letter to the Minister of Foreign Affairs and International Cooperation of a Member State, 17 June 1994, in *United Nations Juridical Yearbook* 453 (1994). The Office of Legal Affairs referred to the 1967 study by the Secretariat on the Practice of the United Nations, the specialized agencies and the International Atomic Energy Agency, in *Yearbook of the International Law Commission*, II 154 (1967).

249 UN Model SOFA, para. 15. The provision refers to the General Convention and, in case the Government is not a party to the General Convention, to the present Agreement.

250 UN Model SOFA, para. 16.

any other person not member of the United Nations peace-keeping operation to such premises."[251]

It is the UN's right to recruit local personnel as and when required. If requested by the Special Representative or the Force Commander the host government must facilitate the recruitment of qualified local personnel.[252]

Status of personnel

High-ranking members, such as the Special Representative, the Commander of the military component, the head of the civilian police and other members of the Special Representative/Commander's staff, shall be accorded the privileges and immunities of diplomatic envoys, as stipulated in Sections 19 and 27 of the General Convention.[253]

Whenever members of the UN Secretariat are assigned to the civilian component of a UN peace operation they remain officials of the UN and accordingly enjoy the privileges and immunities stipulated in Articles V and VII of the General Convention.[254] SOFAs of a later date include UN Volunteers who are required to be assimilated within the civilian component of the operation concerned.[255] Status as experts on mission is accorded to military observers, UN civilian police and civilian personnel, with the exception of UN officials.[256]

The majority of peacekeepers (military personnel made up of national contingents and assigned to the military component of a peace operation) do not enjoy the privileges and immunities under the General Convention. They possess only those privileges and immunities "specifically provided for in the present Agreement."[257]

Locally recruited personnel enjoy, as accredited members of a UN peacekeeping operation, immunity for official acts as stipulated in Section 18 (a) of the General Convention. They are accordingly "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".[258]

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251 Ibid., para. 19.

252 Ibid., para. 22. IFOR/SFOR SOFA, para. 16, KFOR-UNMIK Regulation, Article 14.

253 UN Model SOFA, para. 24.

254 Ibid., para. 25.

255 See e.g. UNMISET SOFA, para. 27, UNAMSIL SOFA, para. 27, and UNMIL SOFA para. 27.

256 UN Model SOFA, para. 26. "whose names are for the purpose notified to the Government by the Special Representative/Commander".

257 Ibid., para. 27.

258 UN Model SOFA, para. 28. See General Convention Section 18 (a). They will also be "exempt from taxation on the salaries and emoluments paid to them by the United Nations" and are "immune from national service obligations", according to Section 18 (b) and (c) of the General Convention.

Regarding "contractors" that supply goods and services in support of a UN peacekeeping operation, the UN Office of Legal Affairs has repeatedly stated that they may not, owing to the commercial nature of their functions, benefit from the privileges and immunities stipulated in the General Convention. They do not qualify as "experts on mission" within the meaning of the interpreted expression.[259] The Office of Legal Affairs recognised the necessity of the UN to rely on commercial firms to provide services and perform tasks that had traditionally been carried out by military personnel. Facilities necessary for the contractors to perform their functions were identified to include

> freedom of movement […]; prompt issuance of necessary visas; exemption from immigration restrictions and alien registration; prompt issuance of licences or permits, as necessary, for required services, including for imports and for the operation of aircraft and vessels; repatriation in time of international crises; right to import for the exclusive and official use of the United Nations, without any restriction, and free of tax or duties, supplies, equipment and other materials.[260]

At the time the Office of Legal Affairs was engaged in drafting relevant provisions for the purpose of including them into future SOFAs. Realising the reluctance of host nations to include contractors in SOFAs, it was emphasised by the Office of Legal Affairs that despite *its* willingness to grant contractors the abovementioned facilities, this was ultimately the decision of the host nation.[261] In SOFAs of a later date contractors were allowed, among other things, freedom of movement, the provision of supplies and services and permits and licences.[262]

Entry and departure

Whenever the Special Representative/Force Commander so requires, the members of a peace operation may exercise the right to enter, reside in and depart at will from the host country/territory, and it is the obligation of the host country to facilitate such movements. Members of peace operations "shall be exempt from passport and visa regulations and immigration and restrictions on entering into

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259 Memorandum to the Assistant Secretary-General for Peacekeeping Operations 23 June 1995, in *United Nations Juridical Yearbook*, 407-8 (1995). On the interpretation of the term "experts on mission" special reference is made to the Advisory Opinion of the ICJ on the Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, ICJ Rep 194.

260 Memorandum to the Assistant Secretary-General for Peacekeeping Operations 23 June 1995, in *United Nations Juridical Yearbook*, 408 (1995).

261 Ibid.

262 See, UNMISET SOFA paras. 12, 20-22, MINURCA SOFA, paras. 12, 20-22, and UNMIL SOFA paras. 12, 20-22.

or departing from" the host country.[263] In the UNMEE operation, certain staff experienced difficulties when entering and leaving at airports of the capitals of Ethiopia and Eritrea as they were subject to a visa requirement. The Secretary-General found that this contravened the UN Model SOFA.[264] In this respect it is interesting to note the difference between the UN Model SOFA and the General Convention. According to Sections 25 and 26 of the General Convention, there is no rule against visa requirements for UN personnel with a *laissez-passer*. It is only an obligation to deal with such applications "as speedy as possible."[265] In 1993 the Government of the Federal Republic of Yugoslavia (FRY) sought to impose requirements on entry visas for both personnel with *laissez-passer* and personnel with national passports of states requiring entry visas for nationals of FRY. In a memorandum to the Under-Secretary-General for Peacekeeping Operations, the Office of Legal Affairs found that "[a]s a general rule, the position of the United Nations in respect of visa requirements is to consider the mere visa requirement as unobjectionable as long as it is a formality which does not entail an impediment to the speedy travel and movement of United Nations personnel."[266]

Identification

Each member of an operation must be in possession of an identity card issued by the Special Representative or the Force Commander. The card must be numbered and contain the bearer's full name, date of birth, title or rank, service and photograph. Except for entry and departure, when movement orders are required, personal identity cards are the only documents necessary for personnel who upon demand from appropriate officials of the host government must produce them. They are not, however, required to surrender them.[267] The personal identity card is essential to the practical implementation of the privileged status and is of great

263 UN Model SOFA, para. 33. The only thing required of members of an operation during the course of entry and departure is to be in possession of a movement order and a personal identity card issued by the Special Representative/Commander. On the right of entry and exit see e.g. UNPROFOR-BiH SOFA paras. 30-32, UNAMIR SOFA, paras. 32-34, UNMEE-Ethiopia SOFA, paras. 34-36, UNMISET SOFA, paras. 34-36. Identity cards must be issued to all members of the operation in question, including locally recruited personnel, as soon as possible. In operations of a later date contractors were also issued with identity cards. See MINURCA SOFA, para. 37, UNMIL SOFA, para. 37, UNMISET SOFA, para. 37, UNAMSIL SOFA, para. 37. If this is not possible before first entry into the host country, a personal identity card issued by the appropriate authorities of a participating state would be acceptable. UN Model SOFA, paras. 34 and 35.

264 Progress report of the Secretary-General on Ethiopia and Eritrea, para. 7 UN Doc. S/2003/858 (2003).

265 General Convention Article VII Section 25.

266 Memorandum to the Under-Secretary-General for Peacekeeping Operations, 15 October 1993, in *United Nations Juridical Yearbook* 409 (1993).

267 UN Model SOFA, para. 36.

importance. A lost identity card must therefore be reported as soon as possible as a matter of urgency since there would be a risk of unauthorised persons entering restricted areas. There is also to be considered the aspect of trust towards UN personnel. When it comes to identity cards, markings and UN logos, it is obviously important to avoid their improper use. Given the special status of a UN operation and its personnel, there is always the risk of abuse by persons not connected with the operation concerned in order to achieve their own ends. In the long-term perspective there could be serious implications for the UN operation in question on how it is perceived by the local population.

Uniforms and arms

Military personnel and civilian police involved in UN peace operations are required to wear uniforms in the performance of official duties. They may also bear arms while on duty when authorised to do so by orders.[268] In SOFAs of a later date UN Security Officers and Field Service officers may wear UN uniforms. UN Security Officers may also bear arms while on official duty. Personnel carrying weapons must be in uniform, except for those on close protection duties.[269] The right to carry arms and to wear uniform has been interpreted as being an essential part of peace operations involving a military force.[270]

4.3.3 Powers of Arrest and Jurisdiction

The maintenance of discipline and good order among members of UN operations, including locally recruited personnel, is the responsibility of the Special Representative. Personnel designated by the Special Representative/Commander therefore police the premises of a UN operation. Outside such premises such personnel may only perform their functions under arrangements with the host government in those cases where it is deemed necessary.[271] The primary responsibility of good discipline is to the host government. It should, however, be noted that even though the maintenance of discipline and good order is the responsibility of the Special Representative/Commander, the UN or its representatives cannot exercise executive power over members of national contingents. The maintenance of order and discipline therefore requires contingent commanders to act in accordance with the will of the Special Representative/Commander and uphold discipline whenever the behaviour of military personnel threatens the success of the operation in question.

268 Ibid., para. 37.

269 UNMIL SOFA, para. 39, UNMISET SOFA, para. 39 and UNAMSIL SOFA, para. 39 (except that personnel with close protection duties are not mentioned).

270 Bowett argues that the host state must *prima facie* be deemed to have consented to such right when agreeing on a military force on its territory. Bowett, 448.

271 UN Model SOFA, para. 40.

Military personnel of any UN operation are subject to powers of arrest by the operation's military police. Any military member or members arrested outside the area of their contingent "shall be transferred to their contingent Commander for appropriate action."[272] This is a consequence of the principle that military members of an operation are subject only to the disciplinary action of their own contingents. On the premises of a UN operation, personnel designated by the Special Representative/Commander may take any other person into custody. The reference to "any other person" concerns persons not members of a UN operation. They shall, however, be transferred immediately to the nearest appropriate official of the host government.[273] Under certain circumstances, the host government retains the right to take into custody any member of a UN operation. That right is subject to the provisions that confer the status of diplomatic envoy upon high-ranking members of the operation concerned and the status of experts on missions for certain civilian staff.[274]

Subject to these provisions, the host government may take into custody any member of a UN operation upon the request of the Special Representative/Commander or when "apprehended in the commission or attempted commission of a criminal offence."[275] If detained, that person or persons shall be immediately transferred to the appropriate representatives of the UN operation concerned together with any weapons or other equipment seized. The host government and the UN operation both have the right to make a preliminary interrogation. Such an interrogation should not, however, delay the transfer of custody to the appropriate authorities. Even after such transfer the person or persons concerned should be made available to the arresting authority if needed for further interrogation.[276]

The foregoing provisions clearly reflect a will to co-operate in matters involving criminal offences. At the same time, they uphold the division in the exercise of jurisdiction between the UN operation concerned and the host government. This co-operation is taken even further, in the stipulating of an obligation for

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272 Ibid, para. 41.

273 Ibid.

274 Ibid., para. 42. The provision refers in respect of the high-ranking members to paragraphs 24 of the UN Model SOFA, which in turn refers to the sections 19 and 27 of the General Convention. According to section 19, these members are accorded privileges and immunities as diplomatic envoys. Article 29 of the Vienna Convention on Diplomatic Relations (1961) states that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." With regard to experts on mission reference is made to paragraph 26 of the UN Model Agreement, which in turn refers to Article VI of the General Convention. According to section 22 (a) of Article VI, experts on mission "shall be accorded immunity from personal arrest or detention and from seizure of their personnel baggage;".

275 UN Model SOFA, para. 42.

276 Ibid., para. 43.

the UN operation and the host government to assist each other in investigating offences in which either or both have an interest. They must, for example, produce witnesses, evidence and items connected to the alleged offence in question.[277]

An effective protection also includes an obligation on the part of the host government to prevent and punish any wrongful act against protected personnel. Such an obligation may be interpreted as being included in the general obligation of the host country in question to "respect the exclusively international nature of the United Nations peace-keeping operation" as stipulated in paragraph 7 of the UN Model Agreement. A special duty to prosecute, however, is incumbent on the host government. According to Article 45 of the UN Model Agreement, the

> Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution.[278]

The condition that it must be regarded as an offence if committed in relation to its own forces possibly indicates a limitation in respect of what is required under general international law. In SOFAs of a later date this provision has been modified with the following text added: "or against the local civilian population".[279] In this respect, it is interesting to note Bowett's view on the duty of host states to comply with the terms of SOFAs. He finds that "whilst various attacks on UNFICYP personnel has occurred, it is difficult to say that the host government has not fulfilled its obligations under paragraph 18 of the Agreement to ensure the prosecution of offenders, for this cannot impose an obligation to use more than due diligence in seeking them out."[280] The duty to ensure the prosecution of offenders of crimes against personnel in peace operations is probably subject to the standard of exercising due diligence.

In operations of a later date SOFAs often contain a provision expressing the duty of the host state to ensure the safety and security of personnel. The UNMISET SOFA reads:

> The Government shall take all appropriate measures to ensure the safety and security of UNMISET and its members. Upon the request of the Special Representative of the Secretary-General, the Government shall provide such

277 Ibid., para. 44.

278 Ibid., para.45.

279 UNMISET SOFA, para. 52, UNAMSIL SOFA, para. 49, UNMIL SOFA, para. 48 (v).

280 Bowett, 559.

> security as necessary to protect UNMISET, its property and members during the exercise of their functions.[281]

It may be regarded as a forerunner to the so-called key provisions of the Safety Convention included in some SOFAs. The UNMISET and UNMIL SOFAs contain a section entitled "Safety and security". The main part of that section includes the Safety Convention's key provisions. The contribution of the Safety Conventions key provisions, and critique thereof, in SOFAs are analysed below in chapter 5.3.3.

Criminal jurisdiction

Probably the most important question to be dealt with in a SOFA concerns jurisdiction. The UN Model SOFA reflects a careful balance between the interests of the government concerned, the UN peace operation and participating states. As a general rule, immunity from legal process in the host country is accorded to all members of a UN peace operation, including local personnel, in respect of words spoken or any act performed in their official capacity. An important aspect of this immunity, especially for locally recruited personnel, is that it continues after they cease to be members of, or employed by, the UN operation in question.[282]

A host government suspecting the commission of a *criminal* offence by any member of a UN operation should immediately inform the Special Representative/Commander and present all available evidence. Depending upon the status of an accused person, the matter is then dealt with in one of two ways.[283] If the accused is a member of the civilian component, or a civilian member of the military component, the Special Representative/Commander will conduct an inquiry if supplementary information is needed and then, together with the host government, decide on whether criminal proceedings should be instituted. If they fail to agree on this matter, a tribunal of three arbitrators will resolve the question.[284]

If the person concerned is suspected of committing a criminal offence and is a military member of the military component, then the sending state exercises *exclusive* jurisdiction.[285] According to the UN Model Agreement, criminal

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281 UNAMSIL SOFA, para. 48. See also the UNMEE Ethiopia SOFA para. 48, and the UNMIL SOFA para. 49.

282 UN Model SOFA, para. 46.

283 Ibid., para. 47.

284 Ibid., para. 47 which refers to para. 53. UNTAG SOFA paras 53 and 54 (*a*), MFO SOFA, para. 11 (*b*) "official capacity".

285 UN Model SOFA, para. 47 (b). Examples of other UN Agreements: ONUMOZ SOFA, para. 46 (b), UNTAC SOFA, para. 44 (b), UNPROFOR-BiH SOFA, para. 44 (b), UNAVEM III SOFA, para. 48 (b), MINURCA SOFA, para. 50 (b), UNAMSIL SOFA, para. 51 (b). However, in the operation in the Congo, civilian members also came under the exclusive jurisdiction of their national state. Paragraph 9 of the ONUC SOFA stated, "Members of the Force shall be subject to the exclu-

proceedings can *never* be instituted against any military member of the military component of a UN peace operation. In his Summary study of the UNEF operation, the Secretary-General underlined the dangers of a "jurisdictional vacuum" where an offender escapes prosecution by both the host state and the participating state.[286] To avoid a lacuna in the exercise of jurisdiction, the responsibility of the sending states in this regard is stressed in the UN Model Agreement. The Secretary-General will "obtain assurances from Government of participating states" to actually exercise their jurisdiction concerning crimes committed within the territory of the host nation.[287] It is stated in the UN Model Agreement that this provision may not necessarily be inserted in a specific status agreement but rather in a memorandum of understanding containing clarifications of the agreement.[288] According to the Model Agreement Between the UN and Troop-Contributing Countries (1991), any state contributing personnel to a UN peace-keeping operation "agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with" the particular operation.[289]

After the UNEF operation the Secretary-General acknowledged that certain difficulties might arise over the principle of exclusive criminal jurisdiction for sending states, particularly in relation to variations in legal systems and the influence of military law of some sending states. Although very few cases in the UNEF operation arose involving such difficulties, it was still considered to

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sive jurisdiction of their respective national States in respect of any criminal offences which may be committed by them in the Congo."

286 Summary study, 1958, para. 136.

287 UN Model SOFA, para. 48. In the UNEF operation, the agreement between the participating states and the UN therefore contained within it the requirement that "immunity from the jurisdiction of Egypt is based on the understanding that the authorities of the participating States would exercise such jurisdiction as might be necessary with respect to crimes or offences committed in Egypt by any members of the Force provided from their own military services". Participating States Agreements (with Finland) para. 5, 271 UNTS 136.

288 UN Model SOFA, note h/, to para. 48. UNEF SOFA para. 5, UNFICYP SOFA para. 5. See Exchange of Letters constituting an agreement between the United Nations and Finland concerning the service with the United Nations Emergency Force of the national contingent provided by the Government of Finland, 21 and 27 June 1957, para. 5 271 UNTS 136. Exchange of Letters constituting an agreement between the United Nations and Pakistan concerning the United Nations Security Force in West New Guinea (West Irian), 6 December 1962 and 18 April 1963, 503 UNTS 26, 30. Exchange of Letters constituting an agreement between the United Nations and Canada concerning the service with the United Nations Peace-Keeping Force in Cyprus of the national contingent provided by the Government of Canada, 21 February 1966, para. 5, 555 UNTS 120.

289 Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, Article VIII, para. 25.

be important for sending states to review their national law in this respect. In the view of the Secretary-General, "national laws may differ in the extent to which they confer on courts martial jurisdiction over civil offences in peacetime, or confer on either military or civil courts jurisdiction over offences abroad. Some provide only for trial in the home country, thus posing practical questions about the submission of evidence."[290]

According to the UN Model SOFA, the duty of the sending states to exercise jurisdiction over their forces, is towards the UN. As is well established in international law a state cannot escape its international obligations by referring to its national legislation.[291] A sending state is therefore required to review its national laws so that they comply with the ability and duty to exercise jurisdiction over its forces.[292]

There seems to be some confusion in the literature concerning the nature of immunity of UN personnel and the exclusive criminal jurisdiction of sending states over military personnel. According to Rogers, the principle of immunity from legal process for official acts for UN peacekeeping personnel "gives the sending states exclusive criminal jurisdiction over their own personnel for all criminal offences. As a concession, however, the UN SOFA does, like the Privileges Convention, allow the UN Secretary General to waive that right if he considers it appropriate to do so."[293] This is, however, only partly true. There is no right of the Secretary-General to waive the immunity in relation to military personnel, being part of an operations military component, as they fall under the exclusive criminal jurisdiction of their sending states.[294]

Wijwardane discusses the lack of a waiver institute in UN SOFAs. He believes that a waiver could be possible in view of the fact that there is no immunity from liability but only from process and jurisdiction. The UN, arguably does not have the authority to waive immunity, nor has any member of the force, since it is not a personal immunity. It would, according to Wijwardane, if at all pos-

290 Summary study, 1958, para. 137. See in this respect also Gabriella Rosner, *The United Nations Emergency Force*, 150-151 (1963).

291 Vienna Convention on the Law of Treaties, Article 27. See also Brownlie, 34-35.

292 Higgins contends that exclusion in the 1960s from Congolese criminal jurisdiction of any criminal offence committed by members of ONUC embraced not only acts criminal under Congolese law, but also "under customary law so far as the conduct of hostilities was concerned". Rosalyn Higgins, *United Nations Peacekeeping, Documents and Commentary, III Africa*, 209 (1980). However, if the UN troops were to be involved in an armed conflict with *governmental* forces the consent to the operation as such would no longer be valid and the legitimacy of the status agreement would be questioned.

293 Rogers, 536.

294 The right and duty of the Secretary-General to waive such immunity for other kinds of personnel under the SOFA is not explicitly stated in the UN Model SOFA but may be inferred from the incorporation of the General Convention.

sible, lie with the contributing state. It is the responsibility of contributing states to exercise criminal jurisdiction. In order to avoid a jurisdictional vacuum these states may therefore fulfil their obligations by waiving immunity in favour of the host state. This could be the only effective way, Wijwardane argues, if a crime committed in the host state was not a criminal offence within the territory of the contributing state.[295] However, it would not seem to be correct to refer to immunity and the possibility to waive such immunity. It rather concerns allocation of jurisdiction. Even though the sending state may benefit from the SOFA, the agreement is between the host state and the UN. Any agreement between the sending and receiving state needs to take into consideration the terms of the SOFA.

In UN peace operations it is an established practice that military members of the military component fall under the exclusive criminal jurisdiction of sending states. This practice can be traced to the law of visiting forces. While the norm on such forces today is that of concurrent jurisdiction, exclusive criminal jurisdiction of sending states has survived when in an operational context. The system of exclusive criminal jurisdiction of sending states requires that such states exercise that jurisdiction in good faith, thereby preventing a lacuna in the exercise of jurisdiction. The Secretary-General, in 1958, justified the principle of exclusive criminal jurisdiction of military personnel on basically two reasons: the independent exercise of their functions and the availability of troops from the member states.[296]

The practice of sending states to retain exclusive criminal jurisdiction over their military forces is largely followed in peace operations not under UN command. In the Multinational Force and Observers (MFO) operation,[297] established pursuant to the peace agreement between Israel and Egypt, in 1979, sending states retained exclusive criminal jurisdiction over military members of the MFO and members of its civilian observer group.[298] Other members of the MFO were immune from the criminal jurisdiction of the host state concerning all acts per-

295 Wijewardane, 187.

296 Summary study, 1958, para. 136.

297 It is endowed with the function to observe and report on the implementation of the peace agreement in specified zones. Its rights and duties are outlined in the Annex to the Protocol establishing the MFO. In an attached appendix its legal status and that of its members is stipulated (hereinafter the MFO SOFA). According to the MFO the "Director-General, his deputy, the Commander, and his deputy, shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law." Appendix to the Annex to the Protocol between the Arab Republic of Egypt and the State of Israel, 3 August 1981, para. 25 UK Treaty Series no. 37 (1982) (Siekmann, *Basic Documents*, 302).

298 MFO SOFA para. 11.

formed by them in an official capacity.[299] It was the duty of the Director-General to "comply with requests of the Receiving state for the withdrawal from its territory of any member of the MFO who violates its laws, regulations, customs or traditions."[300] The Director-General, moreover, could waive the immunity of any MFO member with the consent of the sending state.[301] The right of receiving states, in effect, to declare any member of the MFO *persona non grata* if believed to be guilty of violating "its laws, regulations, customs or traditions" is rather surprising. It could in fact obstruct the independent performance of the assigned duties of the MFO. It should also be noted that the reference to customs and traditions is far wider than the obligation placed upon personnel to respect the "laws and regulations" of the receiving state.[302]

The right of the Director-General to waive immunity for MFO members departs from the general concept of UN peace operations. The need, in this case, to obtain the consent of the sending state before waiving immunity comes close to retaining an exclusive right to exercise criminal jurisdiction for such states. Siekmann concludes that the fact that the consent of the sending state is required results in an *absolute immunity* for MFO personnel.[303]

In an OAU operation (1981) members of the OAU force were "subject to the criminal jurisdiction of their respective countries, in conformity with the laws and regulations in force in these countries. … Members of the Force [were] neither subject to the jurisdiction of Chad Tribunals nor to any other legal procedure as regards their official duties."[304]

On the important question of criminal jurisdiction, the IFOR/SFOR SOFA stipulates that "NATO military personnel under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offenses which may be committed by them in the Republic of Bosnia and Herzegovina."[305] As in the UN

299 MFO SOFA, para. 11 (b).

300 Ibid., para.11 (c).

301 Ibid.

302 Ibid., para. 6 (a).

303 Siekmann, *National Contingents,* 139.

304 In 1981, a Pan-African peacekeeping force was established under the authority of the Organization of African Unity (OAU) to support the Transitional National Union Government of Chad. A SOFA was concluded between the OAU and the Transitional National Union Government of Chad. According to the SOFA, the peacekeeping force was an organ of the OAU and the members of the force, remaining in their national services, were regarded as being international staff under the authority of the OAU. The force was regarded as a subsidiary organ of the OAU and thus "entitled to the status, privileges and immunities granted to the Organization of African Unity." See OAU Status of Forces Agreement, Nairobi, November 28, 1981, Article 5 a, e, and i.

305 Article 7 of the NATO-BiH SOFA.

Model Agreement, the IFOR/SFOR SOFA includes a statement on the exclusive criminal jurisdiction of the troop-contributing nations. The parties to the IFOR/SFOR SOFA agree to assist each other "in the exercise of their respective jurisdictions."[306]

Concerning NATO civilian personnel, they are accorded the status of experts on mission and are thus immune from personal arrest and detention. Rogers finds that key civilian support staff should have the same status as military personnel and that a different status could in fact "impede military operations".[307]

In Kosovo, KFOR personnel, not including locally recruited personnel, were to be

> immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and
> immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States. If erroneously detained, they shall be immediately turned over to KFOR authorities.[308]

KFOR personnel also include civilian personnel and the exclusive exercise of jurisdiction thus includes an expanded category of personnel compared with UN peace operations. The UN Secretary-General retained the right and duty to waive the immunity of UNMIK personnel if and when that immunity impeded the course of justice and could be waived without prejudice to the interests of UNMIK. In theory the possibility also existed of requesting the waiver of jurisdiction for KFOR personnel. Such requests were to be referred to the commander of that national element.[309]

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306 Ibid.

307 The fact that "some states are not able by law to exercise jurisdiction over accompanying civilians […] need not be a driving consideration; it can be provided in the SOFA that the sending state has primary right to exercise jurisdiction." Rogers, 551. Conderman argues that the granting to all "NATO personnel" (including civilians) the status of "experts on missions" and at the same time stipulating that as such "experts on mission, NATO personnel shall be immune from personal arrest and detention" leads to the situation where the host nation has exclusive criminal jurisdiction over US civilians but is prevented from taking them into custody. Paul J. Conderman, Jurisdiction, in *The Handbook of The Law of Visiting Forces*, 99, 109 (Dieter Fleck et al eds., 2001). As sending states exercise exclusive jurisdiction over criminal offences committed by NATO military personnel, it is not clear, however, as to how he arrives at this conclusion.

308 KFOR-UNMIK Regulation, Section 2.4.

309 Ibid., Sections 6.1 and 6.2.

In Afghanistan both ISAF and associated personnel were subject to the exclusive criminal jurisdiction of their respective national elements.[310] ISAF and associated personnel were, moreover, made immune from personal arrest and detention and if mistakenly detained they were to be immediately handed over to ISAF authorities. Although personnel were to be under the exclusive jurisdiction of their national elements, it was explicitly stated that they "may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation."[311] The provision clearly refers to Article 98 of the ICC statute.

The allocation of exclusive criminal jurisdiction for sending states is normally restricted to military members of an operation's military component. To extend exclusive criminal jurisdiction for respective national elements to such a vaguely defined group of personnel such as "ISAF and supporting personnel, including associated liaison personnel" was clearly a new development and it certainly involves a risk of a "jurisdictional vacuum" in relation to such personnel.

In relation to the law of visiting forces, Bowett finds the principle of exclusive criminal jurisdiction justified in peace operations. The functions of the various forces are generally different. They "may actually be operating in the field and may, indeed, be in control of certain areas of State territory ... but it is clear that a United Nations Force will invariably be completely independent of and rarely, if ever, allied to the local forces."[312] The very fact that they will be involved in operations is a valid argument to accord to them "absolute immunity from the jurisdiction of local courts."[313] Bowett, however, stresses the necessity of not abusing such an exception to the general rule on criminal jurisdiction.[314] However, exclusive criminal jurisdiction for military members of the military component of an operation appears to be absolute, with no room for a waiver.[315]

In this respect the legal status accorded EUF personnel, which was by nature and character different from many other agreements on the status of forces in peace operations, should be noted. The agreement stipulated that EUF personnel "shall be granted treatment, including immunities and privileges, equivalent to that of diplomatic agents granted under the Vienna Convention on diplo-

310 Article 3 of the ISAF SOFA.

311 Ibid., Article 4.

312 Bowett, 437-8.

313 Ibid., 438.

314 He asserts that "first, it should be clearly understood that the privileges and immunities are not granted for the benefit of the individual concerned; secondly, there should be machinery for prosecuting offenders against local law and an obligation to use that machinery; and thirdly, the immunity should not be unjustifiably extended." Ibid.

315 Michael Bothe and Thomas Dörschel, The UN Peacekeeping Experience, in *The Handbook of The Law of Visiting Forces* 487, 505 (Dieter Fleck et al eds., 2001). Bowett, 133-4.

matic relations".[316] By referring to the privileges and immunities of diplomatic agents, it was the probable intention of the EU to overcome the insufficient level of protection provided by *international* privileges and immunities for military personnel. It is interesting to note, however, that when the EU launched its first military operation it chose a quite different solution from what had been hammered out in practice by the UN. The UN Model SOFA provides a tested basis for the conclusion of individual SOFAs, which is supported by the fact that this practice has largely been followed in peace operations led by NATO. Reference to diplomatic privileges and immunities, however, is regularly made in SOFAs concluded by the UN concerning high-level figures in peace operations such as the Force Commander and the Special Representative to the Secretary-General. What was new in the agreement between the EU and FYROM was that all personnel, both military and civilian, irrespective of their position in the operation, were accorded this status.[317]

The purpose of the privileges and immunities accorded to diplomatic agents, as well as to agents of international governmental organisations, is to ensure the efficient performance of their functions and not for their personal benefit. The function of a diplomatic agent, however, is fundamentally different from that of an international official. The interpretation of what is of functional necessity therefore depends upon the nature of the status of the personnel concerned and the purpose of the mission.

The agreement between the EU and FYROM does not explicitly provide for the ability to waive the immunity of personnel. The almost (at least in effect) exclusive criminal jurisdiction of sending states was not, as is otherwise the custom, restricted to military personnel. Such personnel usually fall within the disciplinary systems of their national contingents and jurisdiction in relation to them is thus regularly exercised. Civilian personnel may not necessarily be subject to a disciplinary system.

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316 EU SOFA, Article 6.1.

317 It should, however, be noted that in the UN Yemen Observer Mission (UNYOM 1963-1964) and in the United Nations Observation Group in Lebanon (UNOGIL 1958) personnel were granted those privileges and immunities that are accorded to diplomatic agents under international law. The need to accord personnel diplomatic privileges and immunities was due to the "special importance and difficult nature of the functions" they were to perform. See Exchange of Letters constituting an agreement between the United Nations and Saudi Arabia relating to privileges, immunities and facilities for the observation operation along the Saudi Arabia-Yemen border established pursuant to the Security Council resolution of 11 June 1963, 474 UNTS 155 (1963) and Exchange of Letters constituting an agreement between the United Nations and Lebanon concerning the status of the United Nations Observation Group in Lebanon, 1958 303 UNTS 271. According to Wijewardane, UNYOM should probably be regarded as an exception in the practice of observer missions. It was equipped with a reconnaissance and an air unit and the personnel were fired upon and often in danger. Wijewardane, 160.

An essential ingredient of diplomatic immunity is the *persona non grata* institute. This is a characteristic of diplomatic immunities not found in international immunities. On the contrary, the UN, as the illustrative example, has constantly maintained the position that it is the organisation itself that decides who will carry out its functions. It is at the heart of the difference between immunities purely based upon function and those partly based upon its representative character. Would FYROM in fact have had the opportunity to declare any member of the EUF personnel *persona non grata* without, as is customary with this institute, providing any explanation?[318]

The inclusion of diplomatic privileges and immunities thus indicates that such personnel represent their home states and not the EU as an organisation. It should be noted, however, that participation agreements between the EU and third states explicitly state that, although forces and personnel remain under the full control of sending states, the operational control of such forces and personnel shall be transferred to the EU Operation Commander.[319]

The EU-led *Artemis* operation, referred to above, in fact involved incidents where the operation's military personnel were drawn into combat where lethal force was used. Operations of this nature could start to erode the system of diplomatic privileges and immunities which, of course, is part of a wider system devised to foster diplomatic relations between states. The fact that the most senior figures in peace operations are accorded a status equivalent to that of dip-

318 The UN Model Agreement does not stipulate any right for the host nation to refuse entry into its territory of an individual or to expel a particular individual. It is for the Special Representative or the Force Commander to make such decisions. Depending on the position of the member, it may in practice prove impossible not to take into account the views of the host nation. In the ONUC operation, President Joseph Kasavubu requested the Secretary-General to remove his Special Representative, Mr Rajeshwar Dayal. In reply, it was pointed out that this matter came under the exclusive authority of the Secretary-General. It was moreover made clear that Mr Dayal could not, as an ambassador, be declared *persona non grata*. See Letters dated 14 and 15 January 1961 (S/4629). According to Bowett, the question concerns the same principle determining the composition of the force, namely that it "was a matter for the United Nations, with the views of the host State being but one of the factors to be taken into account." Notwithstanding that the position was right in principle it was, in practice, an impossible situation and Mr Dayal was recalled on 10 March 1961. See Bowett 233. He discusses whether or not a state could retain the right under customary international law to expel any individual posing a potential threat to a state's internal security. In view of the fact that a host state would lack disciplinary powers over the members of an operation, and that participating states have exclusive criminal jurisdiction over the military forces, would tend not to support such a proposition. According to Bowett, it therefore appears that host states do not have any legal right to expel members of a force. Ibid., 127.

319 See e.g. Agreement between the European Union and the Republic of Poland on the participation of Polish armed forces in the European Union force (EUF) in the former Yugoslav Republic of Macedonia, Article 5, OJ L 285/44 (2003).

lomatic agents might not constitute a major problem either for the diplomats or the host nation. According such a status to military personnel, of all levels, when engaged in resolving tasks of an enforcement nature is, however, an entirely different matter. It should at least cause alarm to diplomatic agents if the level of protection that has evolved over hundreds of years were to be compromised by military combat.

Before concluding on criminal jurisdiction a few words needs to be said regarding the relationship between Article 98(2) of the ICC statute and SOFAs. Article 98(2) provides the necessary room for states parties to the ICC, hosting a peace operation, to reconcile its obligations under a SOFA and the ICC. Concern over the US practice of concluding bilateral agreements with other states, where the parties to the agreement undertake not to surrender or transfer any person present in the territory to the ICC without the expressed consent of the other party,[320] has also triggered questions of importance to personnel in peace operations. With regard to the fact that the ICC statute "shall apply equally to all persons without any distinction based on official capacity" (Article 27), it has been argued that states parties to the ICC cannot rely on Article 98(2) with regard to SOFAs concluded after the state became a party to the statute. It is held that a SOFA would be contrary to the intention of the Court, and that it shall apply equally to all persons.[321] However, this argument does not seem to take into account that Article 98(2) was designed particularly for the purpose of SOFAs,[322] and that nothing in the article suggests that it should not apply to subsequent agreements.[323] Another argument has also been advanced, to the effect that agreements covered by Article 98(2) would only benefit non-parties to the ICC. According to that argument it is necessary to interpret Article 98(2) as only applying to non-parties, as another interpretation would seriously undermine the effect of Article 27 of the statute.[324] In this respect, it should be noted that the

320 See, for example, Agreement Between the Government of the United States of America and the Government of Uzbekistan Regarding the Surrender of Persons to the International Criminal Court, September 18 2002, 42 ILM 39 (2003). For the purpose of that agreement, "persons" are defined as "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party".

321 Steffen Wirth, Immunities, Related Problems, and Article 98 of the Rome Statute, 429, 456 *Criminal Law Forum* 12 (2001).

322 Kimberly Prost and Angelika Schlunk, Article 98, in *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article By Article*, 1131, 1133 (Otto Triffterer ed., 1999).

323 See Dapo Apkande, International Law Immunities and the International Criminal Court, 407, 426 *AJIL* 12 (2004). According to Article 30(3) of the Vienna Convention on the Law of Treaties, an earlier treaty applies between its parties only to the extent that its provisions are compatible with those of a later agreement between parties to both agreements.

324 Ibid.

ISAF SOFA includes a special provision stipulating that ISAF personnel shall not be surrendered to an international tribunal without the express consent of the contributing state,[325] and that several of the contributing states to ISAF were also parties to the ICC. These states seem to be of the view that they can rely upon agreements covered by Article 98(2). Moreover, as Article 98(2) refers to "obligations under international agreements", one must take into consideration the rules on application of treaties as stipulated in the Vienna Convention on the Law of Treaties. Article 30(2) of that convention states: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that treaty prevail." Against this background, it does seem that ICC parties would be able to benefit from SOFAs. It should also be pointed out that even if the ICC statute is an agreement of a fundamental character, it is not as such an agreement of a higher legal value than other agreements, like SOFAs, in that it prevails over such agreements.

In a recent book on the prosecution and defence of peacekeepers, Knoops deals, *inter alia,* with the relationship between the principle of exclusive criminal jurisdiction in SOFAs and crimes subject to universal jurisdiction.[326] Knoops argues that the principle of exclusive criminal jurisdiction for sending states can be set aside in cases involving crimes of a universal character. The basis for this argument appears to be that "SOFAs are not meant to endow the members of the armed forces of the sending state with criminal impunity for crimes they commit; rather these agreements are promulgated to allocate and delegate or primarily distribute the responsibility for investigating and prosecuting such crimes".[327] He also refers to the *jus cogens* character of war crimes and holds that this may have the effect of overturning the principle of exclusive criminal jurisdiction of sending states.[328]

It is true that there is a general right, and sometimes a duty, for states to exercise their jurisdiction over offenders in relation to certain crimes, such as grave breaches of the Geneva Conventions. However, in the peace operation context the exercise of criminal jurisdiction over some personnel is subject to a *lex specialis* regulation. In this context, the principle of criminal jurisdiction for sending states over their military personnel has not been contested. There is nothing indicating that this special rule should be conditioned only in relation to crimes not subject to universal jurisdiction. The *jus cogens* character of war crimes relates

325 ISAF SOFA, Article 1(4).

326 Geert-Jan Alexander Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law*, 246 (2004).

327 Ibid. (footnote omitted).

328 Ibid., 252.

to a prohibition on committing such crimes. The duty to prosecute perpetrators of grave breaches has hardly been elevated to that of a *jus cogens* duty.[329]

The principle of exclusive criminal jurisdiction is relevant only in relation to the host state. If military personnel suspected of war crimes were to travel to a third state – for example, on leave – they could not rely on the exclusive criminal jurisdiction of their state of nationality. In such circumstances the third state would naturally be within its rights in exercising jurisdiction over such personnel.

As Knoops rightly points out, this principle is based upon a system of allocation of jurisdiction between sending and receiving states and does not, as such, deal with questions of immunity. As pointed out previously, the Secretary-General warned early on of the risk of a jurisdictional vacuum. Therefore, if in the future there is found to be sufficient cause to believe that sending states are not willing or able to exercise jurisdiction, then the rule on exclusive criminal jurisdiction should yield to the interests of not creating a regime of impunity. The system of exclusive criminal jurisdiction is based upon a presumption that sending states act *bona fide* and do not create a *de facto* regime of impunity.

In this respect, Security Council resolution 1497 needs to be addressed. According to that resolution, which authorised the establishment of a Multinational Force in Liberia, the Security Council, acting under Chapter VII of the UN Charter, decided

> that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State;[330]

First, it should be noted that in contrast to Security Council resolutions 1422 and 1487 (that aimed to bar the ICC from instituting investigation or prosecution of any case "involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation"), resolution 1497 stipulated a regime

329 It should also be noted that in cases of grave breaches, the Geneva Conventions explicitly stipulate that notwithstanding the duty to prosecute the perpetrators of such crimes, states parties "may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case". Article 146, Geneva Convention IV.

330 SC Res. 1497, UN SCOR, 4803rd mtg., para. 7, UN Doc. S/RES/1497 (2003). France, Mexico and Germany did not vote for the resolution due to the inclusion of operative paragraph 7.

of exclusive criminal jurisdiction for contributing states over all their personnel. The text of this resolution clearly goes beyond the customary principle established in SOFAs, since the categories of personnel are much wider. Moreover, it makes a distinction between personnel depending on whether or not their state of nationality is a party to the ICC.[331] Finally, it is valid against all states and not just the host state. A limiting factor, however, is that the alleged acts or omissions would need to be related to the Multinational Force.

It is here firmly held that resolutions of this kind might in fact be detrimental to the protection of personnel in peace operations. The risk involved in excluding large categories of undefined personnel from the exercise of jurisdiction of the host state, as well as all other states, clearly heightens the risk of creating a regime of *de facto* impunity for such personnel. This might in the long-term perspective create negative effects for the established SOFA norms.

In conclusion, the principle that military personnel of a peace operation's military component are subject to the exclusive criminal jurisdiction is well established in UN peace operations and has largely been supported in operations led by other organisations. What is new in some of those operations is the expansion of categories of personnel subject to exclusive criminal jurisdiction of their sending states, and according military personnel with a status equivalent to that of diplomatic agents. A credible system of exclusive criminal jurisdiction for sending states requires a well defined category of personnel subject to such a system and an effective means of exercising this jurisdiction. It is true that in operations where there is no functioning judicial system in the host state another solution may be called for.[332] However, when this is no longer the case, such practice may have an eroding effect on the credibility of a system. By extending the categories of personnel, which effectively escape the exercise of local criminal jurisdiction for all their acts, may create the impression that such personnel are above the law. This must, of course, be weighed against the availability of troops from potential contributing states and the need for the independent exercise of their functions. It is here held that the UN Model SOFA reflects a careful balance between these interests. To deviate from those provisions may indeed have negative effects of both a short term and long-term nature.

331 See Salvatore Zappalà, Are Some Peacekeepers Better than Others? UN Security Council Resolution 1497 (2003) and the ICC, 1 *Journal of International Criminal Justice*, 671, 675, (2003).

332 The degree of immunity for personnel was, for example, more far-reaching under the ONUC agreement than the UNEF SOFA. Higgins refers to the "almost total collapse of the legal system which the Congo had experienced". Higgins, *United Nations Peacekeeping*, III, 209.

4.3.4 SOFA Norms as Customary International Law

Whether or not the UN Model SOFA reflects customary international law has attracted some focus in the literature. Sharp, for example, regards the provisions of the UN Model Agreement as customary international law "and thus apply to military forces serving the United Nations even if the operation specific SOFAs are not concluded."[333] He bases this assertion on the fact that the UN Model Agreement is explicitly based upon established practice. Furthermore, he refers in the following terms to the position taken by UN Office of Legal Affairs with regard to the operation in Croatia: "in the absence of a signed agreement, the status of the United Nations forces and operations in Croatia are governed by the customary practices and principles applicable to UN peace-keeping or similar operations as codified in the Model Status-of-Forces Agreement issued as a General Assembly document dated 9 October 1990 (A/45/594)".[334]

Referring to the SOFAs concluded in the UNEF, ONUC and UNFICYP operations, Sommereyns states that the "provisions of these agreements have gradually come to be considered as constituting basic principles governing the status and functions of UN peacekeeping forces; they can be resorted to in connection with any new forces pending the conclusion of specific agreements or in the absence of such agreements."[335]

Siekmann notes that "[a]bsolute criminal immunity would … seem to have become a rule of international customary law and the same conclusion may be drawn with respect to the rules concerning privileges and civil jurisdiction ('on duty' immunity)."[336] Other rules of customary international law, according to Siekmann, are those relating to the status of international personnel and respect for both local law and the principles of humanitarian law.[337] Bothe asserts that in situations where no SOFA is in force the "exemption from civil and criminal

333 Walter Gary Sharp, Sr., *Jus Paciarii. Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century*, 137 (1999) (footnote omitted). Sharp considers the UN Model SOFA and its customary law status limited to operations established under the authority of the UN and conducted under its authority and control. Ibid.

334 Referred to by Sharp as a letter from Ralph Zacklin, Director and Deputy to the Under-Secretary General for Legal Affairs of the United Nations, to Robert B. Rosenstock, Minister Counselor, United States Mission to the United Nations on April 25 1995. Sharp, 39.

335 Raymond Sommereyns, United Nations Forces, in 4 *Encyclopedia of Public International Law*, 1106, 1110 (R. Bernhardt ed., 2000).

336 Siekmann refers to the exclusive criminal jurisdiction of sending states as absolute criminal immunity. Siekmann, *National Contingents,* 153. The fact that Lebanon did not protest at judgments *in situ* of the Dutch Army Mobile Court Martial supports the customary law character of the rule on exclusive criminal jurisdiction of sending states. Ibid.

337 Siekmann, *National Contingents,* 154.

jurisdiction probably only relates to official acts".[338] Fleck, on the other hand, believes that the UN Model SOFA "contains a set of rules which may be considered as being widely recognized as customary international law".[339] On the relationship with Article 98(2) of the ICC statute and a SOFA, Fleck acknowledges that peace operation forces often deploy without an applicable SOFA. He asserts in this respect, however, that "exemption from jurisdiction of the receiving state is both common practice and a well established principle. Inclusion of this principle in a SOFA would only be declaratory in nature. In no case has a receiving state been authorized to exercise jurisdiction over a member of a peacekeeping force".[340]

It is interesting to note in this respect the position by New Zealand. A SOFA was concluded between the Australia and the Government of Indonesia on the status of the International Force for East Timor (INTERFET), led by Australia. New Zealand did not recognise Indonesian sovereignty over East Timor and held that it was not bound by the SOFA. It held, however, that, based upon customary international law, its forces were immune from local jurisdiction.[341]

The examination of SOFAs in UN peace operations supports the notion that the *usus* criterion of a customary law rule is satisfied regarding some norms. It could safely be said that the UN Model SOFA is in itself evidence of an established practice. The practice of regional organisations carrying out peace operations based upon a mandate from the Security Council largely supports this custom. The problem for the claim of customary law status for particular SOFA norms is to find evidence of *opinio juris*. The UN Office of Legal Affairs seems to have largely avoided the direct question of customary law in relation to peace operations by generally referring to the *customary practice* of such operations. However, in a note to the Assistant Secretary-General for Peacekeeping Operations it stated that "in accordance with *customary law* applicable to United Nations peacekeeping operations, SOFAs provide for privileges and immunities to be granted to military personnel contributed by Member States."[342]

A study by Dörenberg on legal aspects of peacekeeping operations was based upon national reports and is evidence of the *opinio juris* of the states participating in the study.[343] The national reports were submitted between September,

338 Bothe, Peacekeeping, 699.

339 Fleck and Saalfeld, 83.

340 Dieter Fleck, Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?, 1 *Journal of International Criminal Justice,* 651, 668 (2003).

341 Michael, J., Kelly, et al, Legal aspects of Australia's involvement in the International Force for East Timor, 841 *IRRC*, 101, 109 (2001).

342 Memorandum to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, 408 in *United Nations Juridical Yearbook* (1995) (emphasis added).

343 Arno, J. T. Dörenberg, Legal Aspects of Peacekeeping Operations, 28 *The Military Law and Law of War Review*, 113 (1989).

1987, and August, 1998, by the following states: Austria, Belgium, Brazil, Canada, Denmark, Finland, Germany (FRG), Ireland, Italy, Netherlands, Norway, Poland, Switzerland, the United Kingdom, the United States and Zaire. According to the study all national reports, except one, supported the system whereby members of a UN peacekeeping force are subject to the exclusive criminal jurisdiction of their respective national states.[344] Dörenberg concluded that "[s]ince the cooperation of the countries supplying troops is essential for the establishment of a peacekeeping operation, and in view of the extraordinary circumstances which obtain in the area where a peacekeeping force operates, it is advisable that the sending states should continue to have exclusive criminal jurisdiction."[345] Further evidence of *opinio juris* is also to be found in an Exchange of Letters between the UN and its members regarding arrangements for stand-by forces.[346]

It is in this study argued that at least norms relating to protection of personnel in peace operations included in the UN Model SOFA are norms of a customary law character. The inclusion of such norms in specific SOFAs, is seldom, if ever, disputed. State practice is vast and opportunities for states to present arguments against these norms have been plenty. A large number of states, (those states that have contributed personnel to UN peace operations) have in fact functioned as beneficiaries of such agreements. The acceptance of all states involved

344 Dörenberg, 165. The reason for keeping the system was, according to the US report, the fundamental difference between peacekeeping personnel and military personnel deployed under a collective defence agreement as visiting forces in a receiving state. Such a security arrangement was beneficial to both parties. In peacekeeping operations states providing personnel "reap no specific security benefit and should thus retain the authority to exercise criminal jurisdiction" Ibid. Zaire stated, however, that exclusive criminal jurisdiction should lie with the host country and gave the following reasons: a. the offence is a breach of the public order of the host country; b. respect for the sovereignty of the host country is at issue; c. situations should not occur in which an offence goes unpunished because the offender returns to his country of origin or because the offence is not punishable under the law of the latter country. Ibid.

345 Dörenberg, 165-6.

346 Letter dated 20 March 1968 from the Deputy Permanent Representative of Finland addressed to the Chairman of the Special Committee on Peace-Keeping Operations, UN Doc. A/AC. 121/13 (1968). In the enclosed Memorandum on Preparations made by Finland for effective participation in United Nations peace-keeping activities, it is stated: "In legal matters the personnel of the force is under the jurisdiction of Finnish military law and can be tried only by Finnish military courts." Letter dated 20 March 1968 from the Representative of Sweden to the Chairman of the Special Committee on Peace-Keeping Operations, UN Doc. A/AC.121/11 (1968) In the enclosed Memorandum concerning the Swedish stand-by Force for service with the United Nations it is stated: "In agreement with the United Nations it has been established that members of the Force are subject to the jurisdiction of Sweden in respect of criminal offences."

in peace operations, either as host states or contributing states, support this position.

Bothe and Dörschel believe, however, that the possible customary law status of SOFA norms is part of another issue. Can a largely uniform practice of bilateral agreements be regarded as evidence of customary law and thereby include elements of both practice and *opinio juris*?[347] They find it difficult to regard the uniform practice, illustrated by the UN Model SOFA, "as proof of customary international law". They do, however, offer another way of reasoning as to the relevance of earlier practice in situations in which no SOFA has been concluded. The agreement to host a peace operation may be interpreted to also include the practice of SOFAs. In particular, that could be the case if the Secretary-General in his reports, preceding the establishment of the operation, referred to this practice. In that case, it is "quite obvious that consent of the host state later referring to the resolution also covers this practice as formulated in the model agreement."[348]

In a state's accepting the deployment of a peace operation on its territory, it may certainly be argued that that state has also accepted the customary concept of peace operations. It must be beyond doubt that such fundamental questions as the retention of the home state of exclusive criminal jurisdiction and freedom of movement, form part of that concept.[349] This concept has developed in practice and is premised on some fundamental norms. The fact that military contingents may carry arms, wear uniforms and use force in self-defence, is necessary for the fulfilment of the operation's functions. A practice of 50 years of concluding SOFAs, primarily between the UN and the host nations concerned, has naturally contributed to the development of the concept and should now be regarded as being part and parcel of the modern peace operation. The reason why it sometimes takes a considerable time to conclude a SOFA does not seem to depend upon diverging opinions on the protection of personnel in the particular operation.[350] The fact that a peace operation needs to be able to run its communications

347 Bothe and Dörschel, 493-494.

348 Ibid.

349 Bowett argues in a similar way on the carrying of arms. It must prima facie be deemed that the host state has "agreed to the carriage of arms and the wearing of military uniforms when it consents to the presence of a military force." Bowett, 448. Based on the Report of the Secretary-General in 1958, in which the importance of certain basic principles to be recognised in future operations, were stressed, Bowett also finds that "[t]wo of those principles have been established in all the SOFA: freedom of movement and full immunity from the exercise of local criminal jurisdiction. These are, however, merely two aspects, admittedly of the greatest importance, of the independent status of the Force and flow, the Secretary-General would argue, from the necessity for the independent functioning of the Force." Ibid., 434.

350 According to a representative from the Office of Legal Affairs, addressing the Second Meeting with the Ad Hoc Committee on the Scope of Application of the Convention on the Safety of United Nations and Associated Personnel (2003), it is a serious problem that it takes a long time to conclude a SOFA. A standard agree-

system, requires a relaxation in visa requirements, requires functional immunity from the jurisdiction of the host state as well as freedom of movement and the sending states' retention of exclusive criminal jurisdiction over their military contingents, should come as no surprise for future host states. By consenting to a peace operation, such states arguably also accept the established concept of peace operations.[351] Host nation consent is really the key to peace operations. While it is legally possible to launch a peace operation against the will of a "host" state this has, for good reasons, been avoided in practice.[352]

It is true that peace operations are broader than the traditional concept of peacekeeping. However, as peacekeeping has evolved the SOFA norms have, with small variations, been kept. In the case of the UN one has seen the inclusion of additional provisions clarifying the duties on the part of the UN and the host nation. These provisions have detailed the responsibility of the UN to respect international humanitarian law. There are now provisions (for limited privileges and immunities) for international contractors and United Nations Volunteers that have been triggered by the increasing dependency of the UN on such personnel. From the perspective of protection of personnel in peace operations, the most important addition relates to provisions emphasising the duty of prosecuting persons committing crimes against personnel. The inclusion of the Safety Convention's key provisions in some modern SOFAs has shown evidence of the commitment to ending impunity for attacks on protected personnel and the new role for the Safety Convention. From a legal point of view the inclusion of these key provisions may not necessarily strengthen the levels of protection of personnel in relation to already established SOFA norms. It will, however, put addi-

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ment is submitted to the host nation. The main problem of why it takes time is the exemption of duties (taxes, customs) of contractors performing tasks for the UN since it affects revenue. In operations where it has not been possible to conclude a SOFA (which prior to 1989 include UNEF II, UNDOF, UNIFIL) the reason was not conflicting opinions on the status of the Force but rather political differences. Siekmann, *National Contingents*, 153. See also on the difficulties of reaching a SOFA in the UNEF II operation, and the fact that Israel and Egypt agreed that the UNEF I SOFA would apply *mutatis mutandis* in the UNEF II operation. N.A. Elaraby, UN Peacekeeping: The Egyptian Experience, in *Peacekeeping. Appraisals and Proposals*, 65, 81-82 (H. Wiseman, ed., 1983), M. Comay, The Israeli Experience, in *Peacekeeping. Appraisals and Proposals*, 93, 109-110 (H. Wiseman, ed., 1983).

351 It has been claimed, however, that one of the reasons why the Federal Republic of Yugoslavia did not accept the Rambouillet Accords was the extensive privileges of the Implementation Force under the Appendix on the Status of Multi-National Military Implementation Force, which was largely based upon the military Annex to the Dayton Agreement. See Marc Weller, *The Crisis in Kosovo 1989-1999. From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities. International Documents & Analysis* Vol.1, 411 and 468 (1999).

352 One may assume that a state refusing a peace operation on its territory would use force to prevent the deployment of foreign forces, thus prompting the rules of war.

tional political pressure on the host state to enhance its efforts to prevent and punish perpetrators of attacks on personnel.

The fact that the UN Model SOFA norms are now an essential part of the peace operation concept and is applicable to the operation and its personnel upon the consent of the host nation, is supported by the practice of the UN Security Council. It is possible to detect a shift in the practice of the Security Council when adopting resolutions enabling a new peace operation. In peace operations launched in 2003 and after, the Council, with small variations, included in the enabling resolution, illustrated by the mandate of the United Nations Mission in Liberia (UNMIL), a text of the following character:

> *Requests* the Liberian Government to conclude a status-of-force agreement with the Secretary-General within 30 days of adoption of this resolution, and notes that pending the conclusion of such an agreement the model status-of-force agreement dated 9 October 1990 (A/45/594) shall apply provisionally;[353]

In UN operations it appears that the Security Council considers the provisional application of the UN Model SOFA to be a matter of law. In operations of an earlier date the Council instead adopted the following passage, here illustrated in the resolution enabling the United Nations Mission in Sierra Leone (UNAMSIL):

> Requests the Government of Sierra Leone to conclude a status-of-forces agreement with the Secretary-General within 30 days of the adoption of this resolution, and recalls that pending the conclusion of such an agreement the model status-of-forces agreement dated 9 October 1990 (A/45/594) should apply provisionally;[354]

The change in language from "should apply" to "shall apply" indicates that the Security Council now considers the provisional application of the UN Model SOFA a *lex lata* obligation of host states during the negotiations of an individual SOFA. The term "should" carries with it the suggestion that the UN Model

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353 SC Res. 1509, UN SCOR, 4830th mtg., UN Doc. S/RES/1509 (2003). See also United Nations Operation in Burundi (UNUB), SC Res. 1545, UN SCOR, 4975th mtg., UN Doc. S/RES/1545 (2004), United Nations Operation in Côte d'Ivoire (ONOCI).
SC Res. 1528, UN SCOR, 4918th mtg., UN Doc. S/RES/1528 (2004), United Nations Stabilization Mission in Haiti (MINUSTAH), SC Res. 1542, UN SCOR, 4918th mtg., UN Doc. S/RES/1542 (2004).

354 SC Res. 1270, UN SCOR, 4054th mtg., UN Doc. S/RES/1270 (1999). See also United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) SC Res. 1291, UN SCOR, 4104th mtg., UN Doc. S/RES/1291 (2000), United Nations Mission in Ethiopia and Eritrea (UNMEE), SC Res. 1320, UN SCOR, 4197th mtg., UN Doc. S/RES/1320 (2000).

SOFA *ought* to be applicable, while the term "shall" is indicative of a strong assertion or command (rather than a wish) that it *is* applicable.[355]

While the UN Model SOFA is arguably part of the whole concept of UN peace operations, can the same be said to be true with regard to those operations led by regional organisations and other alliances? The practice of such operations show a set of norms common to almost all of them, depending on whether the personnel in question represent their states or an international organisation. While the argument might be less persuasive in such operations, there is a case for asserting that in operations based upon a mandate of the Security Council, fundamental norms such as the right to set up a communications system, freedom of movement, and the retention of exclusive criminal jurisdiction by sending states over their military contingents, form part of the peace operation concept.

In such peace operations the relationship between participating states and the host nation should be noted. This may not be a problem in operations where there is a SOFA in force. The status of the members of the operation is then stipulated in that agreement. If no SOFA is concluded the question may arise over which entity the personnel in question represent. In cases where the command and control structures are of such a character that participating states retain command and control over their own forces, the personnel may be regarded as representing their states. In, for example, the two operations in Lebanon and Haiti, a Multinational Force was established where the national contingents exercised exclusive command authority over their forces.

After the massacres of Palestinian civilians in the refugee camps at Sabra and Shatila, the Security Council on 19 September 1982 requested the Secretary-General to start consultations on the possibility of deploying UN forces to assist the Lebanese government "in ensuring full protection for the civilian population in and around Beirut …"[356] The following day the permanent Representative of Lebanon informed the Secretary-General that he had requested the reconstitution of the Multinational Force that had been operating in Lebanon during August.[357] The establishment of a UN force would have necessitated lengthy negotiations and it is apparent that the MNF was re-created because of the need for speedy action. The Multinational Force was clearly not a traditional peace

355 Fleck and Saalfeld note the important role of the Security Council in situations where no SOFA can be concluded. They suggest that the Council in such cases "should clarify the status of the personnel involved and should not hesitate to take appropriate decisions". Fleck and Saalfeld, 84.

356 SC Res. 521, UN SCOR, 2396th mtg., para. 5, UN Doc. S/RES/521 (1982).

357 In 1982 the Security Council condemned the Israeli invasion of Lebanon and demanded the withdrawal of its forces. After a US-brokered agreement, PLO and Syrian forces, which had been surrounded in West Beirut, were able to withdraw. A Multinational Force monitored the process. Letter dated 20 September 1982 from the Permanent representative of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. S/15408, Annex II (1982).

operation. The troop-contributing countries retained command and control over their own forces and assisted the legitimate government to maintain its authority in the capital. The Multinational Force thus constituted an interstate coalition where the personnel involved represented their own states, but where the Multinational Force itself nevertheless acted in the best interests of the international community.

The troop-contributing states entered into bilateral agreements on the legal status of their forces with the Lebanese government: The Exchange of Letters between the United States and Lebanon,[358] as well as those between the UK and Lebanon,[359] are illustrative examples of this practice.[360] The US and UK contingents enjoyed "the privileges and immunities accorded the administrative and technical staff" of their respective embassies in Beirut.

The MNF did not formally represent the UN. There was no established international organisation such as in the case of the MFO and the national contingents exercised exclusive command authority over their forces.[361] Accordingly, members of the Multinational Force were not afforded *international* privileges and immunities. The privileges and immunities accorded to technical and administrative staff of a diplomatic mission are clearly of a *diplomatic* nature. Technical and administrative staffs enjoy those privileges and immunities stipulated in Articles 29-35 of the Vienna Convention on Diplomatic Relations.[362]

In 1994 the Security Council authorised the establishment of a Multinational Force under unified command and control to apply all means necessary to secure the departure of the military leadership of Haiti and the reinstatement of the duly elected president.[363] The US-led Multinational Force was an interim force formed to create a stable and secure environment for the deployment of the UN Mission in Haiti.

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358 Exchange of Letters between the Republic of Lebanon and the United States of America, 25 September 1982, Department of States Bulletin, No. 2068, 50 (1982,) (Siekmann, *Basic Documents*, 330).

359 Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic concerning the deployment of a British contingent for the Multinational Force in Lebanon, 31 January 1983, UK Treaty Series, No. 9 (1983). (Siekmann, *Basic Documents*, 331).

360 Apart from these states Italy and France also contributed troops to the MNF.

361 The multinational forces worked in close co-operation with the Lebanese armed forces. In fact, at the request of the Lebanese government, or at the decision of the sending states, the Multinational Force would depart from Lebanese territory. The Lebanese government agreed to take all necessary measures to ensure the protection of members of the multinational force and to secure assurances from those armed elements, not under the control of the Lebanese government, not to interfere with the force.

362 See Article 37 (2) of the Vienna Convention on Diplomatic Relations. Immunity from civil and administrative jurisdiction is, however, limited.

363 SC Res. 940, UN SCOR, 3413th mtg., UN Doc. S/RES/940 (1994).

The legal status of its military personnel, and the civilian employees of the Department of Defense, was stipulated in an Exchange of Letters between the United States and the Haitian Ministry of Foreign Affairs. They were accorded the same status as administrative and technical staff of the United States Embassy and had the right to move freely in and around Haiti, with proper identification.[364] As with the Multinational Force in Lebanon 12 years earlier, the members of this force represented their states, and not an international organisation, and were accordingly provided the privileges and immunities similar to those of diplomatic personnel.

The customary law that may come into play in absence of a SOFA may therefore, in some operations, be based upon their status as state agents rather than agents of an organisation.[365]

4.3.5 Conclusions

The subjects that are dealt with in a SOFA range from the fundamental question of the exercise of criminal jurisdiction to rather detailed financial issues. Such agreements, however, play an important part in the whole concept of peace operations. SOFAs have developed considerably since Egypt, 1956. Alongside other features, they now form a major part of peace operations. The very notion of peacekeeping, as it was then called and by many still is, was a practical invention responding to the needs of the international community at the time. The elaboration of the norms contained in the status agreement with Egypt drew from established legal frameworks, such as the General Convention and the law of visiting forces, and were adapted to the particular needs of the specific context. A SOFA has been concluded in almost all peace operations between the UN and host nations. With minor changes and additions the content of these SOFAs has been virtually uniform. For military personnel (part of military contingents) SOFAs are of particular importance. They do not benefit from a special protection provided by other legal instruments as do other categories of personnel. The conclusion of SOFAs means that it is now also possible to include other categories of personnel who otherwise would not be entitled to special protection, such as civilian contractors.

It is interesting to note how SOFAs have been developed and adapted to new situations. The Secretary-General's view is that the UN Model SOFA shall continue to serve as a basic framework with the option of adding new provisions

364 Exchange of Letters between the Ministry of Foreign Affairs and Worship and the Embassy of the United States of America 10-11 May, 1995, in Glenn Bowens, *Legal Guide to Peace Operations*, 151 (1998). See also Rogers, 541.

365 Bothe regards the forces in the following operations to be organs of the participating states: NATO states supporting UNPROFOR in former Yugoslavia 1992-5; UNITAF in Somalia; Opération turquoise in Rwanda; the MNF in Haiti; IFOR/SFOR; Operation Alba in Albania, KFOR; and INTERFET in East Timor. Bothe, Peacekeeping, 699.

as and when needed and so accepted by host nations.[366] By taking a 2003 SOFA as an example, it is possible to identify some of the developments that have been important for the protection of personnel in peace operations since 1990. A contemporary SOFA might, for example, contain the following developments: the inclusion of contractors, UN Volunteers and UN Security Officers, reference to the principles and rules of international humanitarian law and a section on safety and security of personnel, including key provisions of the Safety Convention.[367] As has been shown above, contemporary SOFAs in UN peace operations incorporate the UN Model SOFA norms with some changes and additions. It is, however, possible that more recent developments, such as the inclusion of contractors, may not yet be regarded as established practice.

It is not surprising that the practice of disparate organisations and constellations shows some degree of incompatibility. It is instead surprising how cohesive these status agreements are. The reluctance of contributing states to surrender full control over their military forces is well illustrated by the above status arrangements. In one way or another, contributing states retain jurisdiction over their military forces when they are deployed in an operational context. The importance of the context in which military personnel are required to act is particularly emphasised in operations commanded by NATO. It would have been natural for that organisation to rely on the norms of the NATO SOFA (1951) in such operations as these have proved to be functional over the past 50 years. It is apparent, however, that the traditional law of visiting forces is insufficient for the needs of a peace operation. The most obvious difference between the two sets of norms relates to the exercise of criminal jurisdiction over military forces.

In some of the operations mentioned above, command was not vested in an international organisation but with states. Accordingly, the personnel concerned benefited from norms pertaining to diplomatic immunity. In the case of coalitions of the willing, such as the multinational forces in Beirut in 1982 and Haiti in 1994, the personnel concerned were accorded a status similar to that of technical and administrative personnel.[368] In the case of the EU, personnel were accorded a status equivalent to that of diplomatic agents. By drawing up a bilateral agreement it is up to the parties to agree on its content. It should therefore have been possible, and even advisable, to base the agreement upon the status of the force on the UN Model SOFA. If the diplomatic agent solution was borne out of concern over complete immunity from criminal jurisdiction in the host nation, this has been properly resolved in the UN Model SOFA. To provide military personnel with the status of diplomatic agents mixes the functions of these two categories of personnel. Against the backdrop of the functional necessity doctrine, the mix

366 Implementation of the recommendations of the Special Committee on Peacekeeping Operations. Report of the Secretary-General, para. 50, UN Doc. A/54/670 (2000).

367 See e.g. the UNMISET SOFA.

368 See Articles 29-35 of the Vienna Convention on Diplomatic Relations.

of functions could lead to the erosion of fundamental and well-established norms protecting personnel on international assignments. [369]

The practice of concluding a SOFA in peace operations is thus well established in those led by the UN and by other constellations. A SOFA is, or at least has the possibility of being, adapted to the needs of particular operations. But instead of a line of disparate ad hoc solutions, common norms have developed over the past 50 years. The norms arising from this practice may now be regarded as forming an integral part of the concept of peace operations. Although the practice after 1990 has not been perfectly uniform, norms dealing with the protection of personnel appear to have been applied more or less consistently.

On the question of immunity and accountability it should be noted that the "SOFA-arrangement" in Kosovo was criticised by the Ombudsperson Institution in Kosovo. Among other things, it found that the UNMIK Regulation did not comply with the criteria of precision and foreseeability as required by the European Convention on Human Rights. According to the Ombudsperson, the rationale for the granting of immunity did not apply in Kosovo where UNMIK exercised state functions. Accordingly, "[i]t follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself."[370] It was, moreover, stated that "the wholesale removal of a large group of governmental agents, in this case international KFOR personnel, from the jurisdiction of the courts of the territory within which they are operating under colour of law constitutes a violation of the right of access to court guaranteed under Article 6 of the European Convention of Human Rights."[371]

The report by the Ombudsperson Institution highlights the problem of liability and accountability in peace operations. This is a question beyond the scope of this work. However, the use of civilian police in Kosovo and East Timor with a mandate to carry out executive tasks has emphasised the connection between liability and immunity. Because of the possible necessity to use enforcement measures to implement the requirements of the law, the Special Committee on Peacekeeping

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369 It should be noted, however, since May 2005 there is a Draft Model Agreement on the status of European Union-led Forces between the European Union and a Host State. In that agreement there is no reference to the Vienna Convention on Diplomatic Relations and the EU personnel shall be granted those privileges and immunities provided for in the agreement.

370 Ombudsperson Institution in Kosovo. Special Report No. 1 on the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the implementation of the above Regulation, para. 23. http://www.ombudspersonkosovo.org/.

371 Ibid., para. 67.

Operations requested the Secretariat to "consider assigning such personnel privileges and immunities equivalent to those of armed military personnel."[372]

That suggestion appeared to have been prompted by the fact that the Secretary-General had waived the immunity of a civil police officer serving with UNMIK. The fact that some states, in accordance with their national laws, do not have the authority to try individuals for crimes committed abroad, was one reason put forward by states objecting to this proposal. The overriding rationale, however, against such a suggestion, seems to be that police officers should not be perceived as being above the law.

It is true that questions of liability are more acute in situations where there is no functioning host nation exercising governmental authority. However, even in operations such as the one in Bosnia-Herzegovina where there is an existing government, EUFOR has the authority to exercise governmental functions in their relations with the local population. The difficulties outlined in the Report by the Ombudsperson Institution also apply to a certain extent to that operation. The wide executive powers vested in peace operation personnel therefore entail a corresponding responsibility in the execution of their mandated duties.

372 Comprehensive review of the whole question of peacekeeping operations in all their aspects. Report of the Special Committee on Peacekeeping Operations, para. 112 UN Doc. A/57/767 (2003), Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2004 substantive session, para. 134, UN Doc. A/58/19 (2004), Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2005 substantive session, para. 81, UN Doc. A/59/19 (2005).

Chapter 5

Convention on the Safety of United Nations and Associated Personnel

5.1 Introduction

In the early 1990s the United Nations became involved in various operations where its participating personnel were endangered. In the United Nations Operation in Somalia (UNOSOM I-II), as with the United Nations Protection Force in the former Yugoslavia (UNPROFOR), deliberate attacks on its personnel pointed to a growing lack of respect both for the UN and those involved in its operations. In such volatile and violent environments, against which UN and other personnel constantly struggled, it soon became clear that the issues of safety and security were paramount. A growing number of nations, not only those that regularly contributed troops to UN operations, were becoming particularly interested. The Convention on the Safety of United Nations and Associated Personnel of 1994 (the Safety Convention) should therefore be regarded as a response by the international community to the persistent and growing number of attacks on people participating in UN operations. The convention was concluded in a notably short time. Less than 15 months after the item had been assigned to the Sixth Committee, the convention was adopted without a vote.[1] The speed with which it was possible to reach consensus on the content of a new international instrument points to a common understanding that personnel in UN peace operations were in need of a strengthened level of protection. However, the weaknesses of the Safety Convention, which *inter alia* have triggered the creation of an Optional Protocol, could possibly, at least to some extent, be explained by the swift conclusion of the convention. It is therefore of particular interest to summarise the process that led to the adoption of the Safety Convention.

5.2 Process Leading to the Adoption of the Safety Convention

In December 1992 the General Assembly adopted Resolution 47/72 entitled *Protection of peace-keeping personnel*.[2] This noted, and commented upon, the

1 GA Res. 49/59 Convention on the Safety of United Nations and Associated Personnel, UN GAOR 49th Sess., UN Doc. A/RES/49/59 (1994).

2 GA Res. 47/72, Protection of peace-keeping personnel, UN GAOR 47th Sess., UN Doc. A/RES/47/72 (1992).

responsibility of governments in host countries for the safety of peacekeeping and other personnel.[3] The Security Council was recommended, in appropriate cases, to make clear to the relevant parties that it was prepared to take further steps if UN personnel were subjected to deliberate attacks affecting the purpose of operations.[4]

On 31 March 1993 the President of the Security Council made a statement, pursuant to the Secretary-General's landmark report *An Agenda for Peace*, which made specific reference to the safety of UN forces and related personnel deployed in conditions of strife.[5] Speaking on behalf of the Security Council, the President recognised that the deployment of such people, in situations of real danger, was becoming increasingly necessary in order to undertake its responsibility for the maintenance of international peace and security.[6] The Security Council demanded that states should take effective measures to deter, prosecute and punish all those responsible for any such acts of violence.[7] The Council, however, noted that particular difficulties existed where UN forces and personnel were deployed within states where the authorities were unable or unwilling to exercise jurisdiction in this regard. The Secretary-General was requested to report on existing arrangements for the protection of UN peacekeepers and related personnel and to make recommendations for enhancing their safety and security.

New Zealand acted upon the invitation to assist the Secretary-General in making those recommendations, as requested by the Security Council. It delivered a comprehensive report on the existing security arrangements. It contained a proposal to develop, among other things, a convention that would not only codify but also develop international law with regard to the protection and safety of UN personnel.[8]

During the 48th Session, the Special Committee on Peacekeeping Operations debated the question of increasing safety measures and enhancing and defin-

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3 These observations on safety followed grave concerns over the increase in deliberate attacks which had resulted in a growing number of casualties. The General Assembly furthermore emphasised the need for a swift conclusion of a status-of-forces-agreement with all parties concerned in order to stress the international status of UN operations and the obligations of parties, in accordance with the Convention on the Privileges and Immunities of the United Nations. Ibid., para. 5.

4 Ibid., para. 7.

5 Note by the President of the United Nations Security Council, 31 March 1993, UN Doc. S/25493.

6 Ibid., para 3. The Security Council, moreover considered that acts of violence, whether actual or threatened, against UN forces and personnel were wholly unacceptable and "further measures" might be required to ensure their safety and security. Ibid., para. 5.

7 Ibid., para. 6.

8 Report of the Secretary-General, Comprehensive Review of the Whole Question of Peace-keeping Operations in All their Aspects, UN Doc. A/AC.121/40/Add.2 (1993).

ing the role of the UN.[9] It was the committee's view that a new legally binding regime on the status and safety of UN personnel should be developed. It was requested that the General Assembly should consider the appropriate forum for such a process to be implemented.[10]

In June, 1993, following the attacks on the Pakistan contingent of UN forces in Somalia, leaving 24 soldiers dead and 56 wounded,[11] the Security Council adopted Resolution 837. The Security Council reaffirmed the authorisation to "take all necessary measures" against those engaged in preventing UNOSOM II from carrying out its mandate. These measures included the "arrest and detention for prosecution, trial and punishment" of those responsible for the outrage.[12]

In June, 1993, New Zealand made a request for the inclusion of an item entitled *Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for such Attacks are Brought to Justice* in the provisional agenda of the 48th Session of the General Assembly.[13] According to New Zealand, the response of the Security Council demonstrated the limitation of the current system to effectively deter, prosecute and punish those convicted of violence against UN personnel.[14] That country further stressed the importance of individual responsibility and asserted that the UN should have the effective means of holding the perpetrators of an attack personally responsible. In that respect, the principles and structures established in the Geneva Conventions for the protection of civilians and non-combatants was noted. International law protecting UN forces and relevant personnel should at least reach the level of protection as that afforded combatants engaged in a war. New Zealand went on to deal with the question of UN forces deployed in an area of a

9 Report of the Special Committee of Peace-keeping Operations, Comprehensive Review of the Whole Question of Peace-keeping Operations in All their Aspects, UN Doc. A/48/173 (1993).

10 Ibid., para. 123.

11 Report pursuant to paragraph 5 of the Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the Secretary-General UN Doc. S/26351 (1993), Annex, Report of an investigation into the 5 June 1993 attacks on United Nations forces in Somalia by Mr. Tom Farer, para. 1.

12 SC Res. 837, UN SCOR, 3229th mtg., UN Doc. S/RES/837 (1993), para. 5. The resolution was remarkable considering the fact that UNOSOM II had no capability whatsoever of effecting the prosecution of any alleged offenders, let alone their trial and, if convicted, their punishment.

13 Letter dated 24 June 1993 from the Chargé d' affaires a.i. of the Permanent Mission of New Zealand to the United Nations addressed to the Secretary-General, UN Doc. A/48/144 (1993).

14 Ibid., Explanatory Memorandum. It referred to the SC Res 792, UN SCOR, 3143rd mtg., UN Doc. S/RES/792 (1992), SC Res 804, UN SCOR, 3168th mtg., UN Doc. S/RES/804 (1993), and SC Res. 837, UN SCOR, 3229th mtg., UN Doc. S/RES/837 (1993).

non-international conflict between a government and a faction within a state. It recognised that the current norms of international law did not provide adequate protection since entities not regarded as states could not be subject to the obligations of international law.[15]

In August, 1993, the Secretary-General submitted his report on the existing security system, as well as proposals for its improvement, pursuant to the request by the Security Council.[16] In his review of the existing security system, the Secretary-General emphasised that the host government had primary responsibility for UN and related personnel.[17]

In his report, the Secretary-General also considered possibilities of *enhancing* the safety and security of UN and related personnel. As a long-term strategy, in order to codify and further develop international law, the development of a new international instrument could be developed. Such an instrument could also "consolidate in a single document the set of principles and obligations contained in current multilateral and bilateral treaties".[18] The Secretary-General stressed the need for the proper protection of those working for civilian contractors and non-governmental organisations (NGOs).[19] These people are often engaged in UN operations on a contractual or on some other basis. In the short-term perspective, it was held that the Security Council, when deciding upon a new operation, might consider making the deployment of future operations conditional upon certain criteria with regard to safety and security.

As of 24 September 1993 the item proposed by New Zealand in June was allocated to the agenda of the Sixth Committee.[20] During the committee's work, New Zealand submitted a proposal for a draft convention on responsibility for attacks

15 Ibid.

16 Report of the Secretary-General, Security of United Nations operations, UN Doc. A/48/349 – S/26358 (1993).

17 Ibid., para. 4. With regard to conventional international law, the Secretary-General drew attention to Article 105 of the Charter, and the General Convention. The Secretary-General also referred to the model status-of-forces agreement of 1990 and held that it "embodies relevant principles of international law such as those provided for in the Convention on the Privileges and Immunities of the United Nations and the customary principles and practices applicable to United Nations peace-keeping operations" Ibid. para.14.

18 Ibid., para. 34.

19 On NGOs see, for example, Anna-Karin Lindblom, *The Legal Status of Non-governmental organisations in International Law,* (2001) and Francois Hampson, Nongovernmental Organizations in Situations of Conflict: The Negotiation of Change, *International Law Studies,* 71 *The Law of Armed conflict: Into the Next Millennium*, 233 (Michael N. Schmitt & Leslie C. Green, eds., 1998).

20 Sixth Committee (48th Session), Letter dated 24 September 1993 from the President of the General Assembly addressed to the Chairman of the Sixth Committee, UN Doc. A/C.6/48/1 (1993).

on UN personnel.[21] The draft was principally modelled on the IPP Convention[22] and the International Convention against the Taking of Hostages (1979).[23] It was not, however, intended to duplicate already existing rights and obligations but rather to focus on the safety of UN personnel in operations established pursuant to a decision from the Security Council. The New Zealand proposal concentrated on the notion of individual responsibility for attacks on UN and associated personnel. Its purpose was to establish that those responsible for attacks on UN personnel "commit a crime punishable by any country in which they may be found".[24]

A week later the Ukraine submitted a draft convention of its own, to be included in the material of the Sixth Committee. This proposal included references to the status of UN and associated personnel, general obligations of states parties, and provisions concerning breaches of the convention of both states parties and the UN.[25]

A working group was established within the framework of the Sixth Committee, and was assigned the task of providing a basis for future work on the item. It found that it was necessary to decide whether the existing legal instruments provided adequate protection for UN and associated operatives in the increasingly dangerous circumstances in which they were required to perform their duties and, if not, to find ways of bridging any gaps in the international law system. Basically, three possibilities were suggested.[26] The first was a non-binding declaration that would have the advantage of being developed quickly and would represent a significant gesture on behalf of the international community as well as contributing towards the preparation of a binding instrument. However, a number of delegations pointed to the difficulty that those involved in attacks on UN personnel had previously ignored declarations, and it would furthermore delay the elaboration of a binding instrument. The second suggestion was to draft an additional protocol to the IPP Convention. While this idea was found to be interesting and showed a certain amount of merit, it failed in the end to get the support of the working group. This was largely due to the fact that an additional

21 Sixth Committee (48th Session), Proposal for a draft convention on responsibility for attacks on United Nations personnel, UN Doc. A/C.6/48/L.2 (1993).

22 Convention on the Prevention and Punishment of Crimes against Internationally Protected Personnel including Diplomatic Agents, 14 December 1973, 1035 UNTS 167.

23 International Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 206.

24 Sixth Committee (48th Session), Proposal for a draft convention on responsibility for attacks on United Nations personnel, para. 2, UN Doc. A/C.6/48/L.2 (1993).

25 Sixth Committee (48th Session), Letter dated 7 October 1993 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN Doc. A/C.6/48/L.3 (1993).

26 Sixth Committee (48th Session), Summary record of the 29th meeting, para. 2, UN Doc. A/C.6/48/SR.29 (1993). To the following see paras. 2 – 4.

protocol could be perceived as if it did not indicate enough the importance of this issue to the international community, and that states not party to the IPP Convention would be excluded from an additional protocol. Furthermore, it was not designed for the protection of peacekeeping personnel, and to expand the scope of that convention might result in legal difficulties. The third possibility was to elaborate a new international instrument. The proposals by New Zealand and the Ukraine, as well as a conference room paper submitted jointly by those two countries, came to serve as the starting point for that work.

While this is not the appropriate point to deal with all the relevant questions connected to the elaboration of a new binding instrument, the two basic ideas that influenced the future work of the convention should be mentioned. There was both the desire to encompass all persons, irrespective of their affiliations, who were working in support of UN goals, and the possible need to limit the scope of a future convention to situations somewhat related to the control of the UN.[27]

The General Assembly decided to establish an Ad Hoc Committee open to all member states, with the aim of elaborating an international convention on the safety and security of UN and associated personnel.[28] The Ad Hoc Committee had before it the joint proposal[29] submitted by New Zealand and the Ukraine, a working document[30] from the Nordic countries and a Note[31] by the Secretary-General as well as a number of different proposals submitted by delegations. An elaborated text called the "negotiating text" was produced during its first session.[32] Although thoroughly penetrated in detailed discussion, it was not possible

27 Ibid., para. 9.

28 GA Res. 48/37, Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice, UN GAOR 48th Sess., para. 1 UN Doc. A/RES/48/37 (1993).

29 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Proposal by New Zealand and Ukraine, UN Doc A/AC.242/L.2 and Corr. 1 (1994).

30 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Working document submitted by Denmark, Finland, Iceland, Norway and Sweden, UN Doc. A/AC.242/L.3 (1994).

31 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Note by the Secretary-General, UN Doc. A/AC.242/1 (1994).

32 The Ad Hoc Committee held two sessions. The first was between 28 March and 8 April 1994 and the second from 1 to 12 August. The joint proposal submitted by New Zealand and the Ukraine provided the basis for the committee's work, while the "elements" of the working paper submitted by the Nordic countries were examined in conjunction with the relevant articles of the joint proposal. During the examination of the articles, it became clear that the most important and most difficult part of the proposed convention was its scope and definitions. Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on

to include articles on scope and definition in the negotiating text.[33] During the second session a "revised negotiating text" was formulated.[34]

Because it was not able to develop a final text, the committee recommended to the General Assembly the re-establishment of a working group within the framework of the Sixth Committee to continue the work of the revised negotiating text, from which it was able to develop a draft convention.[35] A draft resolution[36] was proposed by both New Zealand and the Ukraine entitled *Convention on the Safety of United Nations and Associated Personnel*.[37] The Sixth Committee then recommended its adoption by the General Assembly, which did so without a vote at its 84th Meeting on 9 December 1994.[38] The Convention on the Safety of United Nations and Associated Personnel came into force on 15 January 1999 in accordance with Article 27 of the Convention.[39]

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the work carried out during the period from 28 March to 8 April 1994, para. 28, UN Doc. A/AC.242/2 (1994).

33 Ibid., paras. 28 and 173.

34 When introducing this revision the chairman noted important differences still remained, in particular, between the nature of the operations and the categories of the operatives to be covered by the convention. It was recognised that the difficulties of reaching an agreement on the definitions and scope of the proposed instrument extended to the rest of the text. Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel 1-12 August, para. 26, UN Doc. A/49/22 (1994).

35 Sixth Committee (49th Session), Report of the Working Group, UN Doc. A/C.6/49/L.4 (1994). This was submitted to the Sixth Committee for consideration with a view to its adoption. The Sixth Committee duly considered the text at its 29th to 32nd and 34th to 35th meetings held in November 1994. See Sixth Committee (49th Session), Summary record of the 29th Meeting, UN Doc. A/C.6/49/SR.29 (1994); Sixth Committee (49th Session), Summary record of the 30th Meeting, UN Doc. A/C.6/49/SR.30 (1994); Sixth Committee (49th Session), Summary record of the 31st Meeting, UN Doc. A/C.6/49/SR.31 (1994); Sixth Committee (49th Session), Summary record of the 32nd Meeting, UN Doc. A/C.6/49/SR.32 (1994); Sixth Committee (49th Session), Summary record of the 34th Meeting, UN Doc. A/C.6/49/SR.34 (1994); Sixth Committee (49th Session), Summary record of the 35th Meeting, UN Doc. A/C.6/49/SR.35 (1994).

36 Sixth Committee (49th Session), Draft resolution, UN Doc. A/C.6/49/L.9 (1994).

37 The draft resolution was sponsored by 29 states and later joined by 13 more. At its 35th Meeting the draft resolution was adopted without a vote.

38 GA Res. 49/59 Convention on the Safety of United Nations and Associated Personnel, UN GAOR 49th Sess., UN Doc. A/RES/49/59 (1994). In connection with the adoption of the convention, eight states explained their position on the resolution. See UN GAOR, 49th Sess., 84th mtg., UN Doc A/49/PV.84 (1994).

39 Convention on the Safety of United Nations and Associated Personnel, 9 Dec. 1994, 2051 UNTS 361. (80 parties 2006-04-01 according to the UN Treaty Section http://untreaty.un.org/English/treaty.asp.

New developments

In 1999, eight months after the Safety Convention came into force, the Secretary-General suggested, that the scope of application of the Safety Convention should be extended to cover personnel not then covered by it. A concrete proposal was made for the creation of an additional protocol to the Safety Convention.[40] Some support was expressed for extending the scope of application of the Safety Convention during debates in the Security Council on the protection of civilians in armed conflicts.[41] Based *inter alia* on discussions in the Security Council, the General Assembly requested the Secretary-General to submit a report on the scope of legal protection available under the Safety Convention.[42] The subsequent report was presented to the General Assembly in November, 2000.[43] In December, the General Assembly established another Ad Hoc Committee, this time to consider the recommendations of the Secretary-General to strengthen and enhance the protection available under the convention.[44] The committee, open to all UN member states, convened four times, between 2002 and 2005.[45] In December 2005 an Optional Protocol was adopted.[46]

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40 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, para. 43, UN Doc. S/1999/957 (1999).

41 See e.g. remarks by the delegate of Argentina, UN SCOR, 3977th mtg., 22, UN Doc S/PV.3977 (1999). See also the delegate of Finland, speaking on behalf of the European Union, UN SCOR, 4046th mtg., 8, UN Doc S/PV.4046 (1999), and the delegate of the Republic of Korea, UN SCOR, 4046th mtg. 16, UN Doc. S/PV.4046 (Resumption 1) (1999).

42 See GA Res. 54/192, Safety and security of humanitarian personnel and protection of United Nations personnel, UN GAOR 54th Sess., UN Doc. A/RES/54/192 (1999).

43 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/55/637 (2000).

44 GA Res. 56/89, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 56th Sess., UN Doc. A/RES/56/89 (2001).

45 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/57/52 (Supp) (2002), UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/58/52 (Supp) (2003), UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/59/52 (Supp) (2004), UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/60/52 (Supp) (2005).

46 GA Res. 60/42, Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, UN GAOR, 60th Sess., UN Doc. A/RES/60/42 (2005).

5.3 Analysis of the Safety Convention

The Safety Convention begins with rather detailed definitions of the kind of personnel and categories of operation that fall within its scope of application, as well as its relationship to international humanitarian law (Articles 1-2). This is followed by provisions relating to the legal status of personnel and the duty of the protected personnel concerned to respect local laws and regulations (Articles 3-6). An explicit duty of states to ensure the safety and security of personnel and to release captured personnel is to be found in Articles 7 and 8. Specific crimes committed against protected personnel are stipulated in Article 9, and the duty of member states to establish their jurisdictions over such crimes is dealt with in Article 10. The following Articles (11-18) primarily concern co-operation in criminal matters, including the important principle of *aut dedere aut judicare*, and fair treatment of alleged offenders. Similar to the Geneva Conventions of international humanitarian law, parties to the Safety Convention are obliged to disseminate the terms of the convention as widely as possible and to include them in their military programmes (Article 19). A number of saving clauses are stipulated in Article 20, as well as a right of self-defence (Article 21). Dispute settlements and review meetings form the subject of Articles 22 and 23, followed by provisions on accession and the entry into force of the convention.

The following analysis of the Safety Convention will deal primarily with its scope of application. There are three reasons for this. First, in comparison with the substantive parts of the convention, dealing primarily with penal provisions, establishment of jurisdiction and measures on prosecution or extradition, the debate over its scope of application was a highly politicised matter. Second, the new Optional Protocol extends the convention's scope of application for parties to it. Third, the inclusion of penal provisions made it of the utmost importance to clarify when, where and to whom the convention applied. This was particularly so in relation to the principles of international humanitarian law. A *penalised* act under the convention may be a *legitimate* act under international humanitarian law. The aim of the drafters was to establish a protective regime for multifunctional peacekeeping operations, including humanitarian efforts. The *material* provisions contribute to such a protection but its scope of application needs clarification. For the purpose of this analysis, the convention has been divided into five parts: 1 Scope of application; 2 Legal status of the personnel; 3 Duty to provide protection; 4 Criminal law provisions; 5 Miscellaneous.

In the event, the convention has attracted some interest from legal scholars, but subsequent state practice is scarce.[47] Against this background, the prepara-

47 Discussions during the Ad Hoc Committee revealed a lack of knowledge of such practice. However, in a case from the House of Lords concerning a British soldier injured serving in the United Nations Protection Force in Bosnia-Herzegovina, the Safety Convention was relied upon to establish whether or not the attack was a

tory works play a major role in the analysis of some parts of the convention, in particularly on its scope of application. The following analysis of the convention will primarily be based upon the text of the convention itself, its preparatory works, legal doctrine and subsequent propositions on the strengthening and extension of its provisions. As to the latter, the report by the Secretary-General on the scope of application of the Safety Convention from 2000 has been particularly useful.

5.3.1 Scope of Application

According to Article 2 of the convention, it applies in respect of UN and associated personnel and UN operations, as defined in Article 1, where "United Nations personnel", "Associated personnel" and "United Nations operations" are, within the framework of the convention, defined as follows:

(a) "United Nations personnel" means:
  (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
  (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) "Associated personnel" means:
  (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
  (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
  (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,

  to carry out activities in support of the fulfilment of the mandate of a United Nations operation;

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of

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crime under international law. The case dealt, however, with the question of compensation for injuries under national law. United Kingdom House of Lords: Regina v Bartle; Ex Parte Pinochet, 25 November 1998, 37 ILM 1302 (1998).

the United Nations and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where 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;

5.3.1.1 "United Nations personnel"

The Negotiations (1993 –1994)

The kind of personnel the new convention should apply to formed the subject of different opinions, based mainly upon whether a restrictive or extensive approach was favoured.[48] Some delegations argued for as broad as possible a coverage of personnel, meaning that irrespective of connection or mandate, they would all run similar risks of attack. It was thought that potential attackers would not examine such subtle considerations prior to launching an assault. Other delegations favoured a more restrictive approach and argued for limiting the protection of the convention to members of a specific UN operation.

The Ad Hoc Committee had before it, when starting the work, two proffered definitions on "United Nations personnel". The joint draft proposal did not explicitly differentiate between "United Nations personnel" and "Associated personnel" in considering the text of Article 1 of the proposal, which read: "United Nations personnel means those persons in respect of whom this Convention applies in accordance with Article 2".[49] In the working document submitted by the Nordic countries, the "Second element" was entitled "United Nations personnel" and could therefore properly be interpreted as making no difference between "United Nations personnel" and "Associated personnel".[50]

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48 For these discussions, see Sixth Committee (49th Session) Summary record of the 29th – 32nd, 34th – 35th Meetings, UN Docs. A/C.6/48/SR.29 – 32, 34 – 35 (1994).

49 In Article 2 of the joint draft proposal from New Zealand and Ukraine, "United Nations personnel" were defined as "(a) Persons deployed by the Secretary-General to participate in a United Nations operation, and includes: (i) Military personnel; (ii) Police personnel; (iii) Associated civilian personnel; (b) Persons deployed by the Secretary-General or a specialised agency or other organisation or programme of the United Nations system to carry out activities in connection with a United Nations operation; (c) Persons deployed by any other humanitarian organisation or agency to carry out activities relating to a United Nations operation where such organisation or agency is operating pursuant to an agreement with the Secretary-General." See Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Proposal by New Zealand and Ukraine, UN Doc A/AC.242/L.2 and Corr. 1 (1994).

50 It contained the following definition of UN personnel: "The persons covered by the new instrument should comprise all personnel authorised by the United Nations

During the course of general debate within the Ad Hoc Committee it was stressed that the definition of the term used in the convention needed to be clear and precise in order to create a widely accepted convention which could be effectively implemented.[51] The need for absolute clarity in this regard was considered to be particularly important in view of the convention's penal provisions.[52] Although the definition of the joint proposal found general acceptance it was found that the term "deployed" was inappropriate. It failed to take into account the fact that individuals were often already in the field before the start of an operation.[53] After the second Ad Hoc Committee meeting the text was amended to "engaged or deployed".[54]

The revised negotiating text from the Ad Hoc Committee read:

> (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
>
> (ii) Other officials and experts on mission of the United Nations and its specialised agencies who are present in an official capacity in the area where a United Nations operation is being conducted.[55]

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operations to participate in a peace-keeping or a peace-enforcement operation. Personnel working for intergovernmental and non-governmental organisations undertaking humanitarian relief activities in areas where a United Nations operation has been launched should also be provided adequate protection." Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Working document submitted by Denmark, Finland, Iceland, Norway and Sweden, 2, UN Doc. A/AC.242/L.3 (1994).

51 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on the work carried out during the period from 28 March to 8 April 1994, para. 21, UN Doc. A/AC.242/2 (1994).

52 Ibid., 35. The definition proposed by the Nordic countries was preferred by some delegations, while another proposal was a third definition: "This Convention shall apply in respect of United Nations personnel deployed by the Secretary-General, the Security Council or the General Assembly in connection with a United Nations operation." Ibid., para. 39.

53 Ibid., para. 41.

54 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel 1-12 August, para. 28, Revised Negotiating Text Article 2, UN Doc. A/49/22 (Supp) (1994).

55 Ibid.

The revised negotiating text distinguished between "United Nations personnel" and "Associated personnel", the former in paragraph (a) and the latter under paragraph (b). It was considered by a number of delegations that the text provided a good basis for further negotiations while others elected to reserve their position.[56] The point was made that subparagraph (a) (ii) should be deleted, since the personnel mentioned were already under the protection of existing instruments on privileges and immunities.[57]

Assessment

Paragraph (a) (i) encompasses personnel contributed by the nations participating in a UN operation and would therefore probably include most of the personnel covered by the convention. They are commonly viewed as the core group of persons referred to as peacekeepers.[58]

The focus on personnel being "engaged or deployed" by the Secretary-General of the UN reflected the concern of several delegations that UN personnel must be under the control of the UN. It clearly gives no room for including national forces under national command.[59] According to the Secretary-General such personnel "are accordingly members of all components of a United Nations peacekeeping operation".[60]

The inclusion of the personnel referred to in Article 1 (a) (ii) satisfied those delegations that sought a broad coverage. There is no need of a connection to a UN operation for such personnel here mentioned. The only requirement is that they would need to be, in their official capacity, in the area of a UN operation. The area of a UN operation is not defined in the convention and must be decided upon, in each case, of future operations.

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56 Ibid., Annex I para. 2.

57 Ibid. para. 4. The only substantive change in the definition of "United Nations personnel" before the adoption of the convention was the inclusion of the International Atomic Energy Agency in subparagraph (a) (ii). See UN Sixth Committee, Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for Such Attacks are Brought to Justice: Report of The Working Group, para. 10(a), UN Doc. A/C.6/49/L.4 (1994).

58 See Evan T. Bloom, Protecting peace-keepers: The Convention on the Safety of United Nations and Associated Personnel, 89 *AJIL* 621, 623 (1995).

59 See, Steven J. Lepper, The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis, 18 *Houston Journal of International Law*, 359, 383 (1996). Lepper states that it was the intention of the U.S. delegation to include personnel deployed by their own nations or multinational organisations within the scope of the definition of United Nations personnel. He concludes that this is clearly not possible considering the requirement "engaged or deployed by the Secretary-General".

60 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 14, UN Doc. A/55/637 (2000).

Ambassador Philippe Kirsch, chairman of the Ad Hoc Committee and its working groups, as well as the working groups established within the framework of the Sixth Committee, observed a few factors that tended to complicate the process. The most important of them was that the work on the convention had become "a surrogate battleground for the more complex issue of the expanded powers of the Security Council".[61] Traces of this "battle" are found throughout the convention. The final definition on "United Nations personnel" suggests an impression of victory for the restrictive approach. The UN, in the form of its Secretary-General, would retain control of all personnel covered by the definition in Article 1 (a) (i). This restrictive approach, however, is balanced by the definition of "Associated personnel".

5.3.1.2 "Associated personnel"

The Negotiations (1993-1994)

Defining "Associated personnel" was far more problematic than to work out a definition of "United Nations personnel". The negotiations centred mainly on two issues: the inclusion of NGOs, and forces under the command of nations and international governmental organisations.

In his Note, the Secretary-General found that the privileges and immunities currently enjoyed by the UN could also be considered to be extended to civilian contractors and to the personnel of NGOs, engaged in UN operations through an agreement.[62] Reference was also made to Security Council Resolution 868 (1993) in which the Council "decided that the safety and security arrangements undertaken by the United Nations or the host country should extend to all persons engaged in operations authorised by the Council".[63]

During debate in the Ad Hoc Committee it was stressed that for personnel to be included within the protective regime of the convention, a clear link must first be shown to exist between them and the UN.[64] With regard to subparagraph (c) of the joint proposal it was, on the one hand, found to be appropriate to include NGOs within the scope of the convention because of the acknowledged role they played, particularly in the humanitarian field, but that the con-

61 Philippe Kirsch, Convention on the Safety of United Nations and Associated Personnel, *Canadian Council on International Law,* Proceedings 182, 187 (1994).

62 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Note by the Secretary-General, para. 11, UN Doc. A/AC.242/1 (1994).

63 Ibid., para. 12. See SC Res. 868, UN SCOR, 3283rd mtg., para. 6(b), UN Doc. S/RES/868 (1993).

64 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on the work carried out during the period from 28 March to 8 April 1994, para. 21, UN Doc. A/AC.242/2 (1994).

tractual relationship should be tightened. On the other hand, it was suggested that subparagraph (c) of the joint proposal should be deleted. This position was based mainly upon the fact that the future convention was aimed at states, and therefore it could prove difficult to include provisions intended for NGOs. It was argued that national laws protected both residents and non-nationals, and if additional obligations were to be imposed upon states, it should be limited to UN personnel.[65]

Several delegations supported the view that the convention should encompass all persons who became involved in a UN operation, including forces invited by the Secretary-General to participate or assist in a UN operation. The main purpose seemed to be that irrespective of category, ultimately they all worked side by side in the attempt to achieve the same objective and logically should therefore be afforded equal protection.[66]

In the revised negotiating text, "Associated personnel" were defined in Article 2 as:

> (i) Persons assigned by a Government or an intergovernmental organisation with the agreement of the competent organ of the United Nations;
> (ii) Persons engaged by the Secretary-General of the United Nations or by a specialised agency;
> (iii) Persons deployed by a humanitarian non-governmental organisation or agency under an agreement with the Secretary-General of the United Nations or with a specialised agency;
>
> to carry out activities directly connected with a United Nations operation.[67]

Some delegations found that the definition of "Associated personnel" in the revised negotiating text excessively expanded the scope of application of the convention. It was therefore necessary to provide for the possibility of making "reservations with regard to the various categories of personnel to which the convention would be applicable".[68] It was also noted that "Associated person-

65 Ibid., paras. 43 – 44.

66 Ibid., para. 163.

67 Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel 1-12 August, para. 28, Revised Negotiating Text, Article 2, UN Doc. A/49/22 (Supp) (1994).

68 Ibid., Annex 1, Summary of the Working Group's debate at the second session of the Ad Hoc Committee, para. 5. Poland submitted a proposal for a provision in this regard: "Each State Party may, at the time of signature, ratification, acceptance or approval of this Convention or accession thereto, declare that that it does not consider itself bound with respect to any of the categories of personnel referred to in

nel" could not operate in the territory of a state without its consent.[69] The definition finally agreed upon included references to the International Atomic Energy Agency,[70] and the new wording "in support of the fulfilment of the mandate of" in subparagraph (b).[71]

Explaining its position on the convention, the delegation of Sudan interpreted "Associated personnel" to mean that host and/or transit states needed to be consulted before the deployment of any such personnel. It furthermore found that persons assigned by a government, intergovernmental organisation or humanitarian NGO or agency fulfilling necessary criteria required the consent of the host and/or transit state.[72] Poland's delegation stated that the various proposals submitted by a number of delegations aiming at making the convention's scope of application "as wide as possible have been properly reflected in its articles."[73]

Assessment

The fact that the UN largely depends upon humanitarian organisations, civilian contractors, and so on, to fulfil its mandate strongly contributed to encompass the category of "Associated personnel" within the scope of the convention. The interpretation of the final definition of the term "Associated personnel", however, is far from clear.

In terms of *protection* afforded by the convention, there is no difference between "United Nations Personnel" and "Associated personnel". Both categories enjoy the same protection under the convention. To be able to fall under the category of "Associated personnel" it is necessary to have a link with the UN. That link may be established in three different ways. A government, or an intergovernmental organisation, may assign the persons in question, by *agreement* with the UN; they may be *engaged* by the UN; or be *deployed* by a humanitarian NGO or agency under an *agreement* with the UN. The UN may act through a competent organ. The connection to the UN, however, is not enough to qualify as associated

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paragraph 2 (b) of this article which it may specify. The other States Parties shall not be bound by paragraph 2 (b) of this article with respect to any such categories as regards any State Party that has made such reservation." Annex II, section R.

69 There were different opinions on the precise meaning of "Persons assigned by a Government". Some delegations took the view that this category was already covered under the category "United Nations personnel" while other delegations disagreed on this point. It was, moreover, argued that NGOs should be excluded from the protection of the convention. Ibid., para. 5, Annex 1, Summary of the Working Group's debate at the second session of the Ad Hoc Committee.

70 The International Atomic Energy Agency is not regarded as a Specialised Agency.

71 Sixth Committee, Report of the Working Group, para. 10, UN Doc. A/C.6/49/L.4 (1994).

72 UN GAOR, 49th Sess., 84th mtg., 14, UN Doc. A/49/PV.84 (1994).

73 Ibid., 16.

personnel. A special link to a UN *operation* is also required. The activities should therefore be in support of the mandate of the operation. The paragraph was the subject of considerable debate and the inclusion of a saving clause made it possible to reach an agreement.[74]

The category of "Associated personnel" consists of three different groups. The first refers to persons assigned by a government or an intergovernmental organisation with the agreement of the UN. This provision enables military forces, not under UN control, to be included in the protective regime of the convention under the category of "Associated personnel". The United States delegation, which had a strong interest in including assisting forces within the protection of the convention, found that the *operations* in Haiti, Rwanda, Bosnia and Somalia would all be covered by the convention. As examples of *associated forces* the multinational force supporting the UN operation in Haiti (UNMIH), as well as members of NATO supporting the UN operation in the former Yugoslavia (UNPROFOR), were mentioned.[75] Another example of assisting forces might also be the US Quick Reaction Force that supported the UN operation in Somalia (UNOSOM II). These are forces that existed before or during the time of the adoption of the convention. They assisted UN forces, but were not acting under UN command and control. The critical issue here is to what extent associated personnel may act independently. They are not subject to UN command and control but are required to act in support of a UN operation's mandate. Is the requirement to act in support of such a mandate also a requirement that the operation must include UN personnel?[76] The ambiguous wording of the last sentence of subparagraph (b) may imply an opening for these forces to act independently. An earlier version of this sentence read: "To carry out activities directly connected with a United Nations operation." The substitution of "operation" for "mandate" supports an interpretation that the "what" with which the personnel need to be associated is not necessarily UN personnel. It may also be that the activities could be associated with the "mandate". This interpretation, however, is not fully supported by the paragraph's negotiating history. Several influential delegations held the view that the association-requirement was with UN personnel. Association with a mandate alone was not enough.[77]

Both Greenwood and Kindred have addressed the example of coalition forces being involved in the Iraq/Kuwait crisis and whether they would have been protected by the convention, had it been in force at the time. Greenwood finds that they would have fallen outside the scope of the convention since the

74 The clause states that consent of the right of entry is unaffected by the convention. See also M.-Christiane Bourloyannis-Vrailas, The Convention the Safety of United Nations and Associated Personnel, 44 *ICLQ*, 560, 565 (1995).

75 UN GAOR, 49th Sess., 84th mtg., 15 UN Doc. A/49/PV.84 (1994).

76 For an interesting discussion on this aspect see Lepper, 386.

77 Ibid., 389.

operation was not conducted under UN authority and control.[78] Kindred suggests, however, that the coalition forces would have been protected as associated personnel in accordance with subparagraph (i). In view of the above, the latter interpretation would probably not find sufficient support, as there were no UN personnel deployed with which to be associated.[79]

The number and tasks of UN personnel that "Associated personnel" need to be associated with, are not obvious. The view of the US delegation that persons included in the multinational force in Haiti should be considered to be associated personnel is not without objections. In fact, the very purpose of the force was to pave the way for the UN mission which had not been able to deploy because of earlier disturbances in Port-au-Prince.[80] The definition of "Associated personnel" is closely related to the definition of a "United Nations operation". For a more thorough discussion on the types of operation that personnel need to be associated with, see the section on "United Nations operation" below.

The key requirement for the next group of "Associated personnel", in paragraph (ii), is the need to be *engaged* by one of the organs referred to. The term "engaged" is not defined but it is borne upon the need of a linkage between the UN and external personnel. During the negotiations in the Sixth Committee the Nordic countries claimed, in relation to the condition to be "engaged" by the Secretary-General of the United Nations, that the reference to the Secretary-General "also covered other parts of the United Nations system such as funds, programmes and offices, notably, the Office of the United Nations High Commissioner for Refugees (UNHCR)".[81] A common view, in the literature, is that this clause applies to civilian contractors.[82] An explicit example of personnel included in this category put forward is that of "truck drivers engaged by the World Food Program as part of its relief mandate in a United Nations operation".[83]

The third group of "Associated personnel" includes those people belonging to an NGO. The link to the UN is in this case the requirement of being "deployed" under an "agreement" with one of the bodies listed in paragraph (iii). Would this

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78 Christopher Greenwood, Protection of Peacekeepers: The Legal Regime, 7 *Duke Journal of Comparative & International Law*, 185, 195 (1996).

79 Hugh M. Kindred, The Protection of Peacekeepers, *Canadian Yearbook of International Law* 257, 276 (1995). The most remarkable aspect of this example, however, is that these forces would definitely have been excluded from the protective regime of the convention in light of Article 2(2), discussed below, because they were clearly acting as combatants in an international armed conflict.

80 See, e.g. Report of the Secretary-General on the United Nations Mission in Haiti, para. 5, UN Doc. S/26802 (1993).

81 Sixth Committee (49th Session), Summary record of the 29th mtg., para. 12, UN Doc. A/C.6/49/SR.29 (1994). See Bourloyannis-Vrailas, 566.

82 Ibid., Bloom, 624.

83 Kindred, 276.

requirement exclude the possibility of making an arrangement with humanitarian organisations already deployed in a particular area before the launching of a UN operation? It may be recalled that the term "deployed" was found to be inappropriate concerning "United Nations personnel", since it did not take proper account of personnel already in the field before the start of an operation. It does not appear to have been the intention that people already deployed should be excluded from the ambit of the convention. The convention, in fact, contains several terminological inconsistencies and it is plausible that the term "deployed" should not, for the purpose of this paragraph, be interpreted as excluding personnel already in the relevant area before the start of a UN operation. According to Bloom, the substantive principle by which it should be judged is the existence of a "contractual link" between the humanitarian NGO and the UN.[84] Apart from the formal linkage to a UN operation, the requirement to "carry out activities in support for the fulfilment of a mandate of a United Nations operation" is valid also for this category of "Associated personnel".

In his report, of 2000, the Secretary-General noticed that the nature and content of an agreement between a humanitarian NGO and the Secretary-General had not been defined but that

> it would be reasonable to assume that any contractual link or a treaty arrangement institutionalizing the cooperation between the United Nations and a non-governmental organization in support of a United Nations operation or in the implementation of its mandate, would meet the requirement of article 1 (b) (iii) of the Convention.[85]

According to the Secretary-General, two kinds of agreement exist between NGOs and the UN. There are the so called "Partnership agreements", concluded for implementation of specific projects "between UNHCR, UNDP, UNICEF, WFP or other United Nations bodies executing humanitarian programmes, and international or local non-governmental organizations",[86] and Security Arrangements between the Office of the United Nations Security Coordinator and NGOs "participating in the implementation of assistance activities of the Organisation".[87]

It is common practice to conclude "partnership agreements" between the UNHCR and humanitarian NGOs. For this purpose a model framework agreement for the operational partnership between the UNHCR and "implementing partners" has been developed, establishing standards of conduct for both part-

84 Bloom, 624.

85 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 15, UN Doc. A/55/637 (2000).

86 Ibid.

87 Ibid.

ners.[88] A similar practice has developed between UNDP and NGOs with special expertise in the field of sustainable human development. A memorandum of understanding (MOU) has been devised for extending UN *security arrangements* to organisations having the status of an "implementing partner". An "implementing partner" is for the purpose of the MOU, "any international non-governmental organization which has already entered into a contractual or a treaty arrangement with an organization of the United Nations system to implement a particular project".[89] At the time of writing of the report, such security arrangements had been signed by one intergovernmental organisation (the International Organization for Migration) and nine NGOs in three countries.

Proponents for a broad coverage of the convention met with considerable resistance from delegations arguing for a restrictive approach when discussing NGOs.[90] The latter group was primarily concerned with the consent of the host state. As the savings clause reads, the inclusion of humanitarian NGOs in the scope of the convention was not tantamount to an automatic right of entry for those organisations. However, subject to the consent of the host nation and fulfilment of the criteria defined in Article 1 they would enjoy the protection of the convention.

Before turning to the definition of a UN operation it is appropriate to touch briefly on the subject of locally recruited personnel. According to the Secretary-General, the convention's scope of application has primarily been questioned in relation to humanitarian NGOs and locally recruited personnel.[91] The Safety Convention makes no distinction between personnel recruited locally and internationally recruited personnel. The Secretary-General notes that locally recruited personnel in peacekeeping operations are regarded as "members of the civilian component of a United Nations peacekeeping operation". In UN offices established out of headquarters, locally recruited personnel are considered to be UN officials, with the exception of those assigned at an hourly rate. For the purpose of the convention, the Secretary-General was of the opinion that they should be regarded as either UN personnel or associated personnel, depending on the nature of the contractual link to the UN.[92]

88 Ibid., para. 16.

89 Ibid., para. 18.

90 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex I para. 5, UN Doc. A/49/22 (Supp) (1994).

91 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 14, UN Doc. A/55/637 (2000).

92 Ibid., para. 19.

5.3.1.3 "United Nations operation"

The negotiations (1993-1994)

In the joint proposal by New Zealand and the Ukraine a "United Nations operation" was defined as an "operation established pursuant to a mandate approved by a resolution of the Security Council".[93] During the general debate in the first session of the Ad Hoc Committee the view was expressed of extending the scope of the convention to operations mandated by the General Assembly. It was suggested by some delegations that the convention should only apply to operations initiated with the consent of the host state.[94] The exchange of views during the meetings reflected a clear line existing between those delegations striving for expanding the scope of the convention and those who pursued a narrow definition of the term "United Nations operation". A redrafting of the whole of paragraph 2 was suggested. It would read as follows: "This Convention applies to all situations where United Nations personnel operate whether in time of peace or during armed conflict".[95]

The problem was acknowledged of relying on traditional distinctions concerning UN operations. Such operations were invariably of a "hybrid and complex" nature, changing over time and could well involve matters ranging from military campaigns to humanitarian relief as well as issues such as electoral assistance, human rights monitoring and development projects.[96] The term "operation" was thought to imply a certain degree of magnitude. The term "mandate" was viewed by some delegations as possessing a constricted meaning, and thus excluded activities conducted by such agencies as the United Nations High

93 UN General Assembly, Elaboration, Pursuant To Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing With the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Proposal by New Zealand and Ukraine', Annex, 3, UN Doc. A/AC.242/L.2 and Corr. 1 (1994). In the working document submitted by the Nordic countries a definition of a UN operation can be inferred from the second element regarding UN personnel. In the first paragraph it is referred to as a "peace-keeping or peace-enforcement operation". UN General Assembly, Elaboration, Pursuant to Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing with the Safety and Security of United Nations And Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Working document submitted by Denmark, Finland, Iceland, Norway and Sweden, 3, UN Doc. A/AC.242/L.3 (1994).

94 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 21, UN Doc. A/AC.242/2 (1994).

95 Ibid., para. 47. Another definition of the term "United Nations operation" was also suggested as "an operation established pursuant to a mandate approved by the United Nations". Ibid.

96 Ibid., para. 49.

Commission for Refugees (UNHCR).[97] Some delegations expressed concern over the term "mandate" and the relation to the requirement of consent of the host state. It was concluded that any future convention should only cover operations based upon the consent of the receiving state.[98]

While some delegations stressed the desirability or necessity of the requirement of consent of the host state, arguing that it would solve many complex problems, others found that the convention would be of little importance if it did not apply to non-consensual operations. It would seem, however, to have been agreed that only operations conducted under the command and control of the UN should be covered by the convention.[99]

In the revised negotiating text the term "United Nations operation" was defined in this way:

> (i) An operation for the purpose of maintaining or restoring international peace and security established by the competent organ of the United Nations and conducted under its authority;
> (ii) An operation for the purpose of providing emergency humanitarian assistance established by the competent organ of the United Nations, where the Security Council or the General Assembly decides that there exists an exceptional risk to the safety of the personnel participating in such an operation.[100]

The discussion again reflected the individual differences of position on the scope of the convention. Apart from the "consent" and "command and control" argu-

97 The approach reflected in the first element of the proposal from the Nordic countries was instead favoured by some delegations in this respect.

98 Ibid., para. 50. Concerning the definition of the term "United Nations operation", the chairman of the working group drew attention to the following questions: (1) Should the application of the convention extend to operations mandated by the General Assembly or more generally to all United Nations operations; (2) should enforcement operations or Chapter VII operations be covered; (3) in the affirmative, should the coverage be limited to operations conducted under the command and control or supervision of the United Nations; (4) in the framework of enforcement operations or Chapter VII operations, again assuming they were brought within the ambit of the convention, should the applicable criminal law regime be that of the convention under elaboration or that applicable to international armed conflicts; (5) should hybrid and multidimensional operations be covered by the convention and in which way; and (6) should the convention be applicable only in the framework of operations conducted with the consent of the host state and under status-of-forces-agreements." Ibid., para. 162.

99 Ibid., paras. 166 – 168.

100 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel', para. 28, Revised Negotiating Text, Article 2, UN Doc. A/49/22 (Supp) (1994).

ments, it was, however, observed that the meaning of "competent organ" in this respect should be clarified. On paragraph (ii) it was observed that the "application of a treaty was governed by the law of treaties and should not depend on a decision of a political organ".[101]

The term "United Nations operation" received its final and authoritative definition after negotiations in the Sixth Committee's working group. The paragraph received a new structure and also some textual changes. It is not entirely clear if these changes are changes in substance. In its final version reference was made to the UN Charter, and the explicit reference to "the purpose of providing humanitarian assistance" is excluded from (ii). The most substantial change, at least from a *prima facie* reading of the text, is that an operation must from now on be conducted under UN authority *and control*.

The US delegation judged it appropriate that operations, other than for the purpose of maintaining or restoring international peace and security, ought to be covered by the convention where there existed an "exceptional risk" to the safety of personnel participating in those types of operation. It expressed confidence that the Security Council and the General Assembly would not hesitate in declaring where appropriate the existence of an exceptional risk. The need to obtain such a declaration was not viewed as posing a barrier for an effective application of the convention.[102] The Australian and Japanese delegations presumed and expected those bodies to make such declarations "early" and "routinely".[103]

The Cuban delegation expressed reservations on the definition of "United Nations operation", arguing for a requirement of consent of the host state under the definition.[104] New Zealand's delegation asserted on the other hand that consent could not form the base upon which protection was afforded to UN personnel. On the contrary, it was in fact in such situations where there was no effective government that the future convention could and would be of specific value.[105]

Assessment

Operation

It is apparent that the term "operation" as such is not defined in the convention. As Bourloyannis-Vrailas observes, an operation did not necessarily have to be of a high magnitude. It could well be limited in its range, such as a fact-finding mission. She concludes that in the absence of a precise definition of the term "a wide interpretation seems defensible".[106] Whether long-term missions, such as human

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101 Ibid., paras. 6-8, Annex 1.

102 UN GAOR, 49th Sess., 84th mtg., 15, UN Doc. A/49/PV.84 (1994).

103 Ibid., 17.

104 Ibid., 16.

105 Ibid., 18. The delegation of New Zealand also encouraged the Security Council and the General Assembly to make pre-emptive declarations.

106 Bourloyannis-Vrailas, 566.

rights offices, which have been active for several years in some states, could be construed as an "operation" is open to interpretation.

Established

In order to fall within the provisions of the convention a UN operation needs to be "established by the competent organ" of the UN, and in accordance with the Charter of the United Nations. In relation both to subparagraph (c) (i) and the purpose of maintaining or restoring international peace and security, the Security Council is clearly a competent organ. It should be noted, however, that UNEF was established under the authority of the General Assembly in accordance with the provisions of the "Uniting for Peace Resolution".[107] It is thus possible that the General Assembly might also be a competent organ under subparagraph (c) (i). The important criterion for judgment is that an operation must be established in accordance with the Charter of the United Nations.[108]

The condition of a UN operation needing to be "established" has previously been interpreted as referring to operations considered to be subsidiary organs of the UN.[109] They should therefore be distinguished from operations that are authorised by the UN but undertaken by a state or a group of states. The fact that a UN operation needs to be "conducted under United Nations authority and control" might complicate such an interpretation. An operation *established* by the UN is normally carried out under its "command and control".[110]

UN authority

The terms "authority and control" are not defined in the convention. It was emphasised by some delegations during the negotiations that only operations conducted under the command and control of the UN should be covered by the convention.[111] The final text clearly reflects a weaker control-requirement of

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107 GA Res. 377 (V) Uniting for peace, UN GAOR 5th Sess., UN Doc A/RES/377 (V) (1950). The resolution was adopted in 1950 by the General Assembly in response to the inability of the Security Council to act on a threat to the international peace and security. See Bowett, 90.

108 According to Lepper, the question of which organ has competence is left open in the Convention and must be decided on a case-by-case basis. Lepper, 392.

109 Claude Emanuelli, *Blue Helmets: Policemen or Combatants?*, 70, 73, (Claude Emanuelli ed., 1997), Robert Siekmann, The Convention on the Safety of United Nations and Associated Personnel: its Scope of Application, in *Reflections on International Law from the Low Countries*, 315, 318 (E. Denters and N. Schrijver eds., 1998).

110 M.-Christiane Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, in *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts, Vol.1 Commentary*, 333, 344 (Gabrielle Kirk McDonald and Olivia Swaak-Goldman eds., 2000).

111 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex I para. 6, UN Doc. A/49/22 (Supp) (1994).

the UN. According to Kirsch, this was a "heavily negotiated compromise language falling somewhere between UN command and control, on the one hand, and UN authority, on the other".[112] A tentative suggestion is that any operation established by a competent organ in accordance with the UN Charter will automatically be conducted under UN authority. The "authority-requirement" could, according to this interpretation, therefore be satisfied by the mere conclusion of a UN mandate. Since this standard, or principle, may not add anything more to the definition of a UN operation the substantial criterion would thus be the term "control".

UN control

Possible interpretations of the term "control", in this context, would be political control and operational control. With regard to the term "command and control", the Secretary-General has distinguished three levels of authority:

> (a) Overall political direction, which belongs to the Security Council;
> (b) Executive direction and command, for which the Secretary-General is responsible;
> (c) Command in the field, which is entrusted by the Secretary-General to the chief of mission (special representative of force commander/chief military observer).[113]

Taking those levels of authority as a basis for the definition of the term "control", it should be clear that it could not amount to (c), "command in the field". The term "control", it is suggested, definitely reflects a weaker control-requirement of the UN than that which is included in UN "command and control". The "overall political direction" appears to be similar to the term "authority", according to the definition used above. The term "control", in the context of the convention, may well be similar to the executive direction of the Secretary General. It would, according to Kirsch, fall somewhere between UN command and control and UN authority. A possible conclusion, therefore, is that operational control should reside with the Secretary General. Shraga asserts that the terminology "command and control" is used to designate "the political direction and exclusive operational command of the United Nations".[114] However, in his report on the scope of application of the convention, the Secretary-General states, with regard

112 Kirsch, 186.

113 Report of the Secretary-General, Supplement to An Agenda for Peace, position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations, para. 38, UN Doc. A/50/60-S/1995/1 (1995).

114 Daphna Shraga, The United Nations as an Actor Bound by International Humanitarian Law, in *The United Nations and International Humanitarian Law,* 317, 335-336 (Luigi Condorelli et al. eds., 1996).

to the criterion in Article 1 (c) (i) that the operation must be "for the purpose of maintaining or restoring international peace and security", that such an operation "is clearly any peacekeeping operation conducted under United Nations command and control, to the exclusion of United Nations authorized operations conducted under national command and control".[115] The reference to "command and control" prompts several questions. Is this indicative of a more restrictive criterion for peacekeeping operations to fall under the regime of the convention? Is it an acceptance that, in practice, peacekeeping operations are either under UN command and control or under the command and control of another intergovernmental organisation or state? Was the authority and control requirement only a means of reaching a conclusion and to adopt the convention?

Operations requiring a declaration of exceptional risk

Regarding the second category, 1 (c) (ii), of UN operations, it would seem on close analysis to encompass any kind of operation, irrespective of its purpose, so long as there had been declared to exist an exceptional risk for the personnel concerned. As of yet no such declaration has been made.[116] The Secretary-General found that an operation of the second category "is any other United Nations presence in a host country established by a United Nations competent organ – though not necessarily the General Assembly or the Security Council – such as, United Nations political missions, 'post-conflict, peace-building offices', and United Nations humanitarian, development and human rights presences".[117]

In view of the fact that the term "operation" is not defined, this might be regarded as an authoritative statement in favour of a broad interpretation. The term "presences", it is contended, definitely indicates something less on the scale of personnel and tasks. It is perhaps well to recall that during the negotiations some delegations expressed concern that UNHCR offices, for example, would not be included, since such offices are based upon a standing mandate of the UNHCR and as such may not be regarded as "established" in the way indicated in the convention.[118] However, in view of the report of the Secretary-General, these concerns might now be of less importance.

115 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, paras. 6 – 7, UN Doc. A/55/637 (2000).

116 Ibid. para. 12. The report refers to a few cases where personnel have been at risk but with a declaration from relevant UN bodies. This was one of the main reasons for the establishment of an Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel. See below on proposed measures to enhance the protection of the convention.

117 Ibid., para. 7

118 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 50, UN Doc. A/AC.242/2 (1994).

Associated personnel

The definition of the term "United Nations operation" will also affect the category of "Associated personnel" with regard to their obligation to support the mandate of such an operation. A UN operation is defined as "being conducted under United Nations authority and control". The fact that an operation needs to be *conducted* supports the interpretation that a separate UN operation needs to *exist* to enable associated personnel to carry out their activities in support of that operation's mandate. In the UNPROFOR and UNOSOM campaigns, where large UN operations were deployed, forces outside UN command and control were requested to assist. This appears to fall well within the proposed interpretation of the category of "Associated personnel". In the case of the UNMIH operation the situation was more complicated and led to the question of whether UN personnel actually needed to be deployed on the ground. The purpose of the multinational force in Haiti was supposed to create conditions for the later deployment of UNMIH. The Security Council was to determine the time of the transition between these forces. An UNMIH advance team was additionally established in order to co-ordinate its work with the multinational force and to monitor its operations.[119] It may be concluded that the multinational force supported the fulfilment of the UN operation's mandate and that they therefore could be regarded as being associated personnel. The problem, however, related to the fact that the UN operation had not at that time been deployed and therefore an association could not be said to exist in relation to UN personnel. Taking another view, it might be possible to consider the establishment of the UN operation as the important criterion, irrespective of its deployment. The wording that the operation needs to be "conducted" does not, however, completely support this interpretation. From a teleological standpoint it seem appropriate to consider the multinational force as associated personnel (had the Safety Convention been in force at the time) since the purpose of their mission was to pave the way for the deployment of the UNMIH operation.[120]

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119 By resolution SC Res. 867, UN SCOR, 3282nd mtg., UN Doc. S/RES/867 (1993) the Security Council approved the establishment of a small UN operation, consisting of police monitors, a military construction unit and military trainers, to provide training and guidance for the armed forces and the new police force. The strength of the mission was 1, 267 people. Violent demonstrations prevented the lightly armed contingent to deploy. As a response the Security Council adopted resolution SC Res. 940, UN SCOR, 3413th mtg., UN Doc. S/RES/940 (1994) where it, acting under Chapter VII of the UN Charter, authorised Member States to form a multinational force. The task was, *inter alia*, to establish and maintain a safe and secure environment to enable a strengthened UNMIH (the Security Council decided to increase the level of troops to 6, 000) to take full control of the operation. Once a safe and secure environment existed the multinational force would terminate its mission.

120 It should be borne in mind that the assisting forces need not to be subject to UN authority and control. See also Lepper, 391-2.

In three large NATO-led operations, in Bosnia-Herzegovina (SFOR),[121] Kosovo (KFOR), and Afghanistan (ISAF), established after the adoption of the Safety Convention, the balance of power between the UN and intergovernmental organisations shifted in favour of the latter. In all of those countries there is, or was, a UN presence: UNMIBH[122] in Bosnia-Herzegovina; UNMIK in Serbia and Montenegro; and UNAMA in Afghanistan. If those UN presences are to be regarded as UN operations for the purpose of the Safety Convention, the NATO-led military operations should probably be considered associated personnel in accordance with Article 1 (b) (i). The fact that these NATO-led operations were to act upon a mandate of the Security Council probably fulfilled the condition of agreement by a competent UN organ. They were assigned by a state to an international governmental organisation with the agreement of a competent UN organ. In view of the fact that these forces acted upon the authority of a UN mandate, it could be argued that NATO-led forces accordingly act in support of the fulfilment of a UN operation's mandate. It appears to be a logical consequence of the practice of the Security Council to authorise and entrust peace operations to the care of regional organisations or other coalitions. The strong opposition against independent activities outside UN control may, however, suggest a restrictive interpretation in these cases.[123]

In the new era of UN-authorised operations, acting under national command and control or through that of an intergovernmental organisation, there may not be a parallel UN operation established for the purpose of maintaining or restoring international peace and security with which the national forces could be associated. However, if the proper UN agency declared that there existed an exceptional risk for personnel taking part in a UN operation of another character, the national forces may, if supporting the fulfilment of the mandate of that operation, be regarded as having "Associated personnel" status for the purposes of the convention. Although not expressed in the convention, it is presumed that the operation must be within the area of operations of the military force. However, the possibility cannot be ruled out that an UN-authorised operation might, in effect, support the mandate of a UNHCR office situated in a neighbouring country. However, the need to support the mandate of a UN operation

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121 It should be noted that from 2 December 2004, the European Union Force in Bosnia-Herzegovina (EUFOR) is the legal successor to SFOR. COUNCIL DECISION 2004/803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, OJ L 353/21 (2004). For the purpose of this study, however, SFOR is the force principally referred to in this respect.

122 UNMIBH was terminated 31 December 2002.

123 See e.g. UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex I para. 5, UN Doc. A/49/22 (Supp) (1994).

seems to be required at the time of assignment of the forces (Article 1 (b)) and may therefore not readily be inferred *during* the operation. On the other hand, if an already deployed UN operation later came under the protective regime of the Safety Convention due to a declaration of exceptional risk, persons assigned by a Government to assist the UN operation in the first place, should than become associated personnel for the purpose of the Safety Convention.

5.3.1.4 Relationship to international humanitarian law

The drafters of the convention were conscious of the relationship to international humanitarian law and that the two regimes should not be simultaneously applicable. In Article 2(2) it is therefore stipulated:

> This Convention shall not apply to a United Nations operation authorized 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 organized armed forces and to which the law of international armed conflict applies.

The negotiations (1993-1994)

Initially the relationship existing between the laws of war and the scope of the convention was vaguely formulated. Draft Article 6 "Applicability of international humanitarian law" of the joint proposal by New Zealand and the Ukraine read:

> 1. In cases not covered by this Convention or by other international agreements, United Nations personnel remain under the protection of universally recognised principles of international law, in particular, norms of international humanitarian law.
> 2. Nothing in this Convention shall be construed so as to derogate from the responsibility of United Nations personnel to respect international humanitarian law.[124]

Two general questions were raised in connection with this article. The first concerned the participation of the UN with international humanitarian law instruments. The other question concerned the relationship between the privileges and immunities of UN and international humanitarian law. It was remarked that the

124 UN General Assembly, Elaboration, Pursuant To Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing With the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Proposal by New Zealand and Ukraine, 4 – 5, UN Doc. A/AC.242/L.2 and Corr. 1 (1994).

distinction to be made was not between peacekeeping and peace-enforcement operations but rather between those types of operation and situations where the UN acted as party to an armed conflict. It was also contended that a distinction should be made between traditional peacekeeping operations as opposed to enforcement and military functions.[125]

During the course of the committee's work, a proposal from the US delegation was found to be particularly useful in the elaboration of the convention's relationship to the law of armed conflict. This proposal read:

> This Convention shall not apply where the operation was authorised by the Security Council as an enforcement action, the operation involves an international armed conflict to which common article 2 of the 1949 Geneva Conventions apply and the United Nations personnel are a party or otherwise engaged as combatants in the conflict.[126]

Some delegations remarked that it was sufficient to refer to the law of international armed conflict instead of referring to Article 2 of the 1949 Geneva Conventions. Moreover, it was stated that there should be no distinction between international and non-international armed conflicts.[127] In the revised negotiating text, paragraph 3 of Article 1-2 "Scope of application and definitions", read:

> This Convention shall not apply to United Nations and associated personnel participating in a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in respect of which any such personnel are engaged as combatants in an international armed conflict of the kind referred to in common article 2 of the Geneva Conventions of 12 August 1949.[128]

Some delegations felt that the paragraph should be broadened, thereby limiting the scope of the convention and another proposal read:

> The present 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 and in which United Nations personnel

125 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, paras. 77-79, UN Doc. A/AC.242/2 (1994).

126 Ibid., Annex, Section F.

127 Ibid., para. 169.

128 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 28, UN Doc. A/49/22 (Supp) (1994).

> may be involved as combatants against forces operating in circumstances where international humanitarian law is applicable.[129]

Another position was to broaden the provision even further to include all operations with a Chapter VII mandate.[130] It was, however, also suggested that the paragraph should be redrafted to clarify the position that the convention would be applicable to operations not involving military coercive action.

Assessment

The intention behind Article 2(2), is to draw a clear line between the application of the convention and the applicability of international humanitarian law. If UN forces were to be drawn into an armed conflict, acting as combatants, they could not at the same time be protected by the convention. Such a situation could perhaps have an eroding effect on the norms of international humanitarian law. The underlying principle of international humanitarian law is that anyone taking part in hostilities as a combatant should have the same kind of legal status, irrespective of whether that person was fighting for an aggressor state or a defending party to the conflict.[131]

Before examining this issue further, it should be noted that both the convention and international humanitarian law might protect UN forces acting in the *area* of a continuing armed conflict. The warring parties must abide by the laws of war and treat UN forces accordingly. The purpose of Article 2(2), is to regulate the situation when UN forces become *part* of an armed conflict. The convention does not restrict the protection UN and associated personnel are entitled to under international humanitarian law. See, for instance, Article 8 of the ICC statute, according to which it is a war crime to attack such personnel when they enjoy protection as civilians under international humanitarian law.[132] Civilian personnel lose their protection under the *convention* once military personnel are engaged as combatants in an international armed conflict. Their protected status according to international humanitarian law, however, would not change. There seems to have been some confusion on this in the Secretary-General's report. Arguing for dispensing with the contractual link between humanitarian NGOs and the UN it is stated in Note 5 of the Report: "In conditioning the protection to

129 Ibid., Annex 1, para. 12.

130 Ibid., para. 11.

131 See Christopher Greenwood, Historical Development and Legal Basis, in *The Handbook of Humanitarian Law in Armed Conflicts,* 1, 8 (Dieter, Fleck et al, eds., 1995).

132 See Dörmann, however, who notes the linkage between the general rules stipulated under the ICC statute with regard to crimes against personnel in peacekeeping missions and Article 2(2) of the Safety Convention. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court. Sources and Commentary*, 158-159 (2003).

humanitarian non-governmental organizations on an agreement with the United Nations, the Convention has, in fact, limited the protection to which they are entitled under international humanitarian law in situations of armed conflict."[133] The Report refers, as support for this view to Article 71 of Additional Protocol I to the Geneva Conventions and Article 8 of the Statute of the ICC. The agreement with the UN makes the protection conditional under the convention and in this respect bears no relationship to international humanitarian law.

Military forces acting on behalf of the UN enjoy protection according to the convention, but the authors of the convention realised that this would not be possible to retain when such forces were acting as combatants to an armed conflict. The result, however, begs a few questions. The paragraph consists of a cumulative list of conditions. When these are fulfilled, the convention becomes inoperative. One condition is that it must be an enforcement action authorised by the Security Council under Chapter VII of the UN Charter. With regard to compromise-solution "authority and control" defining a UN operation, it is surprising that Article 2(2) refers to a UN operation "authorised" by the Security Council. Siekmann finds that this inconsistency in terminology adds to the confusion of the precise meaning of a UN operation and that it suggests that only operations undertaken by states on behalf of the UN would be excluded, and not those conducted by the UN.[134]

Shraga identifies the same problem, suggesting that this might imply that only operations *authorised* by the UN, but conducted under another organisation's command and control, would be excepted from the convention's scope of application. That would, however, create a limited exception since the only way those kinds of operation would come under the convention's regime at all would be if the personnel concerned were *associated* with a UN operation. This interpretation does not seem to be supported by the negotiations and creates unnecessary ambiguity concerning the application of the convention.[135]

Regarding the condition that an operation must be authorised under *Chapter VII* of the UN Charter has been explained by Steven J. Lepper, a member of the United States Delegation to the United Nations Ad Hoc Conference on the Protection of United Nations Personnel, as being "merely a reflection of the fact

133 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, 9 note 5, UN Doc. A/55/637 (2000).

134 Siekmann, The Convention on the Safety of United Nations and Associated Personnel, 321. For a detailed discussion on the relationship between the notion "authority and control" and "authority" see 321-322.

135 Daphna Shraga, The Applicability of International Humanitarian Law to United Nations Operations, in *Blue Helmets: Policemen or Combatants* 17, 30 (Claude Emanuelli, ed., 1997).

that only such operations are likely to involve UN forces as combatants in international armed conflicts".[136]

This is certainly true. Use of force beyond the concept of self-defence in a Chapter VI operation would probably violate the orders of the Force Commander as well as the mandate of the operation. Excessive use of force by military personnel of a peace operation under *such* circumstances would arguably not make the convention inoperative. Acts, otherwise being criminalised under the convention, could therefore be justified as self-defence against excessive use of force by the peace operation military personnel concerned. This will not, however, mean that military forces in a Chapter VI operation could never be involved in an armed conflict.

The moment at which some of the personnel concerned became engaged as combatants, all of the personnel would lose their protected status, according to the convention. Another solution would have been to state that in relation to civilian personnel, the convention would continue to apply but relevant provisions of international humanitarian law would take precedence over the convention. A tentative proposal in this respect could be that *in situations governed by international humanitarian law, the convention continues to apply in relation to UN and associated personnel not engaged as combatants in the armed conflict.*

The convention's "all-or-nothing" approach could have strange effects if small numbers of a large UN force were engaged as combatants in a remote part of the UN force's area of operation. Another issue not properly dealt with is whether the UN and associated personnel could return to the convention's protection at the end of hostilities. A UN operation may be conducted over several years and it is possible that the situation on the ground could change considerably in character.

Another of the cumulative conditions is that the law of international armed conflict should apply to the situation. The specific reference to the law of *international* armed conflict implies that there exist situations where UN forces could take a direct part in hostilities and still be protected by the convention. Since the convention specifically refers to the law of international armed conflict, it appears to apply in armed conflicts of a non-international character.[137] Such a situation might arguably appear when UN forces act against non-state entities. During the negotiations it was suggested that international humanitarian law would apply to situations where UN military personnel "were engaged in combat with organised armed forces having an identifiable command structure, carrying arms openly

136 See Lepper, 398.

137 See Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 568. She finds that this inconsistency seems unclear and that there are no obvious reasons why this situation should be protected by the Convention.

and controlling part of the territory of the host State".[138] It would imply a criterion comparable to the "threshold-requirement" in Additional Protocol II to the Geneva Conventions (AP II). It would thus have created an "overlap" between the Safety Convention and international humanitarian law in non-international armed conflicts in which the opposing party would not have fulfilled the abovementioned conditions based upon the AP II. In the current text the "overlap" between the two regimes is even greater. The Safety Convention continues to apply to all cases of armed conflict not of an international character.[139] Should this be regarded as a mistake on the part of the drafters, or is it intentionally crafted in order to enhance the protection of personnel? The US delegation, up to this point very conscious of the importance of separating the regimes, argued for an "overlap" with regard to non-international armed conflicts. Its position was influenced by the tragic events enacted in Somalia and the captured helicopter pilot Durant. The US delegation regarded this overlapping "as a necessary exception to that general rule".[140]

The Secretary-General noted in his report, of 2000, that the "combatant-exception" in the convention "gives rise to the suggestion that enforcement actions carried out in situations of internal armed conflict (UNOSOM II type of operations), are included within the scope of the Convention and subject to its protective regime."[141] He states in this regard that the distinction between the two mutually exclusive regimes will eventually be settled in practice. The Secretary-General concluded, however, that it was not the nature or character of the conflict that should determine whether the convention or the international humanitarian law applied but rather "in any type of conflict, members of United Nations peacekeeping operations are actively engaged therein as combatants, or are otherwise entitled to the protection given to civilians under the international law of armed conflict".[142] His report clearly supported an interpretation that the regime of the Safety Convention and that of international humanitarian law are mutually exclusive. However, this presumption is only partly true. With civil-

138 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex 1, para. 13 UN Doc. A/49/22 (Supp) (1994).

139 The following discussion is based upon the assumption that involvement of UN forces may not *per se* make an armed conflict an international one.

140 Lepper, 395. In non-international armed conflicts, the Geneva Convention on the treatment of prisoners of war does not apply and if UN military personnel are engaged as combatants in an armed conflict (without the current "overlap") neither would the Safety Convention. In such situations only Common Article 3 to the four Geneva Conventions applies or possibly Additional Protocol II.

141 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, 9 note 3, UN Doc. A/55/637 (2000).

142 Ibid.

ians, the regime of the Safety Convention hardly contradicts the protection provided to them under international humanitarian law. The regime of the Safety Convention and that of international humanitarian law cannot in this regard be regarded as being mutually exclusive. It should also be noted that the Secretary-General appears to add a condition of being "actively" engaged as a combatant for the international humanitarian law to be applicable.[143]

Walter Gary Sharp, severely critical of the convention, has argued *de lege ferenda* that UN forces should also have privileges and immunities when engaged as combatants in an armed conflict. Since they acted on behalf of the international community, they should also enjoy special protection in such situations. He therefore suggests that the "combatant-exception" in the convention should be deleted. In addition, he finds that while a single attack against UN and associated personnel is a criminal act, a massive attack leading to an armed response, of such intensity that the UN forces concerned would be engaged as combatants, would avoid illegality. He concludes that the convention "encourages would-be attackers to ensure the legality of their actions by increasing the size and intensity of their attack".[144] These views are criticised by Greenwood.[145] It is a common understanding within the international community that the principle of equal application is a core feature of the laws of armed conflict. This principle also has pragmatic implications. Everyone who is constrained by the law should also benefit from the law.[146] Greenwood concludes that to "depart from that principle would be likely to undermine respect for the law".[147] Against the background of the NATO air strikes in BiH, Greenwood finds, however, that a higher degree of force may be tolerated in situations involving UN forces before the law of armed conflict becomes applicable.

However, it should be noted that in the context of a non-international armed conflict, states have not given up their right to punish rebels according to national criminal law. Although both parties are under a duty to treat those

143 It is not a condition for being a combatant to have to take an active part in hostilities. However, it should be noted the protection afforded civilians under Additional Protocol I (AP I) is based upon the condition that they do not "take a direct part in hostilities." Article 51(3) of AP I.

144 Walter Gary Sharp, Sr., *Jus Paciarii, Emergent Legal Paradigms for U. N. Peace Operations in the 21st Century*, 86 (1999). He further claims that, if applying "existing international law to United Nations forces without any modification allows members of organised armed forces to simply declare a state of hostilities, thereby invoking the application of the law of international armed conflict".

145 Greenwood, Protection of Peacekeepers, 204.

146 The oft-quoted statement in this respect (by Sir Hersch Lauterpacht) that "[i]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them", Hersch Lauterpacht, The Limits of the Operation of the Law of War, 30 *BYIL*, 206, 212 (1953).

147 Greenwood, Protection of Peacekeepers, 204-5.

not participating in the armed conflict humanely, it may still be a crime under national law to attack governmental forces.[148] There is, for instance, no mention of combatants under the legal instruments applicable in non-international armed conflicts. Rebels, and the like, can therefore not expect to be treated as combatants (who are not punished for their legitimate acts under international humanitarian law).[149] Even if rebel forces abide by the standards of humanitarian law they may still face prosecution under national law for attacking governmental forces.[150] It may therefore be argued that the military personnel of a peace operation, representing the international community, may have a similar status as that of governmental forces, vis-à-vis armed groups and rebels when involved in a non-international armed conflict. There is thus some support to be drawn from the analogy of the relationship between dissident forces and governmental forces. Against the background of these considerations, the overlap between the two regimes may in fact not be an exception to the general rule but rather an expression of *lex lata*. It should be noted that this interpretation of Article 2(2) is not supported by its negotiating history nor by the position taken by the Secretary-General in his report from 2000.

The fact that members of armed groups can be prosecuted under the Safety Convention for attacking UN personnel, even if they are involved in an armed conflict, provides a higher level of protection than if the perpetrators of such attacks were to be immune from prosecution under the pretext that they had conducted a legitimate act of war. In practice, however, the aspect of how this is perceived may also need to be taken into account. There is perhaps a risk that rebel groups involved in an armed conflict with peace operation forces may be discouraged from complying with international humanitarian law if members of such groups were to be punished for acts, which, if taken in the context of an international armed conflict, would have been regarded legitimate acts of war.[151] An opponent involved in a non-international armed conflict would have no reason

148 James G. Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict, 85 *IRRC*, 313, 320 (2003).

149 Prisoner-of-war status was rejected militia members for acts of violence against members of the International Force for East Timor (INTERFET). Michael, J., Kelly, et al, Legal aspects of Australia's involvement in the International Force for East Timor, 841 *IRRC,* 101, 110-111 (2001).

150 According to *The Manual of the Law of Armed Conflict*, issued by the UK Ministry of Defence, members of dissident armed forces, unlike combatants in an international armed conflict, "remain liable to prosecution for offences under domestic law. These can include normal acts of combat – for example, a dissident combatant who kills or injures a member of the governmental forces may be prosecuted for murder or other offences against the person – and even membership of the dissident group". *The Manual of the Law of Armed Conflict*, 387-88 (2004).

151 Stewart, who advocates a single definition of armed conflict, maintains, with regard to prisoner-of-war status in internal armed conflicts, that "there is very little other

to capture soldiers of a peace operation, as prisoners of war, since the captors, according to the convention, would be obliged to release captives as soon as they had identified themselves. In a worst-case scenario this would in fact decrease the protection of UN soldiers. Why bother to capture if you must immediately release? In this respect it should also be noted that not only do current armed conflicts often involve both international and non-international elements, but the distinction between these two types of armed conflict is also becoming less clear in terms of applicable law.

A local court might be called upon to make those deliberations irrespective of the applicability of the convention. The formulation of the Safety Convention's scope of application may, however, have complicated the matter.

5.3.1.5 Proposed measures to expand the scope of the Convention and the new Optional Protocol

As requested by the Security Council, the Secretary-General submitted a report on the scope of legal protection of the convention in November, 2000. According to the report, the need for a declaration of exceptional risk should be dispensed with. The Secretary-General referred to the political and humanitarian operations in Afghanistan, Burundi and East and West Timor to illustrate the weaknesses of the convention. Despite the highly volatile environment for UN and associated personnel in these operations, the proper UN organs did not declare the existence of an exceptional risk. In fact, the existence of an exceptional risk had never been declared. With regard to the categories of personnel protected by the convention, the Secretary-General held that the scope of application of the convention had been in doubt with respect to personnel of NGOs and locally recruited personnel.[152]

Short-term measures

The proposal read:

(a) A procedure to initiate a "declaration" by the Security Council or the General Assembly;
(b) Designating the Secretary-General as the "certifying authority" for the purposes of attesting to the fact of a "declaration" or an "agreement", and to the status of any of the United Nations and associated personnel;

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incentive of insurgent groups to comply with the laws of war if they are not able to claim those privileges". Stewart, 347.

152 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, paras. 9-12 and 14, UN Doc. A/55/637 (2000).

(c) Incorporating the key provisions of the 1994 Convention in the status-of-forces or status of mission agreements concluded between the United Nations and States in whose territories peacekeeping operations are deployed.[153]

The Secretary-General should recommend to the Security Council or the General Assembly that a declaration of exceptional risk should be made whenever there are sufficient warnings of a deteriorating security situation for personnel. For example, where there is an escalation of conflict or warnings of immediate attacks. It is proposed that such a recommendation could be submitted at the time of establishment of an operation or at any time thereafter. UN humanitarian operations are regarded as being particularly difficult because they are not "established" under a specific mandate but rather in the field under "a standing statutory mandate".[154]

The need for a "certifying authority" is based upon the assumption that questions on the status of victims are likely to occur in relation to prosecution and extradition. The Secretary-General has the knowledge on the existence of necessary agreements for associated personnel and their content and whether a declaration of exceptional risk has been declared. It is, moreover, proposed that a certificate by the Secretary-General "should be accepted by State's authorities and jurisdictions as a proof of the facts attested therein".[155]

To incorporate the key provisions of the convention into future SOFAs or status of mission agreements (SOMAs) would make these applicable within the host nation notwithstanding the fact that the host state may not be a party to the convention.[156] The key provisions were identified as being the duty to prevent

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153 Ibid., para. 20.

154 Ibid., paras. 21-22.

155 Ibid., para. 23.

156 In his 2004 report on the Scope of Legal Protection under the Convention on the Safety Convention of United Nations and Associated Personnel, the Secretary-General reported, inter alia, on the practice of including key provisions of the Safety Convention into SOFAs and SOMAs. According to the Report, such provisions had been included in the agreement "between the United Nations and Member States, including the agreement with the Government of Lebanon regarding the status of military observers of the United Nations Truce Supervision Organization (UNTSO) of 2 July 2003; the agreement with the Government of Liberia concerning the status of the United Nations Mission in Liberia (UNMIL) of 13 October 2003; the agreements with the Government of Côte d'Ivoire on the status of the mission in Côte d'Ivoire (MINUCI) of 18 September 2003 and on the status of the United Nations Operation in Côte d'Ivoire of 29 June 2004 (ONOCI); the agreement with the Government of Haiti concerning the status of the United Nations Operation in Haiti (MINUSTAH) of 9 July 2004, and most recently, the agreement with the Government of Sudan concerning the activities of the United Nations Mission in Sudan of 5 August 2004". Report of the Secretary-General, Scope of legal

attacks on members of the operation, to make such attacks crimes in national law and the obligation to prosecute or extradite perpetrators.[157]

Long-term measures

The Secretary-General found the short-term measures to be of limited effect since they did not extend the scope of application of the convention to all UN operations and categories of personnel beyond those already covered. An Additional Protocol was suggested which would dispose of the requirement of a declaration of exceptional risk and the need for a formal agreement between humanitarian non-governmental organisations and the UN.[158]

The proposal by the Secretary-General to extend the application of the Convention to all operations read:

> The protective regime of the Convention shall extend to all United Nations operations or presences established in a host country pursuant to a standing or a specific mandate of a United Nations competent organ, and in respect of all United Nations and associated personnel participating in such United Nations operations and presences.[159]

The nature of the operation should not be decisive for the protection of personnel and the requirement for a "declaration" should be dispensed with. Whether there

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Protection under the Convention on the Safety Convention of United Nations and Associated Personnel, para. 4, UN Doc. A/59/226 (2004). In November 2005, key provisions had been included in agreements in the following operations and presences: United Nations operation in Burundi, UN Office in Timor-Leste, UN Assistance Mission for Iraq (UNAMI), and UNAMI activities in Jordan and Kuwait. In addition agreements in following operations were under negotiation: the activities of the UN Mission in Sudan (UNMIS) in Uganda and in Kenya, the activities of the UN Stabilization Mission in Haiti in the Dominican Republic, and the UN Integrated Office in Sierra Leone. The Secretary-General also sought to amend the SOFA between the UN and the Democratic Republic of the Congo in this respect. Sixth Committee, Summary record of the 8th meeting, paras. 57-58, UN Doc. A/C.6/60/SR.8 (2005).

157 Report of the Secretary-General, Scope of legal Protection under the Convention on the Safety Convention of United Nations and Associated Personnel, para. 24, UN Doc. A/59/226 (2004). See also in the same paragraph example of incorporating these provisions in a status-of-forces agreement. The effect of incorporating these key provisions, however, is limited by the fact that they only extend the protection to personnel covered by SOFAs or SOMAs. The Secretary-General therefore suggested that the key provisions of the convention should also be incorporated in host country agreements concluded in operations of a non-peacekeeping character. The nature of such an agreement, however, would set the limits of applicability of the convention's key provisions. Ibid., paras. 25-26.

158 Ibid., para. 27.

159 Ibid., para. 30.

is a risky or dangerous environment should not be a condition for the applicability of the convention.[160]

As an alternative measure, if it was decided to retain the requirement of a declaration of exceptional risk, it was suggested that in addition to the Security Council and the General Assembly, the Secretary-General should be competent to declare, for the purposes of the convention, that there existed an exceptional risk to the safety of personnel.[161]

The Secretary-General also suggested that the requirement of a contractual link between humanitarian non-governmental organisations and the UN, as stipulated in Article 1 (b) (iii) of the Convention, should be dispensed with.A new provision was thus suggested:

> The protective regime of the Convention shall extend to all persons deployed by intergovernmental, non-governmental and other agencies engaged in a humanitarian relief operation [in the United Nations area of operation] in an independent, neutral, impartial and non-discriminatory manner.[162]

While agreements with humanitarian organisations will still be of importance for both parties, it should not, according to the Secretary-General, be a condition for the application of the convention for the personnel of such organisations.

The Ad Hoc Committee 2002 had before it the report of the Secretary-General. There was a general agreement that the Secretary-General already had the authority to initiate the proposed short-term measures and that no formal action was required by the Ad-Hoc Committee.[163] On the proposal to initiate a declaration of exceptional risk, there was a suggestion to link that to the categorisation of the different phases of security risk for UN personnel, used by the UN Security Coordinator. However, the political aspects of a declaration of exceptional risk were however stressed. The fact that it could negatively affect the independent work of the Security Coordinator in identifying when and in what circumstances UN and associated personnel were put at risk, was also emphasised.[164]

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160 Ibid., para. 29.

161 Ibid., para. 31.

162 Ibid., para. 33.

163 See UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, paras. 10, 22, 33, UN Doc. A/57/52 (Supp) (2002). With regard to the proposals to incorporate key provisions from the Safety Convention into SOFAs and SOMAs and to devise a procedure to initiate a declaration of exceptional risk, some delegations expressed concern that the Secretary-General had not already exercised that authority. Ibid., paras. 12, 22.

164 Ibid., para. 25.

The main concern of delegations on designating the Secretary-General as a certifying authority, centred on the effects of such a certificate. It was stressed that a certificate could not have binding effects on national courts and, consequently, it was for national courts to determine its legal value in a particular case. It was, moreover, emphasised that it should be limited to questions of fact and not of law.[165] The proposal to incorporate key provisions of the convention into SOFAs, SOMAs and host country agreements found general acceptance, although it was held that the nature of the provisions to be incorporated should be taken under careful consideration.[166]

The suggestion to dispense with the requirement of a declaration of exceptional risk was largely supported. It was held by some delegations that this proposal addressed the main problem of the convention and should therefore be a focal point of the deliberations of the Ad Hoc Committee.[167] According to those delegations there should be no distinction between peacekeeping and non-peacekeeping operations. Irrespective of the level of risk, all UN personnel were entitled to equal protection.[168] Those delegations that were positive on adopting a protocol disposing of the "declaration-requirement" regarded the proposed text in paragraph 30 of the Secretary-General's report to be a sound starting point. In this respect it should be noted that according to the proposed text the convention should apply to all "United Nations and associated personnel *participating* in such United Nations operations and presences".[169] The term "participating" indicates a stricter requirement for associated personnel to fall under the regime of the convention than current conditions.

Other delegations disagreed that the requirement of declaration was an element of the crime but rather an element of the application of the treaty in a specific case. Those delegations also supported the distinction to be drawn between peacekeeping and non-peacekeeping because of the inherent characteristics of those operations. They were also of the opinion that the convention was balanced and incorporated the divergent views of states. A protocol extending the

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165 Ibid., paras. 35 and 36.

166 Ibid., para. 15. It was proposed to update the UN Model SOFA to incorporate also the key provisions in the Model Agreement. This could be of particular importance in cases of delay in the conclusion of a specific SOFA during which the Model Agreement could apply provisionally. Ibid., para. 19.

167 Ibid., para. 40.

168 Ibid. Some delegations held that the requirement of a declaration of exceptional risk must be removed since it "made a political assessment of the facts on the ground an element of the crime and in so doing politicised what should have been a question purely of criminal law." Ibid., para. 41.

169 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 30, UN Doc. A/55/637 (2000) (Emphasis added).

applicability of the convention could, in their view, have a negative affect on that balance.[170]

Delegations in general did not favour the alternative proposal, that the Secretary-General should have the competence to declare the existence of exceptional risk. This was mainly due to the feeling that such a role of the Secretary-General would give rise to other issues regarding competence between the different UN organs.[171]

While there was general agreement that the convention should protect the personnel of humanitarian NGOs working together with the UN and with some sort of association with it, the suggestion to dispense with the requirement of a contractual link altogether did not find sufficient support.[172] According to some delegations the link between NGOs and the UN need not necessarily be through a contractual link. Various forms of administrative or institutionalised links could also be acceptable but it was important that the link "should be clear and objectively observable".[173]

Other delegations opposed the proposal by the Secretary-General on the ground that the reference to "an independent, neutral, impartial and non-discriminatory manner" was a question of fact, and could be subject to different interpretations. It was, in this respect, also held that a dispensation of a contractual link with the UN would limit the host state's right to exercise its territorial jurisdiction over crimes committed by the personnel of humanitarian NGOs under Article 8 of the convention, which according to those delegations, provided certain privileges and immunities to the UN and associated personnel.[174]

At its second meeting, the Ad Hoc Committee had before it a proposal from New Zealand.[175] During the deliberations a slightly modified proposal was made by the EU[176] based upon the New Zealand proposal. A third proposal was

170 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, paras. 44-45, UN Doc. A/57/52 (Supp) (2002).

171 Ibid., para. 38.

172 Ibid., paras. 49-60.

173 Ibid., para. 52. Those delegations endorsed the view by the Secretary-General, according to paragraph 15 of his report, that "any contractual link or a treaty arrangement institutionalizing the cooperation between the United Nations and a non-governmental organization in support of a United Nations operation or in the implementation of the mandate, would meet the requirement of article 1 (b) (iii) of the Convention". Ibid.

174 Ibid., para. 57.

175 Proposal by New Zealand, UN Doc. A/AC.264/2003/DP.1 (2003).

176 For the parties to this Protocol, article 1 (c) of the Convention is replaced as follows: "United Nations operation" means any United Nations operation or presence established [in a host country] pursuant to a standing or specific mandate of a United Nations competent organ consistent with the Charter of the United Nations and conducted under United Nations authority and control. Proposal by Greece on

submitted by the delegation of Pakistan.[177] New Zealand had acted on the recommendation contained in the report[178] by the Secretary-General and drafted a protocol to be discussed by the Ad Hoc Committee with a view to removing the declaration of risk requirement and to apply the convention to all UN operations. The New Zealand proposal was largely based upon the recommendations of the Secretary-General.[179]

During the discussions no fewer than four positions emerged on alternative ways to proceed: i) to wait and see the effects of the short-term measures; ii) an optional protocol; iii) an amending protocol; and iv) a stand-alone agreement.

It became clear that not all states were prepared to discuss the details of a new protocol, or even a protocol as such, since they believed that the need for such a protocol had not as yet been properly evaluated. This position stood in stark contrast to the views of the Secretary-General as well as the instructions

Behalf of the European Union regarding the proposal by New Zealand in document A/AC.264/2003/DP.1, UN Doc. A/AC.264/2003/DP.3 (2003).

177 The Secretary-General, in consultation with the concerned States, should recommend to the Security Council or to the General Assembly that they make a declaration that an exceptional risk to the safety of the personnel participating in an operation exists in respect of every operation covered by article 1 (c) (ii) of the Convention on the Safety of United Nations and Associated personnel, at the time of its establishment. Subsequently, on the initiative of States whose personnel are participating in such an operation, the Secretary-General may make such a recommendation to the Security Council or the General Assembly, when considered necessary, if no declaration to that effect was made at the time of its establishment. Proposal by Pakistan, UN Doc. A/AC.264/2003/DP.2 (2003).

178 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, paras. 27-33, UN Doc. A/55/637 (2000).

179 Article 1 of the proposal, dealing with the Application of the Convention to UN operations, stated: "1. The Convention shall apply in respect of all United Nations and associated personnel, as defined in article 1 of the Convention, and to all United Nations operations or presences established in a host country pursuant to a standing or specific mandate of a United Nations competent organ consistent with the Charter of the United Nations and conducted under United Nations authority and control. 2. The provisions of this article shall, for Parties to the Protocol, replace article 1 (c) of the Convention." Article 2 of the proposal dealt with the relationship between this protocol and the convention. "The provisions of this Protocol and the Convention shall, for Parties to this Protocol, be interpreted and applied together as a single instrument. In the event of any inconsistency between this Protocol and the Convention, the provisions of this Protocol shall prevail." See New Zealand proposal, UN Doc. A/AC.264/2003/DP.1 Appendix on Draft Protocol to the Convention on the Safety of United Nations and Associated Personnel to provide for the automatic application of the Convention to all United Nations operations.

for the Ad Hoc Committee as outlined in paragraph 8 of the General Assembly resolution 57/28.[180]

The optional protocol was reflected in the proposal by New Zealand and the EU. An optional protocol would create two separate legal regimes where states could be parties to either the convention or to both the convention and the protocol. In the latter case the state parties would embrace further legal obligations upon themselves due to the enhancement of the scope of application of the new legal regime.

Some states were of the opinion that an *amending* protocol was necessary and would create a more unified legal regime. An amending protocol would, however, not avoid the creation of two separate legal regimes. That separation would still be present between those states being parties to the convention before the coming into effect of the amending protocol and those states being parties to the convention after the amending protocol had taken effect.

The United States proposed a so-called stand-alone protocol. The idea was that it would be possible to become a party to the new protocol without having to be a party to the convention. It was also suggested that in such a protocol it would also be possible to update provisions other than those dealing with the scope of application of the convention.[181]

The New Zealand proposal formed the basis, implicitly or explicitly, upon which the discussions on specific issues were based. The proposal referred to "all United Nations operations or presences". The term "presences" indicated something wider than "operations". In this regard paragraph 7 of the report of the Secretary-General (2000) was thought to be useful for the purpose of defining the meaning of the term. According to the report a UN operation referred to in Article 1 (c) (ii) of the convention is any other United Nations presence in a host country established by a United Nations competent organ – though not neces-

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180 Paragraph 8 of that Resolution reads: "Decides that the Ad Hoc Committee established under resolution 56/89 shall reconvene for one week from 24 to 28 March 2003, and shall continue the discussion on measures to enhance the existing protective legal regime for United Nations and associated personnel, including addressing the application of the Convention to all United Nations operations, taking into account the report of the Secretary-General and the discussions in the Ad Hoc Committee." GA Res. 57/28, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 57th Sess., UN Doc. A/RES/57/28 (2003). The Pakistan proposal would largely fall within the already proposed short-term measures. It did not amount to anything more than a suggestion that the Secretary-General should recommend the proper bodies to make the necessary declaration. What was new was that this was to be done at the outset of every established operation in Article 1 (c) (ii) or upon the initiative of states contributing personnel to a particular operation.

181 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 42, UN Doc. A/58/52 (Supp) (2003).

sarily the General Assembly or the Security Council – such as, United Nations political missions, "post-conflict, peace-building offices", and United Nations humanitarian, development and human rights presences.[182] It was also suggested that the term "operation" could be interpreted in a broad manner, to include the above-mentioned list. It did in fact represent what the Secretary-General had already done when he interpreted the UN *operation* in Article 1 (c) (ii). It is apparent that the Secretary-General was already of the opinion that they were now to be included in the term "operation", as it now stood in the convention – although in need of a declaration of an exceptional risk.

For the 2004 session the situation was somewhat different. The appalling attack upon the UN headquarters in Baghdad on 19 August 2003 underlined the need to respond with vigour to such onslaughts carried out with impunity on UN and associated personnel and to make it clear to perpetrators that such attacks would not be tolerated. The Secretary-General submitted a new report on the scope of legal protection under the Safety Convention in July, 2003, where among other things, he stated that the difficulties surrounding the need to issue a declaration of exceptional risk remained "the single most important limitation to the protective regime of the Convention".[183]

The Ad Hoc Committee during this session was entrusted with a mandate to *expand* the scope of legal protection under the convention.[184] A revised proposal from New Zealand, which took into account the concerns of delegations during previous sessions with the Ad Hoc Committee, functioned as a basis of discussion during the 2004 session.[185] The purpose of the New Zealand pro-

182 It was, however, held that this list was not exhaustive and in addition to it there was also mentioned "offices established by agencies, programmes and funds of the United Nations system". Ibid., para. 25. There was no agreement on the definition of "presences" and the point was made whether it was necessary for such a presence to be a field mission (whatever that might mean) or if it only required an affiliation with the UN. Ibid., para. 26.

183 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 27, UN Doc. A/58/187 (2003).

184 GA Res. 58/82, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, UN GAOR 58th Sess., para. 11, UN Doc. A/RES/58/82 (2003).

185 Article II of the revised proposal read: The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all United Nations operations established pursuant to a standing or specific mandate of a United nations competent organ consistent with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of delivering humanitarian, political or development assistance. A Party to this Protocol shall not be required to apply article X(1) [paragraph 1 of this article] of the Protocol in respect of any permanent United Nations office, such as headquarters of the Organisation or its specialised agencies, established in its territory under an agreement with the United Nations. On the relationship

posal was to expand the scope of application of the convention by a new definition of a "United Nations operation." It included operations that were regarded as being inherently risky and excluded permanent headquarters and offices. To avoid problems of a list of operations to be included in the new article, the definition of a UN operation was based upon its *purpose*. The proposal based the application of the convention upon the mandate of the operation, such as operations carried out for the purposes of "delivering humanitarian, political or development assistance".[186] It would therefore already be known at the outset of an operation whether or not it would fall under the protective regime of the convention.

The Ad Hoc Committee also had before it the report of the working group of the Sixth Committee which contained a proposal by Jordan[187] on a definition of a UN operation and a proposal by Costa Rica on the relationship between the Safety Convention and international humanitarian law.[188] The purpose of Jordan's proposal was also to expand the scope of application of the Safety Convention by disposing of the requirement of a risk declaration. Its proposal, however, was based upon the notion of "risk". The Safety Convention should be expanded only to cover personnel in operations where they were exposed to greater risks than those of normal situations. If the declaration of exceptional risk was dispensed with, the convention should only apply to operations where the personnel were exposed to a certain level of risk. In this respect the proposal followed the existing regime. Although the applicability of the convention, according to the Jordanian

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between the protocol and the convention, Article I read: This Protocol supplements the Convention on the Safety of United Nations and Associated personnel done at New York on 9 December 1994 (hereinafter referred to as "the Convention") and, as between the parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as a single instrument. Revised proposal for an instrument expanding the scope of legal protection under the 1994 Convention for the Safety of United Nations and Associated Personnel, UN Doc. A/AC.264/2004/DP.1 (2004).

186 Ibid.

187 "United Nations operation" means an operation or presence established pursuant to a standing or specific mandate of a competent organ of the United Nations consistent with the Charter of the United Nations and conducted under United Nations authority and control:
(a) Where the operation is for the purpose of maintaining or restoring international peace and security; (b) Where the operation is conducted in situations of armed conflict: (c) Where the host State does not or is unable to establish and exercise national jurisdiction over crimes against United Nations and associated personnel or take all appropriate measures to ensure the safety of such personnel; or (d) Where the United Nations operation is not conducted in a host State. UN General Assembly, Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Annex 1 B, UN Doc. A/C.6/58/L.16 (2003).

188 Proposal by Costa Rica, UN Doc. A/AC.264/2004/DP.2 and Corr.1 (2004).

proposal, did not depend upon the declaration being made, some authority was still needed to qualify a situation as one involving the necessary degree of risk.[189]

The New Zealand proposal, however, became the working document upon which the discussions on the definition of UN operations centred. There was general support for the New Zealand proposal, but some delegations were critical of the fact that it did not properly reflect the element of risk as being a significant condition for the application of the convention.

The reference in the New Zealand proposal to a "standing or specific" mandate was incorporated from the proposal by the Secretary-General in his report of 2000. According to the Secretariat, a UN operation would be established pursuant either to a standing or specific mandate. It was therefore generally agreed that these terms were not necessary in reaching a definition of a UN operation.[190] The New Zealand proposal differed from the proposed definition by the Secretary-General in the way that the range of operations to fall under the new definition was conditional upon the *purpose* of an operation. No such limitations existed in the text suggested by the Secretary-General.

The intention of the New Zealand proposal was clearly to create an optional protocol for those states already party to the convention. It was not possible for a state to become a party to the protocol if it was not already a party to the Safety Convention. For those states that were party to the convention and the protocol, the provisions of both instruments would, according to the 2003 proposal, "be interpreted and applied together as a single instrument". In the revised proposal

189 Jordan's proposal, however, would prove difficult to apply. Who should decide the existence of an armed conflict? This might prove to be a very complex assessment in an intrastate conflict. Furthermore, why should an armed conflict be the decisive criterion? The risk for personnel might in fact be just as grave in situations of internal upheaval where the criteria for qualifying as an armed conflict had at that stage not been met. Paragraph (c) dealt with situations where a host state was not capable of properly fulfilling its functions. It might in fact lack government institutions and in such case it could be questioned whether it qualified as a state. Again, it would be difficult to decide on situations of this kind when they were at hand. It should also be noted that the Safety Convention includes situations where a host state lacks the capability of effectively discharging its functions. According to Article 7(3) state parties shall co-operate in order to effectively implement the provisions of the Safety Convention. This obligation is particularly aimed at a situation where a host state is unable to fulfil its obligations as a state. Whatever criteria are used to define a UN operation, it would be difficult to predict those operations where the Safety Convention would apply. It should in this respect also be emphasised that the Safety Convention is in fact a law enforcement instrument that criminalises certain acts. The criterion of predictability is of special importance with regard to criminal law.

190 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 29, UN Doc. A/59/52 (Supp) (2004). There were also suggestions to the effect that the language structure of Article 1 (c) should not be repeated in a definition of a UN operation.

by New Zealand in 2004, it was explicitly stated that the protocol supplements to the Safety Convention and "shall be read and interpreted as a single instrument".

The draft articles governing the relationship between the protocol and the Safety Convention, in the New Zealand proposal, were based upon the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[191] Some delegations, however, emphasised the link between the substance and form and asserted that the final form of any instrument would be dependent on the agreement of the substantive issues.[192] During the 2004 session some interest still remained in the possibility of creating a stand-alone instrument, but no concrete proposals were made.

The Costa Rica proposal concerned the relationship between the Safety Convention and international humanitarian law. It read: "The Convention shall not apply to any United Nations operation in which any personnel are engaged as combatants against organized armed forces and to which the international law of armed conflict applies."[193]

According to Costa Rica, it was necessary "to clearly delineate the scope of application of the mutually exclusive regimes of international humanitarian law and the protective regime of the Convention".[194] The proposal aimed to meet the concern of the Secretary-General in his report that it should not be the nature of the conflict that decided the applicability of the Safety Convention, but rather

191 The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1589 UNTS 474. In the 2004 session one delegation took the view that the proposed expansion was in fact an amendment to the convention. In that regard several delegations made the point, which they had previously made during the 2002 meeting, that it was not an amendment but an optional protocol supplementing the Safety Convention, thereby keeping its integrity intact. UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 18, UN Doc. A/59/52 (Supp) (2004).

192 Ibid., para. 212.

193 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Annex 1 A, UN Doc. A/C.6/58/L.16 (2003). The proposal was triggered by the report of the Secretary-General where it was stated that the current formulation suggested that the Safety Convention was applicable in situations of non-international armed conflict (reference was made to UNOSOM II as a type of such an operation) where UN personnel participated in such armed conflict.

194 Ibid.

if, in any type of armed conflict, personnel were engaged as combatants or were entitled to protection as civilians under international humanitarian law.[195]

The Costa Rica delegation also presented a proposal to be inserted in an additional protocol to the Safety Convention. It read:

> The parties to this Protocol shall not apply the Convention in respect of any acts governed by international humanitarian law performed during an armed conflict and directed against any United Nations or associated personnel who are not entitled to the protection given to civilians under the international law of armed conflict.[196]

The representative of the ICRC was asked to address the committee on the relationship existing between international humanitarian law and the Safety Convention. He endorsed the position forwarded by the Costa Rican delegation, and the Secretary-General, that there might be situations of overlap between those two regimes.[197] According to the ICRC representative it was possible to distinguish between three situations: i) where only one of the regimes was applicable; ii) where both regimes were applicable and; iii) where neither of the two regimes were applicable. A clarification of the relation between these regimes would, however, strengthen the legal protection of the personnel in question.[198]

In October 2004 the Sixth Committee established a Working Group to continue the work on expanding the scope of legal protection under the Safety Convention. A Chairman's text was presented, which was a product "of intersessional informal consultations and bilateral contacts, building upon work accomplished during previous sessions".[199] The text was basically a combination of the proposals, in brackets, which were recommended to function as the basis of the work for the Ad Hoc Committee during the spring of 2005. Some progress on finding common ground, however, had been made with to the definition of "United Nations operations".[200]

195 Ibid.

196 Proposal by Costa Rica, UN Doc. A/AC.264/2004/DP.2 and Corr.1.

197 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 45, UN Doc. A/59/52 (Supp) (2004).

198 Ibid.

199 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 4, UN Doc. A/C.6/59/L.9 (2004).

200 See Article II, Application of the Convention to United Nations operations, "1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority

For the 2005 meeting, the Ad Hoc Committee had before it, *inter alia*, the report of the Working Group of the Sixth Committee,[201] the report of the Secretary-General on the scope of legal protection under the Safety Convention[202] and a proposal submitted for discussion by China, Japan, Jordan and New Zealand.[203]

In the joint proposal by the delegations of China, Japan, Jordan and New Zealand, the term 'peacebuilding', was introduced. It was to some extent defined in a new preambular paragraph III. The joint proposal also provided a possibility for host states to make a declaration to exclude the application of the protocol to operations delivering humanitarian assistance in case of natural disasters (Article II para. 3). The main argument was that such operations did not necessarily contain an element of risk.[204] This proposal raised a number of questions and several delegations expressed their concern.

The reasoning behind introducing the term 'peacebuilding' was, according to the sponsors of the proposal, "its flexibility and because such operations, by their very nature, contained an element of risk."[205] Although other delegations would have preferred the protocol to include all operations, irrespective of any element of risk, they "recognized that the term 'peacebuilding' had been introduced as a compromise and served to bridge the divergent views reflected in the different alternatives presented under article II of the Chairman's text."[206] While the term 'peacebuilding' is flexible there are certain drawbacks to use such a term in an instrument of a criminal law character. It was pointed out during negotiations that peacebuilding is an evolving concept and thus in need of a definition.[207] There were, for instance, conflicting views whether peacebuilding only included

and control for the [primary] purposes of Alternative A delivering humanitarian, political or development assistance. Alternative B delivering humanitarian, political or development assistance in armed conflict or post-conflict situations. Alternative C delivering emergency humanitarian, special political or development reconstruction assistance." Ibid., Annex I.

201 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/C.6/59/L.9 (2004).

202 Report of the Secretary-General, Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/59/226 (2004).

203 Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Proposal by China, Japan, Jordan and New Zealand for discussion, UN Doc. A/AC.264/2005/DP.1 (2005).

204 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 25, UN Doc. A/60/52 (Supp) (2005).

205 Ibid., para. 16.

206 Ibid., para. 17.

207 Ibid., para. 18.

post-conflict situations or if it also included in-conflict and post-conflict situations.[208] It was, however, remarked that this was not a new term. The *Agenda for Peace* and the proposal by the Secretary-General to create a Peacebuilding Commission was mentioned in this respect.[209] It should also be noted that the Secretary-General already had interpreted operations requiring a declaration of exceptional risk in the convention to include "peace-building offices".[210]

In the framework of the Sixth Committee it was finally possible to reach a compromise between the different positions. The need to finalise negotiations had also been stressed in the 2005 World Summit Outcome.[211] After the Working Group had presented a Revised Chairman's text to the Committee, informal consultations continued.[212] On 16 November the text of the Optional Protocol was introduced. A draft resolution was presented by the Sixth Committee and in December the Optional Protocol was adopted by the General Assembly.[213] It reads, in relevant parts:

> *The States Parties to this Protocol*,
>
> *Recalling* the terms of the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994,
>
> *Deeply concerned* over the continuing pattern of attacks against United Nations and associated personnel,
>
> *Recognizing* that United Nations operations conducted for the purposes of delivering humanitarian, political or development assistance in peacebuilding and of delivering emergency humanitarian assistance which entail particular

208 The discussions on the new types of operations concerned both the third preambular paragraph as well as Article II of the proposed protocol. It was argued that the term 'peacebuilding' would be clarified in the third preambular and that it therefore needed not to be defined in Article II of the protocol. Ibid., para. 23.

209 Ibid., para. 17 and 18.

210 Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 7, UN Doc. A/55/637 (2000).

211 GA Res. 60/1, World Summit Outcome, UN GAOR, 60th Sess., para. 167, UN Doc. A/RES/60/1 (2005).

212 Sixth Committee, Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 6, UN Doc. A/60/518 (2005). For the Revised Chairman's text, see Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nation and Associated Personnel, Annex I, UN Doc. A/C.6/60/L.4 (2005).

213 GA Res. 60/42, Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, UN GAOR, 60th Sess., UN Doc. A/RES/60/42 (2005).

risks for United Nations and associated personnel require the extension of the scope of legal protection under the Convention to such personnel,

Convinced of the need to have in place an effective regime to ensure that the perpetrators of attacks against United Nations and associated personnel engaged in United Nations operations are brought to justice,

Have agreed as follows:

Article I
Relationship
This Protocol supplements the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994 (hereinafter referred to as "the Convention"), and as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as a single instrument.

Article II
Application of the Convention to United Nations operations

1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (*c*) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of:
   (*a*) Delivering humanitarian, political or development assistance in peacebuilding, or
   (*b*) Delivering emergency humanitarian assistance.

2. Paragraph 1 does not apply to any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations.

3. A host State may make a declaration to the Secretary-General of the United Nations that it shall not apply the provisions of this Protocol with respect to an operation under article II (1) (*b*) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation.

5.3.1.6 Assessment

Before a more detailed assessment of the new protocol a few words need to be said about the proposed short-term measures.

The proposal to insert key provisions in status agreements with host nations is certainly not dependent upon "approval" of member states, but rather should be regarded as falling within the competence of the Secretary-General as the chief administrative officer of the organisation. As noted above, key provisions of the Safety Convention have in fact been included, for example, in the UNMISET operation. Regarding the other short-term measures (the Secretary-General as a *certifying authority* and *initiating* the declaration of an exceptional risk) proposed by the Secretary-General it would be within his power to do so, but as yet there appears to be no record of such practice.

The definition of the operations encompassed by the new protocol is mainly based on proposals being purpose-oriented or focusing on the notion of risk. The "risk-approach" is dependent upon the facts on the ground, which are inevitably subject to change in the course of an operation. There was already an element of common ground between the New Zealand and Jordan proposals (before the Ad Hoc Committee in 2004) in that they both included a risk criterion, although less explicit in the former proposal. The exclusion of permanent offices in the New Zealand proposal (and in the Optional Protocol) is evidence that only operations deemed inherently risky for personnel should be protected by the convention. The Russian delegation had previously remarked in the 2003 session that the intention behind an expanded scope of application could surely not be that all UN offices should be protected by the convention – as for instance, the UN Information Office in Moscow. While in principle there should be no objection to including such offices, the main thrust of the proposal to dispense with the declaration of risk-requirement was to include those personnel active in situations involving personal risk.[214]

The risk and purpose-approaches have coloured the discussions in the work developing a new protocol and it includes traces of both. The new operations protected by the protocol shall either be executed for the purpose of "delivering humanitarian, political or development assistance in peacebuilding" or "delivering emergency humanitarian assistance".

The term "peacebuilding" is not defined in the Convention even though there were suggestions to that effect.[215] In the plenary meeting of the General

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214 In this respect it is interesting to note the comment by the Secretariat during their briefing at the meeting with the Ad Hoc Committee (2003) that there was a difference between risk and vulnerability. Risk related to the situation on the ground while vulnerability related to personnel. The military component of a peace operation was often deployed in risky areas but was equipped to deal with that risk and thus was not vulnerable, while humanitarian workers were always vulnerable.

215 The text did in fact, even in October 2005, include, in brackets, text explaining peacebuilding as including pre-conflict, conflict, and post-conflict situations. Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nation and Associated Personnel, Annex I, UN Doc. A/C.6/60/L.4 (2005).

Assembly, during which the Optional Protocol was adopted without a vote, a number of delegations took the opportunity to explain their positions on the protocol.[216] According to one view, the term peacebuilding is not restricted to post-conflict situations.[217] Support for this position was sought *inter alia* in a statement of the President of the Security Council declaring that "peacebuilding is aimed at preventing the outbreak, the recurrence or continuation of armed conflict".[218] According to another view peacebuilding could only be interpreted as a post-conflict operation.[219] This position was supported by *inter alia* the following passage in the World Summit Outcome,

> Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.[220]

It was moreover apparent from the plenary meeting that some delegations still argued for the inclusion of an exceptional risk-criterion.[221] They referred in this respect to the preambular paragraph 3 of the Optional Protocol which reads

> *Recognizing* that United Nations operations conducted for the purposes of delivering humanitarian, political or development assistance in peacebuilding and of delivering emergency humanitarian assistance which entail particular risks for United Nations and associated personnel require the extension of the scope of legal protection under the Convention to such personnel,

An interpretation *e contrario* could thus mean that if such operations do *not* entail particular risks for the personnel, they would not qualify as peacebuilding or

216 UN GAOR, 60th Sess., 61st mtg., UN Doc. A/60/PV.61 (2005).

217 States advocating this view were the European Union including 25 states with 12 other states aligning themselves with EU position. Other delegations that spoke in favour of that position were Australia, New Zealand, Canada, Switzerland, and Jordan. Ibid.

218 Statement by the President of the Security Council, UN Doc. S/PRST/2001/5 (2001).

219 Support for this position was expressed by the delegations of Colombia, India, Indonesia, Cuba, Korea, Venezuela and Iran.

220 GA Res. 60/1, World Summit Outcome, UN GAOR, 60th Sess., para. 97, UN Doc. A/RES/60/1 (2005).

221 See the delegations of India, Venezuela, Iran, and possibly Cuba.

emergency assistance operations. This would, however, lead to a dependency on an authority deciding what kind of operations entail particular risks for the personnel, which is exactly the situation that the new protocol sought to rectify. There is moreover no reference to particular risks in the operative Article II paragraph 1. It does therefore seem to follow from logic that the new protocol does not include a criterion of particular risk.

It is true that the term 'peacebuilding' is an ambiguous term, especially from a criminal law perspective. It is not even clarified whether it only applies post-conflict, which some of the delegations believed, or if it also includes situations of pre-conflict and in-conflict character. This ambiguous term, however, seems to have been a necessary compromise. In contrast to the speedy process of creating the Safety Convention, the Optional Protocol has been discussed rather thoroughly. The bridging of the different views of a purpose-oriented approach and the one based on a notion of risk needed a common ground. The term 'peacebuilding' provided that necessary ground. It is also true that a lot of terminology in this area is ambiguous. The result is perhaps not optimal but probably the best compromise possible under the present circumstances. It should be noted, however, that the sponsors of this proposals saw it as a "compromise package", including the new paragraph 3, Article II.[222]

The suggestion that host states should be able to opt out of the protocol in case of natural disasters had not been discussed before the 2005 meeting of the Ad Hoc Committee. The compromise finally reached on an expanded scope of application included both the term 'peacebuilding' as well as the right of host states to declare the new protocol inapplicable in respect of operations conducted for the sole purpose of responding to natural disasters.

Several delegations were concerned over the possibility to declare the protocol inapplicable. It would contravene the whole idea of a protocol expanding the Convention's scope of application. They found it unreasonable and that it in fact could be perceived as an unfriendly act towards those organisations providing humanitarian assistance to a state struck by a natural disaster.[223] Other delegations believed that it reflected the situations in states where a stable social order existed and that personnel delivering humanitarian assistance would be adequately protected by domestic laws.[224]

222 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nation and Associated Personnel, Annex II para. 16, UN Doc. A/C.6/60/L.4 (2005).

223 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 29, UN Doc. A/60/52 (Supp) (2005).

224 Ibid., para. 32.

While it is not perfectly clear from the text of paragraph 3, it is beyond doubt that declarations of host states need "to be made subsequent to a natural disaster and prior to the deployment of [emergency humanitarian] assistance."[225]

It was also pointed out that since it is only the host state that may opt out there will be separate legal regimes applicable.[226] An act normally regarded as a crime under the Safety Convention, would not be regarded as such if committed in a state that has exercised its right to declare the convention inapplicable. However, if the perpetrator thereafter travels to another state party to the protocol, that state would still be under a duty to prosecute or extradite him/her.

Is this a problem? As the crimes under the Safety Convention most certainly are criminal acts under any national jurisdiction, the host state would still be duty-bound to prosecute the alleged perpetrator. The Safety Convention is primarily aimed to non-host states. All states are under an obligation to prosecute crimes within their jurisdiction. The Safety Convention therefore mainly creates duties for other states. It establishes a universal jurisdiction regime, of a compulsory character, for states parties which are primarily directed to those states which are not already required to prosecute perpetrators of such crimes, like host states, under general international law.

The obligations of the host state to not interfere with the official duties of protected personnel (Article 8) may, however, create some additional burden on host states. Article III of the Optional Protocol provides an interpretation of the Safety Convention's Article 8 and it will therefore be discussed together with that article under chapter 5.3.3.2.

The Safety Convention's scope of application has been extended for parties to the Optional Protocol to include a broader definition of United Nations operations. As the categories of operations has now been extended so will, naturally, the number of associated personnel. It means that not only will a wider group of humanitarian NGO personnel be included under the protective regime of the Convention but also a wider group of military personnel. It is surprising, however, that this has not been an issue for debate in the Ad Hoc Committee.

The question concerning the relationship between the convention and the international humanitarian law was introduced by Costa Rica during the 2003 session of the Ad Hoc Committee. The Costa Rica proposal was commendable in that it tried to rectify a situation that was based upon the notion that UN military personnel should be able to benefit both from the Safety Convention and international humanitarian law. However, Costa Rica did not allow for the fact that non-military personnel would largely retain their protection under international humanitarian law as civilians notwithstanding the fact that the UN operation's military personnel could no longer do so. The regimes were not necessarily mutually exclusive when it came to civilian personnel who were members of an

225 Ibid., para. 34.

226 Ibid., para. 35.

operation's civilian component. Room should also be made for the interpretation that military personnel of a peace operation may attain a status similar to that of governmental forces in relation to opposition forces.

The relationship between the Safety Convention and international humanitarian law has been examined above. Suffice to say, in respect of future developments, the relationship between the two regimes did not attract a similar interest among delegations as did other provisions on the convention's scope of application. This may partly be based upon a realisation that this issue was too complex to be dealt with properly in view of the fact that other, less complex, questions had yet to be resolved.

During the 2005 session of the Ad Hoc Committee, the Costa Rica delegation envisaged three procedural possibilities of a way forward: "(a) an amendment of the Convention; (b) an interpretative authoritative statement; and (c) an additional protocol, which would be elaborated in the context of an extended mandate of the Ad Hoc Committee."[227] There were, however, still some objections regarding the substance of the proposal by Costa Rica.[228] The ICRC observer representative noted that the situations of an overlap between the Safety Convention and IHL would increase in view of an expansion of the Convention's scope of legal protection.[229] The Ad Committee recommended that the work on an expanded scope of application of the Safety Convention would continue within the framework of a working group of the Sixth Committee.

The need to conclude an optional protocol during the sixtieth session, strongly emphasised in the World Summit Outcome, had the effect, however, that some questions including the one from Costa Rica, had to be left out of the process.[230] The questions raised in that proposal are therefore, to some extent, yet to be resolved.

5.3.2 Provisions on the Legal Status of Personnel

Articles 3-6 are elaborated upon similar provisions found in the UN Model SOFA. They deal with the rights and obligations of both UN and host/transit nations. Some of the provisions extend *duties* on UN and associated personnel, but it appears to have been a common view that there should be no link between

227 Ibid., para. 40.

228 Ibid., para. 45. Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Annex I B, UN Doc. A/C.6/59/L.9 (2004).

229 Ibid., para. 49.

230 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 7, UN Doc. A/C.6/60/L.4 (2005).

the applicability of the convention and the fulfilment of the duties of the personnel concerned.

Identification

> 1. The military and police components of a United Nations operation and their vehicles, vessels and aircraft shall bear distinctive identification. Other personnel, vehicles, vessels and aircraft involved in the United Nations operation shall be appropriately identified unless otherwise decided by the Secretary-General of the United Nations.
> 2. All United Nations and associated personnel shall carry appropriate identification documents.

This text was adopted as Article 3 of the convention. Paragraph 1 appears comprehensible. The military and police components and their transports are required to bear exterior markings. Other personnel and their vehicles and equipment are presumed to be appropriately identified, but the Secretary-General of the UN has the authority to decide otherwise. However, the text lends itself to different interpretations. It is surprising, in view of the effort put into the definition of the different categories of personnel, that these defined terms are not referred to in Article 3. The only distinction is between a) "military and police components of a United Nations operation" and b) "other personnel … involved in the United Nations operation". It is not entirely clear how this categorisation of personnel is related to the one defined in Article 1. Might the military personnel assigned by a government with the agreement of a competent organ of the UN (associated personnel) be considered to be components of a UN operation, or should they be regarded as other personnel involved in a UN operation? Is it possible to view officials and experts on mission, in their official capacity in the area of a UN operation, as being *involved* in the operation? Before dealing with these issues it would perhaps be fruitful to examine the significance of identification.

The provision on "Identification" went through considerable changes during the negotiations. One of the main issues was whether identification should be obligatory or at the discretion of the Secretary-General. Advocates for an identification-requirement argued that distinctive markings were necessary to ensure the protection of UN personnel. Identification, moreover, was found to be indispensable with regard to the criminal law provisions of the convention. Without identification of UN personnel, an alleged offender could not know of the protected status of a victim and thus might not have formed the intention of attacking *such* personnel. Proponents for a different approach, allowing more flexibility in identification of UN personnel, stated that the display of distinctive markings might, in certain situations, increase the risk to them.[231] With regard to the crim-

231 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations

inal law provisions they found that these did not depend upon whether or not protected personnel wore distinctive identification. It would be for the national court of the country concerned to judge the existence or absence of intent of an alleged offender in each specific case.[232]

It is clear from the preparatory works that the prevailing view among the delegations was that identification was not a prerequisite for the applicability of criminal law provisions.[233] There is, moreover, an established practice in UN peace operations for military and police personnel to wear UN markings together with their national uniform. The discussion on the requirement of identification therefore concerned only civilian personnel.[234] No particular markings are required. The only condition is that they must be distinctive. It appears to have been a particularly important issue to some delegations that there was no requirement to wear blue helmets and to paint vehicles white. According to those delegations "national military vehicles, in national livery, satisfied this general identification requirement".[235]

Although not clarified in the preparatory works, it seems to be a common understanding in the literature that the identification requirement for military and police components of a UN operation also included such components when

and Associated Personnel, para. 16, UN Doc. A/49/22 (Supp) (1994). Reference was made in this regard to the statement of the representative of the United Nations Security Coordinator. The fact that association with the UN could contribute to the risk of its personnel was addressed by the Secretary-General in his report on Security of UN operations (A/48/349). In paragraph 18 he states; "[w]hereas in the past personnel were assured protection by virtue of their association with the work of the United Nations, this is no longer the case. On the contrary, personnel are more and more often at risk because of such association. In addition, actions by the United Nations in one part of the globe can generate threats to United Nations personnel in another." See also Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 569.

232 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 17, UN Doc. A/49/22 (Supp) (1994).

233 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 62, UN Doc. A/AC.242/2 (1994). This view is supported by Bloom, 628, Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 570 and Lepper, 411.

234 Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 569. She refers to para. 37 of the UN Model SOFA, which states that "[m]ilitary members and the United Nations Civilian Police of the United Nations peace-keeping operation shall wear, while performing official duties, the national military or police uniform of the respective States with standard United Nations accoutrements".

235 See Lepper, 412 and references there.

they were categorised as associated personnel.[236] From the purpose of the provision it thus appears as a reasonable interpretation to make no distinction between United Nations personnel and associated personnel in this respect. Article 3, however, adds to the terminological inconsistencies of the convention. The phrase "military and police components of a United Nations operation" is clearly influenced by the definition of "United Nations personnel" in Article 1, paragraph (a) (i). Why military personnel categorised as "Associated personnel" should be regarded as members of a UN operation in this respect is difficult to understand. The other option is even harder to comprehend. Why should there be a requirement to bear "distinctive identification" for some military personnel and not for others?

Personnel not belonging to the military and police components of a UN operation shall be "appropriately identified" unless decided otherwise by the Secretary-General. They also need to be "involved in the United Nations operation". The term "involved" is not found in Article 1. The qualification of involvement in the operation therefore seems to exclude personnel defined in Article 1 (a) (ii) (other officials and experts on mission present in an official capacity in the area where a UN operation is conducted). This was also pointed out during the negotiations.[237]

All personnel covered by the convention "shall carry appropriate identification documents", but no particular document is specified.[238] Paragraph 2 of Article 3 should be read in conjunction with Article 8 of the Convention which stipulates a "[d]uty to release or return United Nations and associated personnel captured or detained". One of the key features of that provision is the establishment of the identification of the personnel.

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.

Article 4 is formulated in very general terms. It does not really add anything to the already existing rules in this area regarding personnel participating in UN operations. Its function is rather to establish a legal requirement to conclude a SOFA. There is, however, no legal sanction connected to this provision. In prac-

236 See e.g. Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 569-70, Lepper, 411-13.

237 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 22, UN Doc. A/49/22(Supp) (1994).

238 See the requirements in paras. 34-35 of the UN Model SOFA.

tice it will, at best, have an encouraging effect on future host nations being parties to the convention.[239]

In practice it has, on several occasions, proved difficult to conclude a SOFA with the host state. In situations where the government is not in effective control, or where there is no government authority at all, the demands of Article 4 that an agreement shall be concluded will be difficult to comply with. Those UN operations defined in Article 1 (c) (ii) are established for purposes other than maintaining or restoring international peace and security. For these kinds of operation it is not the practice of the UN to conclude a SOFA with the host nation.[240] For all of the above situations the applicability of Article 4 is questionable.[241]

The article went through certain changes during the negotiations. The final text, however, largely reflects the content of Security Council Resolution 868 (1993).[242] Article 4 does not seek to establish the nature of privileges and immunities that should apply for those personnel engaged in an operation. Nor does the provision address the issue of the legal status of an operation and the personnel during that time when no agreement on the status of the operation has been concluded. This raises the important question of jurisdiction over UN and associated personnel. To clarify the situation, the Canadian delegation, in the last minutes of the negotiations, proposed an additional provision to Article 4:

> In the absence of an agreement referred to in paragraph 1, the members of the military component of a United Nations operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offence which may be committed by them in the host State during the course of a United Nations operation.[243]

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239 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 25, UN Doc. A/49/22(Supp) (1994). See also Bloom, 628.

240 See Report of the Secretary-General, Security of United Nations operations, para. 24, UN Doc. A/48/349 – S/26358 (1993).

241 For these issues see also Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 571.

242 According to the resolution the Security Council "[d]etermines that, when considering the establishment of future United Nations operations authorised by the Council, the Security Council will require inter alia: (…) [t]hat an agreement on the status of the operation, and all its personnel, in the host country be negotiated expeditiously and should come into force as near as possible to the outset of the operation". SC Res. 868, UN SCOR, 3283rd mtg., para. 6 (C), UN Doc. S/RES/868 (1993).

243 According to Lepper it was an Informal Working Paper Submitted by Canada (unpublished document), Lepper, 415. It was the view of the United States that in a Chapter VII operation the sending state exercised exclusive jurisdiction. Ibid.

The proposed provision was not adopted. It was mainly due to lack of time at the end of the negotiations. Some delegations also regarded the proposal as "an attack on their sovereignty".[244] However, the view that sending states exercise exclusive criminal jurisdiction over their military forces in peace operations, even without an applicable SOFA, is well established. The proposed provision would merely have contributed to a clarification of the law in this respect.[245]

It was pointed out during the negotiations that the reference to all personnel "engaged" in an operation excluded categories of personnel not so defined in Article 1.[246] That valid remark did not influence the final text of the provision. It is thus difficult to understand what kind of personnel Article 4 purports to be included in the status agreement with the host nation. Why should "Associated personnel" not be included in a SOFA? To extend the security and safety arrangements undertaken by the host nation to also include "contractors, non-governmental organisations and their personnel who are engaged in United Nations operations" was particularly emphasised by the Secretary-General in his report on the security of UN operations.[247] As has been shown above, the current trend in peace operations is to include personnel assisting the operation in various ways in SOFAs. This practice mirrors the opinion of the Secretary-General, and the requirements of Article 4 therefore appear limited in those operations where it is possible to conclude a SOFA.

Transit

> A transit State shall facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State.

244 Ibid.

245 However, in a Canadian report on the tragic events in Somalia in 1993, where a Somali was tortured to death by Canadian forces, the question of jurisdiction was dealt with. According to the report, the Canadian forces were *clearly* subject to Canadian penal law, *probably* subject to the criminal law of Somalia and *possibly* subject to the law of war. James M. Simpson, 47 *Law Applicable to Canadian Forces in Somalia 1992/93 – a study prepared for the Commission of Inquiry into the deployment of Canadian Forces to Somalia*, (1997). The report concluded that even though the Somali courts were not in operation during the deployment of the Canadian forces it was possible that they still retained jurisdiction to try offences that contravened local laws during that time.

246 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 28, UN Doc. A/49/22(Supp) (1994). The only category of personnel, according to Article 1, "engaged in the operation" are those who fall under Article 1 (a) (i).

247 Report of the Secretary-General, Security of United Nations operations, para. 35, UN Doc. A/48/349 – S/26358 (1993). It is apparent that the Secretary-General also used the term "engaged". This should not be confused with the meaning of the term in the convention, which must be interpreted against the definitions used therein.

This text was adopted as Article 5 of the convention. The idea of emphasising the obligations of the transit state was introduced rather late in the negotiations. The original proposal from Austria read:

> Without prejudice to the privileges and immunities enjoyed by United Nations personnel or associated personnel under applicable international treaties, the transit State shall take appropriate steps to ensure the unimpeded transit of United Nations personnel and associated personnel and their equipment.[248]

A major concern seems to have been that through this provision obligations were imposed upon third parties. It was therefore suggested to replace "transit State" with "States Parties". This was met with objections; it would wrongly result in similar obligations of transit states and those of host states in Article 4. It was further remarked that the word "ensure" imposed a strong obligation on the transit state. It was suggested that the word "facilitate" should replace it. Other delegations believed, however, that "facilitate" would require the transit state to take positive steps and thus actually place an even greater burden on these states.[249] It has been argued that this obligation already existed under the UN Charter.[250] According to one writer Article 5 did not add much to the substance of the convention. It was mainly to acknowledge the important role of transit states in UN operations and may be seen as "an expression of gratitude to them".[251]

Each member of the UN has an obligation to accept and carry out decisions of the Security Council according to Article 25 of the UN Charter. It could be argued that it would entail an obligation to facilitate the transit of UN personnel and equipment. An operation not based upon a decision of the Security Council may, however, not so readily impose an obligation on transit states. However, as treaties cannot impose obligations on third states, the duties stipulated under Article 5 of the convention would only affect states parties that also function as transit states.

Respect for laws and regulations

> 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:

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248 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 31, UN Doc. A/49/22(Supp) (1994).

249 Ibid., paras., 33-34.

250 Bloom, 629. He moreover remarks that "facilitate" "is not a particularly onerous burden for transit states".

251 Lepper, 418.

(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.

The obligation to respect local laws and regulations, as formulated in Article 6, reflects the language used in the UN Model SOFA.[252] The words "[w]ithout prejudice" recognise that the duties authorised by their mandate may require the performance of operations not in conformity with local laws (for example, traffic regulations). The obligation, therefore, is to "respect" local laws and regulations. Personnel must show that a "breach" of the law was necessarily required by their duties. UN and associated personnel are also under an obligation to refrain from actions outside the scope of their mandate. Concern was expressed during the negotiations as to who should decide the outer limits of a mandate.[253]

The Secretary-General has a duty to take "all appropriate measures to ensure the observance of these obligations". This will not vest in him (or the UN) competence of jurisdiction over personnel. The exercise of jurisdiction is dependent on the privileges and immunities applicable to the UN and associated personnel, as stated in paragraph 1. During the negotiations an earlier version of the text read: "Without prejudice to their privileges and immunities …".[254] The text was criticised by some delegations on the ground that UN and associated personnel "enjoyed privileges and immunities to a very limited extent if at all".[255]

The failure of UN and associated personnel to comply with obligations would not affect the protection of personnel. An act that qualifies as a crime under the convention is not dependent upon whether or not the personnel have acted *ultra vires*.[256] The obligation for UN and associated personnel to also respect

252 Para. 6 of the UN Model SOFA.

253 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 42, UN Doc. A/49/22(Supp) (1994). The question is if a national judge were to interpret resolutions from the Security Council.

254 Ibid., para. 36.

255 Ibid., para. 38. The current text was then suggested.

256 Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 574. See also UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 40, UN Doc A/49/22 (Supp) (1994). Concern was there expressed "that a linkage might be established between the duty to observe those norms and the entitlement to the protection provided for by the future convention".

international norms and standards is stated in one of the saving clauses in Article 20.

5.3.3 Duty to Provide Protection

Compared with the debate on the scope of the convention, the core regulations were not subject to much deliberation. One reason for this, perhaps, is that they are in general based upon other conventions addressing similar questions, such as the IPP Convention.[257]

Duty to ensure the safety and security of personnel

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.
3. States Parties shall co-operate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

Article 7 may be viewed as the core provision of the convention. Paragraph 1 reflects the fundamental principle, found in the preamble to the Convention, that "attacks against, or mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed".[258] While paragraphs 2 and 3 are addressed directly to States Parties, paragraph 1 is formulated in a passive voice and can be interpreted to also include non-state actors. The reference above to the unacceptability of attacks against UN personnel "by whomsoever committed" supports such an interpretation. Individuals, armed groups or other types of non-state actors will in general not be considered as subjects of international law and as such they are formally not bound by international law. It is, however, incumbent on states to implement their international obligations into national laws. The obligation not to attack UN and associated personnel thus flows from the international norm and is expressed through national legislation binding upon individuals.

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257 A suggestion to draft an additional protocol to the IPP Convention did not find sufficient support in the working group. Sixth Committee 29th meeting, Summary Record of the 29th mtg, para. 3, UN Doc. A/C.6/48/SR.29 (1993).

258 Paragraph 2 of the preamble.

The responsibility of the states parties expressed in paragraph 2 reflects a special responsibility for host states. They are obligated to take all appropriate measures to protect personnel from those crimes set out in Article 9. The situation in Somalia in 1993, where the host government was not able to exercise its jurisdiction over persons responsible for attacks on UN and associated personnel, is the object of paragraph 3. The first version of the text was in fact based upon the language of Security Council Resolution 868 (1993).[259] According to Bourloyannis-Vrailas it is important that this principle is expressed in the convention but it would probably not "provide sufficient guidance in practice".[260] It entails, however, an obligation by states parties to co-operate in matters concerning the protection of UN and associated personnel. If taken seriously it may prove to be invaluable in the fight against impunity on the part of those responsible for criminal acts committed against protected personnel. This is even more so in situations where the host state lacks the capability to take the required measures. As there is no requirement for the host state to be a party to the Safety Convention, the provision provides states parties with an incentive to co-operate in order to punish perpetrators of those criminal acts stipulated in the convention, even when they are committed outside their own territories.

The Nordic countries introduced a proposal whereby non-state entities would be able to apply the provisions of the convention over territory where they exercised actual control. The proposal read:

> An authority exercising actual control over the territory in which a United Nations operation is conducted may undertake to apply the present Convention by means of a unilateral declaration addressed to the Depositary.
> [...]
> The deposit of such declaration shall not in any way affect the legal status of the entity or the territory it controls.[261]

The proposal, based upon Article 96(3) of Additional Protocol I to the 1949 Geneva Conventions, met with strong reservations by some delegations fearing that it would grant recognition to a non-state entity.[262]

259 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 93, UN Doc. A/AC.242/2 (1994).

260 Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 575. She exemplifies the legal issues involved in the extradition of an alleged offender from a state without a functioning government.

261 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex II Sec. W para. 4, UN Doc. A/49/22 (Supp) (1994).

262 Ibid., Annex I, para. 120.

5.3.3.1 Duty to release or return personnel captured or detained

This provision has been interpreted as providing the personnel with immunity from local jurisdiction. The validity of such an interpretation is, however, questioned in this work. Article 8 reads:

> 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 universally recognised standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

As has been shown above, a SOFA accords privileges and immunities for personnel participating in an operation, limiting *inter alia*, the right to exercise jurisdiction of the host state over such personnel. Against this background Article 8 was formulated in a peculiar way. It states that the UN and associated personnel, if detained, should be promptly released – if not provided otherwise in an applicable SOFA. According to the UN Model SOFA, host state authorities only have the right to detain personnel participating in an operation when so requested by the commander of the force or if "apprehended in the commission or attempted commission of a criminal offence".[263] However, if a person has been apprehended he or she shall be "delivered immediately" to the nearest representative of the UN operation.[264] If a SOFA is in place it does not seem that Article 8 adds anything much to the afforded protection other than what is already provided through the applicable SOFA.

So what in effect does this provision mean? The phrase "captured or detained" indicates that it is directed both to state organs as well as individuals. The provision was formulated in the passive voice and may thus encompass persons or groups involved in the kidnapping of the protected personnel. A key criterion is "in the course of the performance of their duties". At first sight it appears as if it is a statement of so-called "on-duty immunity". However, the negotiating history indicates that this was not the intention of the drafters.

The first version of this article, proposed by the US delegation, read: "States shall not detain United Nations personnel for acts taken in performance of an enforcement or a peace-keeping mission. If United Nations personnel engaged in such a mission are captured or detained, they shall be immediately released

263 UN Model SOFA, para. 42.

264 Ibid.

…"[265] In the revised negotiating draft the article contained the following text: "If United Nations personnel engaged in a United Nations operation are captured or detained, they shall be immediately released …"[266] In response to this proposal, it was pointed out that it should also apply to associated personnel. It was suggested that the phrase "for acts taken in performance of an enforcement or peace-keeping mission" should be inserted after the term "detained". Another proposal was to insert, instead of the above-suggested phrase, "for acts carried out in the course of a United Nations operation", after the term "detained".[267]

In the end, the reference "for acts taken in performance of/for acts carried out in the course of" was rejected for the current phrase "captured or detained in the course of the performance of their duties". The apparent difference is that a phrase indicating that the Safety Convention provides functional immunity for the personnel concerned was discarded for a phrase moving away from such an interpretation. From a *prima facie* reading of the text it seems that UN and associated personnel shall be released, promptly, only if they have been "captured or detained in the course of the performance of their duties". Would the obligation to release promptly be different if they were captured or detained when not performing their duties? Given the fact that suggestions to draft the article so as to provide functional immunity to such personnel was rejected there seem to be good reasons to interpret its meaning as only prohibiting *interference* with the work carried out by such personnel and not to providing immunity for acts performed in an official capacity. So long as they carried out their duties they could and should be allowed to work in peace.

The interpretation of Article 8 as one of dealing with non-interference with the functions of the UN operation is further sustained by its context. This interpretation is supported by the nature of the Safety Convention, that it is first and foremost a criminal law instrument. In that respect it has a lot in common with the IPP Convention. A contextual interpretation thus further strengthens the view that Article 8 does not provide immunity for UN and associated personnel.

It is, however, also necessary to understand the circumstances under which Article 8 developed. It was a US proposal and according to Lepper, the US delegate during the negotiations of the convention, the article was "a timely expression of international outrage against situations like Durant's capture and detention in Somalia and the routine capture of UNPROFOR troops in the

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265 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 73, UN Doc. A/AC.242/2 (1994).

266 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 66, UN Doc. A/49/22 (Supp) (1994).

267 Ibid. para. 67.

former Yugoslavia".[268] The US helicopter pilot Michael Durant was captured during the tragic events that occurred in Somalia on 3 October 1993 when 18 US troops were killed. According to Lepper, the US government's first reaction to Durant's capture, with the experiences of the recently-waged war against Iraq in mind, was to regard him as a prisoner of war. However, after analysing the position it was soon realised that major differences existed between the two situations.[269] The hostilities in Somalia could not be regarded as an international armed conflict, thus the law of international armed conflict did not apply – including the Geneva Convention on the treatment of prisoners of war. The incident should either be characterised as a non-international armed conflict, to which only common Article 3 to the four Geneva Conventions applied, or as just a series of criminal acts under international criminal law. The US, moreover, was reluctant to contribute to a legitimisation of the status of Durant's captors, which would send the wrong signals that it was lawful to capture soldiers on those kinds of mission. Prisoners of war would in fact be legitimately held for the duration of the conflict. While it was important to refer to the standards provided for prisoners of war for the treatment of Durant, the US government chose not to rely upon that status for the pilot's protection and release. The events provoked the important question of legal status and protection of personnel acting under a UN mandate. The purpose of Article 8 was to conform to the requirements of US policy, as stated in a Presidential Decision Directive of 11 May 1994 "to provide for the immediate release of personnel captured while performing UN peace operations".[270]

According to Bloom, also part of the US delegation during the negotiations on the convention, Article 8 ensures that personnel captured or detained shall be released immediately, in contrast to the proposition of being returned at the end of hostilities – a stipulation applicable to prisoners of war. The provision therefore limits the risk of a situation developing whereby a claim that soldiers should be treated in accordance with international humanitarian law standards is answered by the argument that soldiers should be regarded as being prisoners of war and would accordingly be released at the end of hostilities.[271]

Though it might be interpreted as an important statement against a lack of respect for UN and associated personnel with the growing tendency of detaining and kidnapping such personnel, an apparent feature of the article is that it does

268 Lepper, 425 (footnotes omitted).

269 Lepper, 362. For the following see Lepper, 362-363.

270 Ibid., 425. The Clinton Administration's Policy on Reforming Multilateral Peace Operations, Presidential Decision Directive 25, 33 ILM 795 (1994). Lepper notes that if the convention had been in force, with Somalia and the former Yugoslavia as parties to it, the capture and detention of personnel would have entailed state responsibility for the violation of the prohibition stipulated in Article 8. Ibid., 426.

271 Bloom, 629.

not *prohibit* detention of such protected personnel.[272] Unlawful detention is prohibited according to Article 9 of the convention.[273]

UN and associated personnel captured or detained shall, moreover, be "promptly released and returned to United Nations or other appropriate authorities". Could this statement be interpreted as meaning a prohibition on the prosecution of UN and associated personnel?[274] The question of jurisdiction over UN and associated personnel in the absence of a SOFA is not directly addressed in the convention. A proposal by the Russian Federation on this topic read: "Personnel participating in a United Nations operation are subject to the exclusive jurisdiction of their respective Member States with respect to any criminal offences which may be committed by them during the operation."[275]

The delegations were in general favour of the idea but its inclusion in the convention, as drafted, was rejected on three main grounds. First, the reference to "Member States" appeared unclear to some delegations. Secondly, it was feared that the provision implied that the personnel in question would be immune from the jurisdiction of the host state with regard to *any* offence committed in that state. Thirdly, it was pointed out that it was necessary that the domestic laws of a sending state authorised the state to exercise its jurisdiction for offences committed outside its territory. Some states did not possess this authority under their current domestic laws.[276]

5.3.3.2 Article 8 and SOFAs

During the work of the Ad Hoc Committee 2002-2005, some delegations voiced concern over the fact that Article 8 provided immunity for UN and associated personnel. The interpretation of Article 8, providing immunity from local jurisdiction, has in fact influenced the entire work carried out by the Ad Hoc Committee. At the very first session of the committee, Jordan's delegation

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272 It should be noted that the provision is formulated in a passive voice and may thus comprise persons or groups involved in the kidnapping of protected personnel. This is subject to the inherent difficulty of non-state actors to assume rights and obligations under international law.

273 To avoid future problems arising as to whether or not a host state's acts are lawful, Lepper argued that the article should be interpreted to comprise a prohibition on any detention or capture not authorised by a SOFA. He suggests that, in retrospect, the article should have included the phrase "United Nations or associated personnel shall not be captured or detained in the course of the performance of their duties. If they are and their identification has …". Lepper, 426.

274 Ibid., 428.

275 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex II Section L, UN Doc. A/49/22 (Supp) (1994).

276 Ibid., para. 69.

brought to the fore the application of Article 8 in relation to associated personnel and locally employed staff. In the 2004 session a number of delegations expressed hesitation over any proposed expansion of the convention's scope of application in view of the effect of Article 8. Jordan, Syria and Egypt were numbered among those delegations that most notably regarded Article 8 as an obstacle for expanding the convention's scope of application. Given that those delegations appeared to interpret Article 8 as providing immunity for personnel, it is perhaps not surprising that states with large UN missions present within their territory, hesitate at the idea of extending the application of the convention. The United Nations Relief and Works Agency for Palestine Refugees (UNRWA), which began operations on 1 May 1950, employs more than 24,000 staff in Jordan, Syria and elsewhere.[277]

In order to meet these fears, without denying the "immunity-interpretation", the New Zealand proposal offered an interpretation of Article 8 under the protocol, as follows:

> The duty of a State Party to the Convention under article 8 shall be without prejudice to the right of a host or transit State, where provided by any agreement concluded under article 4 of the Convention, to take lawful action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State.[278]

The proposal does not add anything more, but merely states the obvious that when host states, or transit states, are provided by a SOFA to exercise jurisdiction over UN and associated personnel they may, in fact, do so. There was general agreement on the point that there was a need to clarify the meaning of Article 8. It was emphasised, however, that an interpretation of Article 8 would relate to the new obligations states would assume under the additional protocol and

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277 UNRWA carry out direct relief and works programmes for Palestine Refugees. GA Res. 302 (IV) Assistance to Palestine Refugees, UN GAOR 4th Sess., UN Doc. A/RES/302 (IV) (1949). According to the agreement providing privileges and immunities to the personnel of UNRWA, locally employed personnel do not, in contrast to internationally recruited personnel, enjoy privileges and immunities under the General Convention. See Article I of the Agreement Between the Government of the Hashemite Kingdom of the Jordan and the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 14 March and 20 August 1951, 12 UNTS 280 (1952).

278 UN General Assembly, Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Proposal by New Zealand, Revised proposal for an instrument expanding the scope of legal protection under the 1994 Convention for the Safety of United Nations and Associated Personnel, UN Doc. A/AC.264/2004/DP.1 (2004).

would thus not amend Article 8 of the Safety Convention.[279] It was also suggested that an interpretation of Article 8 could be inserted in the report of the Ad Hoc Committee or in a General Assembly resolution. Realising the reluctance of some states to apply Article 8 to an extended number of local employees, it was suggested that the protocol might perhaps include a right of reservation to Article 8 in relation to nationals of a state party.[280]

Jordan proposed the following text of a new article relating to an expanded scope of application of the convention:

> 1. Notwithstanding articles 7, 8 and 9 of the Convention, where the provisions of the Convention are extended to a United Nations operation in accordance with article 1 (c), the host State or transit State may exercise national jurisdiction over any United Nations or associated personnel who violate the laws and regulations of that State, unless the host State or transit State is bound to refrain from doing so under other existing international obligations.
> 2. Any lawful action taken by the host or transit State in accordance with paragraph 1 above is not deemed to be a crime under the Convention or to prevent the discharge of the mandate of the United Nations operation.[281]

The main difference between the proposals of Jordan and New Zealand is that the former presumes that the host state possesses the right to exercise territorial jurisdiction over personnel unless being prevented from doing so according to existing international obligations. New Zealand's proposal closely follows the text of the convention (although the convention does not speak of jurisdiction) and presumes that the right of the host state to exercise jurisdiction is dependent upon a SOFA. While it is here argued that Article 8 does not concern jurisdiction, as such, nor immunity, it might affect the exercise of the executive arm of the host state government. In that respect Jordan's proposal could perhaps be regarded as being a restrictive interpretation of Article 8 of the convention. In a situation where there is no applicable SOFA, Article 8 of the convention provides personnel with a bar against interference from local authorities, which according to Jordan's proposal would be lost.[282] However, New Zealand's proposal appears

279 UN General Assembly, Report of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, para. 35, UN Doc. A/59/52 (Supp) (2004).

280 Ibid., para. 36.

281 Sixth Committee, Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, Annex I B, UN Doc. A/C.6/58/L.16 (2003).

282 It is also necessary take due account of evolving customary international law in this respect. The reference to "existing international obligations", in the Jordanian pro-

to amend Article 8, since it suggests that jurisdiction, as such, needs to be provided by a SOFA.

The references to "jurisdiction" and "immunity" in the proposals by Jordan and New Zealand illustrate the difficulties involved. These issues are generally dealt with in instruments of another character. It should also be remembered that the Safety Convention is an instrument directed against the notion of *impunity* on the part of those attacking UN and associated personnel. It has the character of a criminal law instrument the objective of which is to prosecute or extradite those responsible for attacks on protected personnel. The legal status of personnel, in the form of privileges and immunities, is accorded them through other means, such as the General Convention and SOFAs/SOMAs. In that respect the Safety Convention could be compared to the IPP Convention and its relationship to the Vienna Convention on Diplomatic Privileges and Immunities and the General Convention. There is, in fact, some overlap between the regimes of the Safety Convention and the IPP Convention.[283]

For the 2005 session of the Ad Hoc Committee a joint proposal by China, Japan, Jordan and New Zealand presented a new text to be included in the protocol as Article III. This text was later included, without changes, as Article III in the Optional Protocol. It adequately clarifies that article 8 does not provide the protected personnel with immunity from local jurisdiction. It states

> The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State, provided that such action is not in violation of any other international law obligation of the State Party.

It is basically a statement of clarification of what Article 8 already contains. The host state has "the right to take action in the exercise of its national jurisdiction" with regard to any protected personnel violating local laws and regulations "provided that such action is not in violation of any other international law obligation of the State Party."

The reference to "any other international law obligation" necessarily includes customary international law. As it has been argued in this work that basic SOFA-norms has acquired a customary law status, the reference to any international law

posal, without referring to specific instruments appears against this background as a comprehensive suggestion.

283 See Article 2 of the IPP Convention according to which an agent of an international governmental organisation is regarded as an "Internationally protected person" if he/she "is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, …".

obligation may be of importance when personnel deploys before the conclusion of a particular SOFA.

In operations of a later date Article 8 of the Safety Convention has been included in SOFAs, together with other key provisions of the convention, in a section entitled "Safety and security". The following discussion will apply the UNMISET SOFA as an example to illustrate this practice. Before continuing, it should be observed that the duty of the host nation to apply the Safety Convention's provisions is, according to this SOFA, limited to members of the operation. This is tantamount to *UN personnel* being accorded protection under the Safety Convention, largely leaving out *associated personnel*. As a SOFA generally applies only to those considered to be members of an operation, such a limitation should be expected. However, in SOFAs of a later date, and the UNMISET SOFA is no exception, contractors are also included. These would clearly qualify as associated personnel in relation to the Safety Convention. Against this background it appears somewhat strange that the duty of the host nation to apply the provisions of the Safety Convention does not extend also to this category of personnel. It could, however, be a result of the negotiations between the UN and the host nation.

Paragraph 49 of the UNMISET SOFA contains the text of Article 8 of the Safety Convention.[284] The "Safety and security" section, of which paragraph 49 is part, was inserted after the section on "Military police, arrest and transfer of custody, and mutual assistance" and before the section on "Jurisdiction". From the placement of these provisions in the SOFA, it appears as if the UN does not consider the text of paragraph 49 to concern questions of jurisdiction or immunity.

Does paragraph 49 add to the protection of personnel? Paragraph 45 states that the government concerned may take into custody members of UNMISET if *requested* by the Special Representative or if *apprehended* in the commission or attempted commission of a criminal offence. This appears to be the only instance in which a government *may* take a member of UNMISET into custody. As paragraph 49 does not prohibit detention of UNMISET personnel it must be assumed that the capture or detention of such personnel requires that the criteria of paragraph 45 be met. Do the terms "captured" and "detained" in paragraph 49 refer to something other than to "take into custody" as declared in paragraph 45? The term "captured" is presumably indicative of the fact that provision also addresses situations where non-state actors, such as the armed groups of Somalia in 1993, hold personnel in captivity. According to Black's Law Dictionary, "custody" is defined as "The care and control of a thing or person for inspection,

284 It reads: "If members of UNMISET 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."

preservation, or security."[285] The term "detention" is defined as "The act or fact of holding a person in custody".[286] There thus appears to be little, if any, difference between custody and detention.

According to paragraph 46 of the UNMISET SOFA, the government in question may make a preliminary interrogation but it must not delay the transfer of custody, which according to paragraph 45 (b) shall be immediate.[287] However, paragraph 49 stipulates an explicit prohibition on subjecting personnel to interrogation if they have been "captured or detained in the course of the performance of their duties." As it is arguably possible to commit a criminal offence while performing assigned duties (personnel with executive powers, military or police personnel,[288] might, for instance, use excessive force in the execution of their duties) the host government would be prevented from carrying out even a preliminary interrogation of members of the operation. It is certainly a limited contribution by the Safety Convention's Article 8 to the established SOFA provisions and one which appears to be difficult to uphold in practice.

A SOFA is a practical means of ensuring the efficient functioning of a peace operation. The protection of personnel constitutes an important functional aspect. In this light, it does not appear that paragraph 49 adds much to the protection of personnel. Rather it may confuse an already well-established practice dividing issues of custody and related questions between the host nation and the UN. The fact that it obliges the government concerned to treat personnel in accordance both with recognised standards of human rights and the principles and spirit of international humanitarian law, pending their release, does not seem to add substantively to the protection of personnel. Personnel enjoy a special protection under a SOFA. The government involved has a duty under customary international law to treat any person in accordance with recognised standards of human rights and the principles and spirit of international law. With regard to military personnel this is also stated in paragraph 6 of the SOFA.

The difficulty of including the text of Article 8 of the Safety Convention underlines the fact that it was drafted to address situations not governed by a SOFA. Article 8 must be read against the background of the UNOSOM operations where there was no government in place with which to conclude a SOFA. In situations where no agreement on the status of the personnel concerned has

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285 Black's Law Dictionary, 390 (Bryan A. Garner ed., 7th ed., 1999). Physical custody is defined as "Custody of a person (such an arrestee) whose freedom is directly controlled and limited." Ibid.

286 Ibid., 459. Investigative detention is defined thus: "The holding of a suspect without formal arrest during the investigation of the suspect's participation in a crime." Ibid.

287 They should be "turned over as quickly as possible". See Kim S. Carter, The legal basis of Canada's participation in United Nations operations, 1 *International Peacekeeping*, 116, 118 (1994).

288 In the UNMISET operation civilian police had executive powers.

been concluded with the host state, this provision is of particular importance. For some associated personnel the agreement with the UN may not necessarily provide them with a protected status. In these cases Article 8 enhances their protection. It is somewhat strange, considering the strong opposition against including personnel of NGOs, that this provision did not cause greater debate in that respect, during the negations of 1993-1994.

It has now, through the Optional Protocol, been properly clarified that Safety Convention does not as such provides immunity from local jurisdiction. Rather it should be regarded as a bar on interfering in the performance of the official duties of personnel.

Prevention of crimes against the personnel

> States Parties shall co-operate in the prevention of the crimes set out in article 9, particularly by:
> (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and
> (b) Exchanging information in accordance with their national law and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.

This provision (Article 11) is modelled on Article 4 of the IPP Convention and was subject to a very limited discussion. In view of its almost identical language with Article 4 of the IPP Convention, guidance may be sought in the practice of that convention. The dangers of copying an article from another convention, dealing with similar but other types of question, were, however, pointed out during the negotiations.[289] Article 11 concerns obligations on state parties to co-operate in order to prevent crimes, in particular to prevent their own territories from being used in the preparation or commission of crimes against protected personnel and by exchanging information to prevent such crimes from taking place.[290]

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289 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 107, UN Doc. A/AC.242/2 (1994).

290 Under Article 12 of the Safety Convention a state party in which territory a crime has been committed shall provide all states concerned with information regarding the crime and the identity of the offender if it has reason to believe that the offender is no longer in its territory. The obligation to communicate information refers to all states concerned, not only state parties. Every state is furthermore required to provide information concerning the victim as well as the circumstances of the crime that they may have whenever a crime has been committed against an internationally protected person, fully and promptly, to the state party of which the protected person exercised his functions.

Article 11 specifies the duties expressed in Article 7. It focuses on the prevention of future crimes against UN and associated personnel. Although states may take "all practicable measures" in the prevention of future crimes they may only do so within "their respective territories".

5.3.4 Individual Criminal Responsibility

The provisions making concrete the principle *aut dedere aut judicare* will be dealt with under this heading. The states parties to the convention are obligated to criminalise certain acts under domestic laws. They are also under a duty to pursue anyone suspected of committing such crimes and if there is sufficient evidence, to prosecute or to extradite such person or persons to a state having primary jurisdiction. Although the provisions dealt with under this heading are at the core of the convention, they were not the subject of much debate nor were they criticised during the work of the Ad Hoc Committee in its work during 2002-2005. The main reason for the limited discussions that occurred on these provisions is probably related to the fact that they were more or less copied from other conventions that included the *aut dedere aut judicare* mechanism. Against this background, it has been of less importance to examine each article separately. Provisions important for the bringing of suspected perpetrators to justice, including, for example, such things as communicating information on the identity of an alleged offender, are therefore examined as a whole.

Crimes committed against personnel

1. The intentional commission of:
   (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
   (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
   (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
   (d) An attempt to commit any such act; and
   (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organising or ordering others to commit such attack,

   shall be made by each State Party a crime under national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 9 is basically a reproduction of Article 2 of the IPP Convention and it met with little resistance. The negotiations mainly centred on the terms "intentional", "threat" and "complicity". Concerning the term "intentional" it was remarked by some delegations that it could be interpreted to require knowledge of the status of the victim. In this regard it was feared that a link would be established between Article 3 and Article 9. If so, it would imply that the UN and associated personnel were dependent on proper marking in order to achieve the entire protection of the convention.[291] Other delegations presented an opposite view, arguing for the retention of the term in question. In this regard the commentary of the International Law Commission (ILC) to what later became Article 2 of the IPP Convention was considered. According to the ILC the word "intentional" in the draft provision had been used:

> both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminate any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of subparagraphs (a) or (b), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party.[292]

According to Bourloyannis-Vrailas this interpretation appears to be applicable *mutatis mutandis* to Article 9 of the Safety Convention.[293] It was remarked that (without any examples given) "there were other ways" to establish the intent of the offender without the requirement of specific markings.[294] It should be remembered that Article 3 of the Safety Convention only obligates military and police personnel to wear distinctive identification. All personnel, however, are required to carry appropriate identification documents. As pointed out earlier, the con-

291 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 111, UN Doc. A/AC.242/2 (1994). It was further remarked that even with the deletion of the word "intentional" the crimes listed "were intentional in nature". Compare the discussion above on Article 3.

292 Report of the International Law Commission on the work of its 24th session, 2 May – 7 July (1972), in *Yearbook of the International Law Commission*, II 219, 316 (1972). The content of subparagraphs (a) and (b) referred to by the ILC are equivalent to subparas. 1 (a) and (b) of Article 9 of the Safety Convention.

293 Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 578.

294 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 112, UN Doc. A/AC.242/2 (1994). In this regard it may be pointed out that the internationally protected persons covered by the IPP Convention do not in general wear emblems or insignia showing their status as a protected person.

vention's protection is not conditional upon proper identification. It will, however, serve as an important part in establishing intent on the part of an offender. Bourloyannis-Vrailas also draws attention to the fact that the term "intentional" excludes acts of negligence from the convention's regime.[295]

The inclusion of the word "threat" generated some discussion. It was remarked that under most extradition treaties the crime under consideration must be of a certain gravity to qualify as extraditable. It was therefore suggested to modify it to "grave threat".[296] Other delegations emphasised the fact that the concept of threat was found in all anti-terrorist conventions. It would be at the discretion of the prosecutor to decide on the degree of gravity of an offence as to whether it qualified as extraditable.[297]

The criminal act of participation in an attack by "organising or ordering others" is not covered in the IPP Convention. It is an innovation recognising the differences in nature between these two conventions, and takes account of the fact that in the military context political or military superiors may be the instigators of attacks.[298]

Under the UNMISET SOFA, the host government shall establish the acts stipulated in Article 9 of the Safety Convention as crimes under national law when committed against a member of UNMISET.[299]

Measures aiming to bring offenders to justice

Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:
   (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State.
2. A State Party may also establish its jurisdiction over any such crime when it is committed:
   (a) By a stateless person whose habitual residence is in that State; or
   (b) With respect to a national of that State; or

295 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 347.

296 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 78, UN Doc. A/49/22 (Supp) (1994).

297 Ibid.

298 Bloom, 626.

299 UNMISET SOFA para. 50. There is no reference to the "intentional commission" of such crimes.

(c) In an attempt to compel that State to do or to abstain from doing any act.

3. Any State Party, which has established jurisdiction as mentioned in paragraph 2 should notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.
4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.
5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Suffice it to say that paragraphs 1 and 2 of Article 10 reflect generally recognised bases of jurisdiction in international law.[300] Paragraph 4 states there is a legal requirement to prosecute an alleged offender present in the territory of a state that is not extraditing such person to any state that has established its jurisdiction in accordance with previous provisions. Paragraph 4 thus balances the optional character of paragraph 2. Bourloyannis-Vrailas points out that the permissiveness of paragraph 2 "does not affect the crucial obligation of a State which does not have primary jurisdiction to establish its jurisdiction over a case when it does not extradite the alleged offender".[301]

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300 See Chapter 2.1. Article 10 is based upon Article 3 of the IPP Convention. Although the States Parties are required to establish jurisdiction in accordance with paragraph 1, these principles are of such fundamental character that they attracted only limited discussion. Paragraph 2 was subject to different opinions, especially with regard to the inclusion of the passive personality principle. In an earlier version it was combined with the phrase "if that State considers it appropriate" See UN General Assembly, Elaboration, Pursuant To Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing With the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Proposal by New Zealand and Ukraine, UN Doc. A/AC.242/L.2 and Corr. 1 (1994). The appropriateness of leaving jurisdiction to the discretion of the state was questioned and the suggestion was made to delete the phrase. It was, however, remarked that such a phrase is included in Article 5 of the International Convention against the Taking of Hostages (1979). UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, paras. 121-123, UN Doc. A/AC.242/2 (1994). The final outcome is a paragraph analogous to Article 6 paragraph 2 of the IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 27 ILM 668.

301 Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 579.

Paragraph 4 has its counterpart in Article 3 paragraph 2 in the IPP Convention. With regard to that provision Wood has identified the possible problem of exercising jurisdiction over an alleged offender who is a national of a state not party to the IPP Convention.[302] Wood argues that it is possible that the degree of state acceptance expressed in the consensus adoption of the General Assembly resolution, to which the IPP Convention was annexed, may establish jurisdiction over the crimes in that convention even in these types of case. According to Lepper, it would still be possible to hide in states not party to the convention, but alleged offenders would be prosecuted in states that were a party to the convention, irrespective of their nationality.[303] The duty of states to prosecute or extradite the perpetrators of crimes under the Safety Convention is not limited to nationals of states parties.[304]

The state in whose territory a crime under the convention has been committed, and where there is reason to believe that the alleged offender has fled from the territory, is under a duty to communicate relevant information on the crime committed as well as all available information regarding the identity of the alleged offender to the UN Secretary-General and the states concerned (Article 12). Any state party to the convention shall, moreover, fully and promptly report to the Secretary-General and to the states concerned any information regarding the victim and circumstances of the crime that they may have. The requirement to notify the Secretary-General and states concerned relates also, according to Article 13, to any measure taken to ensure prosecution or extradition of an alleged offender under its national law[305] as well as to the outcome of proceedings in the case of an alleged offender being prosecuted (Article 18). The expressions "states concerned" should probably be interpreted as, at the minimum, those states that

302 Michael Wood, The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 23 *ICLQ* 791, 809 (1974). See in respect discussion on IPP Convention in chapter 2.2 above.

303 Lepper, 463-464.

304 Under the UNMISET SOFA, the government shall establish its jurisdiction over the crimes incorporated from Article 9 of the Safety Convention "when the crime was committed in its territory and the alleged offender, other than a member of UNMISET, is present in its territory, unless it has extradited such person to the State of nationality of the offender, the State of his habitual residence if he is a stateless person, or the State of the nationality of the victim". UNMISET SOFA, para. 51.

305 This article is based upon Article 6 of the IPP Convention. The purpose of the notification requirement under that article is twofold: first to inform states involved in the search for the alleged offender that he is in custody and second to enable those states that have an interest of prosecution of the alleged offender to prepare for extradition request and prosecution. Louis M., Bloomfield and Gerald F., FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment. An Analysis of the UN Convention*, 94 (1975).

may claim jurisdiction under Article 10 of the convention.[306] These articles are in general based upon similar articles of the IPP Convention. The requirement to notify the Secretary-General, however, is not found in that convention and is a result of the role the UN plays in relation to the Safety Convention.[307]

Prosecution of alleged offenders

> The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

In Article 14, the principle of *aut dedere aut judicare* is clearly expressed. Furthermore, this article is modelled on the IPP Convention, in this case Article 7 of that convention. In the original proposal, as in the text of the IPP Convention, the last sentence of the current provision was not included. It was remarked during the negotiations that the purpose of this particular sentence was to make clear that, for the purposes of prosecution, it was not permitted to invoke the exception of a political act in relation to the crimes listed in Article 9.[308]

A proposal by the Nordic countries aimed to bring alleged offenders before an international criminal tribunal.[309] An addition to that effect was suggested to Article 14 (at that point Article 15).[310] It did not, however, find sufficient support. It was argued that it could have a discouraging affect on states wishing or contemplating becoming parties to the convention. It could be used as an excuse not to implement the convention's obligations until such tribunal had been instituted, and that the criminal tribunal being prepared would include crimes stipulated in

306 See Lepper, 450. He points out the incoherence that Article 12 refers to states concerned while Article 13 refers to "Other interested states". He finds it reasonable to interpret the latter to mean the same thing as "States concerned".

307 Lepper, 450-451.

308 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 2, UN Doc. A/AC.242/2 (1994). The article is based upon Article 8 of the 1979 International Convention against the Taking of Hostages 18 ILM 1456.

309 UN General Assembly, Elaboration, Pursuant to Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing with the Safety and Security of United Nations And Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Working document submitted by Denmark, Finland, Iceland, Norway and Sweden, para. 2 (6th element), UN Doc. A/AC.242/L.3 (1994).

310 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 133, UN Doc. A/AC.242/2 (1994).

the convention even though this was not expressly provided for in the convention.[311]

Extradition of alleged offenders

Extradition is often based upon a bilateral treaty between states. Article 15 of the Safety Convention refers to terms of extradition. Such provision is a common feature in the so-called "terrorist conventions".[312] The first three paragraphs in Article 15 deal with situations where crimes under Article 9 are not included in such a treaty; when a request comes from a state with which the requested state has no extradition treaty; and when states parties do not require an extradition treaty.[313] Paragraph 4 aims at facilitating extradition to states parties there referred to. What is apparent for these situations is that they are all conditional upon the discretion of the requested state.[314]

States parties are under a general obligation to co-operate in criminal matters. An example of such co-operation is "assistance in obtaining evidence" of interest for the proceedings (Article 16). Prosecution of alleged offenders outside the territory where the crime was committed may naturally be hampered by lack of sufficient evidence. Such a duty is therefore of the utmost importance in order

311 Ibid.

312 Article 15 is modelled on Article 8 of the IPP Convention, which in turn is modelled on Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105.

313 Article 15 reads: 1. To the extent that crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them. 2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State. 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognise those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State. 4. Each of those crimes shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of Article 10.

314 It was suggested to include a paragraph dealing with multiple extradition requests. Although it was favoured by some delegations it was not included. Other delegations felt that it was the requested state that should have the discretion to decide on such requests. UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 135, UN Doc. A/AC.242/2 (1994). It was remarked that the relatively new IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation did regulate this issue in Article 11(5). IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 27 ILM 668.

to give full effect to the mechanism aimed at ensuring that offenders in relation to the crimes set out in Article 9 are convicted. The obligation to assist in criminal matters, however, is at the discretion of the requested state as the law of that state "shall apply in all cases".[315]

Article 17 stipulates important safeguards on fair treatment of any person subject to investigations or proceedings regarding any of the crimes set out in Article 9. An alleged offender "shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings".[316]

5.3.5 Miscellaneous

In contrast to most *aut dedere aut judicare* instruments the Safety Convention includes a duty of states parties to disseminate the convention as widely as possible. Article 19 reads: "The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction." This provision is based upon similar rules found in the four Geneva Conventions and Additional Protocol I.[317] An earlier draft extended the requirement of dissemination to include the civilian population. Bourloyannis-Vrailas deplores the fact that it was not included in the final version. In cases of internal armed conflicts, where many of those fighting may previously not have received military training, such a duty upon states parties could have played an important role.[318]

The adoption of a set of saving clauses proved instrumental for the swift conclusion of the convention. It made it possible to recognise issues regarded as important for some delegations, but for the purpose of this convention it appeared to be superfluous for most delegations. The issues contained within Articles 20 and 21 should be acknowledged as being important questions, but in substance they "exist outside the scope of this convention".[319]

Saving clauses

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognised standards of human rights as contained in international instruments in relation to the protection of United Nations operations and

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315 Article 16(1) of the Safety Convention.

316 Article 17(1) of the Safety Convention.

317 Article 47 GC I, Article 48 GC II, Article 127 GC III, Article 144 GC IV, and Article 83 AP I.

318 Bourloyannis-Vrailas, 582.

319 See Lepper, 452.

United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

(b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

(c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

(d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or

(e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

The convention's Article 2(2) stipulates that a theoretical border exists between the applicability of this convention and international humanitarian law. This does not mean that IHL does not protect UN and associated personnel if they act in the area of an armed conflict while not being a party to it. They are also obligated to respect "international humanitarian law and universally recognised standards of human rights". As Emanuelli rightly points out, Article 20(a) suggests, notwithstanding Article 2(2), that UN and associated personnel assume duties under IHL.[320] The obligation to respect IHL appears to be a concession to the current "overlap" between the Safety Convention and IHL in non-international armed conflicts.

During the negotiations it was emphasised that there was no connection between the respect accorded to these legal regimes and the provisions of criminal law in the convention. The purpose being that the protection afforded by the convention should not be affected if the personnel belonging to the UN operation concerned did not respect those norms.[321] In that regard, it should be noted that any breach of such standards might give rise to the right of self-defence against UN and associated personnel. Force that is used legitimately in self-defence could not be a crime under the convention.

For several delegations the issue of consent-based operations and the safeguarding of the principle of state sovereignty were of particular importance. As it stands in the convention, the issue is acknowledged but it does not have the effect of restricting the scope of the convention. On the contrary, the reference

320 Claude Emanuelli, Humanitarian Assistance Personnel, in *Blue Helmets: Policemen or Combatants?,* 67, 76 (Claude Emanuelli ed., 1997).

321 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, para. 44, UN Doc. A/49/22 (Supp) (1994).

to the UN Charter recognises operations conducted under Chapter VII of the Charter.[322]

The original proposal[323] on the obligation to act in accordance with the mandate was questioned because of difficulties in interpreting the boundaries of the mandate. Who would be entitled to interpret the resolutions of the Security Council was another, and even more relevant, question. It was furthermore feared that a link could be established between the protection of the convention and the proposed obligation.[324] A duty to comply with the mandate, however, may be derived from Article 6 of the convention.

As for the right to withdraw personnel from a UN operation it already exists as such a right in the agreements between the UN and troop-contributing nations.[325]

Right of self-defence

> Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence.

In the joint proposal by New Zealand and the Ukraine an earlier version of this provision, adopted as Article 21 of the Convention, read: "Nothing in this Convention shall be construed so as to derogate from the right of United Nations personnel to act in self-defence in accordance with relevant rules of engagement."[326] It was pointed out that the purpose of introducing a reference to rules of engagement was to "set the limits to the exercise of the right of self-defence".[327] In this connection it was remarked that the article was intended exclusively to apply to military personnel.

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322 See also Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, 584.

323 UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, Annex II Section E, UN Doc. A/49/22 (Supp) (1994).

324 Ibid. para. 43.

325 The only requirement being to give "adequate prior notification to the Secretary-General". Report of the Secretary-General, Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, para. 26, UN Doc. A/46/185 (1991).

326 UN General Assembly, Elaboration, Pursuant To Paragraph 1 of General Assembly Resolution 48/37 of 9 December 1993, of an International Convention Dealing With the Safety and Security of United Nations and Associated Personnel, with Particular Reference to Responsibility for Attacks on Such Personnel, Proposal by New Zealand and Ukraine, Annex, UN Doc. A/AC.242/L.2 and Corr. 1 (1994).

327 UN General Assembly, Report of the Ad Hoc Committee on the Work Carried out During the Period from 28 March to 8 April 1994, para. 86, UN Doc. A/AC.242/2 (1994).

Notwithstanding the fact that this provision was intended to play a more prominent part in the convention, suggested as Article 7 rather than as a saving clause, there are two major differences between this proposal and the one finally agreed upon. Firstly, it is the reference to relevant rules-of-engagement. It was met with much resistance by several delegations. The concept of rules-of-engagement is basically one of policy guidelines, developed by the UN on a case-by-case basis for each operation, transformed into operational terms regulating the use of force by the soldiers. It is obvious that these guidelines must be in accordance with both national and international law. It was therefore found that the reference to rules-of-engagement did not have a place in the convention.[328]

Secondly, in the original proposal there was a reference to UN personnel only, not associated personnel. In the final version neither UN personnel nor associated personnel are referred to. This begs the question: to whom this article is addressed? The most obvious choice is the UN and associated personnel. The purpose of the convention is to enhance the protection of these groups of personnel. The article, however, may also be construed as being applicable to *individuals* subject to the use of force by members of a UN operation, such as alleged offenders in relation the crimes set out in Article 9. Taking the standpoint that the article applies, at least, to UN and associated personnel, it should be made clear that they, as other people, have a right of self-defence. However, an act, generally regarded as a crime under Article 9, could be justified as self-defence against a member of a UN operation who blatantly exceeded *his* right of self-defence.

Review meetings

The Safety Convention provides for the right of the Secretary-General to convene review meetings. Article 23 reads:

> At the request of one or more States Parties, and if approved by a majority of States Parties, the Secretary-General of the United Nations shall convene a meeting of the States Parties to review the implementation of the convention, and any problems encountered with regard to its application.

This is interesting in view of the meetings of the Ad Hoc Committee in 2002-2005. These meetings, however, are not considered to be review meetings as understood by Article 23. These meetings are not limited to states parties to the convention. In fact, many of the states being hesitant to widen the convention's scope of application are not yet party to it.

328 Ibid., para. 88.

5.4 Conclusions

The Safety Convention is without doubt an important instrument for the protection of personnel in peace operations. It draws on existing legal protection based upon a diversity of legal sources such as human rights law, state responsibility, privileges and immunities and the right of self-defence. The result is a comprehensive set of rules overcoming certain lacunas in international law for the protection of personnel participating in such operations. Nevertheless, the convention is not without deficiencies. The difficulties of defining the scope of application may in practice have undesired effects. This is a particular difficulty when one considers that the requirement of predictability is of fundamental importance to criminal law provisions. The fact that it was so rapidly concluded might well have contributed to its sometimes confusing results and terminological inconsistencies. It is possible that in the end speed was preferred to a more thoroughly worked out instrument.

The single most important contribution of the Safety Convention to the protection of personnel in peace operations is the regime of *aut dedere aut judicare* in this regard. This regime creates new obligations for states parties to the convention. It also captures the intentions of the initial idea of a new instrument, that those responsible for attacks on UN and associated personnel should be brought to justice. Today, non-states parties are not under a *duty* to prosecute or extradite perpetrators of crimes stipulated in the Safety Convention. The importance of the Safety Convention as a vehicle for an emerging legal regime against impunity for attacks against personnel in peace operations is discussed in Chapter 6.

Other provisions of the Safety Convention are of less importance to the protection of peace operation personnel. However, for associated personnel generally not included in SOFAs (such as NGO personnel), Article 8 provides an enhanced protection in cases where they do not fall under other agreements providing them with a protected legal status. The idea of including key provisions of the Safety Convention in SOFAs will therefore primarily be of a political nature, emphasising the will of the international community that perpetrators of attacks against personnel in peace operations should be punished. It has been shown in this work that states are already under an obligation to prevent and punish criminal acts committed within their jurisdiction. This duty is explicit in SOFAs. By inserting provisions in SOFAs to stress this duty further will not add to the duties already incumbent on them.

However, the convention provides a set of rules on the protection of UN and associated personnel, and it therefore establishes an appropriate and valuable point of reference on the protection to be afforded personnel participating in future UN operations.

Chapter 6

An Emerging Legal Regime against Impunity*

In his landmark report, *An Agenda for Peace*, the Secretary-General drew particular attention to the safety of UN personnel. He especially recommended to the Security Council that it should "gravely consider what action should be taken towards those who put United Nations personnel in danger".[1] The Security Council shared those concerns that the Secretary-General expressed in his report. The Council found that attacks against UN personnel were "wholly unacceptable" and demanded that states shall "act promptly and effectively to deter, prosecute and punish all those responsible for attacks and other acts of violence against such forces and personnel".[2]

Professor Tom Farer, who conducted an inquiry into the 5 June 1993 attacks on UN forces in Somalia, viewed such aggression towards UN personnel from an international criminal law perspective:

> No act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers to prevent them from carrying out their responsibilities. Such use of force is a plain challenge to the ability of the United Nations to maintain international peace and security and hence to that minimum order on which all other collective human interests depend.[3]

Responding to that attack, the Security Council declared its commitment "to ensure that persons responsible for attacks and other acts of violence against

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* The article by M.-Christiane Bourloyannis-Vrailas on Crimes Against United Nations and Associated Personnel, in *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts, Vol. I Commentary*, 337 (Gabrielle Kirk McDonald and Olivia Swaak-Goldman eds. 2000) has been particularly useful in structuring the present chapter.

1 Report of the Secretary-General, An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping, para. 68, UN Doc. A/47/277-S/24111 (1992).

2 Note by the President of the Security Council, UN Doc. S/25493 (1993).

3 Report pursuant to paragraph 5 of the Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the Secretary-General, Annex, para. 7, UN Doc. S/26351. (1993).

United Nations forces and personnel are held to account for their actions".[4] The Council even went as far as claiming a right of the UN operation concerned to secure the "arrest and detention for prosecution, trial and punishment" of those responsible.[5]

In September, 1993, the Security Council, endorsing the Secretary-General's report on security of UN personnel, confirmed "that attacks and the use of force against persons engaged in a UN operation authorised by the Security Council will be considered interference with the exercise of the responsibilities of the Council".[6] The Security Council further held that in such cases and in situations where a host state was unwilling or unable to ensure the safety of UN personnel it "may require the Council to consider measures it deems appropriate".[7]

The Security Council thus supported the notion that acts of aggression and violence towards UN and associated personnel constituted particularly grave offences and that the perpetrators of such attacks should be punished accordingly. The convention on the safety of UN and associated personnel became the tool for the creation of an effective system of interstate penal law co-operation for crimes against UN and associated personnel. States parties are obliged to co-operate in order to effectively prosecute offenders in relation to stipulated crimes. Such crimes, through this convention, have been elevated from the purely local or national level to a universal level. It is thus a means of confronting and repressing the "culture of impunity" earlier referred to in relation to serious crimes committed against UN and associated personnel. As such it reflects a common determination of will on the part of the international community. There is not as yet a universal adherence to the Safety Convention but its normative character has influenced other instruments. The protection afforded by the convention may therefore be characterised as that of a major step forward towards an effective legal regime against impunity by offenders responsible for criminal acts against personnel in peace operations. The system is not yet faultless. It will require universal adherence to the Safety Convention, or development of the *aut dedere aut judicare* mechanism for such crimes at a level of customary law. If all states had a similar duty to that of host states, to punish perpetrators of such crimes, protection for personnel might, from that perspective, be of a universal nature. There would then be a universal duty to punish offenders, wherever such crimes were committed. The protected status of personnel might consequently be legally enforced through national courts throughout the international community. Such a duty could be characterised as a *universal protection*. A truly effective system, however, ultimately requires a genuine will on the part of states to take seriously the fight against impunity.

4 SC Res. 837, UN SCOR, 3229th mtg., chapeu, UN Doc. S/RES/837 (1993).

5 Ibid., para. 5.

6 SC Res. 868, UN SCOR, 3283rd mtg., para. 4, UN Doc. S/RES/868 (1993).

7 Ibid., para. 5.

6.1 Convention on the Safety of United Nations and Associated Personnel

The drafters of the Safety Convention identified the problem of protection as largely being connected to one of enforcement of already established norms. The developing "culture of impunity" in relation to attacks on personnel involved in peace operations was regarded as being the most alarming of issues. Respect, or the lack of it, for their protected status was clearly seen to be deteriorating. The targeting of UN forces in this respect was not a new phenomenon. But the number of attacks in the early 1990s (the operation in the Congo, 1960-1964, excepted) was unprecedented. The problem was not so much a lack of a normative framework but rather an almost total absence of respect for those norms. It became a reality that the blue helmet no longer functioned as the protective symbol of UN forces. On the contrary, it transpired that blue helmets were targeted precisely because of their affiliation with the UN. Actions by those in blue helmets in one part of the globe actually generated attacks on their counterparts in other parts of the world.[8]

The development of a system of interstate penal law co-operation, aiming to put an end to this developing impunity, was a natural step. In that respect, it formed part of a trend in international law where greater emphasis was gradually placed upon individual criminal responsibility. The Safety Convention makes concrete the notion that attacks on UN and associated personnel are of such a nature and character that perpetrators of such crimes should without question be brought to justice.

Though the Safety Convention includes essential provisions incumbent on states hosting a UN operation, its most important contribution is probably the regime of interstate penal law co-operation. As previously stated, the duty to ensure that the safety and security of personnel engaged in peace operations largely reflects norms of customary law. Host states are bound by a customary law duty to prevent and punish criminal behaviour under their various jurisdictions. The duty to prosecute or extradite alleged instigators of criminal acts under the Safety Convention may therefore not create additional duties for *host states*. The system of penal law co-operation is primarily directed at all other states, and as such creates a new obligation for those states that are party to the convention. The notion of *aut dedere aut judicare* has probably not, as of yet, become part of customary law for all crimes of international concern. Clearly a broader category of states, other than states members to the Safety Convention, have a *right* to prosecute alleged perpetrators of those crimes stipulated in the convention. All states, in principle, may therefore have a right to prosecute offenders in relation

8 Report of the Secretary-General, Security of United Nations operations, para. 18, UN Doc. A/48/349 – S/26358 (1993).

to crimes stipulated under the convention in accordance with recognised principles of jurisdiction.

The problematic issues surrounding the Safety Convention's scope of application hampers the effectiveness of the instrument. A well-defined category of protected personnel will certainly contribute to a more effective system of protection. One of the main achievements of the Safety Convention, however, is that it applies both in times of peace and war (except when the personnel concerned are engaged as combatants). It therefore has a broad coverage. Moreover, it includes auxiliary crimes involving an "attempt" or "threat" to commit stipulated acts. Consequently, it has a low threshold of application. The criminal acts in question are not qualified by having to be committed in a systematic manner or on a large scale. The crimes stipulated in the Safety Convention are of such a nature and character that such acts are probably already in the criminal codes of the great majority of states.[9] In situations where such crimes have not been criminalised in the host state, the Safety Convention also plays an important role in that respect.

The difficulties of incorporating the grave breaches regime in the context of a non-international armed conflict, as well the status of personnel in peace operations as protected persons under international humanitarian law, has led to uncertainties with regard to the *aut dedere aut judicare* regime under that legal framework for crimes against personnel in peace operations. The Safety Convention has in this respect made an important contribution to internationalising the duty to prosecute or extradite alleged offenders, irrespective of the nature of the conflict.

6.2 Draft Code of Crimes against Peace and Security of Mankind

The seriousness of crimes committed against UN and associated personnel was emphasised by the International Law Commission when it became one of five categories to be included in the Draft Code of Crimes against Peace and Security of Mankind (the Draft Code).[10] Some members argued against the inclusion of crimes against UN and associated personnel. They based their position primarily upon a previous decision by the ILC restricting the Draft Code to four core crimes, these being crimes under customary international law. The category of crimes against UN and associated personnel was in their view not appropriate to

9 The Secretary-General stresses the fact that, even before the conclusion of the Safety Convention, "States were already under an obligation to prosecute crimes of murder and physical assault against United Nations personnel". Report of the Secretary-General, Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, para. 28 UN Doc. A/58/187 (2003).

10 Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, paras. 45 and 50, UN Doc. A/51/10 (1996).

include, as such crimes were recently formulated in a new convention which had relatively few signatories (at the time 43 signatories and eight states parties) and therefore could not be regarded as representing the common view of the international community.[11]

The reasons why the ILC eventually decided to include these crimes in the Draft Code will be repeated at some length, as it captures the essence of the reasons for establishing a legal regime for punishing offenders in relation to these crimes:

> Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind. […] Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace. The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel which often occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. Moreover, these crimes by their very nature often entail a threat to international peace and security because of the situations in which such personnel are involved, the negative consequences for the effective performance of the mandate entrusted to them and the broader negative consequences on the ability of the United Nations to perform effectively its central role in the maintenance of international peace and security. In terms of the broader negative implications of such attacks, there may be an increasing hesitancy or unwillingness on the part of individuals to participate in United Nations operations and on the part of Member States to make qualified personnel available to the Organization for such operations. For these reasons, the Commission decided to include this category of crimes in the present Code.[12]

Concern by the international community as a whole, and the all-encompassing objectives of international peace and security, clearly contributed to the fact that

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11 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 351.

12 Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC, 105-106.

crimes against UN and associated personnel became (as the only treaty-crime) one out of five categories to be regarded as crimes against peace and security of mankind.

The Draft Code closely follows the definitions of the Safety Convention.[13] In contrast to the Safety Convention, the Draft Code does not criminalise threats to commit crimes against UN and associated personnel. Attempts and participation, however, are regarded as being criminal acts, and are dealt with in a separate provision.[14] The terms "United Nations personnel", "Associated personnel" and "United Nations operation" should be understood as having the same meaning in both texts.[15]

Only the most serious of crimes committed against UN and associated personnel are regarded as being crimes against the peace and security of mankind. In that respect they must be "committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate". The first condition consists of two alternative criteria. The criterion "systematic manner" is met, according to the Commentary to Article 19,

> by a series of attacks which are actually carried out, by a single attack which is carried out as the first in a series of planned attacks, or by a single attack of extraordinary magnitude carried out pursuant to a preconceived policy or plan, such as the murder of the mediator entrusted with resolving the conflict situation as in the case of the assassination of Count Bernadotte.[16]

13 Article 19 of the Draft Code states: "1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate: (a) murder, kidnapping or other attack upon the person or liberty of any such personnel; (b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty. 2. This article shall not apply to a United Nations operation authorized 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 organized armed forces and to which the law of international armed conflict applies." Ibid, 104.

14 Article 2(3) of the Draft Code.

15 Ibid., 109-110. The Draft Code includes the same text regarding the relationship with international humanitarian law as stated in Article 2(2) of the Safety Convention.

16 Ibid., at 107.

The alternative criterion "on a large scale" concerns the extent of casualties resulting from a single attack or a series of attacks.[17]

The second condition relates to the functions of the operation. In this respect, Bourloyannis-Vrailas notes the requirement that the act must be "instigated or directed by a Government or by any organization or group" to be applicable to crimes against humanity (Article 18 of the Draft Code), and was not included in relation to crimes against UN and associated personnel. She concludes that individuals acting on their own initiatives may commit crimes against UN and associated personnel that constitute crimes against the peace and security of mankind.[18]

The ILC envisaged a number of forms for the Draft Code. These include an international convention, incorporating it within the statute of an international criminal court, or the adopting of the Code as a declaration of the General Assembly, leaving the General Assembly to decide on the most appropriate form.[19] Nevertheless, the Draft Code refers to "state party" and has adopted the system of *aut dedere aut judicare*.[20] As crimes against the peace and security of mankind by definition affect all states, there is no reference to primacy of jurisdiction between states, in contrast to the Safety Convention.[21] It should be noted that crimes committed against UN and associated personnel, as defined in the Draft Code, were initially included in the Draft Statute prepared by the Preparatory Committee on the Establishment of an International Criminal Court.[22]

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17 Ibid. For critique of these conditions see, Lyal S. Sunga, *The Emerging System of International Criminal Law. Developments in Codification and Implementation*, 205 (1997).

18 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 353.

19 Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC, 13-14. The General Assembly drew the attention of the states participating in the Preparatory Committee on the Establishment of an International Criminal Court to take note of the relevance of the Draft Code to their work and invited Governments to submit comments on the Draft Code before the end of the fifty-third session of the General Assembly. See GA Res. 51/160, Report of the International Law Commission on the work of its forty-eighth session, UN GAOR 51st Sess., paras. 2-3, UN Doc. A/RES/51/160 (1997). No comments were received, however. Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 355.

20 Article 9 of the Draft Code states: "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual." Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC, 51.

21 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 354.

22 Although placed in brackets. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Art. 5 UN Doc. A/

6.3 International Criminal Court

Under the International Criminal Court statute, actual physical attacks on UN and associated personnel were defined as constituting a special war crime. Article 8 of the ICC Statute lists a number of acts considered to be war crimes, in both international and non-international armed conflicts. According to the statute, a war crime has been committed by any person or persons when

> intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[23]

In the Draft Statute, crimes against UN and associated personnel were categorised as crimes in their own right, as were several other so-called "treaty-crimes".[24] The definition of crimes against UN and associated personnel was based upon Article 19 of the Draft Code. The requirement that it necessitated acts "committed intentionally and in a systematic manner or on a large scale" was, however, placed in brackets.[25] In the end, it was decided that crimes committed against UN and associated personnel did not warrant a category of crime in its own right under the statute, but instead did merit a special class of war crime.

The Court has "jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes".[26] Bourloyannis-Vrailas finds the expression "in particular" to indicate that the threshold conditions imposed by the above-mentioned provision are of

CONF.183/2/Add.1 (1998).

23 This is a crime both in international and non-international armed conflicts. Article 8(2)(b)(iii) and 8(2)(e)(iii).

24 Michael Cottier, Article 8 War Crimes, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 187-8 (Otto Triffterer ed., 1999).

25 The UN Secretariat voiced concern during the beginning of the Rome conference over the condition that crimes committed against UN and associated personnel needed to be committed in a systematic manner or on a large scale. Hans Corell, Under Secretary-General for Legal Affairs and the Secretary-General's representative, cautioned "that conditioning the criminalization of attacks against United Nations personnel on their systematic character and large scale would be inconsistent with the definition of the crime established in the 1994 Convention, and would hardly ever be appropriate in the circumstances of peacekeeping." Press Release L/ROM/15, 18 June 1998, http://www.un.org/icc/pressrel/lrom15.htm.

26 Article 8(1) of the ICC Statute.

an indicative nature rather than a strict requirement of war crimes.[27] This is generally in relation to the types of crime considered by the Court. She concludes that from this perspective, the ICC definition of the crime is broader than the definition in Article 19 of the Draft Code, since the latter included a threshold as an element of the crime.[28]

In contrast to the Draft Code, the ICC statute did not apply the definitions of the Safety Convention. Article 8 of the statute uses the term "peacekeeping mission". This would possibly be similar to the requirement of the Safety Convention that an operation must be established "for the purpose of maintaining or restoring international peace and security" for the convention to be automatically applied.[29] It has been argued that peace enforcement operations authorised to use force beyond the concept of self-defence would not be included in the definition in the statute.[30] This interpretation is not supported in this work since the crucial point would more appropriately be when the personnel concerned act as combatants to an armed conflict. There is no requirement that the mission should necessarily be conducted under UN authority and control. The same applies to humanitarian missions. The requirement of a declaration of exceptional risk was not included in the ICC definition. The fact that the ICC crime only includes attacks during the course of armed conflict may *de facto* imply that the personnel concerned are present in an area of exceptionally high risk. The broad definition of the ICC crime appears to include UN and associated personnel, as defined by the Safety Convention, involved in a wide range of operations without a declaration of exceptional risk or even a formal link to the UN. The only condition is that the mission in question should be conducted in accordance with the UN Charter. It even implies that the operation concerned may be conducted completely outside UN control – and perhaps even without a

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27 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel 361. Kirsch and Robinson describe the expression "in particular" as an example of a key compromise during the negotiations of the ICC statute. It encourages the Court to concentrate on the most serious cases but does not exclude its right to exercise jurisdiction over isolated war crimes. Philippe Kirsch, and Darryl Robinson, Reaching Agreement at the Rome Conference, in *The Rome Statute of the International Criminal Court: A Commentary,* Vol. 1, 67, 80 (Antonio Cassesse, Paola Gaeta and John R.W.D. Jones, eds., 2002).

28 Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 361. It should be noted that from the perspective that the definition of the crime under the ICC statute is limited to war crime, the Draft Code definition is broader, as it is not limited to attacks during armed conflict.

29 Bourloyannis-Vrailas finds the terms "missions" and operations" presumably to be interchangeable. Ibid., 362.

30 Cottier, 191. The very fact that an operation is *authorised* to use force outside the scope of self-defence would "exclude an entitlement to the protection of civilians" under IHL for the personnel. Ibid., 195.

mandate from the Security Council.[31] To be "involved" in an operation is a lesser requirement than the need to have a formal link to the competent UN organ. On the other hand, it is a requirement that seems to exclude UN officials and experts on mission present in an official capacity in the area of a UN operation Article 1(a)(ii) of the Safety Convention.

The crime of "intentionally directing attacks" may have a different meaning than the crime stipulated under the Safety Convention, which is defined as "[a] murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel".[32] The term "attack" in the ICC statute must be interpreted in the context of international humanitarian law. According to Article 49 of Additional Protocol I to the Geneva Convention, "attack" means "acts of violence against the adversary, whether in offence or in defence".[33] The Commentary on Article 49 interprets the term as "combat action".[34] It appears to be a higher threshold for crimes under the ICC statute than that required by the Safety Convention. The crime of kidnapping may not be included under the criterion of intentionally directing attacks against personnel.[35]

Despite the fact that the ICC crime is limited to armed conflicts and appears to require force of a higher intensity than that under the Safety Convention, the definition of the former crime is in many respects broader than the latter. Humanitarian personnel are covered by the ICC provision without a declaration of exceptional risk or a formal link to the UN. Missions under the ICC statute need not be conducted under UN authority and control nor is it required that attacks on the property of protected personnel should endanger the person or lib-

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31 Bourloyannis-Vrailas limits the interpretation of this requirement to include operations outside UN authority and control but "authorized" by the Security Council. Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel, 362. Cf. Bothe, who believes that this statute provision implicitly refers to the definition of the Safety Convention, since this crime otherwise "would be rather ill defined". Michael Bothe, War Crimes, in *The Rome Statute of the International Criminal Court: A Commentary,* Vol. 1, 379, 412 (Antonio Cassesse, Paola Gaeta and John R. W. D. Jones, eds., 2002).

32 Safety Convention, Article 9 (a).

33 Additional Protocol I to the 1949 Geneva Conventions, Article 49(1).

34 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Commentary, Article 49 AP I, 603 (Yves Sandoz, Christophe Swinarski and Bruno Zimmerman eds., 1987).

35 This view is shared by Bourloyannis-Vrailas, Crimes Against United Nations and Associated Personnel 363. Cf. Cottier, 196. The taking of a hostage, however, is a criminal offence under other provisions of the ICC statute. See Article 8 (2) (a) (viii) and (c) (iii). The ICC statute does not include an additional condition with regard to attacks on the property of peacekeeping operations or humanitarian missions. One is reminded, however, that the Safety Convention requires that attacks on the vital property of an operation must be of a violent nature and "likely to endanger [the] person or liberty" of UN or associated personnel.

erty of such personnel. On auxiliary crimes, the ICC statute includes both participation and attempts to commit crimes. In contrast with the Safety Convention, however, it does not include threats to commit such crimes.

To attack protected personnel is a crime, according to ICC statute, only "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". It appears to be a definition largely devoid of the complex conditions connected to the exception clause of the Safety Convention. The fact that peacekeeping forces may act as combatants to an armed conflict does not make it a legitimate act to intentionally attack the civilian personnel of that operation. The difficulty remains of deciding when such forces in fact act as combatants, or are no longer entitled to the protection accorded to civilians. In relation to non-international armed conflicts it should be remembered that the Safety Convention continues to apply even if peace operation forces were to take a direct part in the armed conflict in question. Some support for that solution has also been accounted for. The drafters of the ICC statute chose another path. Attacks against peace operation forces taking a direct part in hostilities is not a crime under the statute.

6.4 Indictments under the Ad Hoc Tribunals and the Specialised Court for Sierra Leone

To attack personnel engaged in peacekeeping or humanitarian missions does not constitute a crime in its own right under the statutes of the International Criminal Tribunal of former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). Indictments under both the ICTY and the ICTR include, however, allegations of criminal acts against UN personnel. The indictment against Radovan Karadzic and Ratko Mladic by the prosecutor at the ICTY concerned, among other things, the taking of UN personnel as hostages. Between 26 May 1995 and 2 June 1995, 284 UN peacekeepers were held hostage by Bosnian Serbian military personnel, under the direction and control of Karadzic and Mladic, in order to prevent further NATO air strikes.[36] Some of those hostages were also used as human shields at sites of potential targets of any future NATO air strikes.[37] The prosecutor alleged that Karadzic and Mladic had by their acts of commission (or omission in relation to controlling their subordinates) caused the taking of these UN hostages, and their use as human shields. Accordingly, they had committed grave breaches of the Geneva Conventions (taking civilians as hostages and inhuman treatment) and violations of the laws or customs of war (the taking of hostages and cruel treatment).[38] As previously

36 Prosecutor v Karadzic & Mladic, Indictment, ICTY Case No. IT-95-5-I, 24 July 1995, para. 46.

37 Ibid., para. 47.

38 Ibid., para. 48.

stated, these UN personnel were regarded at all relevant times as being protected persons under the Geneva Conventions.

The indictments against Colonel Theoneste Bagosora and Major Bernard Ntuyahaga set out by the prosecutor at the ICTR concerned the murder of ten Belgian UNAMIR soldiers in Rwanda on 7 April 1994.[39] The Belgian UNAMIR soldiers were disarmed and taken to the military camp at Kigali. When they arrived at the camp they were summarily beaten to death by Rwandan soldiers. Four of the Belgian UNAMIR soldiers were killed immediately. The remaining six were also murdered, having survived the beatings for a few hours before dying. Major Ntuyahaga had taken the Belgian soldiers to the camp where he claimed before a group of Rwandan soldiers, that the Belgian captives were responsible for the death of the President of Rwanda. The captives were immediately attacked after that address. While this was going on Colonel Bagosora was attending a meeting at the staff college about one hundred metres away. He was informed of what was happening and of the danger to their lives but did nothing to prevent the murder of all ten soldiers. According to the indictment, Colonel Bagosora was responsible for the murder of the ten Belgian soldiers as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds, and thereby committed a crime against humanity.[40] He was also charged with serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II by being responsible for violence to life, health and the physical well-being of persons, as part of an armed internal conflict. He was in this respect particularly held responsible for the killing of all ten UNAMIR soldiers.[41] Major Ntuyahaga was also charged with crimes against humanity and serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II. He was held to be directly responsible for his acts of commission and omission in relation to the murders.[42]

At the time of writing, seven people faced indictments under the Specialised Court for Sierra Leone for criminal acts against personnel involved in humani-

39 The Prosecutor against Theoneste Bagosora, Case No. ICTR-96-7-I and the Prosecutor against Bernard Ntuyahaga, Case No. ICTR-98-40.

40 The Prosecutor against Theoneste Bagosora, Case No. ICTR-96-7-I, 12 August 1996, Count 5.

41 Ibid., Count 11.

42 The Prosecutor against Bernard Ntuyahaga, Case No. ICTR-98-40, 28 September 1998, Count 3, at 30-1. The charges against Major Ntuyahaga were later withdrawn and he was released from prison at the request of the Belgian government, as it was considered more appropriate for him to be tried in Belgium under a fresh indictment. See the Prosecutor versus Bernard Ntuyahaga, Case No. ICTR-98-40-T, 18 March 1999. On the problems of extraditing Ntuyahaga to Belgium, see Yitiha Simbeye, *Immunity and International Criminal Law*, 82-84, (2004).

tarian assistance or peacekeeping missions.[43] All of them were accused of having "engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian assistance workers within the Republic of Sierra Leone" between 15 April 2000 and 15 September 2000, or thereabout. The attacks included the unlawful killing of UNAMSIL peacekeepers and abducting hundreds of peacekeepers and humanitarian assistance workers and holding them hostage. Individual criminal responsibility for those indicted concerned violations of Article 4 b of the Statute, crimes against humanity (murder – as part of a widespread or systematic attack), violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health and physical or mental well-being of persons, in particular murder and the taking of hostages).[44]

6.5 Conclusions

The establishment of the Safety Convention and the ICC, the conclusion of the Draft Code, the practice of the Security Council, the drawing up of indictments under the international tribunals ICTY and ICTR as well as under the internationalised Special Court for Sierra Leone, all point to compelling evidence that the fight against the culture of impunity in relation to attacks on personnel in peace operations has become a serious cause for concern for the international community as a whole. At the time of writing, however, it was still an emerging system. Most states were not parties to the Safety Convention, the Draft Code was not in force and the jurisdictions of the above-mentioned courts and tribunals were limited. It is encouraging, however, that the indictments brought under the ICTY, the ICTR and the Special Court for Sierra Leone have tended to indicate that attacks on protected personnel may also be regarded as war crimes, or if committed in a widespread or systematic manner, as constituting crimes against humanity.

Although the establishment of ad hoc tribunals, special courts and the ICC enhance the legal regime against impunity on the part of perpetrators of crimes against personnel in peace operations, national courts will continue to play a major role. In this respect, the Safety Convention is of great importance because it places an obligation upon states parties to criminalise those acts stipulated under the convention within their own legal systems, and to prosecute or extradite the alleged perpetrators of such crimes.

43 The Prosecutor against Gbao, Case No. SCSL – 2003 – I, 16 April 2003, the Prosecutor against Sesay, Case No. SCSL-03-I 7 March 2003, The Prosecutor against Kallon, Case No. SCSL-03-I, 7 March 2003, The Prosecutor against Brima, Kamara, and Kanu, Case No. SCSL-200-16-PT, 5 February 2003, The Prosecutor against Taylor, Case No. SCSL-03-I, 7 March 2003, The Prosecutor against Koroma, Case No. SCSL-03-I, 7 March 2003.

44 See e.g. The Prosecutor against Brima, Kamara, and Kanu, Case No. SCSL-200-16-PT, 5 February 2003, Counts 14-17 "Attacks on UNAMSIL Personnel", para. 80.

The offences stipulated under the Safety Convention are of such a nature and character that they are most certainly already criminalised in all national laws. Thus it may properly be asked whether a non-state party to the Safety Convention has a *right* to prosecute alleged offenders in relation to the criminal acts stipulated under the Safety Convention in cases where the only connection to the crime concerned is the presence of the accused within its territory. Given the limited number of states that are party to the Safety Convention, and the resistance to include it as a separate category of crime under the ICC statute, since it could not as yet be regarded as something which beyond doubt was a crime under customary international law (a core crime), tend to militate against the idea that these crimes are of such a nature and character that it would entail universal jurisdiction based solely upon the nature of the crime itself.[45]

It has been suggested, however, that some crimes subject to a treaty-based *duty* to prosecute or extradite are of such a nature and character that all states maintain the *right* to exercise jurisdiction without any special connection to the criminal act itself.[46] International concern expressed over crimes against UN and associated personnel would clearly support such an interpretation. Under the principle of universal jurisdiction, states have a *right* to prosecute any criminal on the sole basis of physical presence. One may therefore argue, as Bassiouni certainly does, that the fact that a certain crime has been regarded as being of such importance that it imposes a duty upon states parties to prosecute or extradite criminals, requiring no other connection to the crime than the physical presence of the accused, indicates that other states would have a similar *right* of prosecution. Crimes committed against UN and associated personnel, as been shown above, have repeatedly been viewed as one of the most serious of international crimes. The cumulative effect of these developments suggests that crimes committed against UN and associated personnel are in fact subject to universal jurisdiction.[47]

A custodial state may also exercise jurisdiction under the representational principle, deriving that right from another state – for example, the territorial state, if requested by that state. Although it may be said that the prosecution of

45 As the indictments under the ICTY, the ICTR, and the Special Court for Sierra Leone, show, as well as the statute of the ICC, crimes against peacekeeping and humanitarian personnel may also be regarded as being war crimes or crimes against humanity. These are violations that beyond doubt constitute crimes under customary international law and are certainly criminal offences subject to universal jurisdiction. In situations where crimes against UN and associated personnel can be regarded as being war crimes or crimes against humanity, all states would a have right to exercise universal jurisdiction over alleged perpetrators of such crimes.

46 See Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 *Texas Law Review* 785, 825-827 (1988).

47 This development must, however, be viewed against the optional Protocol to the Safety Convention extending the range of protected personnel.

offenders responsible for attacks on personnel engaged in peace operations may be in the best interests of all states, the custodial state would, under the representational principle, exercise jurisdiction in the primary interests of the requesting state. Such interstate penal law co-operation requires, of course, a genuine commitment on the part of the international community to take seriously the fight against this appositely described "culture of impunity" that has developed in relation to aggression and violence towards personnel engaged in peace operations.

Chapter 7

Summary and Suggestions for the Future

7.1 Summary

The aim and purpose of this study has been to examine the role of the Safety Convention[1] against the background of general international law in relation to the protection of personnel in peace operations. In a larger perspective this study aims to systematise the protection of such personnel under international law and to identify strengths and weaknesses with the present system as well as some trends and developments in this area of law.

The Safety Convention is first and foremost a criminal law instrument. It was drafted in a response to the emerging 'culture of impunity' with regard to attacks on personnel engaged in peace operations at the beginning of the 1990s. The purpose of the convention is to attempt to prevent deliberate attacks on protected personnel, and to punish those who commit them. In that respect, it forms part of a trend in international law where greater emphasis has gradually been placed upon the criminal responsibility of individuals. States parties are duty-bound to prosecute or extradite alleged offenders in relation to stipulated crimes under the convention. These include murder and kidnapping, as well as other attacks upon the person or liberty of personnel. The Safety Convention, however, has met some criticism and an Ad Hoc Committee was set up in 2002. Since then it has met annually, for the purpose of considering ways of strengthening and enhancing the Safety Convention's protective regime. In 2005 a Optional Protocol was adopted, extending the convention's scope of application.

This study is not limited to the consideration of operations under UN authority and control, but includes UN-mandated operations, also under regional and national command and control. The term "peace operation" has therefore been applied. This term also reflects the complex character of current operations.

7.1.1 *The Safety Convention in International Law*

The Safety Convention was concluded in 1994 and came into force in 1999. It seeks to protect personnel deployed in operations under UN authority and con-

1 Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363.

trol that are established for the purpose of maintaining or restoring international peace and security. Personnel in UN operations of another character are not automatically protected. It requires a declaration from the Security Council or the General Assembly that, for the purposes of the Safety Convention, there exists an exceptional risk to their safety. Such a condition carries with it sensitive political considerations and to date no such declaration has been made. The protected categories of personnel are either *UN personnel*, that is, those forming part of the military, the police, or the civilian component of an operation, and other UN officials (for example, staff members of the UN secretariat) present in an official capacity in the area of a UN operation, or *associated personnel*, that is, those connected with the operation through a formal agreement with the competent organ of the UN (for example, personnel of humanitarian NGOs and military forces assisting a UN operation). Associated personnel also need to carry out activities in support of the fulfilment of the mandate of a UN operation.

The Safety Convention's scope of application, which turned out to be the most problematic provision to draft, also concerns the relationship between the convention and international humanitarian law. Peace operation personnel deployed in the area of an armed conflict generally enjoy the protection entitled to civilians under international humanitarian law. If *military* personnel in the operation concerned become engaged in the armed conflict, as combatants, they would lose their protected status as civilians, under international humanitarian law, and become a legitimate military target. To criminalise attacks against military personnel, engaged as combatants in an armed conflict, would be contradictory to their status under international humanitarian law. The drafters of the Safety Convention were aware of this dilemma and inserted an exclusion clause. The result, however, begs a few questions. According to the convention it does not apply to UN enforcement operations "in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies". The clause makes the Safety Convention non-operative in relation to *all* personnel, although it could have continued to apply in relation to the non-military personnel of an operation. The reference to the law of international armed conflict creates an overlap between the Safety Convention and the law of non-international armed conflict. The experiences of US forces in Somalia were essential to the creation of this overlap, which aimed to strengthen the level of protection of personnel in non-international armed conflicts. Whether or not such an overlap contravenes international humanitarian law is not entirely clear. It appears to be the position of the Secretary-General that applicability of both the Safety Convention and the law of non-international armed conflict is not a satisfactory solution. However, individuals taking part in a non-international armed conflict may be prosecuted under national law for acts which, had they been committed in the context of an international armed conflict, would have been considered a legitimate act of war. Criminalisation of attacks on military personnel engaged in a peace operation and taking part in a

non-international armed conflict may thus, by analogy, be an expression of *lex lata.* It should be noted that the drafters of the Safety Convention did not seem to recognise this interpretation.

However, one needs to take into consideration the internationalisation of modern armed conflicts and the perception of parties to such conflicts. Although the criminalisation of attacks on the military personnel of a peace operation taking part in a non-international armed conflict may have a sound theoretical basis, the protection may in the long run be eroded if it is *perceived* that immunity from attack, even in situations where such personnel take an active part in hostilities, contravenes international humanitarian law. In this respect, the words of Sir Hersch Lauterpacht should perhaps be considered: "[i]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them".[2]

The Safety Convention's provisions on criminal law and jurisdiction, however, are rather straightforward. It follows a tested formula where state parties are obligated to criminalise certain acts and to either prosecute or extradite (*aut dedere aut judicare*) suspected perpetrators of such crimes. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Personnel including Diplomatic Agents of 1973[3] has largely functioned as a model for these provisions. The different nature of the Safety Convention is evidenced by the fact that participation in an attack by "organising or ordering others" is a criminal act under that convention. The Safety Convention thus takes into account the role that military and political superiors might play as possible instigators of attacks in a military context.

The condition that the protection of operations not established for the purpose of maintaining or restoring international peace and security is dependent on a declaration of exceptional risk, by the Security Council or the General Assembly, has been much criticised. The Optional Protocol expands the scope of application of the Safety Convention by disposing of such a requirement. The Safety Convention has, through the protocol, become automatically applicable to a broader category of operations. The final text of the protocol was a compromise between two main positions, crystallised through the deliberations. Some states did favour a scope of application that was as broad as possible. They found that the guiding principle should be the *purpose* of the operation. They suggested that in addition to operations already protected by the convention, the protocol should also automatically protect those operations whose purpose is the deliv-

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2 Hersch Lauterpacht, The Limits of the Operation of the Law of War, 30 *BYIL*, 212 (1953).

3 Convention on the Prevention and Punishment of Crimes against Internationally Protected Personnel including Diplomatic Agents, 14 December 1973, 1035 UNTS 167.

ering of humanitarian, political or development assistance. The other position instead favoured a risk-criterion. Those states advocating this position argued that only such operations that are inherently risky should benefit from the protective regime of the Safety Convention through an additional protocol. The use of term 'peacebuilding' and the right of host states to opt-out of the convention's regime in case of operations responding to natural disasters, introduced as a package deal, was accepted a necessary compromise between the two positions.

One of the more contentious issues in this respect is Article 8 of the Safety Convention and its relationship to NGOs and locally employed personnel. It states that "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". This has commonly been interpreted, both by states arguing for a broad scope of application as well as by those supporting a more restrictive approach, as providing such personnel with immunity from the criminal jurisdiction of the host state in question. This interpretation is contested in this study and the "immunity-interpretation" has also been disregarded in the Optional Protocol. Article 8 was inserted against the background of the difficulties surrounding the status of military personnel captured by opposing forces in the peace operations in Somalia and the former Yugoslavia. In relation to host state authorities, which have consented to the operation, it should only be regarded as a bar against interference with the official duties of personnel. Article 8, together with a number of other articles, has been identified as a key provision of the Safety Convention. Apart from any symbolic value, the purpose of identifying key provisions is that they should, if possible, be included in bilateral status-of-forces agreements (SOFAs) with host nations and thereby be applicable even where the host nation concerned is not a party to the Safety Convention.

Despite the criticism mentioned above, there is no doubt that the Safety Convention is an important instrument for the legal protection of personnel participating in peace operations. It draws upon existing legal protection, including human rights law, international humanitarian law, and SOFAs. The result is the formation of a terminology and norms that are easily referred to as part of such things as peace agreements where a peace operation is relied upon as an integral part of that agreement. Nevertheless, the convention is not without its deficiencies. The difficulties of defining the scope of application might have undesired effects in practice. This is particularly troublesome considering the fact that the requirement of predictability is of fundamental importance to criminal law provisions. The fact that the Safety Convention was concluded with such speed might have contributed to the sometimes confusing results and to the terminological inconsistencies. It is possible to conclude that in the end speed was preferred over a more thoroughly worked-out instrument.

7.1.2 The System of Protection

It is a well-established principle of international law, flowing from the rights and duties of territorial jurisdiction, that a state has the responsibility of ensuring the protection of individuals present on its territory. According to the Secretary-General, the host government retains primary responsibility for UN and related personnel, and "this responsibility flows from every Government's normal and inherent functioning of maintaining order and protecting persons and property within its jurisdiction."[4] The protection, for which a host government is responsible for securing for personnel in peace operations, may be categorised as a *general* and a *special* protection. The former includes, for example, human rights law and international humanitarian law. The latter comprises privileges and immunities accorded to agents of states or organisations. The contribution of the Safety Convention is mainly one of interstate penal law co-operation. States parties are obligated to co-operate in order to effectively prosecute the perpetrators of stipulated crimes. Such crimes have through this convention been elevated from a national to an international level. It is a means of repressing the 'culture of impunity' for serious crimes committed against UN and associated personnel, and as such reflects a common determination of will by the international community. There is not yet universal adherence to the Safety Convention but its normative character has, as will be seen later, influenced other instruments. The protection afforded by the Safety Convention may therefore be categorised as being part of an *emerging legal regime against impunity*. These categories of protection will now be considered.

General protection

Norms under this category include the international minimum standard, human rights law, and international humanitarian law. The vast practice of arbitration tribunals and claims commissions set up to resolve questions and issues relating to diplomatic protection, primarily during the nineteenth and the beginning of the twentieth century, has produced a body of law by which an international minimum standard for treatment of aliens is identified. This standard is in many respects the forerunner of today's human rights law. It is still of importance, however, since central human rights law instruments have not yet received universal adherence. The international minimum standard is a norm of customary international law. It obligates states to show due diligence in their efforts to prevent and punish illegal acts committed against foreigners.

Human rights law protects all persons irrespective of nationality. Basic human rights concerning life, liberty and security of the person have largely developed into a customary law status. In view of the fact that peace operations

4 Report of the Secretary-General, Security of United Nations operations, para. 4, UN Doc. A/48/349 – S/26358 (1993).

may be established in a host state because of an unstable situation, it should be noted that human rights law might be subject to derogation by host states in times of emergency. There is, however, a core of human rights from which it is not possible to derogate. These are, for example, the right to life, the right to freedom from torture and other inhuman or degrading treatment or punishment, and the principle of non-retroactive penal laws.

International humanitarian law applies during armed conflict. It protects civilians from the effects of war and from arbitrary treatment in the hands of a party of which they are not nationals. There is, of course, no complete protection against the effects of war. Civilians should not be intentionally targeted, but if they find themselves close to legitimate military targets then there is obviously a high risk of being harmed through so-called collateral damage. Such risks are legally accepted. This is clearly a hazard for peace operation personnel who are often deployed in inherently dangerous areas.

Protection from arbitrary treatment at the hands of a party to a conflict might not be as straightforward as at first seems. The main purpose of this rule was to protect enemy civilians. Peace operation personnel are not enemy civilians and they have chosen to be in the conflict area. In that respect their status, as protected persons under international humanitarian law, may be challenged. A peace operation, however, may include humanitarian assistance and an analogy may be drawn with the status of relief personnel who should always be protected. The fact that personnel in peace operations might not be regarded as protected persons in all aspects under international humanitarian law, may have the undesirable effect of not qualifying criminal acts against them as grave breaches of that regime. The effect of that is that states are not under a duty to prosecute offenders in relation to such crimes. However, the indictment against Karadzic and Mladic by the prosecutor at the International Criminal Tribunal for Former Yugoslavia (ICTY) considered UN peacekeepers to be protected persons.[5] The Safety Convention, however, might in this respect have contributed to internationalising the crime of attacking peace operation personnel during an armed conflict.

International humanitarian law, in non-international conflicts, is less developed. Common Article 3 stipulates some basic norms applicable in all conflicts. Additional Protocol II (AP II) to the four Geneva Conventions extends the protection but the applicability of AP II is subject to a threshold-criterion and has received limited participation. Practice from the ICTY shows, however, that large parts of international humanitarian law apply also in internal armed conflicts as

5 To take them hostage and to use them as "human shields" was regarded as being grave breaches of the Geneva Conventions. Prosecutor v Karadzic & Mladic, Indictment, ICTY Case No. IT-95-5-I, 26 July 1995, paras. 46-48.

customary international law. This is furthermore supported by the ICRC study on customary international humanitarian law.[6]

It should be noted, however, that basic human rights law is generally regarded to apply in armed conflicts to the point where rules of international humanitarian law do not contradict them – the latter being regarded as *lex specialis*. Human rights law may prove to be of particular importance in internal armed conflicts. The work on a set of *fundamental standards of humanity* by the Commission on Human Rights is evidence of the problems encountered in this context. The project aims to identify standards applicable in all situations and from which there can be no derogation.[7]

Special protection

A special protection is often accorded to personnel representing international governmental organisations and states. To be able to perform their functions properly such personnel are generally entitled to certain privileges and immunities in the host state. In the context of personnel representing international governmental organisations the privileges and immunities conferred are often limited to what is necessary in order to perform their functions (the so-called functional necessity doctrine). There are some major differences between the privileges and immunities accorded to state representatives (diplomatic privileges and immunities) and those accorded to representatives of international governmental organisations (international privileges and immunities). The former are rooted in customary international law, based upon reciprocity, and include elements of sovereignty. The latter are based upon treaty law, and lack a reciprocity mechanism, and do not hinge upon aspects of sovereignty. The main provisions of the Convention on Privileges and Immunities of United Nations, 1946, (the General Convention) do, however, most likely reflect customary international law. The principle of functional necessity has probably developed to a customary principle applicable to personnel representing a wide variation of international governmental organisations who are invited to perform functions in a host state.

For personnel in peace operations privileges and immunities are generally secured through the conclusion of a SOFA between the organisation/state leading the operation and the host state. In 1990 the UN issued a Model SOFA based upon established practices, which was to be used as a basis for negotiations on SOFAs in specific operations. The timely conclusion of a SOFA provides good legal protection for personnel. Such an agreement is of particular importance for personnel of the military component of peace operations, who are not entitled to privileges and immunities under the General Convention. Unfortunately,

6 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC (2005).

7 See e.g. Promotion and Protection of Human Rights, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2004/90 (2004).

such personnel have often been deployed before such an agreement has been concluded. After nearly 50 years, however, a body of practice has emerged which forms part of the concept of peace operations.[8] Requesting or accepting a peace operation on its territory would arguably include recognition of that concept by the host state. It is here contended that norms of the UN Model SOFA relating to the protection of personnel form an integral part of a concept of peace operations and are therefore applicable within the territory of the host state, even when at the material time an individual SOFA had yet to be concluded. Some basic norms relating to the protection of personnel would also have developed into the status of customary law. Such essential requirements, that military personnel be allowed to wear uniform and carry weapons, if their function so requires, are undisputable. Their right to freedom of movement, the right to set up a communications system, functional immunity for such personnel, and exclusive criminal jurisdiction for sending states over their military forces, is also regarded as rules of customary law.

An emerging legal regime against impunity

The norms here included relate to the development of international criminal law. Host states have a customary law duty to punish perpetrators of criminal acts committed against persons on their territories, and prescriptive norms should therefore be mirrored by penal legislation of states hosting peace operations. The inability, or unwillingness, of host states to bring perpetrators to justice initiated the creation of the Safety Convention. If general and special protection are to be regarded as shields for protected personnel, then the symbol for universal protection is the sword.[9]

In 1993, before the adoption of the Safety Convention, the Security Council demanded, "that States act promptly and effectively to deter, prosecute and punish all those responsible for attacks and other acts of violence against [United Nations forces and personnel]".[10] The Safety Convention became the tool for the creation of an effective system of interstate penal law co-operation for crimes against UN and associated personnel. The seriousness of the crime was emphasised by the action of the International Law Commission (ILC) when crimes against UN and associated personnel became one of five categories of crime

8 At least insofar as the concept is derived from the traditional peacekeeping operation.

9 Bassiouni states that since international criminal law (ICL) incorporates human rights law protection, "it can be said that where human rights law is the shield, ICL is the sword"., M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in *International Criminal Law,* Vol. I, *Crimes*, 3, 46 (M. Cherif Bassiouni, ed., 2nd ed., 1999).

10 Note by the President of the Security Council, UN Doc. S/25493, (1993).

included in the Draft Code of Crimes against Peace and Security of Mankind (the Draft Code).[11] According to the ILC

> Attacks against [UN and associated personnel] are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace ... The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal acts against [such] personnel ....[12]

The ILC envisaged a number of forms for the Draft Code, such as an international convention, incorporating it in the statute of an international criminal court, or adopting the Code as a declaration of the General Assembly, leaving the decision to the General Assembly on the most appropriate form.[13] The Draft Code nevertheless refers to "state party" and has adopted the system of *aut dedere aut judicare*.

The statute of the International Criminal Court (ICC) has defined crimes against UN and associated personnel in slightly different terms. According to the statute, it is a war crime if a person (or persons) is

> intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[14]

Attacks on such personnel in the end did not merit a category of its own under the ICC statute. It became a subcategory of war crimes. There was opposition against including so-called "treaty crimes" under the statue. It was felt by many delegations that the statute should only include "core crimes", which beyond doubt were crimes under customary international law. The fact that attacks on personnel in peacekeeping and humanitarian missions did merit, as the only "treaty-crime", a special category of war crimes, carries symbolic significance. The universality of the protection, initiated by the Security Council in 1993, is gradually becoming a reality.

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11 Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996).

12 Ibid., at 106.

13 Ibid., at 13-14.

14 Article 8 of the Rome Statute of the International Criminal Court, 17 July 1998. 37 ILM 999 (1998).

Conclusions on protection

Host states are thus the chief providers of general and special protection. If they fail to meet these duties they may be in breach of an international obligation that would imply their responsibility as states. The Safety Convention stipulates rules of a mainly proscriptive nature relating to the criminal responsibility of the individual. Combating the whole notion of impunity effectively requires international co-operation, especially when host states are unable or unwilling to live up to their international obligations. From that perspective the Safety Convention is primarily directed to all *other* states but host states.

A few words should also be said on some procedural aspects of protection. The right for a state to safeguard its own interests when one of its nationals has been maltreated in a foreign state is known as *diplomatic* protection. A similar right has been recognised for the UN with regard to its agents. Such a right is described as *functional* protection. Diplomatic protection has developed in practice and relates historically to a state's right to protect any of its citizens from being deprived of their fundamental rights in a foreign state. The right for states to exercise diplomatic protection is not dependent on the fact that the individual represents the state but is solely connected to the nationality of the individual. Diplomatic protection is currently a topic being considered by the ILC. The International Court of Justice (ICJ) identified the right of functional protection in the *Reparation Case*.[15] The Court acknowledged the right of the UN to claim reparation from the state of Israel for the assassination of the Swedish mediator Count Bernadotte in 1947. The ICJ recognised the right of Sweden to similarly exercise its right of diplomatic protection but held that there was no rule in international law giving primacy for either one. Although the procedural element is an important aspect for the realisation of the substantive parts of protection, it has in this work only been dealt with briefly.

7.2 Suggestions for the Future

Current peace operations often include a regional dimension and are frequently under the command of organisations other than the UN. The multifunctional character of peace operations requires a wide range of personnel, from military forces to civilian contractors. They are often based upon Chapter VII of the UN Charter and charged with enforcement capabilities. Recent operations have also included a direct mandate to protect civilians under imminent threat of violence. The Safety Convention, and the protection of peace operation personnel as a whole, must be able to respond effectively to these trends.

15 Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) 1949, ICJ Rep 174.

7.2.1 A Broadened Scope of Application of the Safety Convention

During the drafting of the Safety Convention it was a matter of major concern for several delegations that operations that were protected should stay within control of the UN. The peculiar criterion "under UN authority and control" is evidence of the compromise that was finally reached. The text of the Safety Convention, however, has proved to be adaptable to new realities. The peace operations in Bosnia-Herzegovina, Kosovo, and Afghanistan are three examples where military forces, acting upon a mandate from the Security Council, have assisted a UN non-military operation. If the Safety Convention protects these UN operations then there are good reasons to also include the personnel of the NATO and EU-led military operations. They are definitely assigned by a government or an international governmental organisation with the agreement of the competent organ (the Security Council) of the UN and they carry out activities in support of the fulfilment of the mandate of a UN operation. The Optional Protocol extends the automatic application of the Safety Convention to new categories of operation. This also means that larger numbers of military forces assisting UN operations will be protected. It is surprising, however, that this has not been an issue for debate in the Ad Hoc Committee.

From the perspective of combating the notion of impunity there is no compelling reason why the protective regime of the Safety Convention should be restricted to operations conducted under UN authority and control. It is now a common understanding, however, that the Safety Convention is primarily a criminal law instrument. It was never the intention to create an instrument according immunity for protected personnel. Article 8 has not been treated as an immunity provision in those cases where it has been inserted in SOFAs. Instead that provision should be regarded a bar on interfering in the performance of the official duties of personnel.

Current challenges for the Safety Convention appear to relate to its somewhat ambiguous scope of application in the light of its penal law character. Interpretation of the convention's scope of application is now left for local courts to assess. Some contentious issues in this respect are; the interpretation of the term "peacebuilding", the "authority and control requirement", the relation between the Safety Convention and IHL, interpretation of "any other international law obligation" in Article III of the Optional Protocol, and the range of associated personnel in light of the new protocol.

7.2.2 Conformity of SOFA Norms

While the fact that more peace operations are being conducted under the command of organisations other than the UN creates special challenges with regard to the application of the Safety Convention to such operations, the trend also entails a diverse practice with regard to SOFAs. The inclusion of broad categories

of personnel in SOFAs is in many respects positive, as complex peace operations rely upon an increasing number of personnel exercising a wide range of functions. However, there are examples of SOFAs, in operations not under UN command, where the definition of personnel is particularly vague. The use of unclear definitions has probably been a means of extending the protection available under the SOFA to more or less everyone supporting the peace process. But in the end, this might have the opposite effect. The fact that military personnel cannot be tried before local courts is balanced by the fact that sending states exercise exclusive criminal jurisdiction over their military forces. Immunity from local jurisdiction for other personnel under a SOFA may not so readily be balanced by a duty of their national states to exercise jurisdiction. The trend initiated by the EU to provide military officers with a status equivalent to that of diplomatic agents may have the effect of blurring the distinction between military officers and diplomatic agents. As their functions are fundamentally different it is important to uphold the separation between these two categories of personnel. The use of the UN Model SOFA, as a basis for specific SOFAs in operations led by other organisations, would contribute to the formation of common norms applicable to *all* peace operations from the very beginning.

7.2.3 Responsibility and Accountability

Complex peace operations assuming traditional state functions have prompted questions on the whole subject of responsibility and accountability of organisations and individuals enjoying a special protection under international law. These issues, for instance, have been outlined in a report by the Ombudsperson in Kosovo. From the standpoint of sending states it is naturally of the greatest importance that their citizens be entitled to the best protection possible when performing functions for international organisations abroad. However, if such personnel are perceived by the local population to be above the law, then respect for their protected status will deteriorate. The main problem of protection is, in fact, largely connected to a lack of respect of applicable rules. Positive perception alone may go a long way for the materialisation of the protection that personnel could expect. In this respect it is imperative that a privileged status is combined with a supervising and enforcement mechanism enabling appropriate authorities to effectively deal with criminal acts committed by protected personnel. The argument that some states lack jurisdiction for what their citizens do abroad during peace operations should be met by demanding that all sending states adjust their national laws in order to effectively close this loophole of jurisdiction, about which the former UN Secretary-General Dag Hammarskjöld warned. While his warning primarily related to military personnel, it is today relevant for all personnel participating in peace operations who enjoy immunity from local jurisdiction. If the question of accountability is not properly dealt with, the materialisation of the required protection of personnel in peace opera-

tions will be at risk. Drafters of future SOFAs need to move away from the use of very loose definitions of personnel associated with peace operations.

7.2.4 Combating Impunity Effectively

Of all crimes subject to a treaty-based duty to prosecute or extradite alleged offenders, which is not yet beyond doubt crimes under customary international law, crimes committed against UN and associated personnel stand out as representing one of the most serious types of criminality. International concern over crimes committed against UN and associated personnel supports an interpretation that states have a *right* to prosecute an alleged perpetrator of such crimes on the sole basis of the accused being present in the state in question.[16] Crimes committed against UN and associated personnel, as shown earlier, have repeatedly been regarded as being one of the most serious forms of international criminality. The cumulative effect of these developments contributes to the impression that crimes committed against such personnel are subject to universal jurisdiction in the sense that territorial states have a right – but not necessarily a duty – to prosecute.[17]

Creation of mechanisms enforcing individual criminal responsibility is perhaps one of the most important trends in international law today. An advanced system of international criminal law will possibly have a deterring effect on potential attackers launching assaults on protected persons. States are under a customary law duty to prevent and punish criminal acts *within* their jurisdictions. The Safety Convention, however, has provided international leverage to this duty and established an interstate obligation of penal co-operation. From the perspective of combating impunity, which is the main purpose of the Safety Convention, the inclusion of key provisions in SOFAs is of limited importance. A host state is already obligated to prevent illegal acts against personnel and to prosecute alleged offenders. The "right" states are those with no special connection to any criminal act committed against UN and associated personnel. The seriousness of the crime has already been accounted for, and the idea that it entails universal jurisdiction. Combating this 'culture of impunity' effectively requires, however, universal adherence to the Safety Convention. The duty to prosecute or extradite is probably not yet a principle of customary international law.

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16 See Kenneth C., Randall, Universal Jurisdiction Under International Law, 66 *Texas Law Review* 785, 825-827 (1988).

17 This development, however, should be viewed against the Optional Protocol to the Safety Convention extending the range of protected personnel.

7.2.5 The Safety Convention and International Humanitarian Law

As current peace operations are often decided under Chapter VII of the UN Charter, and personnel are given rather wide powers to defend themselves and the operation, as well as the local population, the impact of international humanitarian law is bound to be a relevant issue in the future. The solution chosen by the drafters of the Safety Convention would probably guide a local court, in cases of doubt, whether an attack on UN forces constituted either an act of war or a criminal act, to rule in favour of the latter. However, the simple solution by the ICC statute recognises, in contrast to the Safety Convention, that it is still a war crime to attack *civilian* members of a peace operation even though its forces act as combatants. A similar solution of the Safety Convention would recognise that it continues to apply in relation to the operation's civilian personnel irrespective of any engagement of its military forces in armed conflict.

To decide at what point peace operation forces become combatants in an armed conflict will not be an easy task. It is indeed a matter of great disagreement in the literature and it has even been asserted that they should never assume that status and that it should always be a crime to attack them. The differences of opinion among legal scholars, the incongruous definitions of the ICC statute and the Safety Convention, and the criticised Secretary-General's Bulletin on the observance by UN forces of international humanitarian law,[18] is evidence of the complexity of the problem. In the end, effective levels of protection require a theoretically sound underpinning that must fit in with the system of international law as a whole. By overreaching, good intentions might cause a loss of respect for such protection and this could adversely affect the chances of success for the operation in question.

18 Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, 6 August 1999, UN Doc. ST/SGB/1999/13.

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Statute of the International Court of Justice, June 26 1945, 1 UNTS XVI.

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– Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 3 May 1996, 35 ILM 1206.

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Index

A

Agenda for Peace ix, 15, 206, 255, 293

B

Brahimi report 14, 15
Bulletin on Observance by United Nations forces of international humanitarian law 101

C

Civil police 146, 204
Command and control 14, 19-21, 108, 152, 157, 166, 199, 200, 221, 226, 228, 229, 230, 231, 232, 236, 309
Contractors 13, 140, 141, 153, 163, 165, 166, 167, 172, 175, 176, 189, 197, 201, 202, 208, 218, 220, 222, 266, 278, 318
Crimes against UN and associated personnel 118, 281, 294, 296, 298, 299, 300, 306, 316, 317
Crimes against the peace and security of mankind 298, 299
Culture of impunity x, 31, 40, 56, 294, 295, 305, 307, 309, 313, 321

D

Diplomatic privileges and immunities 120-130
- core crimes 127
- diplomatic agents 121, 123, 124-126, 127, 128, 129, 130
- EU-led operations 120, 130
- functional necessity 121, 122, 123, 130
- inviolability 120, 123, 124, 125, 126
- jurisdiction 123, 124, 125, 127-128, 130
- *persona non grata* 123, 129-130
- reciprocity 121, 122, 123
- Safety Convention 127
- Waiver of immunity 129

Diplomatic protection 11, 21, 22-26, 27, 28, 57, 74, 106, 107, 116, 313, 318
Due diligence 12, 70-74, 75, 89, 91, 179, 313

E

East Timor 20, 147, 149, 294, 203, 240
ECCAS 154, 159
Experts on mission 50, 52, 137, 138-141, 142-143, 146, 147, 149, 150, 153, 174, 175, 178, 185, 214, 216, 262, 264, 302
EU 21, 120, 130, 154, 155, 158, 161, 187, 188, 202, 248, 258, 320

F

Fundamental standards of humanity 57, 58, 88, 117, 315
Functional necessity 50, 55, 121, 122, 123, 130, 134, 135, 143, 187, 202, 315
Functional protection 26-28, 74, 318

G

Grave breaches of international humanitarian law 113-117

H

Hammarskjöld, Dag ix, 151, 320
Humanitarian organisations 220, 223. 224
Human Rights Law 75-92
- armed conflict 81, 84, 85, 86
- customary international law 86-88
- derogation 75, 77, 81, 82, 83, 84, 85, 86, 91, 92
- European Court of Human Rights 78, 82, 88, 89
- emergency 75, 89, 81, 82, 83, 84, 85, 86, 91

- ensure 77, 78, 79, 88, 89, 91
- international humanitarian law 84, 85
- jurisdiction 77, 78, 79, 80, 89, 91, 92
- *jus cogens* 85, 86, 87
- law enforcement 88, 91
- non-derogative 82, 83, 85
- peace operations 75, 80, 86, 88, 91
- Positive duty 92
- *Ratione materiae* 77, 80-86
- *Ratione loci* 77, 78-80
- *Ratione personae* 77, 78
- respect 76, 77, 79, 85, 88, 89, 91
- secure 77, 78, 79, 88, 89, 90, 91, 92
- Safety Convention 91, 92

I

IFOR 54, 155, 161, 163, 166, 172, 174, 184, 185, 201

Impunity 3, 4, 31, 40, 47, 48, 56, 190, 191, 192, 197, 249, 270, 277, 292, 293-307, 309, 313, 316-318, 319, 321

Individual criminal responsibility 45, 115, 116, 281-288, 295, 305, 321

International Criminal Court 3, 29, 30, 36, 45, 48, 49, 56, 104, 113, 115, 128, 186, 189, 190, 191, 192, 194, 235, 236, 299, 300-303, 305, 306, 317, 322

International Court of Justice 5, 15, 26, 28, 73, 84, 88, 97, 124, 126, 128, 131, 132, 134, 139, 140, 141, 144, 149, 318, 327

International Committee of the Red Cross 97, 98, 101, 111, 116, 169, 253, 261, 315

International Criminal Tribunal for Rwanda 30, 36, 45, 46, 115, 303, 304, 305, 304, 306, 329

International Criminal Tribunal for former Yugoslavia 30, 36, 45, 46, 47, 95, 97, 106, 107, 115, 303, 305, 306, 314, 329

International Law Commission 7, 24, 25, 26, 61, 62, 74, 75, 121, 122, 125, 127, 282, 296, 297, 299, 316, 317, 318, 336

INTERFET 194, 240

International Humanitarian Law 92-118
- Arbitrary treatment 104, 105
- *Aut dedere aut judicare* 114, 116
- Bulletin on Observance by United Nations forces of international humanitarian law 101
- Compulsory universal jurisdiction 113
- customary international law 94, 113, 115, 116
- grave breaches 113-117
- human rights 93, 97, 102, 112
- Individual criminal responsibility 115, 116
- Occupation 93, 95, 06, 105
- Permissive universal jurisdiction 113
- Police 98, 99
- protected persons 94, 105, 106, 107, 108, 109, 111, 114, 116, 117
- Relief personnel 98, 110, 111, 112, 117
- Safety Convention 92, 99, 100, 103, 114, 116, 117
- Self-defence 98, 100, 101, 102, 103
- UN forces 99, 100, 101

International Minimum Standard 58-75
- armed forces 65, 66, 67, 68, 73
- Claims Commission 59, 65, 66, 67, 72, 73
- customary law 57, 58, 73, 74, 75
- due diligence 70-74, 75
- Garcia–Amador 60, 61, 62, 63, 69, 70, 71, 74
- human rights law 61, 63, 64, 74, 75
- state responsibility 60, 61, 64, 65, 70, 75
- Safety Convention 73, 75
- *ultra vires* 64, 65, 67, 75

International Privileges and Immunities 130-204
- civilian contractors 140, 153, 201
- civil police 146, 204
- customary law 147, 193
- consent 149, 150, 152, 173, 182, 184, 186, 189, 190, 196, 197, 198
- East Timor 147, 149, 194, 203
- experts on mission 137-138,141, 142-147, 149, 150, 153, 174, 175, 178, 185
- functional necessity 134, 135, 143, 187, 202
- General Convention 135, 137, 138, 139, 141, 142, 143, 146, 149, 150, 153, 163, 165, 167, 171, 173, 174, 175, 176, 178, 182, 201
- International Law Commission 138, 282
- international officials 131, 133, 147

- Kosovo 147, 149, 156-157, 162, 185, 203
- legal personality 131, 132, 133, 148
- military observers 146, 174
- officials 131, 132, 133, 135, 136, 137-138, 139, 140, 141-0142, 143, 145, 146, 147, 148, 149, 150, 153, 164, 173, 174, 176, 191
- Office of Legal Affairs 140, 141, 144, 145, 146, 165, 175, 176, 193, 194
- official capacity 136, 141, 143-147, 148, 149, 159, 162, 165, 180, 184, 189
- Restatement, US (third) 148
- Safety Convention 168, 180, 197, 202

Interstate penal law co-operation 294, 295, 307, 313, 316
ISAF 157, 161, 163, 167, 168, 186, 190, 232

J

Jus cogens 85, 87, 190, 191

K

Kosovo 20, 47, 147, 149, 156, 162, 185, 203, 232, 319, 320
KFOR 156, 157, 163, 185, 203, 232

M

Military Observers 13, 146, 174
MFO 183, 184, 200
MNF 199, 200
MINUCI 242
MINUSTAH 198, 242
MONUC 21, 158, 198
NATO 53, 54, 79, 154, 155, 156, 157, 158, 163, 166, 167, 184, 185, 187, 201, 202, 221, 232, 239, 303, 319
NATO SOFA 8, 54, 55, 150, 151, 155, 184, 202
NATO air strikes 239, 303

N

New Zealand 194, 206, 207, 208, 209, 210, 211, 225, 227, 233, 246, 247, 248, 249, 251, 252, 254, 257, 275, 276, 277, 284, 290

O

OAS 76
OAU 76, 139, 163, 184
ONUC 27, 161, 162, 167, 172, 180, 182, 188, 192, 193
ONUCI 198, 242
ONUMOZ 17, 152, 160, 162, 163, 164, 165, 170, 171, 172, 180

P

Prisoner of war 103, 273
Peacebuilding 15, 230, 249, 254, 255, 256, 257, 258, 259, 312, 319
Persona Non Grata 123, 129-130, 184, 188

R

Restatement, US (third) 34, 38, 85, 87, 88, 147, 148
Rules of Engagement 290, 291

S

Self-defence 15, 18, 69, 98, 100, 101, 102, 103, 125, 126, 196, 213, 237, 289, 290-291, 292, 301
Safety Convention 205-292, 309-313, 318-319, 321-322
- *Aut dedere aut judicare* 213, 281, 286, 288, 292, 311
- Certifying authority 241, 242, 245, 257
- civilian contractors 208, 218, 220, 222, 318
- combatants 207, 222, 233, 234, 235, 236, 237, 238, 239, 240, 252, 253, 310, 322
- command and control 221, 226, 228, 229, 230, 231, 232, 236, 309
- Costa Rica 250, 252, 253, 260, 261
- custody 278, 279, 285
- Declaration of exceptional risk 230, 233, 241, 242, 243, 244, 245, 249, 250, 311
- extradition 213, 242, 270, 283, 285, 287-288
- humanitarian organisations 220, 223, 244
- human rights 225, 230, 249, 271, 279, 288, 289, 292, 312, 313
- ICRC 253, 261
- Identification 262-264, 271, 274, 278, 282, 283, 312
- International Humanitarian Law 213, 233-240, 250, 252, 253, 260, 261, 273, 279, 288, 289, 310, 311, 312, 313, 322
- Impunity 249, 270, 277, 292, 309, 313, 319, 321

- IPP Convention 209, 210, 269, 272, 277, 280, 282, 283, 285, 286, 288
- Intergovernmental organisation 214, 219, 220, 221, 230, 232
- Jordan 243, 250, 251, 254, 257, 258, 274, 275, 276, 277
- jurisdiction 206, 213, 242, 246, 250, 260, 265, 266, 268, 270, 271, 274, 275, 276, 277, 278, 280, 281, 283-286, 287, 292, 311, 312, 313, 321
- Key provisions 242, 243, 245, 257, 278, 292, 312, 321
- locally recruited personnel 224, 241
- natural disasters 254, 259, 312
- New Zealand 206, 207, 208, 209, 210, 211, 225, 227, 233, 246, 247, 248, 249, 251, 252, 254, 257, 258, 275, 276, 277, 284, 290
- NGOs 208, 218, 219, 220, 223, 224, 235, 241, 246, 280, 310, 312
- Non-international armed conflict 234, 238, 239, 240, 273, 289, 310, 311
- Optional Protocol 205, 212, 213, 241-156, 257, 258, 259, 260, 261, 277, 280, 309, 311, 312, 319, 321
- Pakistan 207, 247, 248
- Partnership agreements 223
- peacebuilding 254, 255, 256, 257, 258, 259, 312, 319
- Prosecution 207. 213, 240, 242, 274, 285, 286-287
- Sixth Committee 205, 208, 209, 211, 218, 222, 227, 243, 250, 253, 254, 255, 257, 261
- Somalia 205, 207, 221, 238, 266, 270, 272, 273, 278, 310, 312
- UN authority 227, 228-229, 309, 319
- regional organisations 194, 199, 232
- Respect local laws and regulations 213, 267-268
- risk 226, 227, 230, 232, 233, 240, 241, 242, 243, 247, 249, 250, 251, 254, 255, 256, 257, 258, 259, 262, 263, 273, 310, 311, 312, 321
- Rules of engagement 291, 290, 291
- SOFA 242, 243, 244, 245, 261, 263, 264, 265, 266, 268, 271, 274-281, 283
- self-defence 196, 213, 237, 289, 290-291, 292, 312, 319-320, 321
- transit 220, 261, 266-267, 275, 276

SFOR 155, 162, 166, 172, 184, 185, 201, 232

Status-of-Forces Agreement 51-56, 150-204, 274-281, 319-320
- civilian component 52, 174, 186
- Command and control 142, 157, 166, 199, 200
- Concordia 158
- consent 53, 150, 152, 173, 182, 184, 186, 189, 190, 196, 197, 198
- contractors 153, 163, 165, 166, 167, 172, 175, 176, 189, 197, 201, 202, 278
- customary international law 56, 193-201, 277, 279, 321
- entry and departure 175-176
- EUFOR 155, 204
- exclusive criminal jurisdiction 52, 54, 55, 151, 195, 197, 199, 320
- Force Commander 160, 168, 174, 175, 176, 187
- Freedom of movement 153, 157, 161, 171, 172, 173, 175, 196, 197, 199, 316
- Functional immunity 51, 165, 272, 316
- General Framework Agreement for Peace (Dayton Agreement) 155, 157,
- host government 52, 166, 170, 171, 173, 174, 176, 177, 178, 179, 180, 279
- ICC 186, 189, 190, 191, 192, 194
- Identification 171, 176-177, 201, 274, 278
- IFOR 54, 155, 163, 166, 184, 185
- International humanitarian law 169, 197, 202, 279
- Impunity 56, 277, 319
- ISAF 157, 161, 163, 167, 168, 186, 190
- jurisdictional vacuum 181, 183, 186, 191
- *Jus cogens* 190, 191
- KFOR 152, 156, 157, 161, 163, 185, 203
- Liberia 160, 191, 198
- local personnel 167, 174, 180
- military component 52, 55, 163, 164, 173, 174, 180, 181, 182, 183, 186, 192, 315
- Military Technical Agreement 156, 157
- Ombudsperson Institution 203, 204, 320
- *Opinio juris* 194, 195, 196
- privileges and immunities 52, 55, 150, 204, 277
- regional organisations 151, 152, 194, 196

- responsibility 157, 161, 168, 177, 181, 183, 190, 197, 204, 281, 320-321
- retroactive effect 162
- Safety and Security 179, 180, 278
- Safety Convention 55, 168, 180, 197, 202, 276, 277, 278, 280, 319
- SFOR 155, 156, 163, 166, 184, 185
- Special Representative 164, 167, 168, 174, 175, 176, 177, 178, 179, 180, 187, 188, 278
- subsidiary organ 154, 163, 173
- United Nations Volunteers 165, 197
- Usus 194
- visiting forces 53, 54, 55, 150, 152, 155, 183, 186, 201, 202

Special Court for Sierra Leone 47, 305, 329
State responsibility 22, 24, 25, 26, 58, 60, 61, 62, 64, 65, 70, 75, 273, 292

U

UNAMA 232
UNAMIR 17, 20, 160, 162, 163, 164, 165, 169, 170, 171, 176, 304
UNAMSIL 166, 170, 171, 172, 174, 176, 177, 179, 180, 198, 305
UNAVEM 16, 160, 162, 163, 164, 165, 169, 170, 171, 180
UNCRO 160, 162, 166, 171
UNDP 146, 223, 224
UNEF 16, 54, 150, 151, 153, 154, 161, 172, 181, 192, 193, 197, 228
UNFICYP 151, 152, 174, 181, 193
UNHCR 222, 223, 226, 230, 232
UNICEF 223
UNIFIL 16, 160, 162, 163, 164, 169, 171, 197
Universal jurisdiction 34, 35, 36, 37, 38, 39, 41, 43, 44, 45, 56, 113, 117, 190, 260, 306, 321
Universal protection x, 294, 316
UNMEE 162, 165, 166, 170, 173, 176, 180, 198
UNMIBH 166, 232
UNMIH 16, 17, 160, 162, 163, 164, 165, 221, 231
UNMIK 152, 156, 157, 161, 162, 163, 174, 185, 203, 204, 232
UNMIL 160, 162, 165, 166, 172, 174, 175, 176, 177, 179, 180, 198, 242
UNMISET 160, 166, 170, 171, 172, 174, 175, 176, 177, 179, 180, 202, 257, 278, 279, 283, 285
UN Model SOFA 3, 7, 52, 54, 55, 147, 150, 151, 152, 153, 155, 161, 169, 171, 173, 176, 180, 182, 187, 192, 193, 194, 195, 196, 198, 199, 201, 202, 261, 268, 271, 316, 320
UNOB 153, 198, 243
UNOSOM 17, 100, 108, 146, 205, 207, 221, 231, 238, 251, 279
UNPROFOR 17, 100, 152, 155, 160, 162, 163, 164, 169, 170, 171, 172, 173, 176, 180, 201, 205, 221, 231, 272
UNTAC 16, 17, 160, 162, 163, 164, 165, 171, 180
UNTSO 164, 242
UNV 165
United States 24, 30, 33, 34, 48, 49, 59, 60, 66, 69, 70, 71, 73, 124, 125, 129, 144, 195, 200, 201, 221, 236, 248

W

World Summit Outcome 255, 258, 261

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