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**Can the International Criminal Court prosecute Military
Personnel of United Nations Peace Support Operations?**

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'Informal Consultations on the Review Conference', in ELSA International (ed.), "Report on the 5th Assembly of States Parties to the Rome Statute of the International Criminal Court", pp.11-14, available under http://www.iccnw.org/documents/ELSA_ICC_ASP_Report_2006.pdf;

'The Crime of Aggression', in ELSA International (ed.), "Report on the 4th Assembly of States Parties to the Rome Statute of the International Criminal Court", pp. 21-25, available under <https://www.elsa.org/aieh4925y980ppqq2/EI%20Delegations/Reports/ICC/DRAFT%20ASP%20REPORT%202005.pdf>;

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Can the International Criminal Court prosecute Military Personnel of United Nations Peace Support Operations?

1. INTRODUCTION

The vast number of soldiers serving in United Nations Peace Support Operations today leads to problems which did not arise in early days of peace support operations. More and more, the United Nations are forced to investigate the conduct of forces engaged in UN operations. Involvement of peace support operations' personnel in sexual exploitation and abuse was proven in missions to Bosnia and Herzegovina in the early 1990s, in Cambodia and Timor-Leste, West Africa and the Democratic Republic of the Congo in recent years.¹

Nevertheless, not every case is investigated properly in the home country of the involved personnel, nor does the United Nations itself possess an effective system to prosecute crimes committed by military personnel in peace support operations.

Since 2002, the International Criminal Court² is operating in The Hague, The Netherlands. Its subject-matter jurisdiction contains the most serious crimes of concern to the international community as a whole. One of the core principles of the Rome Statute of the International Criminal Court is complementarity. That means states have the right, but also the duty, to exercise their criminal jurisdiction over those responsible for international crimes and only if a state is unable or unwilling to do so, the International Criminal Court can exercise its jurisdiction.³

The complementarity principle could put an additional pressure on states to investigate or prosecute the conduct of their military personnel in UN operations if the Court had the power to prosecute those personnel. However, military personnel of

¹ See UN General Assembly, *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, UN Doc. A/59/710 (2005), at 7, para. 3.

² Hereinafter referred to as 'the Court' or 'ICC'.

³ Cf. Article 17 Rome Statute.

peace support operations are entitled to certain privileges and immunities. Furthermore, troop contributing states usually maintain the exclusive jurisdiction in criminal matters over members of their contingents. Hence, the immunities of military personnel on the one hand and the question of jurisdiction, on the other, could influence proceedings before the International Criminal Court.

In my paper I seek to clarify whether the International Criminal Court can prosecute military personnel of UN peace support operations at all. Therefore I will first determine the privileges and immunities the military personnel are entitled to in these operations. Further I will examine how the Rome Statute deals with immunities and whether there might be problems surrendering the suspected persons to the Court. Moreover, Status-of-Forces Agreements⁴ as well as some UN Security Council Resolutions grant exclusive jurisdiction to contributing states in criminal matters. The impact of this exclusive jurisdiction on proceedings before the International Criminal Court and recent Security Council Resolution on this issue will be considered in the third section of the paper.

My paper will be delimited to UN peace support operations; missions under NATO, EU, AU or another mandate and command might lead to other problems and solutions, which are not under review at this point. Further, I will concentrate solely on military personnel of peace support operations. These personnel are placed by contributing states under the disposal of the United Nations while civil servants in these operations are often United Nations employees or locally recruited personnel with the privileges and immunities distinct from those of the military component.

⁴ Hereinafter referred to as 'SOFAs'.

2. THE IMMUNITY OF MILITARY PERSONNEL IN UNITED NATIONS PEACE SUPPORT OPERATIONS

2.1. Introduction

Privileges and immunities are essential for international peace support operations. The personnel working in such operations are depending on various rules to be able to fulfill the mandate and to work independently. Since the peace support operation UNEF I in Egypt 1957, so called Status-of-Forces Agreements have been put in place to define the status, and with that guarantee certain privileges and immunities, of the personnel of a mission. The SOFA is a bilateral treaty, concluded between the leading entity of a mission and the host country. Generally, such an agreement is signed before the mission starts. Its main function is to clarify the status, privileges and immunities of all members of a mission and to take into account the specific circumstances, which differ from operation to operation.

However, there are situations possible, where no SOFA is concluded. One possible situation could be the lacking consent of the host state, for example in peace enforcement missions under Chapter VII of the UN Charter, authorized by the UN Security Council. Another case could be a mission in a failed state without any effective governmental authority in power and thus not able to enter into agreements. Finally, in urgent cases the negotiations of a SOFA could last too long, so that the mission starts without an agreement in the first stage of the operation. Nevertheless, in such a situation the consent of the state generally exists, which might have implications on the law applicable in contrast to situations without state consent.

Instruments covering situations with an absence of a SOFA between the United Nations and the host state could be the Convention on the Privileges and Immunities

for the United Nations⁵, Article 105 of the UN Charter, customary international law or probably UN Security Council Resolutions.

2.2. UN Peace Support Operations

To be entitled to privileges and immunities in a country, the personnel must be employed by an organization with an authority to grant certain privileges and immunities. Only then, a state might agree to provide the personnel with special rights under its sovereignty or has already done so by becoming a member through ratifying the constituent document of the organization. Non-Governmental Organizations lack for instance such an authority, because they are established under national law and thus no third state agreed to give them any powers. That is different for International Organizations, which are based on a constituent document that is signed by several states. Contrary to rights of diplomats, which are well established in customary international law for centuries, personnel of international organizations are entitled to privileges and immunities by treaties.

Since the United Nations possesses legal personality, which the International Court of Justice found in its *Reparations* Advisory Opinion, it has the capacity to acquire certain rights *vis-à-vis* its member states.⁶ But the International Court of Justice went in its *Reparations* Advisory Opinion even further and concluded that the United Nations, due to its almost universal membership, has also objective international personality towards non-member states.⁷ This could have implications on provisions in the UN Charter, which are granting privileges and immunities for United Nations personnel, even towards non-UN member states, bearing in mind that this would certainly be an exceptional situation regarding 192 UN member states today.

⁵ 1 UNTS 15 (corrigendum in 90 UNTS 327), 13 February 1946; hereinafter referred to as ‘the Convention’ or ‘CPIUN’.

⁶ *Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports 174, at 179.

⁷ *Reparations* case, *ibid.*, at 185; P. C. Szasz and T. Ingadottir, ‘*The UN and the ICC: The Immunity of the UN and Its Officials*’, (2001) 14 *Leiden Journal of International Law* 867, at 869.

The Security Council generally establishes peace support operations, only in exceptional circumstances the UN General Assembly does so as well. The Department for Peacekeeping Operations (as part of the UN Secretariat) runs an operation under the responsibility of the UN Secretary-General. Peacekeeping missions are regarded as subsidiary organs of the Security Council (cf. Article 29 UN Charter and in case of operations created by the General Assembly Article 22 UN Charter) and form part of the Secretariat under Article 98. Thus, peace support operations are organs of the United Nations and hence form part of the institutional system of the Organization.⁸

Consequently, peace support operations fall under the provisions of the UN Charter. However, this concerns the operation as such and it is therefore necessary to look in detail on the personnel participating in such operations. Generally, the United Nations has the authority to grant immunities to its personnel. However, in cases where an operation is not run by the United Nations alone, the member states contribute forces on an operation-by-operation basis.

2.3. Personnel of United Nations Peace Support Operations

Before turning to privileges and immunities of the personnel, it is important to clarify who are the members of an operation and what is their general status.

The UN Model SOFA⁹ gives in Section VI a comprehensive description of members in an operation. A main contingent forms the military personnel of national contributors assigned to the military component of the UN operation. There is, on the other hand, a civilian component in each operation. While national contingents form the military part, the civilian one consists of United Nations officials and specially recruited personnel including the local population. However, both components are

⁸ M. Bothe, 'Peace-keeping', in B. Simma (ed.), *The Charter of the United Nations* (2002), 648 at 684 *et seq.*; E. Suy, 'United Nations Peacekeeping System', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (1982), 1143 at 1144 *et seq.*

⁹ Draft Model Status-of-Forces Agreement between the United Nations and host countries, UN Doc. A/45/594, Annex (1990).

highly interrelated. In my paper and the following sections, I will take only military personnel into consideration; different rules might apply for the civilian component.

2.4. Privileges and Immunities for Personnel of Peace Support Operations

Privileges and immunities are necessary for personnel of peace support operations to execute their functions and mandate effectively within a country without being impeded by the host state.¹⁰ Generally, United Nations personnel are only entitled to immunities for acts in official capacity, whereas the Secretary-General has the right to determine, which acts are official ones.¹¹ In peace support operations, the Force Commander has to make this determination.¹² However, ultimately he is under the Secretary-General's authority and therefore not completely free in his decision.¹³ Individual or collective responsibilities for wrongful acts are not affected by the privileges and immunities provisions.¹⁴ Privileges and immunities can be granted to military personnel by different instruments.

2.4.1. Status-of-Forces Agreements

Usually, privileges and immunities are granted to military personnel by a special bilateral treaty between the United Nations and the host state, the Status-of-Forces Agreement. In such an Agreement, all circumstances of an operation and a situation in the host state are taken into account and thus the privileges and immunities may vary from mission to mission. Nevertheless, generally the provisions are quite similar to those of the UN Model SOFA. A SOFA is not however the only means to provide privileges and immunities to personnel of peace support operations. It is certainly the

¹⁰ P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), at 498.

¹¹ *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] ICJ Reports 62, at 87, para. 60; Sands/Klein, *supra* note 10, at 504.

¹² Sands/Klein, *supra* note 10, at 509.

¹³ Suy, *supra* note 8, at 1146; Szasz/Ingadottir, *supra* note 7, at 871.

¹⁴ D. Fleck, 'Securing Status and Protection of Peacekeepers', in R. Arnold and G. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (2006), 141 at 143.

most common and detailed document, but other agreements ensure certain rights on a more basic level, often referred to in a SOFA. These agreements play an important role in the regulation of the status of the military personnel of peace support operations in the absence of a SOFA between the United Nations and the host state.

To emphasize the importance of SOFAs one has to consider the consequences related to the absence of such an agreement. In such a case members of forces risk being accused and convicted under domestic law.¹⁵ Nevertheless, there were already missions without a SOFA, for example UNEF II, UNDOF, UNIFIL and UNMEE.¹⁶ Also in Somalia, no SOFAs were concluded between the United Nations and any Somali authority.¹⁷ In such a situation the question arises, how the personnel is protected.

2.4.2. Convention on Privileges and Immunities for the United Nations

In first place, the Convention on Privileges and Immunities for the United Nations might be applicable to personnel of peace support operations. As a precondition, the host state has to be party to the Convention. There are at the moment 153 states signatories to the Convention.¹⁸ Although not each member of the United Nations signed the Convention, some authors apply the provisions of the Convention to all UN members, arguing that Article 105 UN Charter is self-executing and thus the Convention only determines the privileges and immunities of Article 105 in a more detailed way.¹⁹ However, Article 105 (3) makes the distinction between a more detailed determination of paragraphs 1 and 2 of Article 105 by the General Assembly in form of recommendations to its member states, which were indeed self-executing, and in form of proposals for Conventions to them. The latter case occurred with the

¹⁵ P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents', 2000 *Journal of Conflict and Security Law* 45, at 50.

¹⁶ O. Engdahl, *Protection of Personnel in Peace Operations* (2007), at 196, fn. 350; UNEF II (1973-79, Egypt and Israel), UNDOF (1974 to date, Israel and Syria), UNIFIL (1978 to date, Israel and Lebanon); Fleck, *supra* note 14, at 150; UNMEE (2000 to date, Ethiopia and Eritrea).

¹⁷ J. M. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93* (1997), at 5.

¹⁸ cf. <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty1.asp> (last time visited 15 August 2007).

¹⁹ M. Gerster and D. Rotenberg, 'Article 105', in Simma, *supra* note 8, 1314 at 1316.

1946 CPIUN, which was proposed to the member states for accession. Since the Convention was a proposal and not a recommendation by the General Assembly, it is not self-executing and thus not applicable to all UN member states. Therefore, the Convention applies only to its signatories.

Since the Convention expands Article 105 UN Charter and deals with the privileges and immunities of the United Nations as such, it is applicable to UN operations due to them being part of the United Nations institutional system.²⁰

Having a closer look inside the Convention, there are different categories of personnel described. Article IV addresses representatives of members, Article V officials and Article VI experts on mission for the United Nations.²¹ These three groups of persons are protected by the Convention. Each SOFA puts the personnel of an operation into one of these categories by referring to the related article in the Convention, except for the military personnel, which is entitled to privileges and immunities as defined by the SOFA itself.²² Thus, only the military personnel, including the Commander with its high-ranking staff members, do not seem to fit in the Convention. Military personnel do not have a contract with the United Nations; instead, they are set under the disposal of the United Nations by the contributing states.

The only category the military personnel might fit in, is the category of ‘experts on mission’. The International Court of Justice found in its *Applicability of Article VI, Section 22 CPIUN* Advisory Opinion, that there are persons within peacekeeping forces, which are not UN officials and which are entrusted with certain tasks and, hence, are experts on mission.²³ These tasks consist, according to the decision by the International Court of Justice, of various activities, but nothing in them is related to the core tasks of the military personnel in a peace support operation, such as monitoring peace, disarmament or protection of civilians. Since the International Court of Justice did not consider the military personnel in its Advisory Opinion, it

²⁰ See *supra* note 8.

²¹ H. G. Schermers and N. Blokker, *International Institutional Law* (2003), at 254, para. 326.

²² Draft Model Status-of-Forces Agreement between the United Nations and host countries, *supra* note 9, at Section VI.

²³ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] ICJ Reports 177, at 194, para. 48.

seems at least doubtful whether the military personnel can be qualified as experts on mission.

Moreover, the UN Model SOFA itself supports the view that the military personnel do not belong to experts on mission. In Articles 26 and 27, it distinguishes between military observers and civilian personnel on the one hand and military personnel of national contingents on the other hand. The former shall be considered as experts on mission within the meaning of Article VI of the Convention, the latter are granted privileges and immunities especially under the SOFA itself. In addition, Article 47 provides for the exclusive jurisdiction regarding criminal offences of the troop contributing nations for military personnel, whereas civilian personnel can be subject under the jurisdiction on criminal matters of the host state, depending on a special agreement between the Special Representative/Commander and the host state. Even the UN Model SOFA recognizes a difference between the status of the civilian and the military components of an operation. To conclude, military personnel are not at all part of the provision of the Convention.²⁴

2.4.3. Article 105 UN Charter

Since the Convention is not applicable in case of military personnel, Article 105 UN Charter might offer protection. Article 105 contains in its paragraph 2 the general privileges and immunities for UN officials to enable them for the independent exercise of their functions in connection with the organization. The CPIUN was adopted by the General Assembly according to paragraph 3 of Article 105 to determine more detailed the broad approach of Article 105 (1) and (2). It has also been argued that the Convention serves as codification of the privileges and immunities and as being necessary for implementing Article 105.²⁵

²⁴ See also Szasz/Ingadottir, *supra* note 7, at 871.

²⁵ J. K. King, *The Privileges and Immunities of the Personnel of International Organizations* (1949), at 164; Engdahl, *supra* note 16, at 131.

Article 105 is applicable in all member countries of the UN. Paragraph 2 refers to officials of the Organization, which seems on the first view to be congruent with the more detailed determination on officials in Article V of the Convention. As consequence, the protection extends to the UN officials only and neither experts on mission as in the Convention nor military personnel would be protected by Article 105. On a closer view and considering the broad content of Article 105, the term 'officials' could also be very broad and thus include all personnel related to the United Nations.²⁶ Article 105 aims to enable persons acting on behalf of the Organization to exercise independently their functions in connection with the Organization. Not only officials, but also experts on missions contribute to the Organization's functions and, finally yet importantly, peace support operations are an integral part of the UN system since the very first days of the Organization. Furthermore, peacekeeping forces form a subsidiary organ of the United Nations and they are considered as part of the UN Secretariat. Thereby all UN Charter provisions cover them.²⁷ To stress the coercive authority of the UN Security Council under Article 25 UN Charter, in particular in the field of the maintenance of international peace and security, military personnel of peace support operations play a decisive role.²⁸ Therefore, they must fall under the umbrella of Article 105 as UN officials serving the principles and purposes of the Organization in a broad sense.

Thus, the broad scope of Article 105 as well as the purpose of the Article leads to the conclusion that military personnel are also included in it. Due to the open content of Article 105, the more detailed determination of what exactly the privileges and immunities of persons entitled to them under Article 105 are is difficult. Certainly one has to consider and interpret the provisions established by the UN General Assembly in the CPIUN with the purpose to determine Article 105 (2) of the UN Charter.

2.4.4. Customary International Law Rules on Privileges and Immunities

²⁶ Szasz/Ingadottir, *supra* note 7, at 871.

²⁷ See *supra* note 8.

²⁸ W. G. Sharp Sr., *Jus Paciarum. Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century* (1999), at 140.

Although a situation where the UN Charter does not bind an entity seems hardly possible to occur, privileges and immunities might be granted to personnel of peace support operations by customary international law. Such rules might protect the military personnel in absence of a SOFA in a more detailed way as Article 105 (2) UN Charter does.

The determination of rules under customary international law poses a lot of questions and problems. The process of developing customary rules is highly arguable and hence it is not very easy to reach reliable results. Generally, customary law is developed out of state practice and an *opinio juris* supporting state practice.²⁹ In relation to international organizations, Brownlie notes that compared to diplomats' rights there is

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.³⁰

Therefore, one must be very careful regarding customary rules on privileges and immunities of personnel in peace support operations.

An established collection of certain provisions regarding privileges and immunities of personnel of peace support operations are contained in the UN Model SOFA. These norms could be the basis for customary law rules. However, state practice varies especially depending on the general consent by a host state to a mission or no consent at all in case of an enforcement mission under Chapter VII UN Charter. To determine rules of customary international law it is important to elaborate the specific situations in which states show a certain reliable practice that might lead to a customary law rule. In the case of peace support operations, there are no common grounds applicable to all

²⁹ I. Brownlie, *Principles of Public International Law* (2003), at 7.

³⁰ *Ibid.*, at 652.

operations. Peace support operations were born out of the necessity to restore or maintain peace and security in a specific situation. The obvious gap in the UN Charter of a single identifiable legal basis for those operations could serve as an indicator. In the end, each mission is to a certain extent unique and depending on the circumstances of the situation, because the question of peace and security is always far from being easy to solve.³¹

Turning to the question of customary international law and privileges and immunities of military personnel of a peace support operation, two different types of missions can be generally found in practice. There are the operations, where the host state agreed to receive the mission on its ground and is thus willing to accept certain privileges and immunities of the personnel. On the other hand there are operations without state consent, where the personnel is not welcomed in the host state and where the host state is also not willing to grant any privileges and immunities to members of the operation to facilitate their tasks. In the absence of a SOFA, the former situation would be a case where no agreement was negotiated right in time before the commencement of the operation, the latter situation refers to enforcement missions under chapter VII of the UN Charter where usually no SOFA is concluded at all. Difficult is the situation of a mission in a failed state, where no authority exists, which could express consent to the operation at all.

Missions with State Consent

First of all, missions with state consent are classic examples for situations wherein a SOFA is concluded between the United Nations and the host state. Only in the beginning of a mission with an urgent character, a SOFA might not yet be completely agreed on. Since SOFAs vary from mission to mission, taking into account all circumstances different to each conflict, only the UN Model SOFA gives some orientation on general rules. Specific SOFAs of a mission are usually based on the UN model. To determine state practice, it is important to examine, which rules of the

³¹ Fleck, *supra* note 14, at 143.

Model SOFA are usually accepted in a specific one and on the other side which rules are amended or supplemented by additional agreements. Therefore, only some provisions of the UN Model SOFA can be regarded as leading to state practice.

Concerning provisions on criminal jurisdiction, there are arguments that at least the immunity from criminal jurisdiction of the host country does not exist under customary law in a case where a national of the host country itself is the victim of the criminal conduct in question.³² Other authors can hardly find any criminal case, where a host state had claimed criminal jurisdiction on a member of visiting forces outside agreed SOFA provisions.³³ These two different views show the problems in finding reliable state practice. Also the NATO Model SOFA has been supplemented by additional agreements on jurisdiction and consequently, no evidence of common state practice can be drawn from its provisions.³⁴

If a state gives its consent to a peace operation, it also agrees to the established concept of this operation including privileges and immunities for the personnel involved.³⁵ In addition, the Security Council notes in its peace support operations establishing Resolutions that the UN Model SOFA *shall* apply until a special agreement is signed. Before 2003, the formulation of similar Security Council Resolutions was slightly different, envisaging that the UN Model SOFA *should* apply.³⁶

To sum up, in situations where a SOFA is still under negotiation, but the general consent of the host state to the mission exists, the personnel is protected under certain, in this case customary, rules of the UN Model SOFA.³⁷ However, exactly the lack of clear and precise rules makes it so difficult to say, which rules are the core of the generally applicable rules in such situations. Therefore, in practice it does not help much to have some customary rules on privileges and immunities without a clear

³² Simpson, *supra* note 17, at 7.

³³ Fleck, *supra* note 14, at 144.

³⁴ *Ibid.*, at 145.

³⁵ Engdahl, *supra* note 16, at 197.

³⁶ See *ibid.*, at 198, fn. 354 for a number of UNSC Resolutions.

³⁷ Sands/Klein, *supra* note 10, at 509.

content. One should avoid referring to those customary rules to claim privileges and immunities for personnel of peace support operations.

Mission without State Consent

However, there are authors that even go further and see the UN Model SOFA as customary law in all situations.³⁸ They refer as evidence of state practice to the fact that SOFA norms are the result of practice of the last 50 years. In addition, the UN Office of Legal Affairs claimed the customary status of the provisions in the UN Model SOFA regarding the mission in Croatia in 1995 and, in the same year, in a memorandum to the Assistant Secretary-General for Peacekeeping Operations, without a SOFA having been concluded by that time.³⁹ These statements are some of the little evidence that can be regarded as *opinio juris* for customary law rules applicable to all missions. Another proof is the correspondences between the United Nations and contributing states.⁴⁰ Other authors understand only some provisions of the UN Model SOFA as customary law, e.g. the absolute criminal immunity.⁴¹ Rowe argues against the customary status of absolute criminal immunity in situations without state consent. He refers to the ancient U.S. case of *The Schooner Exchange v. McFaddon & Others* that dealt with state consent and jurisdiction over foreign military property.⁴² The decision established the law of the flag doctrine, according to that in a situation only with state consent the foreign forces possess absolute immunity *ipso facto*. The consent is hereby the decisive factor.⁴³ The contrary theory envisaged the exclusive jurisdiction of the host state over foreign forces, unless there was a special agreement concluded. Also this situation and in particular the special

³⁸ Sharp, *supra* note 28, at 137; R. Sommereyns, 'United Nations Forces', in Bernhardt, *supra* note 8, 1106 at 1110 and 1115.

³⁹ Referred to in Sharp, *supra* note 28, at 39; Memorandum to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, 408 in *United Nations Juridical Yearbook* (1995).

⁴⁰ Engdahl, *supra* note 16, at 195.

⁴¹ R. Siekmann, *National Contingents in United Nations Peace-keeping Forces* (1991), at 153; D. Fleck, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?', 2003 *Journal of International Criminal Justice* 651, at 668.

⁴² Rowe, *supra* note 15, at 51; *The Schooner Exchange v. McFaddon a. o.*, [1812] 11 U.S. 116 (Cranch).

⁴³ J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law* (1992), at 170.

agreement was depending on consent. Without consent, the host state retained its exclusive jurisdiction over foreign forces on its territory.

Nevertheless, it seems questionable to me where the state practice supporting privileges and immunities for military personnel should come from. A state refusing UN peace support operations and forced by a Chapter VII Resolution to accept multinational troops does not agree to any of the SOFA rules either. The state is bound by Article 105 UN Charter, but there is no state practice, which might lead to further customary law rules. For good reasons the United Nations tries hard to avoid missions to countries without their consent.

The entire body of customary international law is difficult to determine. Without a profound analysis of states practice and *opinio iuris*, as the International Committee of the Red Cross did for customary international humanitarian law rules within the last decade, there can hardly be elaborated rules that reflect widely accepted customary law. Moreover, even the ICRC Study shows how difficult it is to elaborate precise customary rules, since neither the rules identified in the ICRC Study are beyond any discussion. Official statements by various United Nations representatives are in favor of customary law rules, in particular those provisions of the UN Model SOFA and the CPIUN, but authors have many problems to find reliable state practice confirming these views by UN officials. Further, these discussions do not support the mission of the personnel of UN peace support operations in the field, which need clear and precise rules on privileges and immunities. For this purpose, customary international law rules are largely unsuitable.

2.4.5. *UN Security Council Resolutions*

Another suggestion without any practical examples is the power of the UN Security Council under Article 25 UN Charter to adopt binding resolutions for UN member states. Thus, the Security Council could use this power to bind a host state of a mission mandated by a Security Council Resolution to respect for instance UN Model SOFA rules. This decision would avoid lengthy negotiations of a specific SOFA

between the UN and the host state.⁴⁴ As mentioned above, the Security Council only refers to the provisions of the Model SOFA as binding until a specific SOFA has been concluded.⁴⁵

2.5. Conclusion

In most operations a SOFA between the United Nations and the host state exists and grants privileges and immunities to the military personnel of UN peace support operations. Nevertheless, there are situations conceivable where no SOFA is concluded. Statements by UN officials often contain the view that there are comprehensive privileges and immunities in every situation. In the absence of a SOFA, the provisions of the UN Model SOFA would form part of customary international law. Hence, in any event SOFA rules could be invoked.

But it is far from being that simple. Peace support operations with state consent might be protected in the absence of a SOFA by some rules of customary law reflected in the UN Model SOFA. However, it must be born in mind that in the enforcement operations without state consent, there are no customary rules protecting the military personnel. In any event, customary rules are very vague and there is no agreement on what precisely is a customary rule. Further, reliable state practice is lacking. Thus, customary rules do not support the protection of military personnel in peace support operations. Only Article 105 UN Charter is applicable to all states because of the universal character of the UN Charter. Nevertheless, Article 105 UN Charter provides general privileges and immunities, but the content of the Article is very broad and does only contribute little to the elaboration of precise rules. In the end, as often in the case of peace support operations, it remains very important to look on problems on a case-by-case basis.

⁴⁴ Fleck, *supra* note 14, at 152; D. Fleck and M. Saalfeld, 'Combining efforts to improve the legal status of UN peace-keeping forces and their effective protection', (1994) 1 *International Peacekeeping* 82, at 84.

⁴⁵ Cf. *supra* note 36.

3. THE INTERNATIONAL CRIMINAL COURT AND MILITARY PERSONNEL OF UN PEACE SUPPORT OPERATIONS

3.1. Introduction

During the negotiations of the Rome Statute France made a proposal that persons acting with a mandate of the UN Security Council should not be under the jurisdiction of the Court while exercising their mandate. Article 26 of the 1998 Draft Statute of the International Criminal Court read as follows:

2. Persons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it shall not be criminally responsible before the Court.⁴⁶

This proposal was dismissed and even described as superfluous, because it would never be possible that crimes under the jurisdiction of the Rome Statute would be committed under a mandate of the UN Security Council.⁴⁷ Nevertheless, in peace support operations crimes may be committed and there should not be a general exclusion of certain groups of persons in proceedings before the International Criminal Court.

3.2. Possible Situation under the Jurisdiction of the International Criminal Court

Generally, the crimes of the Rome Statute all contain a high threshold for their application. Concerning admissibility there must be sufficient gravity to justify further action by the Court.⁴⁸ Furthermore, each single crime necessitates additional requirements. Crimes against Humanity must have been of a systematic or widespread

⁴⁶ Art. 26 (2) Zutphen Draft Statute (available under <http://www.npwj.org/netrep/cdrom/zut/zut.pdf>, last time visited 15 August 2007).

⁴⁷ A. Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes, Perspektiven und Probleme vor der Staatenkonferenz in Rom*, (1998) 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 47, at 84.

⁴⁸ Cf. Article 17 (1) (d) Rome Statute.

character and War Crimes usually require a plan or policy or large-scale commission of the crime. However, recent examples in peace support operations have shown that enforced prostitution or rape are not only single cases, moreover, in parts of some missions many of these conducts can be found and a widespread character cannot be completely excluded for all times.

Under the Rome Statute, there is no link required between a Crime against Humanity and an armed conflict. Thus, crimes committed in peace operations without an enforcement element requiring an actual combat taking place can well be prosecuted under the Rome Statute. Certainly, for the commission of War Crimes an armed conflict must be present, nevertheless in missions where peace enforcement forms part of the mandate, an armed conflict situation can arise.

The immunity granted to military personnel by SOFAs could be one obstacle for the Court to exercise its jurisdiction. Another problem could be restrictions concerning the surrender of a suspected person. Furthermore, in SOFAs as well as in Security Council Resolutions states are given exclusive jurisdiction over their military personnel acting in a peace support operation. The impact these issues might have on the proceedings before the International Criminal Court is examined in the section below.

3.3. Immunity and Surrender Issues

3.3.1. Immunity of Military Personnel and Article 27 of the Rome Statute

As I examined above, military personnel is entitled to immunity for acts in official capacity in criminal matters by a SOFA or under Article 105 UN Charter. However, the Rome Statute takes another approach to immunities whether granted under national or international law. Article 27 of the Rome Statute addresses these immunities. According to its paragraph 2

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁴⁹

Therefore, Article 27 (2) excludes any immunity granted for official acts. Military personnel of UN peace support operations possess such immunity for official acts according to SOFAs or Article 105 UN Charter. Nevertheless, this immunity does not persist before the International Criminal Court. Article 27 (2) overrides international agreements that grant immunities to persons for acts in official functions.⁵⁰ The Statute envisages that there is no immunity at all to fight impunity most effectively.

3.3.2. Non-Surrender of Suspected under Article 98 (2)

However, although there is no immunity, the surrender of a person could become a problem. Article 98 of the Statute deals with requests for surrender by the Court and, in its paragraph 2, does not permit the Court to

proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁵¹

Thus, the Court would not be allowed to request the host state of a peace support operation for the surrender of a person from a contributing state if there is an agreement between these two states not to surrender nationals to third entities. Such an agreement could be a Status-of-Forces Agreement. This agreement is usually concluded between the United Nations and the host state, not between each contributing state and the latter. The SOFA guarantees the exclusive jurisdiction of

⁴⁹ Article 27 (2) Rome Statute.

⁵⁰ Sands/Klein, *supra* note 10, at 510.

⁵¹ Article 98 (2) Rome Statute.

the contributing states over their military personnel in criminal matters.⁵² Further, it ensures that military personnel arrested by the host state while committing a criminal offence has to be delivered immediately to the nearest appropriate representative of the UN peace support operation.⁵³ Therefore, in operations covered by a SOFA with the host state, military personnel will be in custody of the United Nations, not of the host state. Thus, a request by the Court to the host state for surrender of a suspected person is unlikely to occur. Therefore, Article 98 (2) Rome Statute describes other situations outside UN peace support operations.

In cases where no SOFA exists, the host state could arrest members of the UN operation. In such a situation, the Court could also request the host state for surrender. Article 98 (2) cannot be invoked by the host state, if there is no other obligation under international agreements not to surrender. The host state might have bilateral agreements with the contributing state involved, but related to the UN operation itself there would not be an obligation under international law not to surrender. Military personnel would enjoy the general immunity under Article 105 UN Charter, but exactly this immunity cannot be invoked under the Rome Statute due to Article 27 (2), as described above.

Nevertheless, the regular procedure of complementarity should be that the contributing state first has the opportunity to investigate or prosecute a case. Only if the state is unwilling to act the International Criminal Court steps in. In such a case, the suspected person usually is present in its home state and thus a request for surrender would be addressed directly to this state. Then, Article 98 (2) would not apply either.

3.3.3. Conclusion

There is no immunity for military personnel of UN peace support operations before the International Criminal Court. Since suspected persons are usually first sent back to

⁵² Cf. UN Model SOFA, *supra* note 9, at para. 47 (b).

⁵³ *Ibid.*, at para. 42 (b).

their home country to deal with the alleged crime, a request for surrender by the Court would have to be addressed to the contributing state. That leads to difficult situations, because the contributing state would have to surrender an own national to the Court and furthermore that would also mean that this state is not either able or willing to investigate or prosecute the case itself.

3.4. Exclusive Jurisdiction on Criminal Matters of the Contributing State

3.4.1. According to a Status-of-Forces Agreement

As mentioned above, the states have the first possibility and responsibility to investigate and prosecute a case due to the complementarity principle of the Rome Statute. Additionally, in SOFAs the troop contributing state retains the criminal jurisdiction over its military personnel. The jurisdiction normally stays with the contributing state, although exceptions, such as shared jurisdiction, are possible if agreed upon in a treaty. Therefore, the contributing state can prosecute first the conduct by members of its personnel in peace support operations.

The fact that the host state agrees in the SOFA not to exercise its territorial jurisdiction does not mean that there is also no territorial jurisdiction of the International Criminal Court anymore. The Court has to decide itself whether it wants to exercise its jurisdiction over a territory of a State Party to the Rome Statute. Thus, acts committed on the territory of a State Party remains under the Court's jurisdiction as well as nationals of State Parties according to the personal jurisdiction of the International Criminal Court.⁵⁴

3.4.2. According to UN Security Council Resolutions

⁵⁴ Cf. Art. 12 Rome Statute.

According to Article 16 of the Rome Statute the UN Security Council is allowed to request the Court not to commence or proceed with an investigation or prosecution for a period of twelve month. Through a Resolution with such a request, the Security Council could shield military personnel from the Court's action. There is already a disputed practice developed through Security Council Resolutions on this issue.

In Resolution 1422 of 12 July 2002⁵⁵, the UN Security Council referred generally to operations established or authorized by itself and requests the Court not to act in case officials or personnel from a contributing state not a Party to the Rome Statute is involved, unless the Security Council decides otherwise.⁵⁶ Although the situation concerned was a concrete one, namely the mission to Bosnia and Herzegovina, the Security Council adopted a general request to the Court not to investigate or prosecute UN Security Council operations. However, the purpose of Article 16 Rome Statute is to suspend investigations by the Court, for example in situations where suspected persons are negotiating a peace treaty. That means also that there must be a particular situations and even particular person concerned. A *general* protection of groups of persons was not envisaged by the drafters of Article 16 Rome Statute.⁵⁷ Therefore, this Resolution operates outside the provisions of the Rome Statute and particularly Article 16, which the Court could express in one of its future decisions in case it will ever be confronted with this issue. After twelve months Resolution 1422 was renewed by Resolution 1487 of 12 June 2003⁵⁸.

Another controversial Resolution was Resolution 1497 (2003)⁵⁹ concerning the establishment of a multinational force in Liberia. In this Resolution the Security Council grants exclusive jurisdiction to states which are not Party to the Rome Statute over their officials and personnel. Contrary to Resolution 1422, the state itself and not the Security Council anymore has to waive such exclusive jurisdiction expressly to

⁵⁵ UN Security Council, UN Doc. S/RES/1422 (2002).

⁵⁶ *Ibid.*, para. 1.

⁵⁷ C. Fritsche, 'Security Council Resolution 1422: Peacekeeping and the International Criminal Court', in J. Abr. Frowein et al. (eds.), *Verhandeln für den Frieden – Negotiating for Peace: Liber Amicorum Tono Eitel* (2003), 107 at 115.

⁵⁸ UN Security Council, UN Doc. S/RES/1487 (2003).

⁵⁹ UN Security Council, UN Doc. S/RES/1497 (2003).

permit the Court to commence or proceed with investigations.⁶⁰ The same provision can be found in Resolution 1593 (2005) in which the Security Council referred the situation in Darfur, Sudan, to the Court.⁶¹

The latter two Resolutions show that the Security Council is willing to transfer the right to waive the exclusive jurisdiction over military personnel in UN peace support operations to the contributing states. On the one hand, the United Nations contravene their Relationship Agreement with the Court and their assurance of full cooperation. The United Nations does not have the power to delimit the jurisdiction of the International Criminal Court. The UN Security Council has only the possibility to request the Court under Article 16 of the Rome Statute not to commence or proceed with investigations or prosecutions in a concrete case. Officials and personnel of a state not Party to the Rome Statute are not under the jurisdiction of the Court pursuant to personal jurisdiction. However, the Court still exercises territorial jurisdiction over the territory of State Parties to its Statute. This territorial jurisdiction cannot be limited by a UN Security Council Resolution. Thus, Resolutions 1497 and 1593 provide for exclusive jurisdiction of the contributing states towards other states, but the International Criminal Court can still exercise its territorial jurisdiction over officials and personnel even of non-State Parties to its Statute.

3.4.3. Conclusion

The Court has its own jurisdiction. Agreements between states or between International Organizations and states cannot revoke the Court's jurisdiction. In specific cases, only the Security Council is allowed to suspend the Court's investigations and prosecutions according to Article 16 of the Rome Statute for a period of twelve month. The exclusive jurisdiction in criminal matters granted to states by international agreements concern the relation among states and their domestic jurisdictions.

⁶⁰ *Ibid.*, at para. 7.

⁶¹ UN Security Council, UN Doc. S/RES/1593 (2005), at para. 6.

4. CONCLUSION

Military personnel of UN peace support operations is entitled to immunities according to Status-of-Forces Agreements or in a very vague sense by Article 105 UN Charter. Nevertheless, since this immunity is related to acts committed in an official capacity, there is no immunity before the International Criminal Court pursuant to Article 27 (2) Rome Statute.

Another issue is the jurisdiction of the Court. SOFAs and UN Security Council Resolutions provide the contributing states with exclusive jurisdiction over their officials and personnel. Nevertheless, the territorial jurisdiction of the Court cannot be delimited by these instruments. Regarding the complementarity principle, the contributing state has exclusive jurisdiction to investigate or prosecute a case first. However, if the requirements of Article 17 Rome Statute are fulfilled, the Court can also exercise its jurisdiction over these persons.

The Court and the UN follow similar goals and therefore a close cooperation is desirable to achieve the best outcomes and results. Trials against military personnel of UN peace support operations would strengthen the trust of local populations in the United Nations and its operations and that there is no impunity for soldiers acting under the UN umbrella. However, there can still be a conflict of interest between the United Nations and contributing states concerned with the criminal conduct of their military personnel. Those states might be more reluctant to set again troops under the disposal of the United Nations in case the International Criminal Court would exercise its jurisdiction. Nevertheless, those states have the primary jurisdiction over these cases and can prosecute them under their domestic judicial system because of the complementarity principle in the Rome Statute. Hence, a close cooperation between the Court and the United Nations would further contribute to the credibility of the Court and in particular of UN peace support operations.

CAN THE INTERNATIONAL CRIMINAL COURT PROSECUTE MILITARY PERSONNEL OF
UNITED NATIONS PEACE SUPPORT OPERATIONS?

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Therefore, the United Nations should be aware of its Relationship Agreement with the Court and the provision to cooperate closely with it when concluding SOFAs containing provisions on exclusive jurisdiction of the contributing state in criminal matters or when adopting Resolutions in the Security Council which similarly grant exclusive jurisdiction and even give the right to waive it to states.